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*Issues and Practices*

## Sentencing Reform in the United States: History, Content, and Effect

- How many States have increased the severity of their sentencing laws?
- What is known about the effectiveness of mandatory sentencing?
- Is there a trend to abolish parole?
- How many States have targeted repeat offender sentencing?
- Have the new sentencing reforms affected prison populations?

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# Sentencing Reform in the United States: History, Content, and Effect

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Erik Olsen

August 1985

97667

U.S. Department of Justice  
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- Assessing the impact of probation and parole on subsequent criminal behavior
- Enhancing Federal, State, and local cooperation in crime control

James K. Stewart  
Director

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This project was supported by Contract Number J-LEAA-013-78, awarded to Abt Associates, Inc., by the National Institute of Justice, U.S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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...Certainly there have been great changes in this country during the past ten years, and these changes have had a profound impact upon government efforts to deal with antisocial behavior. Indeed, the decade has come to be known as a period of social revolution, so great have the changes been, particularly in the large urban areas. Though this is true, it does not follow that the (administration of criminal justice) issues stressed are less significant than they were ten years ago. Indeed the changes have made it more important to understand the criminal justice system, its strengths and limitations, and to confront more directly than we have in the past the important administrative policy decisions which must be made....

Robert O. Dawson, 1969  
Sentencing:  
The Decision as to Type,  
Length, and Conditions of  
Sentence

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## Preface

The following review of the context, content, and impact of sentencing reform over the past ten years must, of necessity, omit many details. Our intention was to provide an accurate overview of these aspects of each state's current sentencing structure, but, importantly, an overview that was useful to both practitioners and social scientists. We attempted, then, to report statistical findings in a way that would be of interest to judges as well as to researchers. Additional and other original sources are cited for those who wish more detailed information.

Sources for this review of sentencing reform are varied. We collected information from published materials, from scholarly journals, and from documents developed and printed by various state agencies. We also talked with many individuals in different states, and surveyed a selected number of states (see Appendix A) when published information on their sentencing structure was not in abundant quantity. Although there may be individual and excellent studies that we overlooked and some alterations to sentencing laws that we omitted, we feel we have included as much of the current knowledge on sentencing reform and its impact as is realistically possible to gather in an effort of this kind.

Despite the caveats mentioned above, this review is unique in its scope. There is no other extant source of the information contained herein. We claim our omissions and errors, therefore, but believe that the assembling in one source of each state's sentencing reform data is an important first step in understanding the changes that have occurred in our criminal courts in the past decade.

The discussion of sentencing reform in each state is organized in a similar fashion beginning with a section tracing the history of the current sentencing structure or the reform, followed by a summary of the content of the actual reform and concluding with a section discussing the impact and effect of the reform. Whenever the data permitted, we included original analysis of the reform and/or its impact. For ease as a reference, the review is presented in alphabetical order of the states. The concluding section entitled "Summary and Typology of Sentencing Reform" attempts to discuss the commonalities in the many types of sentencing reform and in their many impacts. A table portraying the salient variables which best characterize each state's sentencing structure is also included in the final section.

Many individuals assisted us in this effort. We are grateful for the editing assistance and collegial support of John Reindl and Carol Toussaint. Gail Hoffman did a masterful job of typing the final draft and correcting our sometimes confused writing. John Elder, Tom Biladeau, Rod Martin, and Paul Higgenbotham served as research assistants during earlier drafts of this work, and some of what we present here is due to their work of a year or two past. We also owe thanks to the numerous individuals in the various states who willingly answered our even more numerous questions, and sent us more information on sentencing than we believed existed.

Finally, we thank our families and close friends who persevered with us during the sometimes dreary stages of statute reading to the completion of this project.

Given the rapidity of sentencing structure modification in the past ten years, we hope this document remains relatively up-to-date between the writing and the reading.

Sandra Shane-DuBow  
May, 1983  
Madison, Wisconsin

## INTRODUCTION

Growing public awareness and concern over what appears to be an increasing crime rate has focused attention on the courts and sentencing. Although the courts are only one decision making point in a chain of discretionary judgments brought to bear on any criminal case, and despite the fact that decisions made by the courts cannot be directly linked to changes in the crime rate, the courts and their sentencing function, in particular, have come under heavy criticism. Similar criticisms have been voiced by those who are less concerned with apparent increases in crime and more disturbed by allegations of inequities in sentencing and disparities in the imposition of punishment. Thus, dissatisfaction with many aspects of the criminal justice system has led to reexamination of its most visible and reviewable (and researchable) part--the sentencing court.

Since the late 1960's, the equity, speed, and deliberation of judicial sentencing has been the subject of public debate, legislative reform, and research scrutiny. Although preliminary conclusions regarding the extent and magnitude of sentencing disparity of variability are sometimes contradictory,<sup>1</sup> a number of states have altered their sentencing laws as a response to the concern over sentencing disparity. During the last decade, determinate, fixed, or flat time sentencing became a common modification in the statutes dealing with punishment because it theoretically established an equitable, predictable, and standardized sentence for anyone who committed the same crime. The rehabilitative, indeterminate ideal was seen as flawed, so typically, determinate sentencing eliminated the parole function. Convicted offenders were to serve the sen-

tence that was imposed (plus or minus good-time considerations). However, the decision to incarcerate or not generally remained a judicial decision.

Sentencing guidelines were yet another form of sentencing reform. Seen as less intrusive than the rejection of indeterminacy and the adoption of determinate sanctions via legislated changes in statutes, judicially sponsored standards established in the form of sentencing recommendations or guidelines were developed for use in some states, often intended to be implemented within an existing indeterminate sentencing structure. To some, guidelines were seen as more responsive to social change, decriminalization, or shift in public sanction because they could be modified without legislative action, were intended to be updated, and were not seen as applicable in every case. (One armed robbery was not seen to be the same as all other armed robberies.)

Over the same period of time that determinate or guideline sentencing schemes were being established, specific sentencing laws or procedures were also being implemented, sometimes in the same states and sometimes regardless of the overall sentencing structure, to increase penalties, especially for offenders who committed very serious crimes or who could be classified as repeat or habitual criminals. Still other responses to apparent increases in strength of public concern about specific offenses, such as sexual assault or drug crimes or over specific attributes of an offense such as the use of a gun, resulted in the development of mandatory-minimum sentencing schemes in which a determinate prison term had to be imposed and probation was not an option to the sentencing judge. Other sentencing

reform plans called for presumptive sentencing or a hybrid blend of new sentencing laws and practices.

This review of sentencing structure reform reports on changes in sentencing plans that have occurred in general jurisdiction courts in 50 states and the District of Columbia during the past ten years. We have attempted to illustrate some of the variety of forms these plans have taken. When appropriate and/or available, summaries and criticisms of reform research and evaluations of reform impact are noted. It is clear that differing applications of the idea of sentencing reform have resulted in greatly different schemes from state to state, even when the reform was ostensibly the same type. Maine's determinate sentencing, for example, is much different from the determinate sentencing now used in Illinois. Because sentencing reform is frequently set in policy decisions, we have also included brief reviews of the historic or political context of sentencing structure modifications in each state.

A further word concerning the political context of sentencing reform is in order here. Frequently, sentencing reform was locally developed and implemented in only one jurisdiction. This was particularly true with guideline schemes. In some of these states, the early guideline work was adopted in revised fashion for statewide use. In other states, proponents of determinate sentencing legislation or those disenchanted with how the earliest guidelines actually worked caused the sentencing reform movement to shift to other considerations, abandoning the guideline idea entirely. In most cases, the decision to use or not use the early reforms was based on a combination of policy decisions and practical needs. The control of

crime through sentencing reform, though never documented as a valid association by criminologists and practitioners, was a frequently used argument in the machinations of state political careers. Despite the dearth of objective data, political actors in some states continued to make public announcements about the need for sentencing reform, often in the context of the determinate or mandatory bill they had just sponsored.

Other problems with sentencing reform surfaced. The first guidelines suffered from some methodological flaws, for example, that created other problems in the criminal justice system, impacting on that system in ways their originators had not foreseen. Dissatisfaction with the methodology used in developing the early guidelines and the guidelines resulting from this methodology was not, therefore, unfounded. However, as we shall see in the following review of more recent sentencing reforms, both political decision making and methodological problems have been a burden to non-guideline reforms as well. Jaundiced legal actors, the public, and even some convicted offenders have taken a dim view of such embattled "progress" in criminal justice reform.

Several states adopting a version of the justice model have carefully developed a combination of guidelines and determinate sentencing reforms with limited penalties and little judicial discretion. Others have adopted strict determinate sentencing. And still others have followed the early guideline model closely, structuring judicial discretion but not limiting it, usually within an indeterminate sentencing scheme. None of these approaches, or any of the other "hybrid" sentencing reforms, has been shown to effect the crime rate;

## Courts

/f51/Sentencing Reform  
in the United States:  
History, Content, and Effect

/f21/S. Shane-DuBow, A.P. Brown,  
and E. Olsen, Wisconsin Center  
for Public Policy

Intended for use by criminal justice practitioners and researchers, this review of sentencing structure reform reports on changes in sentencing plans that have occurred in general jurisdiction courts throughout the United States between 1973 and 1983.

/pg/A summary of sentencing reform and its impact is provided for each State and the District of Columbia; each summary contains sections tracing the history of the current sentence structure or reform, describing the content of the reform, and discussing the reform's impact and effect.

/pg/Common reforms States have undertaken involve determinate sentencing, sentencing guidelines, increased penalties for serious and habitual offenders, mandatory-minimum sentencing schemes, presumptive sentencing, and hybrid blends of new sentencing laws and practices.

/pg/The book also contains a brief history of sentencing, punishment, and imprisonment in Europe and the United States since the 18th century; its concluding section discusses common features of sentencing reforms and their impacts.

/pg/1985. 348 pp. Sponsoring agency: National Institute of Justice, U.S. Department of Justice. Contract number J-LEAA-013-78 awarded to Abt Associates, Inc. Footnotes. Bibliography. Appendix. Tables. NCJ 97667

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all have had at least some positive results with regard to standardizing sentences for similarly situated offenders (though this point is subject to much debate, Sparks, 1979; Rich and Sutton, 1979); and all have had some unforeseen negative effects such as prison overcrowding (under some determinate sentencing) and negligible impact (under some types of guidelines).

In sum, neither the early sentencing guidelines nor the other sentencing reform plans that came out of the policy focus on sentencing in the early 1970's answered the myriad of criminal justice problems

that were being linked to sentencing. Some did begin to address the one aspect of criminal justice that sentencing reform did affect--judicial imposition of sentences. The following review beginning after the historic perspective section, continues our discussion of the types of sentencing reforms and their impact in selected states. For ease as a reference, the discussion is organized by states in alphabetical order. In states where there has not been any reform attempts of note, we review the existing sentencing structure. The final section includes a typology of sentencing reform by state.

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HISTORIC PERSPECTIVE

Before discussing the results of our examination of sentencing reform, it is illustrative to begin with a broader view of the subject. To more realistically understand the topics of sentencing variability and sentencing reform, it is useful to put the current thinking regarding these subjects into perspective. Despite recent proposals calling for what is sometimes seen as modern change from indeterminate to determinate sentencing, determinate sentencing is hardly a new concept. This section briefly traces modern historical development<sup>2</sup> of sentencing, punishment, and imprisonment in Europe and the United States.

Europe. Lacking a cohesive and rational criminal code, judges of the eighteenth century were commonly presented with situations where a defendant had been found guilty of some crime which was proscribed in the existing codes but sanctionable by a wide array of punishments. Even where a penalty was specifically noted the judge was allowed great latitude to increase or diminish the penalty.

The nature of the penalties imposed during the eighteenth century had not changed much from earlier times. The death penalty remained a typical sentence for major crimes. Executions were practiced in public and in a myriad of forms. Major crimes included a great many offenses. Violent felonies (a more modern term) such as murder were punished by death, as were crimes against the state such as treason. The legacy of medieval times and the strictures of religion made sorcery and witchcraft crimes punishable by death, and suicide the occasion for mutilation of the corpse. Even such relatively minor crimes, at least by modern standards, as

petty theft were punishable by hanging. During the reign of George II (1760-1820), the English criminal code contained over 200 capital crimes. They ranged from murder to cutting a tree on another person's property.

Early attempts to make the criminal justice system more rational and more humane were few and generally shortlived.<sup>3</sup> However, by the mid-eighteenth century some in-depth attempts to alter the nature of the criminal justice system were at least being discussed. Indeed, it is in the eighteenth century that significant and lasting criticisms and proposals were first offered and gained ground. In 1748, Montesquieu, the French philosopher, acting in accord with the developing humanitarian enlightenment of the period, published Spirit of Laws. In this single volume, Montesquieu systematically analyzed the whole criminal justice system of his time and proposed the restriction of torture, the compilation of concise codes for criminal law, and the development of penalties that would not only be milder than those in existence but which would also more rationally correspond to the seriousness of the offense. He did not, however, deny that the state had a right to impose capital punishment or even that it should be eliminated or restricted on other grounds.

Probably the single greatest contribution to the critique of the existing criminal justice system was made by the Italian, Cesare Beccaria. In 1764, his work On Crimes and Punishments was published and soon became the most widely acknowledged statement on the need for reform in the criminal justice area. Basically utilitarian in philosophy and drawing from Rousseau's "social contract" theory of the individual and the state, Beccaria's work

called for establishment of legislatively determined sentences, the development of a clear criminal code, the restriction of pre-trial detention, the need to base a finding of guilt on "certainty" rather than a mere preponderance of evidence, and the open administration of accusation and prosecution in criminal matters--preferably before a jury. Beccaria's systematic observations and proposals covered matters of both substantive and procedural criminal law. He argued for an accused party's right to refuse to testify against himself, the presumption of innocence, and a prompt trial. He also demanded the elimination of torture, and--in a bold proposal for his time--the abolishment of capital punishment. In place of the death penalty, Beccaria proposed imprisonment.

Beccaria's work was severely criticized by the ruling powers of his day. As early as 1765, spokespersons of the Roman Catholic Church had denounced Beccaria as a heretic and even as being a "socialist". In 1776, the Church placed On Crimes and Punishments on its index of condemned books. The philosopher Immanuel Kant also took issue with Beccaria's work, particularly with Beccaria's demand for an end to capital punishment. Arguing that society must impose capital punishment in order to maintain a system based upon the individual's inherent worth as an individual and his right to receive punishment, Kant dismissed Beccaria as being an affected humanitarian. Despite the criticism, Beccaria's ideas slowly spread across Europe as On Crimes and Punishments was translated into many languages.

The United States. The situation in the colonies of England was not substantially different from that existing in the mother country. The Massachusetts Bay Colony, for example, as early as 1636, in its

"Capital Laws of New-England" prescribed the death penalty for twelve offenses including witchcraft, assault in sudden anger, and adultery. In 1657, it was noted that the Puritans had whipped two Quakers for the offense of being Quakers, and that in 1659 two men were hung as heretics. It will also be remembered that it was in 1692 that the Salem witch trials were held. More unsettling than this though, was the fact that in the colonies--as in England and on the Continent--the criminal codes were incomplete and judges were often provided little direction in regard to the choice of punishment. In Pennsylvania, as late as 1783, five men were put to death for one robbery.

The reform movement of the mid and late eighteenth century did reach the New World, however. John Adams, for example, quoted from the works of Beccaria during his defense of the British troops who were on trial in 1770 for their actions in the Boston Massacre. Also, in various letters written between 1783 and 1785, Benjamin Franklin expressed his interest in a thorough reform of the criminal justice and penal system. The reform movement in the New World took hold during the period after the American Revolution. The American Constitution, with its formal guarantees of a fair, open, and speedy trial before a jury of one's peers, the presumption of innocence in criminal matters, its proscriptions of cruel or unusual punishments or excessive bail, and its general demand of due process, clearly bears the mark of the enlightenment of the late eighteenth century and the reform movement of Europe. Although many of these procedural guarantees were flushed out by court rulings in the later nineteenth and twentieth centuries, it is important to

note the structural base from which American criminal theory developed and its criminal justice system was born.

In 1787, the prominent Quaker Benjamin Rush outlined his proposals for a "House of Reform" where criminals could be isolated from society and amend their anti-social ways. In 1790, responding to the influence of the Quakers, Rush, Benjamin Franklin, and others, Pennsylvania adopted Rush's idea of a "House of Reform", or "penitentiary" as the Quakers called it. Based upon a theory of reformation, as well as deterrence and incapacitation, the Pennsylvania system promoted both solitary contemplation by the inmate and also private labor, including the manufacture of nails, and marble or stone cutting. The inmate was sentenced to a fixed term, but it is not clear that inmates fully understood the length of their terms. This fact follows Benjamin Rush's argument for indeterminate sentences:

The duration of punishments, for all crimes, should be limited: but let this limitation be unknown. I believe this secret to be of the utmost importance in reforming criminals, and preventing crimes. The imagination, when agitated with uncertainty, will seldom fail of connecting the longest duration of punishment with the smallest crime (Rush, 1793).

The early experience with Pennsylvania's system appears to have been positive, at least in the opinion of one observer--Robert Turnbull. In a series of articles in 1786, Turnbull described Pennsylvania's penitentiaries as clean, active, and devoid of racial segregation. Pennsylvania

also confronted the issue of capital punishment. Drawing from its early attempts to limit the use of the death penalty, the Pennsylvania legislature restricted imposition of capital punishment to the crimes of murder, rape, arson, and treason in 1786, and, in 1794, the legislature eliminated it from all crimes but first degree murder.

Virginia, also responding to the growing interest in reform and in the wake of the experiment in Pennsylvania, adopted in 1796 Thomas Jefferson's "Bill for Proportioning Crimes and Punishments in Cases heretofore Capital". Jefferson's bill, drawing upon the ideas of Beccaria as well as from the developing experience of the new nation, called for limited sentences to prisons where inmates would engage in hard labor, and for the restriction of the death penalty.

The national movement toward abolishment of capital punishment was clearly presaged by Pennsylvania's Quakers in their activities as early as the mid-seventeenth century, and in that state's restrictions of the death penalty in 1786 and 1796. It was in the late nineteenth and early twentieth century, however, that the movement gained sufficient support to eliminate the death penalty in a majority of the states. After the considerable effort of Benjamin Rush, the American Society for the Abolition of Capital Punishment, the Quakers, the editor of the New York Herald Tribune (Horace Greeley) and others, the movement sustained success when Michigan abolished the death penalty for all crimes except treason in 1846. Wisconsin, in 1853, became the first state to abolish capital punishment entirely.

Towards Indeterminacy. The growing population of the new nation, its immigrant and transient composition, the increased efficiency of the police and court apparatus, the fixed sentence, and other factors all contributed to a rapidly increasing number of inmates to be housed. Overcrowded prisons and the mere warehousing of inmates resulted. To relieve the overcrowding and to make room for new inmates, the use of pardons became widespread. Within the first decade of the nineteenth century, one New York prison requested and received pardons at whatever rate was necessary to meet the space requirements of new arrivals. The young state of Ohio "simply pardoned convicts whenever the population rose above 120 in number" (Council of State Governments, 1976). Problems with the pardon system, including bribery and extortion, led New York to adopt the nation's first "good-time" computation law in 1817. The good-time proposal was soon adopted by most all of the other states.

In addition to good-time provisions which, though reasonably effective as a population control device, were still rather unwieldy as an administrative mechanism, the various states began to look seriously at the English "ticket-of-leave" system. The English ticket-of-leave system was developed in order to better limit populations in the English detention institutions. During the nineteenth century, however, the system was heralded by reformers as a useful method of reformation and gradual reintegration of the inmate into society. Developing in conjunction, and at times in confusion with, the American indeterminate sentencing movement, the ticket-of-leave practice took on the name of parole and was first adopted by Massachusetts in 1884. It was thought that parole boards would be more immune to improper political

influence than the pardon system and that they might better reflect a reasoned approach to both rehabilitation and control of institutional populations. The parole movement quickly spread across the nation. By 1900, twenty states had adopted some version of parole practice. By 1922, the number had risen to forty-four states.

Another means of controlling institutional populations and also pursuing goals of rehabilitation, as well as allowing more lenient punishments to those persons who did not appear to present any threat to society developed during the nineteenth century. It became known as the suspended sentence or probation. The development of probation in the United States is commonly tied to the work of John Augustus who in 1841 began to post bond for persons standing before the Boston courts. In time, as he became known and trusted by the courts, Augustus was allowed to post a bail to postpone sentencing and then later return to the courts and comment on the individuals' adjustment to the regime established by Augustus. Often this resulted in the imposition of a very light fine or other non-incarcerative sentence. Records indicate that Augustus received nearly 2,000 persons by 1858, had pledged nearly \$100,000, and had fewer than one dozen "failures".

The state of Massachusetts first formally authorized the use of probation in 1878, but limited its practice to the area of Boston. Again, records indicate that the program was largely successful and that, of the 536 persons placed on probation during the first 14 months of the program, only forty-three failed. Probation terms were generally of three to twelve months. Based upon the general success of the

practice in Boston, probation was extended state-wide in 1880.

The early spread of probation was restrained, for among other things, it was thought that the courts lacked authority to impose a suspended sentence without specific legislative authority. Following the New York Court of Appeals decision in People ex rel. Forsyth v. Court of Sessions of Monroe County, 141 N.Y. 288 (1894), however, where it was ruled that "The power to suspend sentence after conviction is inherent in every court having criminal jurisdiction..." and that the suspension power was distinct from the power to pardon, other courts endorsed probation. Vermont passed a probation statute in 1898, and others quickly followed. By 1921, 28 states had adopted probation programs, and by 1954, forty-seven of the forty-eight states had done so (The exception was Mississippi).

The use of pardons, good time, and in later times parole, all contributed to the growing indeterminacy of sentences handed down by judges of the nineteenth century. Each of these practices affected the sentence, or more precisely the time served under a sentence, by altering the fixed term rendered by the judge at sentencing. Pardons and good time largely developed in response to the administrative needs of exerting some control over prison populations. Parole, though also having this function, developed in the late nineteenth century in conjunction with the growing interest in rehabilitation and with indeterminacy as a general principle. The central purpose of the indeterminacy and rehabilitation movement was not parole, however. Rather, the movement was primarily directed at the revision of sentencing statutes and the replacement of fixed terms with broad sentence ranges

that would be coupled with parole to produce a system that would be flexible.

The call for adoption of the indeterminate sentence was first raised in an organizational format during the First Congress of the (then) National Prison Association in Cincinnati in 1870. This Congress (whose participants were almost entirely drawn from the staff members and administrators of prisons) declared that "preemptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by the mere lapse of time" (Zalman, 1978). Interested primarily in the rehabilitation of the criminal, the Congress adopted a Declaration of Principles which advocated the "moral regeneration" of the inmate who would be sentenced not only according to his or her crime but also on the basis of his or her character.

The impetus behind the call for indeterminacy may be clearly linked to the "mechanical" application of the fixed sentencing regime of the eighteenth century and to the many abuses which grew up in conjunction with the system. Beyond this however, the indeterminacy movement represented a more general ideological shift among policy makers in America. The adoption of indeterminate sentencing legislation by the states began slowly, partly at least by a result of the confusion of legislators and others concerning the indeterminate sentence and parole. The general direction toward indeterminacy was undeterrable, however. Advocates of the new system, such as Zebulon Brockway, lobbied incessantly for the indeterminate sentence; and the experience of the Elmira "reformatory" in New York, which had stressed the rehabilitative principle from 1870 on, helped to further the adoption

campaigns which took place during the later nineteenth and early twentieth centuries. The progress of the indeterminacy movement was rapid--nine states adopted the indeterminate sentence by 1911.

The acceptance of the indeterminate sentence became the rule during the twentieth century. The reports of subsequent Congresses of the National Prison Association (later known as the American Prison Association, and later still as the American Correctional Association) in 1890, 1904, 1922, 1935, and 1953, read like carbons of the First Congress of 1870. Other reports, such as that of the Wickersham Commission report of 1931, further indicated increasingly universal acceptance of the principle of indeterminacy. The courts by and large did not interfere with the development or application of the indeterminate sentence. By the turn of the century, for example, Justice Holmes of Massachusetts had written decisions upholding the indeterminate sentence based on legislative supremacy and the reasonableness of sentence.

By the 1960's, every state of the nation had an indeterminate sentencing structure or some variation (Council of State Governments, 1976). The general acceptance of the practice was unanimous. Much of the theory of the indeterminate sentence was grounded upon the assumption that the offender suffered from some physical, psychological, or social-environmental affliction. Around this assumption developed what has been termed the "treatment model" of corrections. The treatment model has persisted, although the early indeterminate sentencing advocates appeal for the "moral regeneration" of the offender has been displaced by the more recent objective of returning the offender to "normalcy". Indeed, much of the litera-

ture on indeterminate sentencing has stressed the utility of the expert, of accurate diagnosis and professional treatment.

Determinacy. In the late sixties, the indeterminate sentence came under attack by many persons involved in the criminal justice system. The challenge to indeterminacy occurred for many reasons. Many advocates of change pointed to what they termed "the failure of rehabilitation", others to the lack of empirical proof that treatment works as a rehabilitating mechanism, and still others to the lack of fairness in a criminal justice system which is based upon the exercise of discretion in a society that contains great disparity of wealth and access to political power. The alternatives set forth by the advocates of change, their objectives basically that of establishing some sort of determinate sentencing format, were based on such concepts as "empowerment" (American Friends Service Committee, 1971), "equity, certainty, and visibility" (Dershowitz, 1976; Fogel, 1975), and "just deserts" (Von Hirsch, 1976).

The critique of rehabilitative treatment, both of its practical effectiveness and its validity as a guiding principle of corrections, emphasized arguments such as: no conclusive evidence could be produced that could attest to treatment's success at altering the offenders' behavior; practitioners did not have the necessary knowledge needed to assemble this evidence; and the treatment system was coercive and contrary to both accepted knowledge concerning behavior modification and our general sense of righteousness in a free society. Critics challenged the usefulness of treatment when such might mean nothing more than cruel experiments to reduce the rate of cursing among inmates,

and when some experts have argued that inmates are no more in need of therapy than persons of the general population. Other critics argued that the experience of prison itself is more detrimental to future reintegration in society than the benefit that could possibly be derived from treatment or training programs, and when many vocational options are closed to felons due to their records. Offended by what they perceived to be coercion in the name of science and treatment, and frightened by the prospect of the corrections system adopting unproven methods of psychological treatment, those opposing indeterminate sentencing proposed that inmates not be penalized for declining to participate in institutional programs.

As much as the indeterminate sentence has been associated, and in fact founded upon rehabilitation, so also has it been tied to the discretionary exercise of power. Under an indeterminate sentencing structure the legislature, the prosecutor, the judge, the prison staff, the governor, the parole board, and the probation and parole officer all exercise important and immediate decision-making powers which affect not only the duration of the criminal's sentence but also the quality and nature of the penalty imposed upon him or her.

The indeterminate sentence was criticized for creating a situation where sentences for similar actions done by persons of similar or different backgrounds could receive widely disparate terms of incarceration. This disparity in sentences was defended, or at least explained, as being the natural product of a system where judges are elected and where the particular assessments of the seriousness of some act are measured and penalized according to the demands of the local community. Despite this argument, critics of indeter-

minacy maintained that the extent of disparity could be severe-- that some judges used probation in only ten percent of their dispositions while other judges, often in the same jurisdiction, utilized probation in 70 to 80 percent of their dispositions (Rubin, 1965). These critics felt that, whatever the possible justifications or explanations that could be made for disparity, be it in reference to the electoral system, the attitudes of the local public, or even the need for disparity to affect the meaningful rehabilitation in particular cases, the practical result was often considerable inmate anger and frustration which often caused unrest within the prisons.

Although criticisms of the indeterminate sentencing structure had been voiced by individuals in the 1950's and 1960's, the final report of the Working Party of the American Friends Services Committee entitled Struggle for Justice, which appeared in 1971, was the first major systematic critique. Struggle for Justice grew out of the disparities seen in the California prison system<sup>4</sup> and denounced the very existence of prisons.

The final report of the group specifically criticized the indeterminate sentencing structure for its assumption that: 1) crime is the product of individual pathology; 2) penology has the knowledge to affect treatment of criminals; 3) experts have established a sufficient body of knowledge to diagnose the particular factors resulting in a criminal activity; 4) knowledge for practice in criminology is free from biases of race, class, or status; 5) useful and accurate means of measuring the success of treatment exists; and finally that 6) discretionary power is a necessary attribute of a fair and efficient criminal justice system (American

Friends Service Committee, 1971). The critique provided by Struggle for Justice was both technical and political. At the technical level, the group emphasized that the present state of knowledge available to criminologists, prison staffs, and others was insufficient to support claims for indeterminacy, discretionary power, and rehabilitation. At the political level, Struggle for Justice argued that the discretionary exercise of power by the criminal justice system had contributed to the development and continuation of a dual system of justice which was unfair to the poor, the non-white, and the politically weak.

The reaction to Struggle for Justice was not entirely favorable. The report was unstructured and undetailed on how to go about setting up a sentencing system to correct the wrongs it enumerated, but, on the whole, the work was well received and was often cited in subsequent writings having to do with criminal justice in general, and sentencing in particular. Two additional influential works having to do with sentencing appeared in the mid-seventies, Dershowitz's Fair and Certain Punishment and Andrew von Hirsch's work Doing Justice: The Choice of Punishments. While each of these works drew from the American Friends Services Committee's report, each developed its own unique proposals for changing sentencing and for introducing greater degrees of determinacy into the sentencing process.

At the core of the proposals presented in Fair and Certain Punishment and Doing Justice is the establishment of what has been termed the "presumptive sentence". As described in Fair and Certain Punishment, the legislature would set penalties for crimes defined in very specific and detailed language, and the judge would

then be required to impose the penalty as called for by the statute which the defendant was convicted of violating, though aggravating or mitigating circumstances that might be present could be considered. In determining the punishment for various crimes, the legislature would be responsible for weighing the importance of many variables which normally are present in different crime situations. For example, whether a loaded gun should be treated the same as an unloaded gun in the case of a robbery or whether murder for hire is a distinct form or degree of homicide which is different from first degree murder. Following the determination of crime categories, the legislature would then establish the presumptive (or normal and expected) sentence which it felt appropriate for the particular offense as well as the relative seriousness of the offense in comparison to other offenses.

In addition to setting the presumptive sentence appropriate for each of the crimes defined by the statutes, both von Hirsch and Dershowitz proposed that aggravating and mitigating factors be provided by the legislature so that, according to the specific facts of the case, judges might increase or diminish the sentence. They suggested that the possible factors which might be included in a list of aggravating or mitigating factors would include such things as the victim's ability to protect him or herself, the offender's objective of "thrills" or desire for luxuries, or the character and attitude of the defendant. The judge's sentence could then fall short or exceed the presumptive sentence by as much as 25 percent (or some other determined amount) according to the mitigating or aggravating factors that were found by the judge to exist. In very exceptional cases, where clear evidence existed that the offender was potentially

dangerous, von Hirsch proposed that special sentences which were in excess of those otherwise available under his model be allowed so long as they were accompanied by a written judicial declaration explaining the sentence.

Dershowitz's proposal called for the retention of parole, but for a severe limitation to be placed on its use and scope. Von Hirsch called for the virtual abolition of good-time and parole procedures. While Dershowitz acknowledged that the establishment of his sentencing proposals without modification of the plea bargaining practices now common throughout the nation might lead to abuse through circumvention, he also argued that "...sentencing reform cannot be held in abeyance until the debate (over plea bargaining) is resolved..." (Dershowitz, 1976). Other advocates of determinate sentencing, including Fogel (1975), Morris (1977), and McGee (1978), also adopted this position in regard to plea bargaining.

It has been said of the presumptive sentence in general, and of von Hirsch's proposals specifically that the major aims were: 1) to establish penalties that are commensurate with the harm caused by the criminal activity and with the offender's culpability; 2) to produce a fairer system of criminal justice; 3) to reduce the typical severity of penalties; 4) to incarcerate only the most serious offenders; 5) to reduce the discretionary power available to judges and paroling authorities; 6) to allow special sentences for offenders where the circumstances are clearly exceptional; 7) to eliminate early release procedures for inmates; and 8) to make participation in treatment or rehabilitative programs completely voluntary by in-

mates with no effect on their terms of incarceration (Gardner, 1976).

Criticisms of Determinacy. Significant questions have been raised, however, about determination of a commensurate sentence. These questions include the following: 1) the fairness of the presumptive sentence model; 2) the length of sentences under a determinate sentencing system and that system's likelihood of controlling discretion or disparity; 3) the wisdom of eliminating parole or good time or of making participation in rehabilitative programs entirely voluntary; and 4) the practical effect of creating a determinate sentencing structure within the present context of the American political process or the criminal justice system.

Critics of determinate sentencing have expressed a fear that by allowing the legislature to set narrowly defined penalties for crimes, we might be subjecting the criminal courts to undue political influence. These critics see legislators as political actors, responding to many interest group pressures which emanate from both within and outside of the criminal justice field, susceptible to pressures which might result in the establishment of penalty levels that are out of proportion to either the seriousness of the crime or the capability of the prison system to accommodate the numbers of offenders who would be sentenced to incarceration. Some of these criticisms have born fruit. Some critics of determinacy posited that if the worst was realized and that legislatures established unworkable penalty structures, that this alone might suggest that the theory of the determinate sentence was unrealistic.

Other critics pointed to the difficult legislative problems involved in designing

statutory language that was very specific, as was called for in the Twentieth Century Fund proposal of Dershowitz, and yet which did not result in a criminal code that became unmanageably long and complex. The problem of specifically listing mitigating or aggravating factors which might diminish or extend a sentence, for example, demanded that the legislature anticipate all (or at least most) of the conceivable factors which might be presented within the varied factual situations which occur daily before judges when sentencing. The problem was given currency in Albert Alschuler's example of "an armed robbery where \$10 to \$50 is taken from a single victim without special vulnerabilities by an offender who is mentally retarded, acting alone, and using a loaded firearm" (1978). He posed the question of whether we could devise a factor list that might rationally designate this crime as an armed robbery in the 161st degree.

Some advocates of determinate sentencing proposed that, in order to avoid the problems associated with having the legislature set the penalties for the various crimes and establish acceptable mitigating and aggravating factor lists, a special sentencing commission should be established which would perform those tasks. The commission could be composed of judges alone, or might also include lay persons with knowledge of the justice system. It remained questionable that judges or other members of the commission would be much more likely to agree on the appropriate penalty levels or on mitigating or aggravating factors than legislators. Furthermore, determinate sentencing critics argued that, although the commission might be one step further removed from the pressures that may be brought to bear on legislators, the ultimate result would not differ. Dissatisfied groups, upset with

what they perceived to be too lenient or too harsh penalty levels would, in all likelihood, work to revise the commission's powers or composition through political action.

In regard to the regulation or elimination of discretionary power, critics of the various determinate sentencing formulas indicated that the formulas may result in a more undesirable use of discretion. Most typically these critics have commented on the potential increase in the prosecutor's discretionary power during the plea bargaining process. Given that plea bargaining is a pervasive and now acknowledged practice within the criminal justice system (where prosecutors are generally situated in a more favorable bargaining position due to their more complete knowledge of all available evidence, their familiarity with the court and judge, and the defendant's vulnerability resulting from the considerable risks which are confronting him or her), critics argued that the establishment of a determinate sentencing structure without plea bargaining regulation would merely alter the nature of discretion without affecting its arbitrariness.

These critics pointed out that plea bargaining is basically of three sorts: bargaining of the charge, of the number of counts, and of the sentence. Clearly, a determinate sentencing structure would eliminate the direct bargaining of the sentence to be recommended by the prosecutor. However, in that the sentence received by a party under a determinate plan is directly related to the crime charged at conviction, sentence bargaining could readily be subsumed within charge bargaining. Additionally, the prosecutor under the late 1970's determinate plans of at least California, Indiana, and Illinois

also might exercise the discretionary power to introduce evidence related to the habitual criminal activity of the offender or of aggravating circumstances. In that this evidence could later result in a specific finding by the court which would significantly affect the sentence (indeed, in the case of Indiana, a finding of habitual criminality increased the term of sentence by mandating a 30-year consecutive term), it was expected that these matters would also be bargained and the use of discretionary power by the prosecutor be further maintained or enhanced. The continued existence of prosecutorial discretionary power under specific determinate sentencing statutes was thought so substantial that one source indicated that the new California sentencing law has increased the prosecutor's power (Messinger and Johnson, 1978), and another author that Indiana's law can be justifiably characterized as a prosecutor's law (Clear, Hewitt, and Regoli, 1978).

Although arguments can be made both in favor of bargaining and against it, determinate sentencing critics stated that the concentration of discretionary power within the hands of the prosecutor as opposed to having it distributed among a number of actors--particularly the judge--was undesirable due to such factors as the diminished visibility of the process, the increased likelihood of capricious use of power, the exercise of power by persons with less experience or knowledge of the whole system, the limited objectives of the prosecutor, the basing of discretionary decisions on less complete information, and the making of bargains directly upon the waiver of constitutional rights. The concentration of power, in the view of the critics of the determinate sentencing proposals, might well produce a system where "our old discretionary regime--a

regime in which mercy could be given--" is abandoned and a "new discretionary regime is substituted in which mercy would only be sold" (Alschuler, 1978).

Many of the determinate sentencing proposals called for the abolishment or substantial curtailment of parole. These proposals were based upon the perception that rehabilitation had failed within the prisons and that parole did little to further rehabilitation or to assist the offender in his or her reintegration into society. Determinacy critics, however, pointed out that the perceived failure of rehabilitation or parole was insufficient grounds to abandon the whole indeterminate sentencing process, particularly when it was not clear that the consequences of determinate sentencing without parole were known. They also stated that certain functions of parole--as an extrajudicial hearing--had been shown to be relatively effective. Additionally, it was argued that good time (and by inference parole as well) assisted in the maintenance of discipline within the prisons and provided a flexible means of adjusting prison populations to available space.

The question of prison populations also attracted the attention of critics of determinate sentencing. Given the fact that only a small percentage of convicts are sent to prison, if judges did not utilize the probation option to a substantial degree under determinate sentencing laws, it was argued that an increase in prison populations could be expected. This would be particularly true if the legislature allowed penalty levels to be set at or above the existing average sentence levels. Even if relatively non-serious crimes were afforded lighter incarceration sanctions than were then possible, critics suggested it was conceivable that judges might

choose incarceration over probation to a greater degree than they did in the past precisely because of the shorter possible incarceration term. Critics pointed out that the possible adverse effects of an increased prison population are many. They include overcrowding within the institutions which may result in disciplinary problems, the inability of prison programs to accommodate the numbers of persons who either want or need training, and increased costs to the state. In sum, criticisms of determinate sentencing focused on the likelihood that terms of incarceration were likely to lengthen dramatically, and that conditions within the prisons might deteriorate and might not be as readily reviewed by the courts.

Much of the controversy concerning sentencing reform is generated by differing views concerning the effectiveness of the present system to control crime or to rehabilitate offenders, but much of it is also the result of serious consideration of the many possible effects that a partial overhaul of the system, such as the adoption of a new sentencing system without other changes in the substantive law and in criminal justice practice, may have on the system as a whole. Regardless of the type of the sentencing reform, critics cautioned that any new sentencing system based on the adoption of existing sentencing patterns might preclude serious further evaluation of the overall utility or justice of those practices. This, of course, applied to sentencing guidelines as well as to determinate sentencing.

It may well be, as Professor Caleb Foote has suggested, that "from a historical perspective, the current flurry of so

called determinate sentiment will turn out to be a fad..." (Hussey, 1978). At the same time, however, it appears that the widespread interest and comment on sentencing and criminal justice will not soon subside. Indeed, the extent and diversity of sentencing reforms reported below represent a broad spectrum of theory and practice sometimes in conflict with each other.

A word concerning our review of sentencing reform in each state is in order. We gathered information from published materials, from scholarly journals, and from documents developed and printed by various state agencies. We also talked with many individuals in different states, and surveyed a selected number of states (see Appendix A) when published information on their sentencing structure was not in abundant quantity. We feel that we have included as much of the current knowledge on sentencing reform and its impact as is realistically possible to gather in an effort of this kind. We also believe that there may be individual and excellent studies we overlooked, and alterations to some sentencing laws we omitted. Despite these caveats, the following is unique in its scope. The review for each state is organized in a similar fashion beginning with a section tracing the history of the current sentencing structure or the reform, followed by a summary of the content of the actual reform, and ending with a section discussing the impact and effect of the reform. For ease as a reference, the review is presented in alphabetical order of the states. We hope the value of the information presented outweighs any (hopefully) minor omissions.

## ALABAMA

### Sentencing reform

In 1979, Alabama's new criminal code creating classifications for crimes, rather than individual classifications, went into effect. The law required Alabama courts to sentence a convicted felon to a definite term of incarceration according to the four classes of felony offenses.

Alabama's Felony Offense Classifications

<u>Offense Class</u>	<u>Sanction</u>
	Murder Death Life Without Parole No Sentence Less Than Ten Years
Class A	Life Imprisonment Not More Than 99 Years No Sentence Less Than Ten Years
Class B	Imprisonment Not More Than 20 Years No Sentence Less Than Ten Years
Class C	Imprisonment No More Than Ten Years No Sentence Less Than One Year and One Day

Each felony offense carries a statutorily defined class. The court may also impose a non-incarcerative term; however, a sentence may not be suspended and probation is not an option for sentences over 10 years. The Alabama Parole Board determines the actual release date of an incarcerated felon and "good-time" allowances may also reduce time served.

Habitual felony offender statute. The 1980 Habitual Felony Offender Statute allowed for increased and more certain punishment for repeat offenders. Previous provisions for habitual offenders were quite limited and allowed for an increase of 25 percent for a second conviction only for the same offense. This law was usually overlooked mainly because it was unclear and awkward to enforce. Considerable debate, and different types of legislation increasing sanctions for repeat offenders were considered in the Alabama Legislature before arriving at the present system for sentencing these individuals. The new code provides for increased penalties for prior felony offenses, specified by the class of the offense of current conviction, and the number of previous felony convictions.

The new law requires that sentencing repeat offenders under the system be mandatory. This habitual offender sentencing law is thought to have already added to the numbers of persons imprisoned.<sup>5</sup> The chart on the following page displays these data.

Legislation to reduce time served. While steps have been made to increase sanctions for repeat offenders, other measures have been taken to provide early release for other offenders. Specific legislation, especially concerning "good-time" allotments, has addressed the problem of early release for those inmates not serving particularly long sentences. Other measures have also been taken. For example, the old criminal code had sanctions specified for the use of a firearm in committing certain offenses. These provisions are not included in the new code. The Alabama Parole Board has also considered and made several changes to paroling procedures. Determining time

Alabama's Habitual Offender Sentencing

<u>Instant Offense Class</u>	<u>Punishment</u>
<b>For One Prior Felony Conviction:</b>	
Class A	Life Imprisonment No More Than 99 Years-No Less Than 15 Years
Class B	Sentence Under Class A
Class C	Sentence Under Class B
<b>For Two Prior Felony Convictions:</b>	
Class A	Life Imprisonment No Less Than 99 Years
Class B	Life Imprisonment No More Than 99 Years-No Less Than 15 Years
Class C	Sentence Under Class A
<b>For Three or More Prior Felony Convictions:</b>	
Class A	Life Imprisonment Without Parole
Class B	Life Imprisonment
Class C	Life Imprisonment No More Than 99 Years-No Less Than 15 Years

that a person will actually serve in Alabama has become somewhat complex.

**Parole release.** In 1972, legislation was enacted setting parole eligibility at one-third of sentence for most offenders. Individuals serving sentences of 30 years or more would not be eligible for parole consideration until 10 years had been served. To parole an inmate before the one-third eligibility date required the vote of all three members of the Parole

Board. Recently, however, Alabama's Parole Board, in response to the 1980 good-time legislation and dissatisfaction with the automatic one-third eligibility date, has developed a new paroling policy based on a table of parole eligibility ranges reflecting the imposed sentence length. Generally, this paroling policy provides for early release for those persons serving sentences under 10 years, and requires a higher percentage of imposed sentence to be served for those

offenders facing over 10 years. Prior to 1980, most good-time provisions did not determine release date, but rather determined when an inmate would be eligible for parole consideration. The new policy changes of the Parole Board have altered this provision. Now the Parole Board has more discretion in the release decision, because they are not bound by the eligibility dates determined by good-time allotments.

**Incentive good-time act.** Prior to 1976, "good time" was awarded on a varied scale depending on the length of sentence. In 1976, the Legislature passed the Incentive Good-Time Act. This allowed for an additional day of credit for each day served in addition to the good time allowed under the old law. At first, this provision was made retroactive. Since at that time good time was applied to determine parole eligibility dates, many persons became automatically eligible, and were thus paroled. This provided immediate relief for overcrowding problems in the state's prisons. However, the incentive good-time law was soon modified by the Attorney General's Office so that an inmate must be incarcerated for six months first and, in order to receive the good-time credit, must receive a recommendation from the head of the institution. This system led to many perceived inequities, especially for those persons serving sentences in county jails. Finally, this modification by the Attorney General's Office led to a new good-time law.

**Correctional incentive time act.** In May, 1980, legislation became effective completely changing Alabama's good-time provisions. The Correctional Incentive Time Act essentially provides for a classification system designating good-time allotments and prohibits offenders serving

sentences of 10 years or more from earning good-time credit. Inmates may fall into one of four classifications.

Alabama's Good-Time Provisions

<u>Class</u>	<u>Good time Allotment</u>
Class 1	75 days for every 30 served (105 days per month total)
Class 2	40 days for every 30 served (70 days per month total) Three months must be served in this class before moving to Class 1
Class 3	20 days for every 30 served (50 days per month total) Six months must be served in this class before moving to Class 2
Class 4	No Good time All persons sentenced to ten years or more are in this class All persons originally start in Class 4 and must remain here for 30 days or until they are reclassified.

An inmate must move from Class to Class in sequence. Good time may be forfeited for misbehavior. The Commissioner of Corrections shall set the criteria for the classifications--based on a prisoner's behavior, discipline, work practices, and responsibility. Except for those persons sentenced to terms of 10 years or more, good-time is no longer based on length of sentence. The law also states that persons convicted of certain offenses may never be classified in Class 1. There was some concern that this Act could lead to disciplinary problems in the institutions, but thus far it does not seem to have created insurmountable problems. Unlike the other good-time law, this Act was not made retroactive and only those persons sentenced after May 19, 1981, are covered by the Act. (Alabama also allows 30 days of credit per year for persons donating blood to the Red Cross.)

Governor's 1982 crime package. In August of 1982, the Governor of Alabama succeeded in getting a crime package passed in the Legislature. Parts of this package include: 1) further definition and tightening of the use of an insanity defense; 2) provisions denying work release to certain violent offenders; 3) provisions allowing victims to be present during trial proceedings; and 4) provisions allowing for defendants convicted of sentences of 10 years or less to be sentenced to a term not exceeding five years plus some probation time. While the intent of the package was to get harsh on crime, many aspects of the package seem negligible. At the present time, this crime package is being contested due to the fact that the Governor failed to file the Acts with the Secretary of State during the requisite time period.

Impact

Overcrowding. In 1975, a Federal judge ruled that overcrowding in Alabama's pri-

sons was in violation of constitutional rights and set quotas for population ceilings for each correctional institution. These quotas led to a reduced prison population, but resulted in a large backup of state prisoners in county facilities. And Alabama continues to have a serious overcrowding problem--the number of persons sent to prison increased 24.8 percent from 1980 to 1981, an increase of 1,480 persons.<sup>6</sup> Much of this increase is due to the revised habitual offender law. Also, because of other legislative changes, Alabama has many inmates serving life sentences without the possibility of parole. Finally, due to the federal restriction on Alabama's correctional institution population, more than 1,000 inmates are housed in temporary, modular housing units, and there remains a back-up in the county jails. Two 1,600 bed institutions are currently under construction; however, these new facilities will not eliminate the overcrowding problem.<sup>7</sup>

**ALASKA**

Context of sentencing reform

Prior to 1980, sanctions were proscribed for each felony offense. The criminal code had not undergone any major revision for close to a century. The general feeling of prosecutors, defense attorneys and judges was that the code was outmoded, confusing and inconsistent.<sup>8</sup> For example, the sentence range for robbery or assault with intent to kill, a sentence range from one to fifteen years, was less than the sentence range for forgery offenses which was from two to twenty years. In spite of many legislative attempts to revise this criminal code, it was not until 1980 that a new revised code became effective.

In order to insure consistent sanctions based on the seriousness of the offense, Alaska's new criminal code, as in many other states, reclassified most felony offenses into one of three classes with special distinctions given to murder and kidnapping.

ALASKA

<u>Offense Class</u>	<u>Sanction</u>
Murder	20 to 99 years incarceration
Kidnapping	5 to 99 years incarceration
Class A	Incarceration up to 20 years
Class B	Incarceration up to 10 years
Class C	Incarceration up to 5 years.

The minimum penalty must be imposed for murder and kidnapping offenses, but for the other classes of felonies the judges are free to impose incarceration or non-incarcerative sentences.

A presumptive term of six years is specified in the criminal code for those who

use a firearm in the commission of a Class A felony. Presumptive terms are also specified in the criminal code for repeat offenders according to the class of the instant offense and the number of prior felony convictions.

<u>Class and Prior Record</u>	<u>Presumptive Term</u>
Class A - First Conviction	6 years
Second Conviction	10 years
Third Conviction	15 years
Class B - Second Conviction	4 years
Third Conviction	6 years
Class C - Second Conviction	2 years
Third Conviction	3 years

For Class A and B felonies with prior convictions, imprisonment may not be suspended and the minimum may not be reduced. Statutorily defined aggravating or mitigating circumstances may alter any of these presumptive terms by up to 50 percent. Prior to the new criminal code, Alaska had provisions for increased sanctions for habitual offenders, but this was not mandatory and rarely enforced.<sup>9</sup> The new sentencing code did not change the fundamental philosophy behind sentencing which sought the rehabilitation of the offender; isolation of the offender for the public protection; deterrence; and reaffirmation of societal norms.

Prior to the new criminal code, Alaska also had mandatory minimum sentences for some drug offenses. For violation of the UNDA Drug Code (heroin), the first offense sentence range was from two to ten years; for the second offense 10 to 20 years; and for the third offense 20 to 40 years. Mandatory sentences for the illegal selling of drugs to a minor for the first offense was 10 to 30 years; for the second

offense 15 to 30 years; and a life sentence for the third offense. Offenders had to be sentenced to at least the minimum of these sentences with no suspension allowed. Drug offenses are now included in Alaska's sentencing guidelines, discussed below.

Parole. The incarcerative sentence given by the court becomes the maximum time an offender must serve, with the Alaskan Parole Board determining the actual release date. Prior to 1974, the judge could fix a time for parole release consideration not to exceed one-third of the sentence. Legislation in 1974 required that defendants serve one-third of their sentence before parole eligibility and allowed the judge to specify a longer time before parole consideration if they felt this was necessary.

Good time. Good time is allowed on the basis of one day for every three days served. Inmates may earn an additional three days per month for working in a prison project or for exceptional or meritorious conduct during their first year of imprisonment. Five days per month for exceptional or meritorious conduct is allowed for each additional year of incarceration. Good time must be forfeited if an offender violates prison rules.

#### Presumptive sentencing guidelines

In 1977, the Alaska Judicial Council released a study that looked at all felonies sentenced in Alaska from August 1, 1974, through August 1, 1976. Data on a total of 860 felony counts against 683 defendants were collected. Analysis of variance and multiple regression analysis was performed on the data collected. The regression analysis revealed that, for most offenses, prior record had a signifi-

cant impact on sentence length. The defendant's status on probation or parole at the time of the offense or a past history of probation or parole revocations were found to be significant. The study also revealed that significant racial disparity existed in the sentences imposed:

After taking into account the independent contribution of all other factors in the study, being black in and of itself contributed an estimated 11.9 months to drug felony sentences and 6.5 months for crimes of theft or unlawful entry. This independent "blackness factor" survived both statistical tests and was shown to increase the severity of sentences entirely aside from such considerations of employment history, educational level, occupation, income, prior criminal history, and probation and parole status (Alaska Judicial Council, 1977).

At a meeting in June of 1978, the Conference of Alaska Judges asked the Alaska Supreme Court to establish a committee to study the feasibility of developing sentencing guidelines. This was a direct response to the Judicial Council's findings of sentencing disparity for some offenses and because of the exposure of several of the judges to the guidelines concept. A Supreme Court Advisory Committee on Sentencing Guidelines was established to develop sentencing guidelines where appropriate. The membership of the committee consisted of three judges, the State Public Defender, the Chief Prosecutor for the State, and representatives of each of the State's three minority groups.

The advisory committee reviewed the Judicial Council's data and came to the

conclusion that sentencing bias was unconscious and not deliberate on the part of the judges. The committee decided that this sentencing bias was due to so-called "social stability" factors that most judges consider when deciding length of sentence. These factors might include marital history, education, employment history, residential stability factors, and other factors that would favor white middle class offenders over minorities. The committee concluded that sentencing guidelines developed for use in Alaska should avoid these factors.

The actual sentencing guidelines developed in Alaska were based on the Judicial Council's study, and deliberate policy preferences of the committee. The guidelines were designed to deal with three types of criminals: drug offenders, first time offenders, and misdemeanants. The guidelines are based on a two-dimensional grid system much like that developed for use in other states. The offender score takes into account such factors as the offender's criminal history and his legal status at the time of the offense. The offense score is based on degrees of seriousness factors, which in drug offenses is determined by the amount of drugs involved. The drug guidelines further provide a range for each class of narcotics, and were devised primarily to deal with the sale of such drugs as heroin and cocaine. As the Alaska guidelines require, judges must consider the guidelines in sentencing and explain each sentence on the record. Departure from the guidelines is permitted for statutorily defined aggravating and mitigating factors, provided reasons for departure are stated.

In November 1980, the Judicial Council released a new report (Maroules and

White, 1980). In this study, the Judicial Council reported that efforts by the Alaska court system and trial judges had resulted in the disappearance of racial disparity for fraud and property offenses, but that disparity persisted in drug offenses. The new study, which looked at felony sentences from 1976 through 1979, revealed that blacks went to jail more frequently and received sentences of 11 months longer than whites or natives convicted of the same crimes. Sentencing guidelines for drug and narcotic offenses were not distributed until the middle of 1980 and each judge must now supply the Sentencing Guidelines Committee with a written statement on how the drug sentencing guidelines were used in imposing the sentence and why the particular sentence was imposed. Based on this information, it has been found that there is a correlation of .75 between the sentences trial court judges have imposed for drug offenses and the sentencing guidelines recommendation. The committee has concluded that there is now more uniformity in sentencing. The committee also concluded that, when judges sentence outside of the guidelines for drug offenses, it is usually for a "good reason". These sentencing guidelines are still in use in Alaska, but no thorough study, such as the original one conducted by the Alaska Judicial Council, has been done on their usage.

#### Prohibition of plea bargaining

In 1975, the Attorney General of Alaska banned plea bargaining in the state. Under Attorney General Avrum Gross's orders, plea negotiations for a sentence recommendation or for charge reductions or dismissals could no longer be carried on, although it was recognized that there might be some exceptions to this policy

such as plea agreements in exchange for information. The Attorney General's rationale for banning plea bargaining was an attempt to return the sentencing function back to the court.

The excuse that the courts were giving to the public for their lenient sentencing was that their hands were tied by the district attorney's sentence bargaining. I wanted to return the sentencing function to the courts, and that was my main purpose in carrying out this policy (Rubenstein, et al., 1980).

Plea bargaining has always received a fair amount of criticism. Many reasons exist for using the plea bargaining system, chiefly because it saves time and money when a case is bargained rather than going to trial. Plea bargaining is often in the interest of the criminal justice administrators. It is generally thought that defendants who enter a plea agreement are rewarded with more lenient sentences than if they go to trial, but this also discounts the fact that, if they go to trial, the case may be dismissed or acquitted. Some of the legal thinking endorsed by the American Bar Association is that, while it is improper to penalize a defendant for going to trial, it is entirely appropriate to reward a defendant for pleading guilty (American Bar Association, 1968; 1979). Sometimes, however, it is difficult to discern the difference. Albert Alschuler in his 1981 article on plea bargaining analyzes some of the underlying unfair and irrational processes of plea negotiations:

In criminal cases, the extent of an offender's punishment ought to turn primarily upon what he did and, perhaps, upon his personal character-

istics rather than upon a postcrime, postarrest decision to exercise or not to exercise some procedural option. As an initial matter, it seems unjust that, when two virtually identical defendants have committed virtually identical crimes, one should receive a more severe sentence than the other only because he has exercised his right to trial. Quite apart from the threat that plea bargaining may pose to constitutional values, the danger that it may present of convicting innocent defendants, and a variety of other objectives to it, plea negotiations may be inherently unfair as a matter of sentencing policy (Alschuler, 1981).

Alaska is in a unique position because it is the only state that has put a total ban on plea bargaining. Unfortunately, because of its population and other factors,<sup>10</sup> Alaska may be an atypical state. What has happened with the restrictions on plea bargaining in that state may not have wider implications. But some of the major questions brought up by the ban on plea bargaining--did it increase the number of defendants pleading not guilty and going to trial and were defendants sentenced more harshly without plea bargaining--can be looked at through the Alaskan experience.

A second study was done by the Alaska Judicial Council (Rubenstein, et al., 1980) to evaluate the impact of the ban on plea bargaining in Anchorage, Fairbanks, and Juneau--Alaska's major urban areas. This evaluation looked at case processing for the year preceding the ban (1974-1975) and the year following the ban (1975-1976). The study also conducted interviews with almost all the lawyers and

judges in these cities and a number of police personnel. Regression analysis and other statistical tests were performed on the data collected. Some of the study's conclusions include: 1) plea bargaining was effectively curtailed in Alaska and was not replaced by covert or implicit substitutes; 2) defendants continued to plead guilty at about the same rate; 3) the rate of trials increased but the number of absolute trials remained low; 4) sentence severity generally did not increase except for drug offenses and for some "low risk" property offenses; and 5) conviction rates changed very little. The study also found regional differences in how the criminal justice system reacted to the plea bargaining ban.

As for the legal interviews, most prosecutors were generally favorable to the ban because they could often achieve the same results while spending less time on routine cases. They also felt less responsible for the outcome of cases. Defense attorneys were less favorable to the ban because, unless charges were dismissed early on, they had to spend more time preparing and researching a case for the sentencing hearing. Judges also seemed rather ambivalent about the ban and thought that the absence of prosecutorial participation in sentence recommendations left a void in that it reduced the number of viewpoints that may aid in the judicial decision. The Attorney General got his wish that responsibility for sentencing be restored to the judge, but judges felt that there were too few guidelines to follow in exercising judicial discretion.

The Alaska Judicial Council concluded that, although the Attorney General proved that it was possible to make significant changes in the plea bargaining process without a breakdown in the court operation

system, it may not have resulted in a "better kind of sentencing" (Rubenstein, et al., 1980). At the end of the first year of the plea bargaining ban it appeared that the new system resulted in:

A denial of leniency to the minor offender and the drug offender without any increase in the severity of punishment for violent or dangerous criminals (Rubenstein, et al., 1980)

Thus far, the Rubenstein study offers the most comprehensive analysis of changes brought about by Alaska's ban on plea bargaining. This study, while fairly complete, may be problematic because its unit of analysis was separate charges (called cases) rather than defendants. Therefore, multiple charges for one defendant would appear as several cases in the data when the central issue might have been the disposition for each defendant rather than the disposition for each case. The data were analyzed in this way because the authors were interested in examining the response of the criminal justice system to individual crimes. However, the offenses were categorized into six classes, a disadvantage if this masked charging patterns within the classes. Also, many of the major conclusions of the study were a result of interviews with legal personnel.

#### Impact

Whether it has been a result of Alaska's ban on plea bargaining, the new criminal code, the sentencing guidelines, the result of non-criminal justice system factors such as the rapid increase in Alaska's population, or any combination of factors, the prison population in Alaska has increased dramatically over the last

several years. At the end of 1973, the inmate population in Alaska was only 174, the lowest in the country. By 1980, the prison population--including those in jails--had reached 820, and in 1981 there was an additional increase of 24 percent, resulting in a total of 1,019 inmates (Gardner, 1982). Since Alaska sentences many of its felons to short periods of jail time (Rubenstein, et al., 1980), often as little as 30 days or less, it is hard to know if this is a reflection of an increase in long-term incarceration or an increase in persons being sentenced to jail.

## ARIZONA

### Sentencing reform and its context

Prior to 1978, Arizona's indeterminate sentencing system allowed for a great deal of judicial discretion. Concern over possible sentencing disparity resulted in Maricopa County (Phoenix) becoming one of the pilot sites of the original sentencing guidelines in 1977. The guidelines developed from that study were short-lived, however, because in 1978 sweeping sentencing changes occurred in Arizona with the passage of presumptive sentencing legislation which also revised the criminal code.

Sentencing guidelines. The staff of the Criminal Justice Research Center of the University of New York at Albany used Maricopa County--which encompasses the large urban areas of Phoenix and Scottsdale as well as the university town of Tempe and the impoverished Mexican-American town of Guadalupe--as the fourth and final site where, in 1977, they developed models of sentencing guidelines. The guideline effort in Maricopa County was initiated by the Arizona Supreme Court, which was seeking an urban court to pilot the project. The court had become interested in the Denver sentencing guidelines project and wished to introduce a project locally.

The models here were of the same basic structure as those developed in Denver County, a two dimensional decision-making matrix, but were based on a larger sample. The Honorable Stanley Z. Goodfarb, presiding criminal judge of the Maricopa County Superior Court, noted at a national sentencing guidelines workshop in 1979 that a significant quantity of inaccurate data was uncovered when the study got un-

derway, and that there was little uniformity in the quality of presentence reports. Despite this, he felt that the quality of data being collected improved as the project progressed (American University, 1979). The researchers themselves believed that these factors served to diminish some sources of statistical errors that arose in the Denver study. It was thought that, since Maricopa County was the last of four pilot sites for sentencing guidelines development, that guidelines developed here gained from the knowledge used in establishing the other guidelines.

Two different guideline models were designed in Maricopa County--a "general" model and a "generic" model. The general model ranked offenses into six classes according to statutory penalties. An "intra-class ranking system" was further devised by having participating judges rank offenses within the statutory categories by relative seriousness. A "seriousness modifier" was then developed to take into account aggravating and mitigating aspects of the offense. This was primarily added to take into account physical injury to the victim. Use of a weapon, also seen as a seriousness modifier, was made explicit in the statutory definitions and, therefore, a separate modifier for this factor was not included. The offense score was obtained by adding the intra-class rank to the values for the seriousness modifier and the number of instant criminal events, dichotomized to indicate one criminal event, or two or more. The offender score was obtained by scoring such factors as prior adult or juvenile record, legal status at the time of the offense, and employment status. This model accurately predicted approximately 81 percent of the IN/OUT decision. As in other jurisdictions, the Maricopa

judiciary rejected the bifurcated model, preferring a grid that combined the IN/OUT decision with the appropriate sentence length (Kress, 1980).

The generic model grouped offenses by type; for example, violent crimes, property crimes, and drug offenses. A separate "interclass" ranking system based on the maximum sentence for an offense was developed because the judges had not ranked offenses within the generic categories. The offense score was again obtained by adding the rank of the most serious offense at conviction to the number of criminal events variable, and the seriousness modifier. The offender score utilized seven factors--legal status, prior juvenile convictions, prior juvenile incarcerations (over 30 days), prior adult convictions, prior adult convictions for crimes against persons, prior adult incarcerations (over 30 days), and employment status. Ultimately, the generic model was chosen for implementation because of its greater predictive power--as high as 87 percent with some types of offenses (Kress, 1980).

Following the training sessions with the research staff, judges used the guidelines for one month on an experimental basis. Sentencing guidelines were then officially implemented in Maricopa County on March 1, 1978, for a six month period. It has been estimated that the subsequent compliance rate was approximately 80 percent.<sup>11</sup> As Judge Goodfarb pointed out at the sentencing guidelines workshop, a 75 to 80 percent rate of compliance is the highest that should be reasonably expected, for there will always be the extreme or special case to which the guidelines cannot be applied. Sentencing guidelines were never developed for use on a statewide basis because, in 1978, legislation

calling for presumptive sentencing became effective.

Presumptive sentencing. In October of 1978, the Revised Arizona Criminal Code became effective in Arizona's court system. This new code was seen as both revolutionary and reactionary. This legislation established statewide presumptive sentences in Arizona and was an effort by the legislature to deter crime through tough legislation.<sup>12</sup>

The new code classified felonies into six classes from the most serious (Class 1) to the least serious (Class 6). It also included three misdemeanor classes and a "petty offense" class. Each felony class sets forth a definite term which it is "presumed" should be imposed upon conviction. A minimum and maximum sentence is also given for each class. Arizona's presumptive sentencing scheme is illustrated in Table 1.

Deviations are determined by the classification of the felony. Classes 2 and 3 may be decreased by 25 percent or increased by 100 percent. Classes 4, 5, and 6 may be decreased by up to 50 percent or increased by 25 percent. There are no deviations for a Class 1 felony--first degree murder--which carries a 25 year mandatory minimum. Offenders may also be classified as "non-dangerous" or "dangerous" offenders. Dangerous offenders involve the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury. This must be proved in court. Most offenders classified as dangerous must serve two-thirds of their terms prior to release of any sort.

Only first time non-dangerous offenders are eligible for probation. If they are

TABLE 1  
ARIZONA\*  
CRIMINAL CODE SENTENCING OPTIONS  
PETTY OFFENSE - \$300 (Persons) - \$1,000 (Enterprises)

CLASS	FINES (corporations)	MISDEMEANORS	FIRST OFFENSE	SUBSEQUENT OFFENSES
1	\$1,000		6 months	1 1/2 years
2	750		4 months	6 months
3	500		30 days	4 months

Class 1 Felony (1st Degree Murder): Life Imprisonment (parole eligible at 25 years) or Death

OTHER FELONIES

OFFENSES

DANGEROUS OFFENSES  
(with weapon or where serious physical injury occurs)

CLASS	FIRST			SECOND			THIRD			FIRST			SECOND			THIRD		
	MIN.	P	MAX	MIN	P	MAX	MIN	P	MAX	MIN	P	MAX	MIN	P	MAX	MIN	P	MAX
2	(5.25)	7	(14)	(7)**	10.5	(21)	(14)**	15.75	(25)	(7)**	10 1/2	(21)	(14)**	15.75	(28)	(21)**	28	(35)
3	(3.75)	5	(10)	(5)**	7.5	(15)	(10)**	11.25	(20)	(5)**	7 1/2	(15)	(10)**	11.25	(20)	(15)**	20	(25)
4	(2)	4	(5)	(4)*	6	(8)	(8)**	10	(12)	(4)*	6	(8)	(8)**	10	(12)	(12)**	14	(16)
5	(1)	2	(2.5)	(2)*	3	(4)	(4)**	5	(6)	(2)*	3	(4)	(4)**	5	(6)	(6)**	7	(8)
6	(3/4)	1 1/2	(1.9)	(1 1/2)	2 1/2	(3)	(3)**	3.75	(4 1/2)	(1 1/2)*	2 1/2	(3)	(3)**	3.75	(4 1/2)	(4 1/2)	5 1/2	(6)

P = Presumptive Sentence

\* Not eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until 1/2 t sentence imposed by the court is served. May earn release credits at rate of 1 day for each 2 days served.

\*\* Not eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until 2/3 t sentence imposed by the court is served. May earn release credits at rate of 1 day for each 3 days served.

NOTE: First-time, nondangerous offenders are eligible for probation and, if imprisoned, may be paroled at 1/2 the term imposed and may earn release credits at the rate of 1 day for each 2 days served.

ADDITIONAL SENTENCING OPTIONS:

Fines for Felonies: Individuals, \$150,000; Enterprises, \$1,000,000  
Probation: Supervised or unsupervised, plus jail or restitution  
Restitution  
Loss of Licenses

\*Received from Ellis C. MacDougall, State of Arizona, Department of Corrections.

**ARKANSAS**

Indeterminate sentencing modifications

Even though no major structural changes have occurred in sentencing in Arkansas in the last ten years, alterations in several areas including code revisions, habitual offender sentencing, and parole eligibility requirements have impacted on time served in Arkansas. Sentencing in Arkansas is based on an indeterminate model with felony offenses divided into five classes with statutory minimum and maximums provided. Act 620 of 1981 altered these minimum and maximum limits for each class of felony and established a new felony class, Class Y, which includes such offenses as kidnapping and murder in the first degree. A comparison of sentence ranges before and after Act 620 is provided below:

Felony Sentences in Arkansas

Class	Prior to March, 1981	Act 620 Changes Effective March, 1981
Class Y	--	10-40 years
Class A	5-50 years	6-30 years
Class B	3-20 years	5-20 years
Class C	2-10 years	4-10 years
Class D	Less than 5 years	Less than 6 years

It appears that the minimum sentence has been raised for all the felony classes, and that the maximum has been greatly lowered for Class A offenses only.

A judge may impose a sentence of any time within the statutory ranges. Actual time served is determined by the Parole Board

and good-time allocations. The court in most cases may also sentence to a non-incarcerative term, though no probation term is to exceed five years.

Parole. Significant changes have occurred quite regularly regarding parole eligibility requirements for Arkansas' felons. The basis for paroling inmates was established in 1968 with Act 50. This Act stated that no inmate sentenced to death could ever be paroled, and persons sentenced to life had to serve a 15 year minimum term minus good-time (which was not to exceed five years). For all other offenders, parole eligibility could be anytime, unless the court specified a minimum sentence.

In order to provide more surety about the length of time served, laws specifying percentages of sentence to be served before release on parole became law with Act 1157, passed in 1975. This law started a trend in parole decision-making which was to continue for several years in Arkansas. Act 1157 provided more stringent punishment for those defendants sentenced to life sentences--persons sentenced to life imprisonment before Act 50 (March 1, 1968) and after Act 1157 (1975) would be denied parole.<sup>13</sup> Act 1157 established that, for all other felons, one-third of a sentence had to be served before an inmate could be considered for parole release.

Additional legislation, passed in 1976, reflected the desire of the legislature to provide more stringent punishment for repeat offenders and those offenders who use a deadly weapon in the commission of an offense. Those persons who had previously served two or more times in the state penitentiary, and those persons who used a deadly weapon in the commission of

an offense would be required to serve one-half of their sentence, minus good-time, before being eligible for parole.

Act 93 of 1977 further refined the establishment of parole eligibility requirements for habitual offenders. As stated in this Act:

It is hereby found and determined by the General Assembly that the present system of parole eligibility does not adequately deter crime, especially the habitual offenders, and that such habitual offenders should have their parole eligibility bear a direct relationship to the number of times they have been incarcerated. (Arkansas Annotated 43-2830, 1977).

Specific classifications of Act 93 for habitual offenders are provided below:

Arkansas Parole Eligibility Requirements of Act 93 (Effective April, 1977)	
Classification	Parole Eligibility
Class One-First offenders, or those with one or more felony convictions but never incarcerated	One-third of sentence served
Class Two-Second Offenders, or those with two or more prior felony convictions and one prior incarceration (could be local, state, or federal, but must be for a felony)	One-half of sentence served
Class Three-Those offenders with three or more prior felony convictions and two prior incarcerations	Three-fourths of sentence served
Class Four-Those offenders with four or more felony convictions, and three or more prior incarcerations	No parole

Act 93 also stated that, if a person is on probation or parole and commits a new felony, the new sentence must be made consecutive to the time left to serve for the old offense.

Further legislative change for parole eligibility requirements were specified in Act 620 of 1981 as follows: those persons who have one previous incarceration shall be eligible for parole after serving one-half of their sentence rather than one-third, and completing specific parole eligibility requirements based on prior incarcerations for the newly created Class Y felony.

Good time. Good time is allotted for most persons sentenced to prison in Arkansas, even those persons who are not eligible for parole release. Previous to 1976, good time was automatically determined based on the number of years to be served: the first five years of a sentence, or

sentences of five years or less--eight days per month; after five years--12 days per month. "Meritorious" good time of five days per month could also be earned. Legislation in 1976 changed the basis of good-time allowances and the amount of time that could be earned. Inmates are now divided into one of three classes: Class One--ten days per month; Class Two--five days per month; and Class Three--no good time allowed. Good time now is based solely on good behavior, work record, and behavior in prison.

Youthful offenders. Since Act 378 of 1975, Arkansas provides special sentencing for "Youthful Offenders". Those eligible for this classification must be under 26, convicted of less than a capital felony, and have no more than one previous felony conviction. The court may either suspend a sentence, place the defendant on probation, or assign the defendant to the alternative service program. Alternative service, defined by the Act, includes any program that provides corrective guidance and rehabilitation and thus protects the public from anti-social tendencies. This includes anything from employment and education to social welfare services or community service programs. Expungement of the defendant's record occurs after successful completion of the sentence. "Youthful Offenders" may be given an incarcerative sentence also, and except for convictions of Class Y felonies, may be immediately eligible for parole.

Habitual offenders. As outlined in the section under parole eligibility requirements, Arkansas began to provide harsher penalties for repeat offenders with Act 93 of 1977. Further legislation regarding the sentencing of habitual offenders was provided in Act 620 of 1981. With this Act, sentencing of habitual offenders is

determined separately for each offense class, with a minimum-maximum sentence range provided as shown below:

Arkansas Act 620-Habitual Offenders

Class	Habitual offender sentence ranges	Non-habitual sentence ranges
Class Y	20-60 years	10-40 years
Class A	12-50 years	6-30 years
Class B	10-30 years	5-20 years
Class C	8-20 years	4-10 years
Class D	6-12 years	Less than 6 years

A habitual offender is defined as someone convicted of a felony who has had more than two prior felony convictions or who has been found guilty of more than two felony offenses. A habitual offender is also not eligible for a probation sentence. The parole eligibility requirements for these offenders still hold. Though the sentence ranges are considerably harsher for the habitual offender, the court still maintains a great deal of discretion in determining sentence length. It is still too early to determine if judges are giving the longer sentences for repeat felons.

Firearms. Because legislators felt that the previous laws were too lenient on offenders who committed offenses while armed with a deadly weapon, Act 1157 of 1975 required that anyone convicted of a crime involving the use of a deadly weapon must serve one half of their sentence before parole release consideration. However, even after this was law, political pressure calling for even harsher treatment of armed offenders continued. In 1981, legislation was passed (Act 583)

requiring a mandatory-minimum sentence of ten years, without parole (but minus good time) for persons convicted of a felony involving the use of a deadly weapon.

Suspended sentences. Before statutes authorizing suspension of sentences were enacted in 1976, judges often allowed a defendant to enter a plea of guilty and would postpone entering the sentence. If the defendant later violated the law, the court could render the original judgment, even if the violation was many years later. Laws in 1976 repealed these earlier provisions by allowing the court to suspend a sentence, but only for a specified amount of time, or, the court could place the defendant on probation. The court could not do both as was allowed before. Legislation passed in 1981 further amended these provisions by allowing suspended sentences only for jail terms.

#### Impact of sentencing legislation

Though we know of no studies looking at the specific impact of recent legislative changes on Arkansas' prison population,

Arkansas has experienced an increase in the number of persons being incarcerated each year. From 1980 to 1981, Arkansas had an increase of 12.2 percent (Gardner, 1982). With a new men's facility in 1974, two new work release centers in 1975, a new women's unit in 1976, a community corrections center in 1980, and two new units in 1981, Arkansas has maintained sufficient capacity to handle the increase in the prison population. A new maximum security unit will be completed in 1983, and another is scheduled to be completed in 1986. However, if the incarceration rate continues to increase as it has in the past few years, and if Act 620 results in longer prison sentences, especially because of the habitual offender changes, Arkansas may not be immune from the overcrowding problems that are plaguing most other states. The Arkansas Department of Corrections is continuing to work on programs providing alternatives to incarceration and on ways to reduce the cost of operation of the Department (Survey Response, Arkansas Department of Corrections).

## CALIFORNIA

### Sentencing reform and its historic context

California's indeterminate sentencing structure dated back to 1917, when laws were enacted that placed broad discretion into the hands of the parole board, the Adult Authority, and the Women's Board of Terms and Parole. California had one of the most extreme forms of the indeterminate system. The courts would decide whether to imprison for wide ranges of prison terms, in some offenses ranging from six months to life. The parole boards determined when a person was rehabilitated and could safely be let out into the streets again. This system generated numerous problems and criticism, and California, in the early 70's, readily joined a number of other states actively seeking an alternative to the indeterminate sentencing system.

California's Determinate Sentencing Bill (SB 42) began as a small study by State Senator John Nejedly in 1974, and was the product of compromises between the Prisoner's Union, the American Civil Liberties Union, the District Attorney's Association, the Governor's Office, and to a lesser degree California's judges, law enforcement groups, and the Correction's bureaucracy (Messinger and Johnson, 1978). California's new law stated explicitly that:

The sole purpose of sentencing is punishment and the goals of the sentencing system should be the elimination of sentencing disparity and the promotion of sentence uniformity (Penal code of California, Sec. 1170 (a) (1)).

California's original determinate sentencing law is often cited as the purest determinate sentencing scheme adopted. The Bill follows closely the blueprint of determinacy prescribed by the American Friends Service Committee, Alan Dershowitz, David Fogel, and Andrew von Hirsch.

Substance of Senate Bill 42. Senate Bill 42 was passed by the California legislature in 1976, and became effective July 1, 1977, after some major revisions (discussed below). The new law code combined several discrete ingredients to determine length of incarceration in a way that severely curtailed judicial discretion. The court could still decide whether to incarcerate a person or to grant probation,<sup>14</sup> but the legislature set narrow ranges of prison terms with increments for mitigating and aggravating factors. Both the Adult Authority and the Women's board of Terms and Parole were eliminated and replaced by the Community Release Board. The court was required to make public statements regarding its reasons for sentencing. The Bill was also made retroactive.

Since the parole board functions were greatly altered by SB 42, the Adult Authority and Women's Board of Terms and Paroles were replaced by the Community Release Board, whose functions included: 1) parole for lifers, 2) revocation of parole, 3) review of sentences for disparity, 4) application of the retroactive aspects of the law, 5) review of lengths and conditions of parole, and 6) denial of good-time. Sentences could be revised within 120 days of commitment by either the trial court or the Community Release Board. The Community Release Board was required to review all sentences within the first year and recommend re-sentencing

if the sentence was thought to be disparate. Also, those sentenced under the new Act were to be supervised for one year after release with re-imprisonment for up to six months for revocation.

It was the intention of the Bill's authors to change the sentencing process without drastically changing actual time served by the total population involved. The new sentencing structure consisted of four categories of offenses<sup>15</sup> with three possible incarceration terms specified as shown below:

According to the 1977 law, the middle term had to be imposed by the court unless aggravating or mitigating factors were presented and proved during public sentencing hearings. Attorneys could offer arguments and testimony during these hearings. If the upper and lower term was to be given, the judge was required to state reasons for the decision. The kinds of circumstances that would justify aggravating or mitigating decisions were not identified

by the Bill. Enhancements from one to three years for aggravating factors could also be added to the base term.

These enhancement provisions were designed especially for the more complex cases. There were two different types of enhancements--specific and general. Specific enhancements included those factors related to the offense such as weapon use or great bodily harm. General enhancements pertained to prior record (one year for each prior offense incarceration for non-violent felonies and three years for each prior violent felony incarceration if the instant offense is violent),<sup>16</sup> multiple counts (sentence may be enhanced by one-fourth of base term for each additional convicted offense), and those offenses causing great loss of property. With the enhancement provision, the scope of judicial discretion allowed under the 1977 law increased greatly. Although enhancements had to be pled or proved and the adjusted sentence normally imposed by the court, a judge might choose to strike the addition-

Offense Category*	Sentence Terms		
	Lower Term	Middle Term	Upper Term
a	5 yrs.	6 yrs.	7 yrs.
b	3	4	5
c	2	3	4
d	16 mons.	2	3

\*a) murder second degree, rape with force of violence  
 b) robbery first degree, burglary, rape  
 c) robbery second degree, arson, assault with deadly weapon  
 d) burglary second degree, forgery, auto theft.  
 (Offenses are not inclusive.)

al time to be added (that is, strike the punishment, not the finding). The judge was required to state and enter into the record, however, the mitigating circumstances to justify this action. The decision to use a factor either to impose the upper term sentence or to add time under the enhancement provisions was also seen as a critical decision. Enhancements had to be proved and pleaded, thus they could also become another factor in plea negotiations.

Some limitations on enhancements were written into the Bill, such as: 1) the same factor used to give the upper term could not be used again as an enhancement, 2) there was a five year limit for consecutive enhancements for nonviolent offenses, 3) enhancements could not exceed double the base term except for violent crimes, and 4) in some instances, only the enhancement with the largest sentence increment could be added.

Senate Bill 42 also contained provisions for good time that would reduce a prison term by one-third. Good time became automatic unless taken away for prison misconduct, and was calculated on a yearly basis. Good time not lost during the year became vested and could not be lost later.

**Retroactive provisions.** One of the major complications of California's determinate sentencing legislation was that it was made retroactive to those sentenced to prison before passage of the Bill. Criticism of this retroactive provision came from various sources, including law enforcement officials, political figures, and the public who feared a flood of vio-

lent offenders would be released (Cassou and Taugher, 1978). Also, inmates feared their time in prison would be lengthened. A complicated set of rules and formulas was used, administered by the Community Release Board, to recalculate sentences for all persons incarcerated under the indeterminate law. Inmates were to be released at the earliest release date. Because of the fear that violent offenders would be released, provisions were provided for hearings to extend terms for particularly violent offenders.<sup>17</sup> The Community Release Board followed the behavior of those released for several months, and determined that arrest and commitment rates were no greater for this group than from that of other paroled prisoners.

**Changes to the bill.** Much of the detailed work on SB 42 was done in a few months before its passage. Because of the push to get the bill through the legislature quickly, a thorough review of the Bill by judges, attorneys, and other interested parties was precluded. Thus, a variety of problems and inconsistencies immediately surfaced. Three major amendments were adopted--AB 476 (1977), SB 709 (1978), and SB 1057 (1978)--making substantial changes in the legislation and provisions therein. The major focus of modifications included increasing middle and upper terms (see below) for violent felonies and increasing supervision after release from prison from one to up to three years, with revocation time increased to up to one year. In general, subsequent modifications to the law have been in the direction of increased prison terms and in the mandating of prison sentences in various types of offenses.

SB 709 Term Changes

Offense Category*	SB 42 Term	SB 709 Terms
Murder second degree (a)	5,6,7	5,7,11**
Rape (b)	3,4,5	3,6,8
Robbery second degree (c)	2,3,4	2,3,5
Burglary second degree (d)	16 mos,2,3	2,3,4

\* Offenses within categories received different sentence terms.  
 \*\* Numbers show lower, middle, and upper terms respectively in years.

Impact

The most obvious outcome of the new determinate sentencing legislation has been an increase in the prison populations<sup>18</sup> creating a serious threat of overcrowding (Cassou and Taugher, 1978). Whether this is a direct result of the new legislation or part of a continuing trend is not clear. (Casper et al., 1981, argue that the increase in California's prison population was already a trend that began considerably before the implementation of the new law.) The increase is complicated in that the median length of prison terms has dropped slightly, while the number of persons being incarcerated has increased slightly (Lipson and Peterson, 1980; Cassou and Taugher, 1978). The first evaluation literature indicated that there was a greater number of shorter prison terms being given, possibly because judges were provided with realistic intermediate sentences rather than a choice between a long indeterminate term and time in the county jail. The determinate sentencing legislation may have extended the trend of increased use of incarceration and stabilized it at a higher level than would

otherwise have happened. One reason may be related to the requirement that judges provide reasons for decisions. This makes it easier for the media and the public to monitor judicial decisions and may have increased the perceived political risk involved in what may be seen as lenient sentencing.

Though Lipson and Peterson (1980) showed that there was an increase in the number of persons being sent to prison under determinate sentencing, comparison of lengths of terms is more difficult to do and interpret. The release practices of the Adult Authority and the Women's Board of Terms and Parole varied from year to year, and the good-time provisions which were initiated by the determinate sentencing law in California make it difficult to do exact calculations. From data provided by the Department of Corrections, (see below), it seems that imposed prison terms are longer under determinate sentencing but actual time served will be less when good time is taken into consideration (providing inmate behavior does not cause significant loss of good-time). However, since under the determinate sen-

tencing bill there is a larger proportion of felons committing the less serious felonies sentenced to prison for shorter prison terms, the greater numbers will tend to bring down the average. Comparing medians is problematic because it also reflects the increase in extreme terms. (These data do not reflect SB 709 which increased length of sentences for certain offenses.)

Preliminary studies (Lipson and Peterson, 1980) showed that the power of the prosecutor increased under determinate sentencing in California because there was more surety that the agreed upon sentence would be carried out. In addition, the prosecu-

tor could decide whether to pursue and charge enhancements. Data from the Judicial Council (1980) showed that prosecutors were more likely to file charges dealing with weapon use and victim injury than with prior record. In 60 percent of all robberies during a period of July 1, 1977, to September 30, 1978, prosecutors pled and proved weapon use. Enhancements for prior record were used less often. For the same period and across all crimes, prior prison terms were pled and proved in 8 percent of the cases, while time was added to the sentence in only 6 percent of the cases. This is in spite of the fact that 30 to 40 percent of California's inmates had prior prison terms.

Comparison of Median Sentence Length Across all Felony Offenses for Males Under Indeterminate and Determinate Sentencing in California

Year	Median Prison Term	Actual Term*
1972	32 mos.	
1973	30 mos.	
1974	35 mos.	
1975	39 mos.	
1976	34 mos.	
Determinate Sentencing Effective:		
1/1977 - 6/1977	30 mos.	
7/1977 - 6/1978	36 mos.	21-33 mos.**
7/1978 - 6/1979	36 mos.	21-33 mos.**

\*The actual term reflects good-time credit.  
 \*\*It is thought that most inmates will receive most of their good-time credit, so that the median will be closer to the low end of the range.

However, more recent work has questioned the strength of the suggested relationships between the law and its purported effects. Neither Casper et al., (1981) nor Sparks (forthcoming) indicated a clear relationship between increased prison commitments, increased power of the district attorney, or alteration in plea bargaining practices. Utz (1981), comparing data from two different California counties before and after the passage of the bill, found that the usual practices and procedures followed in each influenced the manner in which the changes introduced by the bill were implemented. In Alameda county where bargaining was always high, it continued to be high as the new law was used instrumentally. In Sacramento county where bargaining was always tacit and not openly negotiated, the new law may have increased the number of trials. As Casper et al., (1981) suggested, the best way to measure the effect of the law was to understand how the local legal culture and court room workgroup worked before the law.

Other concerns over the law have surfaced. California's determinate sentencing bill is often criticized as being too complex. Its complexity makes it difficult for general practitioners to use and understand, and may lead to miscalculated sentences. The new law focuses on calculations rather than individuals, and the rigidity of the law often allows identical treatment of the extraordinary crime with the average one. Also, emphasis is placed on calculations, rather than on reasons for sentencing in a particular category. The bill also does not allow enough leeway to handle the emotionally disturbed or mentally retarded offenders.

One of the most crucial criticisms of legislatively determined sentencing, such

as California's, is that because of the elimination of parole boards, there is no flexibility provided for dealing with overcrowding in the prisons. There is a tendency to increase penalties in response to public and political pressures without considering the costs and consequences (Lipson and Peterson, 1980), both in monetary and human terms. The first year of determinate sentencing in California saw an increase of 12 percent in the felon population in prison (California Department of Corrections, 1979). It appears that legislatures must realistically cope with rising prison populations that are a direct result of their sentencing legislation. Casper et al., eloquently note:

...the coalition that came together to support the determinate sentencing legislation is well on the way to dissolution, if it has not been pronounced dead already. Due process liberals who supported the bill with reservations have found one of their fears borne out: Once legislators get into the business of setting prison terms there is little to stop them from raising them substantially. Terms have been raised several times already, and many new probation disqualifiers have been introduced since the 1976 passage of the law...The "informal effects" of the determinate sentencing law--sending marginal offenders to prison for short terms--may prove less effective as the terms get longer...even law enforcement interest may come to identify the problem as being the determinate sentence law itself...Reintroduction of some form of indeterminate sentencing and a parole board may thus appear as a solution to the problems seen by both camps (Casper et al., 1981).

Perhaps a longitudinal analysis of changes in the California Penal Code, beginning where Berk et al., (1977) left off, would further illuminate the conflicting sources of revisions to California's criminal law.

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## COLORADO

### Sentencing reform and its context

For decades before the mid-seventies Colorado had a sentencing structure patterned after the Model Penal Code. Offenders were classed by relative seriousness and ranked on the basis of minimum and maximum sentences. In May 1976, House Bill 1111, providing for mandatory sentences for violent and habitual offenders, became state law. It prescribed a mandatory sentence for any person twice convicted of a felony in a five-year period. Violent offenders, as defined by statute, had to be given at least the minimum term of incarceration, and were not eligible for an indeterminate sentence under the new law. The act also modified the habitual offender statute to mandate a twenty-five to fifty year term of incarceration for any offender convicted of a felony that carried a maximum penalty in excess of five years, and who also had been twice convicted of a felony within a ten-year period.

Sentencing guidelines. In addition to this legislation, concern about sentencing took other forms. Sentencing guidelines were implemented on a voluntary basis in Denver County District Court in November of 1976. This was the result of a feasibility study conducted by the Criminal Justice Research Center in Albany, New York.

Begun in 1974 by a team of researchers headed by Jack M. Kress and Professor Leslie T. Wilkins, this feasibility study evolved from an earlier research effort which successfully developed operating guidelines for the United States Board of Parole (now known as the Parole Commission). The original guideline researchers felt that the basic concept of guidelines

could be effectively utilized in other decision-making areas of the criminal justice system, particularly in sentencing. With this in mind, the directors of the Albany study approached trial judges in several jurisdictions, including Denver County, with the idea of adapting parole guidelines methodology to the design of sentencing guidelines. Their intent was to describe existing sentence decision-making practices through empirical research, and to construct the guidelines around those factors which statistically accounted for the greatest variation in the sentencing decision. The researchers envisioned that this process would "make explicit the underlying sentencing policy of a given court system" (Wilkins et al., 1978).

From their pilot study, the researchers constructed three slightly different sentencing models which were eventually synthesized to form a demonstration model. The Denver Demonstration Model consisted of a matrix system with one grid for each of the six felony and three misdemeanor categories in the Colorado criminal code. Each grid classified the offender on the basis of an offense score (Y axis) and an offender score (X axis). The offense score consisted of the ranked seriousness of the offense at conviction modified by a value for the degree of harm or loss to any victim that was involved. The reason for use of this "harm/loss modifier" was so that charging and plea bargaining practices did not diminish the actual gravity of the offense. The offender score included information on: previous incarcerations, probation or parole revocations, legal status at time of offense, prior adult record, and employment background. A "social stability" factor, whether the offender was employed or attending school, was also included in the offender score.

The guideline sentence was selected by locating the cell where the offense (Y axis) and offender (X axis) scores intersected. Each cell indicated a sentence of probation, incarceration, or a possible alternative sentence when appropriate. If incarceration was indicated, the statutory ranges were specified.

In testing the Denver Demonstration Model, the researchers utilized a simple random sample of 221 cases. In predicting the IN/OUT decision, this model achieved a 90 percent rate of accuracy. That is, the researchers stated that the guideline sentence matched the judge's decision to incarcerate or not to imprison the offender in 90 percent of the cases. If a judge's sentence varied from the guideline sentence range by more than a year, it was considered to have fallen outside of the guidelines. This was the case in an additional five percent of the sample. Thus, the researchers reported, "85 percent of the sentences in the construction sample gathered in Denver from November, 1975, to mid-January, 1976, fell within the guideline both as to whether or not the offender was incarcerated and also, if the sentence was to a period of incarceration, as to length of incarceration" (Kress, 1980). In a subsequent validation sample of 137 cases during March and April of 1976, 80 percent of the cases fell completely within the guidelines (Wilkins et al., 1978).

The original guideline researchers posited that, regardless of the problems of divining and defining an explicit policy where no such theoretical policy existed, research of this type should at least point to the various normative tendencies of individual judges, and thus provide an empirical basis for formulating the guidelines. They argue that the real value of

a system of guidelines is in its embodiment of prevailing sentencing norms in a framework of specific sentencing criteria (Wilkins et al., 1978). The degree to which the empirical data reflected actual practices was thus assumed to be central to the development of effective guidelines. If guidelines were not an accurate reflection of legally relevant factors, the researchers believed they would not be construed as a useful tool by the judges and legislators who ultimately must accept or reject them.

Guideline evaluation and criticism. As a measure of how well the Denver guidelines reflected actual sentencing norms, an evaluation of judicial behavior following implementation of the guidelines was conducted and the results presented to the Academy of Criminal Justice Science in March of 1979. For an eleven-month period, a team of researchers different from the team that developed the guidelines examined certain offender and offense characteristics, and the extent to which these contributed to deviation from the guideline sentences. Looking at a decision whether to incarcerate an offender or not (IN/OUT), they found actual sentences imposed agreed with those prescribed by the guidelines in 80 percent of the cases. As to length of sentence, some uniform deviation as a function of type of crime was noted. Overall, for example, among drug offense sentences there were proportionately more lenient deviations than severe deviations while the reverse was found to be true with fraud and forgery cases. Turning to specific guideline factors, the study found that prior criminal history variables were apparently far more central to the judges' decisions than would be indicated by their assigned weights (scores) in the guidelines (Rich, 1979). This analysis raised some serious

questions regarding the validity and reliability of the original research methodology. Some of the criticism raised by the evaluators included faults in the decisions regarding what variables the original researchers collected and the size of their research sample.

Although the effect of race on sentencing has always been considered an important area of criminal justice research (Sellin, 1928; Bullock, 1961; Farrell and Swigert, 1978), the data collection technique utilized in the Denver guidelines effectively eliminated this as a variable. Because the Denver pre-sentence investigation reports do not adequately distinguish offenders of hispanic origin, Mexican-Americans are often classified as "Caucasian" rather than "Hispanic". By failing to make this important distinction in their data collection effort, the original researchers diminished any significant race finding that might have become apparent had those with Spanish surnames been coded as such (Rich et al., 1980).

Further, and of paramount concern to the evaluators, the original guideline sample size was questionable. The evaluators correctly noted that the utility of multivariate analysis is dependent in large part on a sample of sufficient size to obtain accurate parameter estimates. The Denver study originally selected a simple random construction sample of 200 cases as they were processed through the court system. Because the statutory class of the offense at conviction was not discernable in 80 sentencing decisions, however, the sample was reduced to 120 cases (Wilkins, 1978). In order to reduce the standard error of the parameter estimates, there should be, as a general rule, at least 30 cases for each independent (predictor) variable. With as many as fourteen pre-

dictor variables in some of the original analyses, 120 cases was seen to be a woefully inadequate sample (Rich et al., 1980). It has further been suggested that the entire Denver regression analysis was based on, at best, as few as 50 cases (Rich et al., 1980). This resulted from the necessary deletion of cases with missing information from the sample, a common methodological technique used for dealing with missing observations. This finding regarding sample size undermined the original researchers' claims to an empirical basis for the Denver guidelines and other guidelines developed by the Albany group.

#### Determinate sentencing

Although use of the guidelines by the judges has been voluntary, the compliance rate of Denver judges by all estimates was in excess of 74 percent (Wilkins et al., 1978; Rich et al., 1980). Use of the guidelines in Colorado ended, however, when the state legislature intervened and enacted a state-wide system of presumptive sentencing ranges. This action was due primarily to widespread dissatisfaction with existing sentencing throughout the state. The Denver guidelines were geared to sentence ranges that were different from those enacted under presumptive sentencing and made use of the guidelines untenable. The presumptive sentencing statute, which became effective July 1, 1979, effectively ended the guideline experiment in Colorado when it defined a narrow presumptive range for each statutory class of crime. These sentence ranges may be halved for mitigating circumstances, or as much as doubled when aggravating factors are present. Automatic review is provided for any sentence that falls outside of statutory ranges. In general, the determinate sentencing

legislation adopted in Colorado has increased penalties.

Now Colorado felonies are statutorily divided into five classes, distinguished by presumptive ranges, and including a prescribed parole term, as shown below:

Colorado Presumptives Ranges  
By Felony Class<sup>20</sup>

Class I: Life imprisonment or death  
Class II: 8 to 12 years, one year of parole  
Class III: 4 to 8 years, one year of parole  
Class IV: 2 to 4 years, one year of parole  
Class V: 1 to 2 years, one year of parole

In the case of Class I felonies, a separate sentencing hearing is required to determine the existence of aggravating and/or mitigating circumstances. The judge sets a definite term of years based on the presumptive range, and this term must be served in full minus good time. At the time of sentence imposition, an additional year of parole is added. <sup>NO</sup> provision is made for an early release date.

Whenever a judge modifies a sentence from that prescribed by statute, he must state the unusual and extenuating circumstances that justify a deviation from the presumptive range. In cases in which the death penalty is imposed, the court must state in writing its findings of aggravating circumstances beyond a reasonable doubt. The death penalty is automatically reviewed by the State Supreme Court. In addition, when the sentence imposed is outside of the presumptive range, the Court of Appeals automatically reviews the sentence.

As mentioned above, the court sets a fixed term of years which must be served in full

minus good time. The division of Adult Services provides a one year parole supervision term for Class II, III, IV, or V felonies. Conditions of parole are established by the State Board of Parole prior to the offender's release from incarceration. If parole is revoked, the offender may be reincarcerated for up to six months. Reincarceration and parole supervision are never more than one year. Fifteen days per month good time sentence reductions are earned by an offender for abiding by institutional rules, diligence in work, etc. An additional fifteen days per six months may be deducted for "outstanding" performance in work or study, etc.

Special circumstances. Existing law requires that the minimum sentence within the presumptive range be imposed for the use of a "deadly weapon" in the commission of certain crimes. This term is non-suspendable. Any person with two prior felony convictions in the past ten years, who is convicted of a third felony which has a maximum penalty of five years, is punished by imprisonment for 25 to 30 years. Further, persons with three prior felony convictions are, on conviction of a fourth, sentenced to imprisonment for life. If convicted of a crime of violence, the person must be imprisoned for the minimum term within the presumptive range provided statutorily for such offense.

Proposed revisions to the Colorado criminal code

Subsequent to the 1979 enactment of the Colorado presumptive sentencing law, the state's executive, legislative, and judicial leadership determined that a study should be conducted to monitor the implementation of the laws and determine the

classification appropriateness of felonies. The Advisory Commission on Crime Classification and Sentencing, which oversaw the study, issued a report in 1981 detailing their recommended changes to the 1979 law. The following statements of policy reflected the Commission's philosophical support of specific recommendations for change in the 1979 law:

STATE OF COLORADO  
Preliminary Report of the Advisory  
Commission on Crime Classification  
And Sentencing: Proposed Revision of the  
Colorado Criminal Code<sup>21</sup>

- That the proper classification of felony offenses is critical to the achievement of the legislative purpose in enacting the presumptive sentencing law.
- That the current classification scheme is inappropriate to the presumptive sentencing law because it does not adequately distinguish the separate natures of felony offenses.
- That the reclassification of felonies within a greater number of classes provides for more precision and less disparity in sentencing.
- That the current presumptive sentence ranges provide penalties inappropriately low for some of the more serious offenses, and inappropriately

high for nominal felonious conduct.

- That statutory judicial guidelines should be promulgated to ensure the proper use of aggravated and mitigated punishments in extraordinary cases.
- That criminal conduct should be proscribed in general terms, wherever possible, to avoid the need for and the creation of special legislation based upon the status of the victim or the status of the offender.
- That duplicative, archaic, or outmoded criminal statutes should be repealed in favor of a more streamlined criminal code.

The context of the Commission's preliminary report was quite detailed and provided specific recommendations as to felony reclassifications (based on a Delphi Survey), extensive review of the implementation problems in the presumptive sentencing law, and discussions of the potential impact of implementation of the Commission's proposals. The Commission's report was thorough and somewhat controversial politically. At the time of this writing (February, 1983) none of the proposed changes to the 1979 law have gone into effect, although sections of the recommended revisions are included in two drafts of legislation currently pending in the Colorado legislature.

CONNECTICUT

The move towards sentencing reform

The primary impetus for changes in Connecticut's indeterminate sentencing system has come from the legislature. Efforts which led to the adoption of determinate sentencing in 1981 began as early as 1974 when the legislature established the Commission on Parole Evaluation Techniques and Rehabilitation. This was in response to wide criticism of the "hidden" sentencing done by the parole release decision-making process. This Commission, using information from a study done by Professor George F. Cole of the University of Connecticut, recommended that Connecticut's indeterminate system be replaced with determinate sentencing. The legislature then created the Commission to Study Alternative Methods of Sentencing.

The Commission to Study Alternative Methods of Sentencing did research on sentencing practices in Connecticut with the assistance of the Honorable Stanley Goodfarb of the Maricopa County Arizona Superior Court; Jack Kress of the School of Criminal Justice at SUNY Albany; and Jack Packel, Director of the Appellate Division of the Philadelphia Defender Association. Based on the results of its research, the Commission became involved in drafting House Bill 5987, submitted to the legislature in 1978. House Bill 5987 called for a sentencing guidelines system based on current offense information and prior record factors. Presumptive sentences were recommended which could be increased or decreased by 15 percent for aggravating or mitigating factors. Judges could go outside the recommended ranges if compelling circumstances were present, but reasons for doing so had to be put in writing.

However, the preliminary research sample from which these recommendations were made consisted of only 650 cases. It was expected that these efforts would eventually be validated by a larger sample, but the validation research was not done. The guidelines legislation met strong opposition from many quarters and was subsequently defeated in the legislature. Critics of the legislation ranged from defense attorneys who wanted a wider range of sentences with which to bargain to those who felt the commission had inadequately assessed the impact of guidelines on the operations of the state's attorney.<sup>22</sup> The methodology used in constructing the guidelines was also criticized as being deficient.

In the 1979 legislative session, two competing sentencing reform bills were submitted to the legislature. The first was a resurrection of House Bill 5987 proposed by the Commission to Study Alternative Methods of Sentencing already described. The second reform measure was a compromise bill put together by former Commission members and others. This bill called for a sentencing commission that would draft yet another sentencing guidelines grid. It also proposed increased appellate review of sentencing. The legislature did not endorse either bill but instead established a new Sentencing Commission by Special Act 79-96.

The new Sentencing Commission began in mid-August, 1979, and proceeded to evaluate felony sentencing in Connecticut with an eye towards the potential for subsequent sentencing reform. The Commission studied sentencing reform in other states, reviewed previous reform in Connecticut, and examined available data on Connecticut's current sentencing practices.

One of the major tasks of the Sentencing Commission was to further develop sentencing guideline ranges based on past sentencing practices in Connecticut. Data were collected over a five month period and consisted of a sample of 1,749 offenders convicted of felonies in Connecticut for the years 1976 and 1977. This represented one-third of all those sentenced for those years. The minimum and maximum sentences were examined for each offense. It was found that, when there was a sufficient number of cases, a very wide range of sentences was given for the same offense. Regression analysis was used to discover the variation in sentencing decisions that could be attributed to such variables as prior record or injury to the victim. Because the Commission staff was not allowed to collect information from pre-sentencing reports, however, variables that might have been crucial in explaining sentencing variability were not included.

Based on the research, a sentencing grid was established with offenses grouped into offense categories (See Table 2). Both mean and median sentences were calculated to give a better representation of sentences given. The recommended sentences were based on current sentencing practices, taking into consideration that, with good-time allowances, an offender would serve approximately two-thirds of a given sentence. It was anticipated that the use of the sentencing guidelines grid would result in the elimination of the parole board. Importantly, the IN/OUT decision was not incorporated into the sentencing guidelines grid; the Sentencing Commission chose to leave that crucial decision in judicial hands. The grid could be used, however, to determine the length of probation imposed and, in the case of split-sentences, to recommend the total sentence to be given. A sentencing judge could

sentence outside of the guidelines for statutorily defined aggravating or mitigating circumstances. Evidentiary hearings establishing aggravating or mitigating factors were to be allowed by permission of the court, if cause was shown. Anytime judges sentenced outside the recommended ranges, they were to state their reasons for doing so on the record.

After developing this sentencing guidelines system, the Sentencing Commission went on record stating that it was strongly opposed to the adoption of the sentencing guidelines system, but rather recommended the replacement of the indeterminate sentencing system in Connecticut with a determinate sentencing scheme. The reasons for this turn of events were multiple and included perceptions of Commission members that the sentencing guidelines would lead to a reduction or elimination of judicial discretion, and would "undermine the principle of just punishment based on all the characteristics of the offense and the offender..."<sup>23</sup> With the reluctantly submitted sentencing guidelines grid system presented to the legislature, and the strong recommendation of the Sentencing Commission for a determinate sentencing system, it is no wonder the legislature again did not pass legislation for the adoption of sentencing guidelines.

#### Determinate sentencing in Connecticut

Public Act 80-442, effective July 1, 1981, revised Connecticut's sentencing system from indeterminate to determinate sentencing. The main provisions of the Act included: 1) determinate or fixed sentences; 2) the elimination of both parole release and parole supervision; 3) mandatory minimum sentences; 4) redefinition of

TABLE 2  
 Connecticut's  
 Sentencing Guideline Grid\*\*\*  
 (sentences in years unless otherwise stated)

Class of offense	Prior conviction score			
	0-9.9	10-19.9	20-29.9	30+
Capital felony		Life* or Death		
Murder	10-Life*	15-Life*	20-Life*	25-Life*
A felony	5-9	6-10	7-11	8-12
B person property drug**	3-7 6 mo.-2 6 mo.-2	4-8 1-3 1-3	5-9 2-4 2-4	6-10 3-5 3-5
C person property drug**	1-2 1/2 6 mo.-18 mo. 3 mo.-18 mo.	1 1/2-3 1/2 1-2 6 mo.-24 mo.	2 1/2-4 1/2 1 1/2-2 1/2 12-30 mo.	3 1/2-5 1/2 2-3 1-3
D person property drug**	6 mo.-24 mo. 3 mo.-18 mo. 1 mo.-12 mo.	9 mo.-24 mo. 6 mo.-24 mo. 3 mo.-12 mo.	12 mo.-30 mo. 12 mo.-24 mo. 3 mo.-15 mo.	1 1/2-3 1-2 1/2 6 mo.-18 mo.

\*Life-50 years incarceration with no more than 15 years good time, computed at the present rate.

\*\*Drug-see text, Section 3 Use of Grid.

\*\*\*Reprinted from the Final Report of the Legislative Sentencing Commission, March 12, 1980.

"persistent" offenders; and 5) the reduction of good time for sentences over five years from 15 days per month to 12 days per month. A detailed description of these changes is given below.

**Indeterminate vs. determinate sentencing.** Under the indeterminate sentencing system in Connecticut, a judge would sentence a felon to a term by specifying a minimum and maximum sentence. Offenses were divided into four classes with a wide sentencing range given for each class specified below.

Connecticut's Indeterminate Sentencing Structure

Felony	Sentence
Capital Felony	Life (50 years)
Class A-Murder	25-Life (50 years)
Class A-Not Murder	10-25 years
Class B	1-20 years
Class C	1-10 years
Class D	1-5 years

The parole board would determine actual release after the minimum sentence had been served, minus good time. Previous parole board practices were to release approximately 70 percent of felons after they had served the minimum sentence.<sup>24</sup> With the determinate sentencing change adopted in 1981, judges now decide on a fixed sentence rather than a sentence range. None of the maximum sentences have been changed except for an increase of 10 years to the 50 year minimum for life imprisonment. The parole board, however, has been abolished.

It was assumed that, in sentencing under the indeterminate system, most judges adjusted their sentences according to their understanding of parole eligibility release. The expectation, then, was that judges would fix a sentence under the

determinate laws at the minimum they would have sentenced under the indeterminate law, if they choose to keep sentence length approximately the same under the new law. This may or may not be borne out with practice. Under the indeterminate law, the minimum sentence could not be greater than 50 percent of the maximum indeterminate sentence (unless the maximum was less than three years). For example, the highest maximum sentence for a Class B felony was 20 years, and the highest minimum was 10 years. If judges wanted to impose the harshest sentence for a Class B Felony, they could only give a sentence in the 10 to 20 year range. The defendant would be eligible for parole after serving 10 years (minus good time) and would have a 70 percent chance of being released at this time. Under the 1981 determinate law, sentences could be fixed higher than the minimum indeterminate sentence allowed. Thus, if judges wanted to sentence a felon to the harshest sentence allowed for a Class B felony under the determinate sentencing structure, they could sentence a defendant to 20 years in prison. The felon would be required to serve the entire 20 years sentence, minus only good time.

Connecticut's determinate sentencing law still allows the judge considerable discretion in setting sentences. Many states with determinate sentencing structures have fixed sentences for offenses statutorily prescribed (armed robbery convictions require a sentence of 20 years). The judge may have discretion in the IN/OUT decision, but if a felon is to be incarcerated the sentence structure is clearly defined by law. In Connecticut, however, the judge has discretion in the IN/OUT decision (except for mandatory minimum sentences) and a great deal of discretion in setting the fixed sentence. As

illustrated in Exhibit 8-1, the range for a Class B felony is from 1 to 20 years. A judge may fix the determinate sentence anywhere in that range.

**Mandatory minimums.** Connecticut's determinate sentencing act established mandatory minimum sentences for certain offenses. They are as follows:

Connecticut's Mandatory Minimum Sentencing Structure

Offense	Mandatory Minimum Sentence
Assault I (B Felony)	5 years
Assault I, victim 60 years or older (B Felony)	
Assault II, victim 60 years or older (D Felony)	2 years
Assault III with a deadly weapon, victim 60 years or older (D Felony)	3 years
Sexual Assault I with a deadly weapon (B Felony)	5 years
Burglary I (B Felony)	5 years
Robbery I (B Felony)	5 years
Manslaughter I	5 years
Kidnapping II	5 years
Manslaughter II	3 years

The law mandates that the court must sentence all offenders convicted of the above offenses to prison for at least the minimum sentence. This law pertains to first time offenders, as well as those with prior records. There is some anticipation that there will be an increase in both the number of people sent to prison and an increase in the sentence lengths. Sentences for these offenses are likely to be

greater, because the mandatory minimum sentence is already greater than the minimum under the indeterminate sentencing structure. In fact, figures from the Connecticut Department of Corrections issued in March, 1980, show that 45 percent of those imprisoned for Assault I received sentences less than five years.<sup>25</sup> Under the mandatory provisions, those 45 percent must serve at least five years.

**Persistent offenders.** Under Connecticut's indeterminate sentencing system, there were three categories of persistent or repeat offenders: 1) persistent dangerous felony offenders; 2) persistent felony offenders; and 3) persistent larceny offenders. If judges wished to sentence a persistent offender to more than the maximum allowed for the felony committed, they could sentence the defendant to the next higher class felony. Thus, a person found to be a persistent dangerous felony offender could be sentenced under Class A felonies. A persistent felon was defined as someone who had one or more prior imprisonments of a year or more, and if the court was "of the opinion that his history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration will best serve the public interest..." (Connecticut statutes Ch. 952. Sec. 53a-40 (g)).

Provisions in the 1981 determinate sentencing act redefined the persistent offender. A persistent offender now includes offenders with two prior felony convictions. The judge may now impose a harsher sentence on anyone with two prior felony convictions (except for Class D felonies). Also, under the determinate sentencing act, a persistent offender must be sentenced to a minimum of three years in prison.

Good time. The determinate sentencing act also changed both the way good time was calculated and the good time allowance. Since October, 1976, the good-time rate was 10 days per month for the first 5 years of a prison sentence and 15 days per month after the sixth year. Under the new law, there is a reduction of good time allowed after the sixth year--12 days per month rather than 15.

#### Impact

A study was done to look at the impact of the new determinate sentencing legislation on the prison population by Falkin, Funke, and Wayson of the Institute for Economic and Policy Studies, Inc., Alexandria, Virginia. They concluded that the impact of Connecticut's determinate sentencing legislation will depend on the extent to which sentencing practices are consistent with changes in the law. It is assumed that, under the indeterminate sentencing law, judges sentencing offenders did so with parole decisionmaking in mind. Judges could, therefore, be fairly accurate in sentencing offenders to the time they actually wanted them to spend behind bars. That may or may not still be possible. Though sentencing is now determinate, judges continue to be allowed a great amount of discretion in setting the sentence. There may also be changes in plea bargaining practices under the new law, especially if it is perceived that sentences will be harsher. Falkin, et al., conclude that it is difficult to

derive statistical models for this aspect of the new bill, since so many of these variables are still unknown and difficult to measure.

The impact of fixed sentences will not be reflected in the prison population until the fortieth month (within two years for the persistent offender clause), and the good-time recalculations won't be effective until the fifth and eighth year. The mandatory minimum provisions of the new sentencing act will, however, have an immediate impact on the prison population. Both the number of people sentenced and the length of time to be served should increase. Connecticut's prisons were already past capacity at the time the determinate sentencing act was passed,<sup>26</sup> so any increase at all would require additional capacity and related costs. Impact estimates done by the Institute for Economic and Policy Studies, Inc. show that there would necessarily be an increase in the state population without the determinate sentencing law, but with the law, and especially with the mandatory minimum provisions, the cost of incarceration over the next five years (including all operating costs) would be an additional \$15 million dollars.<sup>27</sup> Despite this information, the Connecticut legislature passed the determinate sentencing act. Future impact assessment should be of critical importance in determining whether the current sentencing structure best fits Connecticut's criminal justice needs.

## DELAWARE

### Indeterminate sentencing

Delaware's criminal code last underwent major changes in 1973. Felonies are divided into five classes with a specified incarceration range or sentence as follows:

Delaware's Felony Classifications	
Class A	Death or Life Imprisonment
Class B	3-30 years
Class C	2-20 years
Class D	10 years
Class E	7 years

This classification scheme in sentencing is rather unusual since Class D and Class E felonies carry a definite statutory term rather than a range from which the court may choose. The court, however, is free to impose a non-incarcerative sentence for all but Class A felony offenses. Delaware's sentencing law also specifies that no concurrent sentences may be given. Certain offenses, such as assault in a detention facility, require a mandatory minimum sentence. Mandatory minimums for robbery and some narcotic offenses will be explained below.

The Delaware Parole Board has the discretion to determine the release date for incarcerated offenders. Inmates become eligible for parole after serving one-third of their sentence minus good-time allotments, or 120 days, whichever is longer. Certain offenses require that a mandatory minimum sentence be served before the defendant may be released on parole. Defendants remain under parole supervision until the expiration of the maximum term of their sentences. Good-time allotments are not considered a

vested right in Delaware, but rather are earned through working and from not violating the Department of Correction rules. Inmates may earn good time as follows: five days per month the first year; seven days per month the second year; nine days per month the third year; and ten days per month after the third year. Up to five days per month may be earned for "exemplary achievement in rehabilitative programs."

Sentencing enhancements. The 1973 revised code provided for mandatory minimums for robbery in the first degree in order to provide harsher punishment for persons who commit this offense. For the first conviction, a three year mandatory minimum sentence is required. This sentence cannot be suspended, and the three years must be served before parole eligibility. For the second or subsequent robbery conviction, a ten year mandatory minimum must be imposed and the court may sentence up to a 30 year mandatory minimum. Delivery of narcotics requires a mandatory minimum sentence of 30 years. If death results because of the sale, the mandatory minimum sentence becomes 45 years. Selling or distributing narcotics to persons under 18 mandates a prison sentence, and delivery to persons under 16 carries a one year mandatory minimum prison term. Delivery to persons under 14 requires a two year mandatory minimum. In 1982, legislation was signed by the governor setting a 20 year mandatory minimum sentence for first degree rape. This sentence cannot be suspended, and 20 years must be served before the inmate achieves parole eligibility.

In 1982, the offense class of persons who have in their possession a deadly weapon during the commission of a felony was raised to a Class B felony offense with a mandatory minimum sentence of five years.

This sentence cannot be suspended nor parole granted until five years has been served. This sentence must also be served consecutively. Juveniles over 16, if convicted of this offense, are tried as adults and are subject to the five year mandatory minimum term.

Rather harsh provisions are provided in Delaware for habitual offenders. If a defendant has two prior specified felony convictions<sup>28</sup> and commits a third or subsequent felony (or any attempts of these offenses), the court must impose a life sentence. For a fourth conviction for any other felony offense, the court may, at its discretion, also impose a sentence of life in prison. These habitual offenders are not eligible for probation or parole.

#### Further changes

Those proposing further sentencing changes in Delaware are still in the initial

stages. In order to make changes in sentencing, it is felt that a study must first be done to look at past practices. Such a study has yet to be done in Delaware. Currently, the major problem seems to be overcrowding in the prisons, although with Delaware's small prison population, successful alternatives to incarceration may be workable. The governor has indicated a desire to see fewer persons sent to prison. To that end, a new program was started in 1981 designed to provide supervised custody for those persons convicted of certain offenses, and before the year's end 200 people were in this program. This is in spite of the fact that a strong constituency favoring non-incarceration does not exist in Delaware. In addition, the Supreme Court is examining Appellate Review of sentencing as a way of eliminating disparate sentencing without requiring judges to follow lists of requirements in sentencing.<sup>29</sup>

## DISTRICT OF COLUMBIA

### Indeterminate sentencing

Washington D.C.'s indeterminate sentencing system has not undergone any structural changes since the 1960's. Defendants are sentenced to indeterminate terms with sanctions provided for each individual felony offense specified in the statutes. The court sentences the offender to a maximum term. A minimum term must also be imposed which is not to exceed one-third of the maximum. In cases where the minimum sentence is specified by law, the maximum sentence cannot be less than three times the minimum. Judges have a great deal of discretion in determining sentence lengths for some offenses such as rape where the statutory provision specifies any term of years up to and including life as the sentence. Other felony offenses have sentences with a lesser range such as robbery where a term of imprisonment may not be less than two nor more than 15 years. The court may also, for most felony offenses, impose a probationary term, suspended sentence, fine, or any combination of these alternatives.

The District of Columbia's Parole Board determines the release date for those persons who are sent to prison. Persons become eligible for parole any time after serving the minimum term or after serving one-third of the maximum sentence. A person may be released earlier than this time only with approval of the parole board. For life sentences, 15 years must be served before any inmate can be considered for parole release. Good conduct reductions are based on the number of years an inmate has to serve as follows:

<u>Sentence</u>	<u>Good-time Allotments</u>
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1-3 years	6 days per month
3-5 years	7 days per month
5-10 years	8 days per month
10 years or more	10 days per month

The District also has a program called the Resocialization Furlough Program whereby some offenders may be released within 12 months of the earliest parole date if certain conditions are met. These include an initial sentence of definite terms, or after the inmate has served one-half of the minimum, for indeterminate sentences (provided that 12 months have been served.) Persons with a sentence less than 18 months are eligible for this program after one-half of their sentence has been served.

The criminal law for the District of Columbia includes a clear preference for consecutive sentences. Unless the court states otherwise, all sentences shall run consecutively. Consecutive sentences cannot be given, however, for multiple charges arising out of the same offense.

Habitual offenders. Since 1967 the sentencing laws for Washington, D.C. have provided harsher punishment for habitual offenders. The intent of this legislation was to provide judges with new tools and sentencing alternatives to provide progressively longer sentences for persistent offenders. Beginning with the second conviction for a criminal offense (excluding only non-moving traffic offenses), the court may impose an additional fine, or a sentence not more than one and one-half times the maximum term provided for that conviction. For the third and subsequent

convictions, the court may impose an additional fine or a sentence not to exceed three times the maximum for that offense. Defendants must be given formal notice that they are being prosecuted as second offenders, and the court must ask defendants to deny or affirm previous convictions.

Further sanctions are prescribed for persons with at least two prior felony convictions. If the court decides that due to offender or offense characteristics, further incarceration is necessary to serve the public interest, it may sentence an offender to any term that it feels is necessary including life imprisonment. This sentence is in lieu of any other sentence that may be authorized.

If an offender commits an armed robbery or an assault with intent to rape and has one previous violent felony conviction, a two year minimum sentence is required. If an offender is convicted of rape with one prior violent felony conviction, a seven year minimum sentence must be imposed.

Weapon enhancements. Additional penalties for persons who commit offenses while armed with a firearm or dangerous weapon dates to the 1960's in Washington, D.C. For crimes of violence where a firearm or other deadly weapon is used, the defendant may be sentenced to any term up to life. This is in addition to any punishment already imposed for the offense. For a second time weapons offense the minimum sentence may not be less than five years and the maximum sentence may not be less than three times the minimum up to a life sentence. Also, probation and suspended sentences may not be given to second or subsequent offenders.

Further weapon enhancements. Legislation passed in 1982, following electoral approval of a three to one margin, further enhanced the punishment for persons who commit crimes with handguns. The previous weapon enhancement statute provided for severe punishment, up to life imprisonment, for persons who commit offenses while armed with a gun or other dangerous weapon. However, it was left to the discretion of the court as to what term to impose. The 1982 law provided for a mandatory minimum sentence of five years for the first offense, and a mandatory minimum of ten years for repeat offenders. No probationary sentences may be given for these offenders, and parole may not be granted until the mandatory minimum has been served. Since these sanctions apply only to those offenders who commit an offense with a handgun, other deadly weapon offenders are still sentenced under the old provisions.

In the same referendum, Washington, D.C. voters decided by a three to one margin to require mandatory minimum sentences for drug dealers. Upon conviction of selling illegal drugs, a mandatory minimum sentence for from one to four years may be imposed (depending on the drug). For example, selling marijuana requires a one year mandatory minimum, whereas selling heroin requires the four year mandatory minimum sentence.

#### Impact

To date we know of no major study examining the 1982 weapon enhancement change and its effect on the District's prison population. Currently the Council for Court Excellence is undertaking a major study of felony sentence practices in Washington,

D.C. This study will not be completed until late in 1983. However, researchers are currently working on a sentencing feedback project whereby participating judges will be able to obtain periodic feedback, in report form, on their sentencing practices.<sup>30</sup>

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FLORIDA

History of sentencing reform

In the mid-1970's, Florida became one of the many states to re-examine the indeterminate sentencing system. The results of this examination have included both the development of Parole Guidelines and the more recent statewide adoption of Felony Sentencing Guidelines.

Parole guidelines. Florida's parole guidelines were promulgated in December, 1978, and became effective beginning January 1, 1979. The primary purpose of establishing parole guidelines in Florida was to promote more consistent use of discretion and to facilitate more equitable decision-making without removing individual case consideration. The parole criteria that were given prime consideration were offense severity and past criminal behavior. The Florida parole guidelines include a range of time to be served for each combination of offense severity and offender characteristics. Time ranges are merely guidelines; parole release decisions may be made outside the guidelines, but must be accompanied by specific written reasons. Aggravating and mitigating circumstances are included for each severity level. Offenses deemed especially aggravating or mitigating may justify a decision outside the guidelines. A "Salient Factor Score" is used to predict future parole behavior. The Florida Parole and Probation Commission must review the guidelines at least once a year and may revise or modify them at any time.

Inmates appear before a hearing examiner panel of the parole board early in their sentence--within six months for sentences five years or less, and within one year

for sentences longer than five years. A presumptive parole release date is then set. Once the presumptive date is set, it can be modified only for good cause in exceptional cases. If a sentence is over two years, a hearing will be held two years after the initial hearing and every two years thereafter to determine whether there is any information that might affect the presumptive parole release date. Within 60 days prior to the release date, a hearing is held and, if an inmate's institutional conduct has been unfavorable, the board may not release the inmate on the presumptive release date. Florida's guidelines specifically state that no one will be released on parole merely as a reward for good conduct or efficient performance of duties while in prison.

Criticism and evaluation. A report done by the Florida Research Center (1978) for the Florida Parole and Probation Commission criticized the bill establishing the parole guidelines for not taking a systems approach into account. The parole board, for example, was given only a minimum amount of time to conform to the new law, and no consideration was given to the possible effects of the guidelines on the rest of the criminal justice system. Because the parole board did not help draft the parole guidelines legislation, they were reluctant to implement the guidelines as intended. The study strongly urged the necessity of doing a systems analysis before applying such legislation. Not only the parole board but the courts themselves had not been instructed on changes the legislation might have on relevant court processes such as sentencing. The study also suggested that the Department of Corrections should monitor the effects of the guidelines on prison populations in an

effort to investigate possible links between the parole guidelines and disciplinary problems.

Sentencing guidelines. The development of sentencing guidelines in Florida began in 1977 when the Chief Justice appointed a Sentencing Study Committee consisting of judges, prosecutors and public defenders to look at possible disparity in sentencing. This Committee recommended the development of sentencing guidelines with a panel of judges determining the guidelines and a sentence review panel to consider cases sentenced outside of the guidelines.

Because of the interest of the Committee in sentencing guidelines, the State Court's Administrator's Office applied for and received a grant from the National Institute for Justice to test the feasibility of developing and implementing sentencing guidelines in a multijurisdictional setting, as well as to evaluate the effectiveness of a sentencing guidelines system as a means to enhance sentencing consistency across different jurisdictions in a state. Thus the Florida Multijurisdictional Sentencing Guidelines Project began in September, 1979.

Four judicial circuits--which included 13 counties--were chosen for the study. The selection of these sites was based in part on the assessment of the availability of sentencing-related data, a desire to have a mixture of urban, suburban, and rural felony cases, and a geographic distribution reflective of the varying social and political attitudes within the state.<sup>31</sup> The study included a sample of 5,100 felonies sentenced from 1976 through mid-1979. Offenses were grouped into six categories based upon the similarity of the type of offense characteristics.

These six categories accounted for 85 percent of the felony caseload in the 13 counties. Guidelines were not developed for offenses outside the six categories because the frequencies were too small to allow for tests of statistical significance. The data were analyzed to determine which factors were associated with type and length of sentence. The Advisory Committee then eliminated those factors which were considered inappropriate (e.g., race) and added factors which it deemed appropriate, but had not been shown to be significant in the analysis of previous sentencing decisions.

Four variables were found to be important in all six offense categories. They were: 1) the number of counts for the primary offense; 2) prior juvenile felony convictions; 3) legal status at the time of offense; and 4) the role of the offender during offense commission. Other factors related to offense specific behavior were added to the different offense categories. The weights or point scores assigned to each of the variables was based on both the statistical analysis and on decisions made by the Advisory Committee.

In developing sentencing guidelines, Florida's guideline project adopted the "classic" guideline model similar to that developed in other states. Aspects of this model include: 1) the assumption that guidelines are a mechanism for reducing unwarranted sentencing variation; 2) that guidelines were developed to insure that similarly situated offenders convicted of similar crimes receive similar sentences; 3) that the guidelines that were developed were based in part on past sentencing decisions; 4) that aggravating and mitigating factors, if sufficiently compelling, may be used as a basis for sentencing outside the guidelines--provided

that written reasons for departure were articulated; 5) that guidelines should be developed with the aid of an advisory committee composed of a predominately judicial membership; and 6) that guidelines should be developed for use within an indeterminate sentencing system which included a parole decision making body.

Florida's guidelines differ from other guidelines systems in that the offender and offense characteristics are combined on one axis, and the offender receives only one score. This score is used to determine a sentencing decision on a one dimensional matrix (See Tables 3 and 4). The median sentence is recommended, though a minimum/maximum range is given. Judges are to consider the sentencing guidelines sentence as the actual sentence to be served--minus only good time. However, the parole board decision making process (including the parole guidelines reviewed above) has not been altered by the initial guidelines.

Implementation of trial guidelines. The sentencing guidelines became effective in 13 study counties April 15, 1981, for a one year trial period. Judges were required to use the guidelines. Sentences imposed under the guidelines were not subject to formal review since direct review of sentences is not a part of the usual review process in Florida. The State Courts Administrator's Office monitored the use of the guidelines during this first year, noting the reasons for departures from the guidelines. Departures also were reviewed by the Advisory Committee so that they could decide what factors might warrant eventual inclusion into the guidelines. Florida's Advisory Committee considered this an essential element in the concept of guidelines in that noting sentencing departures is necessary to

check on any deficiencies in the matrices, and to insure that guidelines continue to meet changing sentencing patterns.

Three major modifications were made to the initial guidelines early in the implementation period. First, the first two cells of the guidelines were incorporated into a single cell. Apparently there was confusion as to whether the "out" decision could include jail sentences. The change produced the first cell that could consist of probation--with all the usual conditions including up to one year incarceration--to a period of incarceration. Further changes were made by the Advisory Board including: 1) category two offenses now had an "extent of victim injury factor", and 2) points were to be given for all offenses and all counts of the primary offense at conviction.

Initial analysis of the guidelines showed that of 3,379 sentences imposed in the first year of use, 81.1 percent fell within the recommended guideline range. No comparisons have been made, however, between sentencing before and sentencing after the guidelines. This includes the critical factor that no analysis has been done that would look at the effect of the guidelines on Florida's already overcrowded prison system. Perhaps this is because the paroling system still exists under the sentencing guidelines. It is also difficult to measure whether the first year of guidelines use has had any effect on reducing sentencing disparity.

Other provisions in sentencing. Florida also has a habitual or repeat offender statute which states that if an offender is convicted of his third offense, the sentence may be enhanced by doubling the applicable maximum term. Use of a firearm carries a three year mandatory minimum

TABLE 3

FLORIDA SENTENCING GUIDELINES SCORE SHEET

Category 1						
Docket No.	District	<input type="checkbox"/> 4th	<input type="checkbox"/> 14th	Judge	Date of sentence	
		<input type="checkbox"/> 10th	<input type="checkbox"/> 15th		/	/
Name		Date of Birth		Sex:	Race:	
		/ /		Male	White	Other
				Female	Black	
Primary Offense	Statute	ID Code	Degree	Counts	Date of Conviction	
Secondary Offense	Statute	ID Code	Degree	Offense Modifiers		
				Attempt	Consecutive	Concurrent
				Conspiracy	Concurrent	
Third Offense	Statute	ID Code	Degree	Offense Modifiers		
				Attempt	Consecutive	Concurrent
				Conspiracy	Concurrent	
Assistant State Attorney		Defense Counsel		PSI Investigator		

SCORE

1. Primary offense at conviction
  - Life felony 400 points
  - 1st degree felony 240 points
  - 2nd degree felony 120 points
  - 3rd degree felony 40 points
2. Second offense at conviction
  - 1st degree felony 240 points
  - 2nd degree felony 120 points
  - 3rd degree felony 40 points
  - 1st degree misdemeanor 8 points
  - 2nd degree misdemeanor 2 points
3. Third offense at conviction
  - 1st degree felony 240 points
  - 2nd degree felony 120 points
  - 3rd degree felony 40 points
  - 1st degree misdemeanor 8 points
  - 2nd degree misdemeanor 2 points
4. Number of counts of primary offense
  - One 0 points
  - Two 72 points
  - Three or more 144 points
5. Prior adult convictions
  - Each prior capital felony 150 points
  - Each prior life felony 150 points
  - Each prior 1st degree felony 90 points
  - Each prior 2nd degree felony 45 points
  - Each prior 3rd degree felony 15 points
  - Each prior 1st degree misdemeanor 3 points
  - Every five 2nd degree misdemeanors 3 points
6. Prior juvenile felony convictions
  - Each prior life conviction 150 points
  - Each prior 1st degree conviction 90 points
  - Each prior 2nd degree conviction 45 points
  - Each prior 3rd degree conviction 15 points
7. Extent of physical injury
  - No injury, no contact 0 points
  - No injury, contact made 40 points
  - Injury, no treatment required 80 points
  - Injury, minor treatment required 120 points
  - Injury, hospitalization required 160 points
  - Death 200 points
8. Victim precipitation
  - Precipitation verified 0 points
  - None 60 points
9. Type of weapon used
  - None 0 points
  - Weapon other than firearm 55 points
  - Firearm 110 points
10. Legal status at time of offense
  - Free, no restrictions 0 points
  - Under some form of restriction 96 points
11. Role of the offender
  - Accessory 64 points
  - Alone or equal involvement 0 points
  - Leader 64 points

Work habits:  Stable  Unstable

TOTAL

Recommended Guideline sentence \_\_\_\_\_

Sentenced imposed \_\_\_\_\_

Table 4  
Florida Sentencing Guidelines  
Sentence Recommendations

Category 1

Composite Score	Sentence
0-260	Probation - 18 mos incarceration
261-280	2 years (18-36 mos.)
281-320	4 years (3-5 years)
321-350	6 (5-7) years
361-400	8 (7-9) years
401-440	10 (9-11) years
441-480	12 (11-13) years
481-560	15 (13-17) years
561-600	20 (17-22) years
601-680	25 (22-27) years
681-760	30 (27-30) years
761+	Life years

sentence which must be served before an offender is eligible for parole or good-time credits. Certain drug offenses carry mandatory minimum terms. A felony punishable by life also carries a 25 year mandatory minimum sentence.

Future. The first year of sentencing guidelines has been considered a success in that it proved that it is indeed feasible to have a uniform sentencing system for diverse jurisdictions, and because it appears that the system can be implemented and operated for an extended period of time. More importantly, however, because

of the success of the Multijurisdictional Sentencing Guidelines Project, the Chief Justice recommended to the Legislature on January 7, 1982, that sentencing guidelines be developed on a statewide basis patterned after the trial guidelines described above. Senate Bill 410, passed April 7, 1982, created a Sentencing Commission responsible for developing sentencing guidelines for the rest of the state. Upon recommendations of this Commission, guidelines will be imposed by a Supreme Court rule. A September, 1983, implementation date is expected.

## GEORGIA

### Sentencing reform and its context

Although there have been several attempts in recent years to alter its basic sentencing system, Georgia continues to use the indeterminate system which was established when the current criminal code went into effect in 1969. While written so as to be consistent with court decisions of extant law, the sentencing philosophy of the code was drawn primarily from the Model Penal Code and the codes of other states that had recently been rewritten: Wisconsin, Illinois, Louisiana, New York, and Connecticut (Code of Georgia Annotated, Book 10, Title 26). Consequently, the code generally adheres to what is commonly referred to as the "rehabilitation model" of sentencing. At the time the code was written, the controversies which engulfed American criminal justice in the seventies had not yet become pronounced.

In the last few years, criminal justice in Georgia, as elsewhere, has had to steer a course between the problem of overcrowded prisons and demands for more severe punishments.<sup>32</sup> The response to this situation has been one of piecemeal change rather than systematic reform, with the legislature acting to increase some sanctions while simultaneously attempting to relieve the population pressure in prisons.

Georgia has consistently been among those states with the highest rates of sentenced prisoners per 100,000 civilians<sup>33</sup> (Sourcebook of Criminal Justice Statistics, 1981). Moreover, inmate population pressures, resulting from the tremendous growth in the prison population through the seventies and eighties, have severely strained the capacity of correctional

facilities. The inmate population went from 12,210 at the end of 1980 to 14,030 at the end of 1981. During this period there was also a tremendous increase in the number of inmates sentenced to prison, but held in county jails as a result of overcrowding.

In order to alleviate some of these population pressures, the state legislature passed a law in 1982 which authorizes the governor to declare a state of emergency with regard to jail and prison overcrowding when the "population of the prison system...has exceeded the capacity (as certified by the Commissioner of the Department of Offender Rehabilitation and approved by the director of the Office of Planning and Budget) for thirty consecutive days." (CGA, 1982 supplement). Under the law, which went into effect on November 1, 1982, once an emergency has been declared, the State Board of Pardons and Paroles "shall select sufficient state prison inmates to reduce the state prison population to 100 percent of its capacity." The selections are to be made without regard to "limitations placed upon service of a portion of the prison sentence." On the other hand, the act prohibits the release of "dangerous offenders."<sup>34</sup> Other than this limitation, however, the release of inmates during an emergency is entirely at the discretion of the parole board. It remains to be seen whether the parole guidelines in use since 1980--or any other type of guidelines--will be applied in these circumstances. The legislation itself only stipulates that the director of the Office of Planning and Budget is required to prepare annual reports on the success of inmates released under the provisions of the act.

In contrast to this attempt to ameliorate the problem of prison overcrowding, the legislature in recent years has also responded to public demands for stiffer penalties for convicted felons. For example, state law now requires that one-third of any sentence must be served before an inmate may be considered for parole. In addition, the legislature established in 1980 a series of mandatory minimum sentencing provisions for the trafficking of marijuana, cocaine, and several narcotics.<sup>35</sup> Generally, the legislature has responded to public demands by raising either the floors or ceilings of certain indeterminate sentences, and particularly those for repeat offenders. For example, in 1980, a new schedule of sentences for burglary went into effect. Under this schedule, each successive conviction for burglary (up to the fourth conviction) results in a more severe sentence range. For the first conviction, the indeterminate sentence is from 1 to 20 years. This changes to 2 to 20 years for a second conviction and 5 to 20 years for the third and subsequent convictions. In addition, sentences for offenders with two or more prior burglary convictions may not be suspended, probated, deferred, or withheld. A similar (although less severe) grading of punishments now exists for the offense of theft by shoplifting. In addition, the legislature recently raised the maximum for aggravated assault from 10 years to 20 years and for homicide by vehicle from 5 years to 10 years, with a mandatory minimum sentence of 1 year for anyone who committed the offense at a time when his or her driver's license was revoked.

Although the indeterminate sentencing structure has basically been left intact, the effect of provisions such as these is to encourage a bifurcated sentencing policy which distinguishes between ordinary

offenders (e.g., first-time, non-violent, and/or youthful offenders) and criminals considered more dangerous (e.g., repeaters and/or those who have inflicted injury on victims). In many respects, the new provisions in the Georgia code simply represent an expansion of this policy. The original (1969) version of the code, for example, established the bifurcated policy for armed robbery. Under the code, the schedule for armed robbery moves from an indeterminate sentence of 5 to 20 years to a mandatory minimum 10 year term of imprisonment (with no upper limit for repeaters and offenders who inflicted injury on the victim). In addition, the code contains a general provision which requires that felony repeaters be sentenced to the maximum. For the second and third felony conviction, the sentence may be probated or suspended. However, for a fourth conviction, the offender must serve the maximum allowable term in prison before being eligible for parole. On the other hand, it should be pointed out that for those felony cases where the maximum sentence is ten years or less (including among others, 2nd degree burglary, forgery, and several types of theft), the code gives judges the option of sentencing as if for a misdemeanor.

Over the last six years, there have been sporadic attempts to counteract or prevent presumed sentencing disparities. As mentioned earlier, these efforts led to the passage of legislation requiring the development and use of parole guidelines. In addition, since 1977, there has been a Sentence Review Panel, composed of three trial court judges who sit on the panel for three-month intervals. The task of these judges is to examine all petitions for review of sentences of five years or more. The panel is empowered to lower, but not raise, sentences. In the first

three years of this appellate review process, seven percent of the approximately 3,000 sentences reviewed were reduced (Criminal Courts Assistance Project, 1980).

Proponents of sentencing guidelines in Georgia have not met with much success. An exploratory attempt by the Georgia Administrative Office of the Courts to develop integrated multijurisdictional guidelines floundered from lack of support from the judiciary. Another effort to construct guidelines, this one by the Clayton County Supreme Court, was abandoned, apparently after the analysis of sentencing data for the county confirmed the expectations of judges. At the present time, there are no efforts underway to develop sentencing guidelines in the state.

Caught between demands for longer sentences and the press of current prison conditions, Georgia has so far adopted a strategy of piecemeal change. Without directly challenging the indeterminate sentencing system, the legislature in recent years has fortified and to some extent established a bifurcated sentencing policy which singles out repeat and violent offenders as well as certain special kinds of offenses (e.g., drug offenses) for increasingly severe punishments. The legislature has done this by raising the floors and/or ceilings on certain sentences and by establishing a limited number of mandatory minimum sentencing laws. These actions have been taken without a corresponding reduction in sentence ranges for less serious offenders and offenses.

#### Research on sentencing practices in Georgia

The issue of sentencing variability in Georgia is the subject of a comprehensive inquiry into sentencing practices in the state currently being undertaken by Dr. Susett Talarico and the Byrd Graduate Studies Research Center of the University of Georgia. While the project was still in the process of analyzing data at the time of this writing, some preliminary results were available.<sup>36</sup>

In contrast to most previous research on sentencing variation, the Georgia sentencing project emphasized what is called a "multi-contextual model" of analysis, meaning that "research on the sources of sentencing differentials must take multiple levels of data into account" (Talarico and Myers, 1982). So far, this "multi-contextual model" has been employed in conjunction with propositions associated with what is known as the "conflict theory" of criminal justice--namely, that offenders with lower socioeconomic status are more likely to be treated harshly by the system than other types of offenders, other factors being equal. Specifically, the multi-contextual approach has been used by the Georgia project to supplement a conflict theory perspective through an examination of the effect of particular demographic contexts in a court jurisdiction on sentencing outcomes. We review it in detail because of its uniqueness in the sentencing variability literature.

In the most comprehensive of the project's analytical efforts to date (Talarico and Myers, 1982), the jurisdictional (i.e., county) demographic characteristics that were examined included age (operationalized as the median age in the county),

race (percent black), sex (percent female), and urban (percent urban). The authors treated these characteristics as indications of the socioeconomic context for the sentencing process which could be analyzed in relation to the same characteristics among offenders and judges in order to examine the effect of socioeconomic dissimilarity between judges and defendants on sentencing outcomes (both type and length of prison term) in different community contexts. In addition to these three sets of demographic variables (i.e., relating to the defendant, the judge, and the community), the authors included two variables regarding the type of offense and one relating to prior record as control variables.

In the first stage of the analysis, additive models were used to test the effect of these variables on the type of sentence (incarceration versus non-incarceration) and length of incarceration for the subset of prisoners. The results indicated that the contextual variables (median age, percent black, percent female, and percent urban) contributed very little to the amount of measured variance. Before the contextual variables were added, the  $R^2$  for the type of sentence equation was .379 (meaning that approximately 38 percent of the variance was explained). After the addition of the contextual variables, the  $R^2$  increased to only .382. For the length of incarceration equations, the amount of explained variance went from 25 percent to 26 percent. With respect to the type of sentence analysis, the defendant's race was consistently the strongest predictor: controlling for all other variables, non-whites were more likely to be incarcerated than whites. For the length analysis, the type of offense was clearly the most powerful variable.

The second stage in the analysis involved the application of additive and interactive models to subgroups within the total sample and the prisoner subsample. Due to limitations in the collection of data, the authors restricted their analysis to subgroups based on age for the total sample (county median age greater than 25 versus county median age lower than 25) and to subgroups divided by degree of urbanization (low, moderate, high) for the subsample. Not surprisingly, given the tenuous relationship between either judicial age and sentencing or between age and socioeconomic status, the additive model for the age subgroups did not reveal any significant differences (each  $R^2$  was .250). The addition of interactive terms for judge and defendant age and sex increased the  $R^2$  for the under 25 contextual subgroup to .294 and .336 for the over 25 subgroup. The sex interaction variable was by far the more significant of the two. In addition, defendant race was a relatively powerful variable in the under 25 subgroup while crime type was a strong predictor in both subgroups.

The additive model for the contextual urbanization subgroups revealed some significant difference in the sources of variation for the length of prison sentences for the different subgroups. The model was most powerful with the rural subgroup, where 32 percent of the variance was explained, followed by moderate urban counties with 27 percent and high urban with 26 percent. The variable defendant urban background was significant for the rural subgroup and not for the other two. Judge urban background, on the other hand, was only significant for the high urban subgroup. Prior record was significant for the rural and moderate urban subgroups, but not for the high urban subgroup. Type of offense was sig-

**CONTINUED**

**1 OF 4**

nificant and had about the same level of predictive power for each subgroup. Finally, the affiliation of an interactive model produced negligible increases in the amount of explained variance for each subgroup, although the interaction term for defendant-judge urban background was significant in the high urban subgroup.

The third and final stage of the analysis involved the use of simplified regression models (i.e., without controlling for the other independent variables) in order to analyze particular three-way interactions. Results indicated that the one "...pattern of interaction between defendant and judge is constant from one county context to the next." Thus, the authors concluded that the county median age does not affect the "interaction between defendant and judge." On the other hand, results of the analysis for the urban background model did indicate that there were consistent shifts in the patterns of interaction from one county type to another. Thus, for example, in rural counties, rural judges were more likely to sentence urban defendants harshly. Alternatively, in urban courts, rural defendants were more likely to receive longer terms of imprisonment when being sentenced by urban-born judges. However, the authors caution that these results must be considered "exploratory," particularly since other potentially significant variables were not included in the analysis.

The authors concluded that the results of their analysis "offer marginal support of conflict theory propositions." They go on to suggest that additional variables relating to socioeconomic conditions are probably necessary for further exploration of the conflict theory. In addition, Talarico and Myers contend that the "multi-contextual approach carries po-

tentially strong policy implications." Specifically, they argue that "...an appreciation of the complexity of sentencing variation should caution against high expectations for or endorsement of simple proposals to eliminate all sentencing discretion and to introduce definiteness in sentencing laws."

While it is difficult to argue against the value of multi-contextual analysis, either from an empirical or a policy point of view, several observations are in order. First of all, if multi-contextual analysis is to be a useful tool in the analysis of sentencing variability, it must not only include relevant and sensitive measures of socio-economic contextual variation, but it also must be accompanied by a thorough examination of the variables which previous studies of sentencing have shown to be associated with significant sources of variation. In particular, numerous variables relating to prior record, court processing, and the severity of the offense must be examined along with demographic and other contextual factors. The Georgia research has been hampered by a paucity of information relating to legal and "quasi-legal" variables. With respect to prior record variables, the research could have benefited from more sensitive indicators of an offender's prior record--for example, the number of previous felonies or violent felonies as opposed to all convictions, or the nature of an offender's previous experiences while under supervision. In addition, the Talarico and Myers research did not include any court processing variables. Numerous studies have indicated that variables such as the prosecutor's recommendation, the number of additional charges dismissed or read-in to the court for sentencing, and the defendant's pretrial status are often significant predictors of sentencing decisions.

In fact, multi-contextual analysis of court processes in different jurisdictions would be particularly appropriate (see Utz, 1981). Finally, the Georgia research would have benefited from additional information relating to the offense--in particular, variables relating to the use of a weapon, the degree of harm to the victim, demographic characteristics of the victim, and the number and kind of additional charges, if any.

Clearly, all research is limited by the amount and type of information that can be collected, and the intent here is not to criticize the Georgia project for not collecting or utilizing all relevant information. However, if multi-contextual analysis is to contribute to the study of sentencing patterns, it must do so by expanding onto analysis of more conventional variables. While the contextual variables of degree of urbanization had some significant impact in the Georgia research, the interactive models generally added very little to the analysis and the amount of variance explained by most of the models was relatively small. Interestingly, conventional variables such as race and type of offense were consistently among the strongest predictors of sentencing outcomes.

In a subsequent analysis of a subsample of sexual assault offenders, Myers (1982) attempted to include more sensitive contextual and socioeconomic status variables. Specifically, two measures of contextual income inequality along with

two measures of degree of court bureaucratization were added. However, the results of eight additive and interactive models yielded  $R^2$  values of no higher than .150. Other than degree of urbanization, none of the contextual variables were significant. Again, interactive models had a negligible effect on sentence type or sentence length. As with the analysis of the larger sample, race and charge seriousness were consistently significant.

In sum, it is in the context of more conventional variables relating to sentencing variability that the policy implications which Talarico and Myers justifiably point out become problematic. Specifically, while it is important to keep in mind that efforts to structure sentencing direction may flounder on the rocks of local resistance as a result of contextual factors, it is equally important to realize that efforts to structure discretion may be directed against certain clearly inappropriate sources of variation, regardless of whether they are localized or not. Consequently, it is both ethically and empirically important to see whether sentencing differentials are the result of legally appropriate variables such as prior record and the seriousness of the offense or inappropriate extra-legal factors such as the defendant's race. In light of the consistent strength of the race variable in the Georgia research, this seems like an appropriate subject for further research within the multi-contextual framework.

## HAWAII

### The criminal code and recent changes

Sentencing reform in Hawaii over the past ten years has included both the adoption of a system grounded in rehabilitation and a movement away from this system through the establishment of several mandatory sentencing provisions. In 1972, the legislature enacted a criminal code which almost completely paralleled the Model Penal Code developed by the American Law Institute. A year later, the legislature adopted the Hawaii Correctional Master Plan,<sup>37</sup> which had been developed by state officials in conjunction with the National Clearinghouse on Criminal Justice Planning and Architecture, a group which emphasized community-based programming.

Both the new criminal code and the Correctional Master Plan represented the fruition of many of the most advanced ideas associated with the medical model of sentencing. However, shortly after their adoption, the climate for reform began to change. For one thing, the crime rate continued the rapid increase which had started around 1970. In Honolulu, where approximately 85 percent of the state's offenders reside, the crime rate doubled between 1972 and 1975, going from 3,000 crimes per 100,000 residents to 6,000 per 100,000 (Serrill, 1978). According to Serrill, both judges and the parole board responded to this increase by harsher penalties for offenders.<sup>38</sup> Moreover, in 1976, the legislature passed the first of several mandatory sentencing provisions. In this atmosphere, it became difficult to implement the Correctional Master Plan. Rather than being able to concentrate on community-based centers and programs, corrections officials were compelled to focus on ways to handle the tre-

mendous growth in the prison population. At the end of 1973, there were 295 inmates in Hawaii's correctional system. By the end of 1981, there were 1,202 inmates. In 1981 alone, the inmate population increased by 22 percent, the fifth largest increase in the country.

The criminal code, which went into effect in January of 1973, represented a comprehensive revision of the state's criminal law. In addition to establishing procedures, guidelines, and rules of law, the code also redescribed offenses and created a classification system with an indeterminate sentencing structure. Under the code, offenses were broken down into felonies, misdemeanors, and petty misdemeanors. Felonies were further broken down into three classes: A, B and C. The maximum penalty for Class A offenses is 20 years, for Class B offenses, 10 years, and Class C offenses, five years. Examples of offenses which fall in each class are provided on the following page.

The code also allows for extended terms for certain types of offenders. For persons convicted of a Class A offense, the extended term goes up to life, for Class B offenders, the maximum is 10 years. In the original version of the code, this provision applied to persistent offenders (offenders over 22 years old with two prior felonies), professional criminals, dangerous offenders (as determined by a psychiatric exam), and multiple offenders (HLA, Title 37, 706: 661). In recent years, the legislature has added to this list offenders who commit crimes against the elderly or the handicapped as well as anyone convicted of murder, rape, robbery, felonious assault, burglary, or kidnapping (1981 Supplement).

Hawaii Laws Annotated and the 1981 Supplement

<u>Class A</u>	<u>Class B</u>	<u>Class C</u>
Kidnapping	First Degree Assault	Burglary-2nd Degree
Rape-1st Degree	First Degree Burglary	3rd Degree Rape
Robbery-1st Degree (armed)	Robbery-2nd Degree Robbery	Theft-1st Degree (over \$200)
Dangerous Drugs- 1st Degree (Heroin and other narcotics)	Rape-2nd Degree	Motor Vehicle Theft

\*Murder is classified under Class A, but it has a maximum of life imprisonment and life without parole in certain special cases

Under the code, young adult defendants--offenders between the ages of 16 and 22--are subject to "specialized correctional treatment and a special indeterminate sentence." Originally, this term was a maximum of four years for any felony. In 1980, the legislature upgraded this special term so that the maximum is now eight years for Class A offenders, five years for Class B offenders, and four years for Class C offenders (HLA, Title 37, 706, 667).

Following the Model Penal Code, the original version of Hawaii's code made probation the preferred sentencing option and relegated to the parole authority most decisions regarding the actual amount of time an offender was to serve. Since 1976, however, the sentencing structure in the code has shifted steadily in the direction of mandatory sentencing.

In 1976, the legislature passed a schedule of mandatory terms of imprisonment for anyone convicted of using a firearm in the commission of a felony. For first-time offenders, the mandatory term may be up to ten years for a Class A offense and five

years for a Class B offense. For firearm repeaters, the mandatory term is ten years, regardless of the offense class. During the same year, the legislature enacted a mandatory minimum sentencing provision for repeaters of the following offenses: murder, first degree assault, kidnapping, first degree sodomy, first degree burglary, first degree robbery, promoting of dangerous drugs (first or second degree), and promoting of harmful drugs in the first degree (706-6065). Since 1980, the applicability of this provision has been extended to include a variety of offenders with any of the foregoing offenses in their record (1981 Supplement). The penalties under this provision are a mandatory term of five years for a second conviction, and ten years for a third and subsequent conviction. Unlike most sentences, the imposition of a sentence under this provision may be consecutive to any other sentence imposed at the time.

Another significant step away from the philosophy of the 1973 version of the code was taken by the legislature in 1980. At that time, sentences for any Class A

offenses were made unsuspendable. For example, a conviction for a Class A offense carries with it a mandatory term of imprisonment of up to twenty years (706-659, 1981 Supplement).

For non-mandatory sentences, the parole authority is required to determine the minimum term to be served by holding a hearing within six months of conviction (706-669). Formal guidelines, adapted from the code, have been in use for several years. Under the code, good time may be earned at a maximum rate of ten days per month (706-670).

To summarize, Hawaii has adopted a hybrid sentencing structure which has emerged as

a result of mandatory sentencing provisions and a general sanction upgrading grafted onto an indeterminate structure. Hawaii is a case study of how perceived change can lead to fundamental change. At this point, the legislature seems content with this hybrid form. A 1981 evaluation of sentencing done by the state judiciary (under a grant from the Hawaii State Law Enforcement and Juvenile Delinquency Planning Agency) resulted in a recommendation of formal sentencing guidelines. However, legislation to establish such guidelines failed to pass.

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**IDAEO**

The context of reform

Like many other states, Idaho has in recent years experienced an increase in public and legislative support for more severe sanctions against criminals, and, in particular, against repeat offenders convicted of violent crimes. However, the response in Idaho has been piecemeal rather than systematic, resulting in an accretion of determinate sentencing provisions and options within what remains a fundamentally indeterminate sentencing system.

Although the Idaho criminal code was rewritten in 1979, the basic sentencing structure has remained the same since 1948. At that time, the legislature established an indeterminate system for all felonies and misdemeanors. As can be seen from Table 5, the sentencing schedule under this indeterminate system provides judges with substantial penalty ranges for felony offenses. Judges are generally free to impose any sentence within these broad limits, provided that the maximum is not less than two years, unless specifically allowed for by statute.

Judges may withhold judgment in all non-capital cases. In addition, they are authorized to impose a sentence of probation (provided the term does not exceed the maximum for the offense), or suspend all or part of any sentence. Finally, since 1972, judges have been entitled to "retain 120 day jurisdiction" over defendants after sentencing. During this period, offenders are sent to the diagnostic unit of the state penitentiary. If it is determined that they are not dangerous, they are taken to the North Idaho Correctional Institution where they undergo

further testing and are admitted to treatment programs. After completion of the 120 day period, which may be extended 60 days upon application by the Board of Corrections, the judge decides whether to suspend the remainder of the sentence.

Clearly, judges have a tremendous amount of discretion within this system, both with respect to the length and the type of sentence. This has recently been diminished in some respects by the establishment of several mandatory minimum sentencing provisions (see Table 5). Nonetheless, the treatment-oriented, indeterminate sentencing system outlined here remains substantially intact.<sup>39</sup>

Under this system, most felons are eligible for parole from the beginning of their terms. In practice, however, inmates do not come before the board for six months to a year. Moreover, the board generally adheres to a policy which requires that offenders serve approximately one-third of their sentences (Guide to the Idaho Courts, 1981). However, in addition to those sentenced under the new mandatory minimum provisions of those given fixed sentences (see Table 5), there are several other exceptions to this policy. First of all, anyone sentenced to life imprisonment (including, for purposes of parole eligibility, anyone receiving an indeterminate sentence of 30 years or more) is not eligible until ten years have been served. Secondly, those convicted of homicide (without a life sentence), violent rape, kidnapping, robbery, armed burglary, assault with intent to kill, and lewd conduct with a child are not eligible until they have served either one-third of their sentences or five years, whichever is greater. Finally, sexually dangerous offenders may be released only after a psychiatric recommendation.

Table 5  
 Selected Felony Offenses and Penalties Under  
 Idaho's Indeterminate Sentencing System<sup>39</sup>

Offense	Statutory Minimum	Statutory Maximum
Aggravated Assault	None	5 years and/or \$5,000
Burglary-1st Degree (nighttime)	1 year	15 years
Burglary-2nd Degree (daytime) Manufacture, Delivery, or Possession With Intent to Deliver:	None	5 years
Schedule I-narcotic or Schedule II	None	Life and/or \$25,000
Schedule I non-narcotic or Schedule III	None	5 years and/or \$15,000
Schedule IV	None	3 years and/or \$10,000
Schedule V	None	1 year and/or \$5,000
Possession of more than 3 ounces of marijuana	None	5 years and/or \$15,000
Desertion and Nonsupport	None	14 years and/or \$500
Forgery	1 year	14 years
Murder 1st Degree	Life	Death
Murder 2nd Degree	10 years	Life
Rape	1 year	Life
Robbery	5 years	Life
Use of Firearm	3 years	15 years

<sup>39</sup> Adapted from Guide to the Idaho Courts, 1981 and Idaho Code Annotated.

Unless an offender has been sentenced under the fixed sentencing alternative (see Table 5), inmates earn between five and ten days off their sentence each month, depending on the length of the sentence. Additional good time is awarded for outstanding achievements. Those sentenced to life imprisonment are not eligible for good time.

The nature of reform in Idaho. The pattern of change in the Idaho criminal justice system over the last two decades generally evinces a shift of focus from administrative and managerial concerns to sentencing practice. In the sixties, the major changes were the development of a unified court system and the upgrading of professional standards for judges (Guide to the Idaho Courts, 1981). In the seventies and early eighties, however, the emphasis has generally been on criminal sanctions. The first of these latter changes occurred in 1970, when the legislature enacted a habitual criminality (or persistent violator) statute which established a penalty of five years to life for anyone with three prior felony convictions, regardless of whether those convictions were in Idaho or outside the state of Idaho (ICA, 19-2514). A year later, the legislature passed a repeater statute which authorized judges to sentence drug offenders with a prior drug conviction anywhere in the United States to a term or fine up to twice that otherwise allowed for the instant offense.

By the mid-seventies, the nation-wide movement towards greater determinacy began to have an influence on the reform efforts of Idaho's legislature. However, rather than adopting a sentencing structure with a greater degree of determinacy, the legislature enacted a law in 1977 which provided judges with the option

of imposing fixed-term sentences. In taking this step, the legislature was clearly not interested in creating a system which minimized disparity and maximized certainty of punishment. On the contrary, the legislative intent--as adduced by the State Supreme Court--was to allow judges to prohibit the granting of parole to certain offenders.<sup>40</sup> Other than stipulating that the fixed sentence is not to exceed the maximum allowed for the offense and that it must be a sentence of not less than two years, the statute does not provide any guidance regarding the appropriate circumstances for its application; its use is entirely at the discretion of the judge.

On November 7, 1978, a constitutional amendment enabling the legislature to "provide mandatory minimum sentences for any crimes"<sup>41</sup> was ratified in a general election. Since then, the legislature has used its new authority to establish several mandatory minimum sentencing provisions. The first of these went into effect in 1979. In 1977, the legislature had created a special sentencing provision for persons convicted of using a firearm or other deadly weapon in the commission of any of the sixteen felonies covered by the statute including among others, aggravated assault, escape, burglary, rape, and robbery (ICA, 19-2520). A sentence of 3 to 15 years, to be served consecutively to any other sentence imposed for the offense, was established. The first mandatory minimum sentencing provision was an amendment to this law (ICA, 2520A). It stipulated that anyone convicted of committing one of the aforementioned offenses with a firearm or other deadly weapon and who had a previous similar prior conviction in Idaho or any other state within 10 years shall be imprisoned for a mandatory minimum period

of not less than three years and up to fifteen years. Again, the sentence is to be served consecutively to any sentence imposed for one of the innumerable felonies. Moreover, the three-year mandatory minimum term is to be served without eligibility for parole, although there is an allowance for good time.

In 1981, the legislature established two additional mandatory minimum enhancement provisions (ICA, 19 2520 B and CO). The first one created a mandatory minimum enhancement of not less than five years nor more than 20 years without eligibility for parole for offenses which result in the infliction of great bodily injury. The term of the enhancement which is to commence upon completion of the sentence for the actual felony, is applicable to all accomplices as well. Under the statute, great bodily injury is defined only as significant or substantial physical injury; there are not specific standards of proof established for the offense. However, the provision does not apply to offenses where "great bodily injury is an element of the offense" for which the offender is found guilty.

The second mandatory minimum enhancement passed in 1981 established a term of not less than three years nor more than fifteen years (without eligibility for parole) for repeated sex offenses,<sup>42</sup> kidnapping, and extortion. Specifically, the statute applies to offenders who have committed or have been in custody for one of the covered offenses within a 15-year period and to offenses which were committed "by force, violence, duress, menace of threat of great bodily injury in excess of that which is necessary to commit the offense." For persons with two previous similar convictions, the enhancement is increased to a 10 or 20 year range. As

with the new statute covering great bodily injury, this statute provides little in the way of guidance or standards of proof for the application of the enhancement. Finally, it should be pointed out that the statute covering offenses resulting in great bodily injury is to take precedence whenever circumstances arise which would indicate that both enhancers could be applicable.

The provisions discussed above constitute the major changes in sentencing practices in recent years. There has been little interest in Idaho regarding either sentencing guidelines or the general problem of sentencing disparities. However, the Supreme Court of Idaho has actively promoted a judicial educational program. Between 1974 and 1976, it developed a sentencing manual for trial judges as part of an LEAA funded program. The manual offers suggestions regarding appropriate judicial behavior for such circumstances as plea bargaining and contains a checklist of considerations to be used in sentencing. In addition to the sentencing manual which is to be reviewed at least semi-annually, court rules provide for minimum sentencing standards and "require specific findings on the record in order for judgment to be withheld and the case to be dismissed."<sup>43</sup>

Impact of recent changes. To the best of our knowledge, there has been no research done on sentencing patterns in Idaho, either before or after the changes discussed in the preceding section. The response to our selected sample survey indicated that approximately 5 percent of all felonies being sentenced in Idaho were being disposed of under the fixed sentencing alternative enacted in 1977. However, there apparently has not been any systematic statistical analysis of the

circumstances under which this option has been employed nor has there been any such analysis of the impact of either provision or the new mandatory minimum sentencing statutes on prison populations.

Given this paucity of information and the short time during which the latest mandatory minimum enhancements have been in effect, it is difficult to assess the impact of statutory changes on sentencing practices in the state. Nonetheless, some observations are warranted.

First of all, it is clear that the Idaho legislature has moved in the direction of what has been referred to as a bifurcated penal policy, whereby incapacitation and punishment, rather than rehabilitation, are the primary objectives in the sentencing of more dangerous, repeat offenders. Secondly, the establishment of the mandatory minimum sentences will undoubtedly result in longer sentences for those offenders sentenced under them. However, whether this will result in an overall increase in the prison population or,

ultimately will be counteracted either by shorter sentences for other offenders or by adjustments in other parts of the criminal justice system remains to be seen. Finally, while the new provisions add a degree of determinacy to sentencing and parole practices, they will probably have only a marginal impact on overall discretion within the system. Even under the mandatory minimum provisions, judges retain a wide range of possible sentence lengths. In fact, there is reason to believe that the new statutes will increase some kinds of discretion. Somewhat ironically, for example, the existence of the fixed sentence alternative increases judicial discretion by providing judges with yet another option as to sentence type. Moreover, the creation of more severe sentencing options without precise standards or guidelines for their application is likely to result in an increase or prosecutorial discretion. Again, however, these statements must be viewed as tentative; as in the case with so many other states, the results of sentencing reform in Idaho are not yet in.

ILLINOIS

Sentence reform and its context

After almost three years of debate, Illinois enacted a determinate sentencing bill in November of 1978. The debate over sentencing in Illinois was from the beginning influenced by proposals circulating in the criminal justice literature. Initially, the debate revolved around the work David Fogel, previously a correctional administrator in Minnesota and at the time the legislation was passed, the Executive Director of the Illinois Law Enforcement Commission. As the debate intensified, however, the influence of Fogel's justice model receded, and more conventional and conservative views of criminal justice began to surface. In particular, the work of James Q. Wilson (1975) was cited as a counterweight to Fogel. In contrast to Fogel, Wilson emphasized deterrence and incapacitation as well as certainty of punishment. However, in the final analysis, the transformation of Fogel's proposal was not so much the result of alternative theories of academic criminology, but rather the political circumstances under which sentencing reform was debated. Nonetheless, Fogel's model remains the starting point for a discussion of reform in Illinois.

The differences between the justice model and those models which emphasized rehabilitation and individualized sentencing stem from fundamentally different philosophical orientations towards crime and punishment. As with other proposals currently being lumped by scholars under the rubric of the justice model, Fogel's model, as outlined in We are the Living Proof, was grounded in the belief that greater equity in the punishment is derived by emphasizing the severity of the offense rather than indi-

vidual circumstances of the offender. This belief was related to the argument that punishments should match the severity of offenses in such a way that similar offenses committed under similar circumstances are punished similarly.

To Fogel, the purpose of punishment was not the rehabilitation of individuals, but rather the predictive restraint of offenders. In order to achieve this in an equitable manner, it was argued that the amount of discretion which existed under indeterminate sentencing systems must be substantially reduced and more clearly delimited. Thus, Fogel called for the abolition of discretionary supervised releases, the institution of a determinate sentencing system with legislatively fixed presumptive sentences, and a limited range of lower and higher sentences to allow for judicial determination of previously specified aggravating and mitigating circumstances.<sup>44</sup>

In developing his specific sentencing proposals, Fogel adopted the classification system of the Illinois code which was replaced by the new law. The presumptive sentences which Fogel proposed for each class as well as the range for aggravating and mitigating circumstances are shown below:

Sentences Under Fogel's Justice Model

Offense Class	Presumptive Sentence	Range	
		Agg. or Mitigation	Range
Murder A	Death or life	-	Death or life
Murder Class 1	Life or 25	+ 5	Life or 20-30
Class 2	8	+ 2	6-10
Class 3	5	+ 2	3-7
Class 4	3	+ 1	2-4
Class 5	2	+	1-3

As this exhibit shows, the intent of Fogel's proposal was clearly not to link his concern with equity and certainty to lengthy prison terms. It was also significant that under the justice model, probation remained the preferred intervention for first-time and ordinary offenders. Specifically, Fogel argued that probation should be granted in every felony case if the state could not show "...that the felon could not be safely supervised in a non-incarcerative program" (Fogel, 1975).

The argument by justice model advocates for more predictability and less discretion in the imposition of sanctions was underscored by a belief in the value of formal legality in the administration of criminal justice. Among other things, this translated into an emphasis on the formal rights and duties of offenders. For example, the abolition of parole was proposed not only to introduce more certainty into the system, but also in order to end coercive programs, treatments, and therapies for inmates, particularly insofar as participation in these programs was a condition of release. In addition, the justice model sought to ensure due process in the regulation of institutional conduct. Thus, Fogel argued that good time should be vested and that there should be procedures whereby good time decisions could be appealed by inmates.

This emphasis on formal legality applied as well to the criminal justice system as a whole. To some extent, this emphasis was merely the judicial expression of the values of equity and certainty. However, it also reflected a concern for the necessity of visibility and accountability in the decision-making process. Essentially, the argument was that greater discretion in the application of sanctions should exist in the judiciary than in executive

or administrative agencies, but with respect to the establishment of sanctions, the legislature should have more discretion than the judiciary.

In addition to these substantive values, Fogel's proposal was also grounded in several practical considerations. In particular, the justice model sought to address the problem of prison unrest by generally reducing the level of uncertainty among inmates, and through specific programs such as conjugal visitation and self-governing prison councils comprised of inmates and guards. In fact, when the Fogel proposal for reform was first announced by Illinois Governor Walker in February of 1975, emphasis was placed on the problem of violence and mental unrest among inmates and the capacity of the proposed reform to alleviate these problems by dealing with two of their presumed causes: sentencing disparities and uncertainties regarding the length of time to be served in prison. At the time the proposal was announced, Fogel declared that the major goals of the plan were to achieve "fairness in sentencing and establish an atmosphere of certainty among prisoners."<sup>45</sup>

These then are the major tenets and policy alternatives offered by the justice model and contained in the initial proposal for criminal justice reform in Illinois. Clearly, the kind of criminal justice system envisioned by Fogel and other adherents of the justice model is to be distinguished from that which is suggested by those who advocate reforms which are intended to insure the incapacitation of certain types of offenders. In contrast to the justice model, the incapacitation strategy emphasizes such policies as mandatory minimum sentences or sentence structures with substantial enhancements

for certain types of offenders (e.g., repeaters or persons committing violent crimes).

During the early period of the debate over sentencing reform in Illinois, Fogel's proposal was enthusiastically championed by Governor Walker. In fact, at least one observer referred to it as the Fogel-Walker proposal (Alschuler, 1978). At the time, the Council of State Governments was able to include Illinois among the states with major definite sentencing proposals, as distinguished from proposals emphasizing incapacitation (The Council of State Governments, 1976). However, as suggested earlier, while Fogel's model was a catalyst for much of the reform movement in the early years (1975 and 1976), the criminal code which emerged is considerably different from that envisioned by the justice model. While having much of the form and mechanics of presumptive sentencing, the new system contains substantially more discretion for judges, prosecutors, corrections officials, and the Prisoner Review Board than would be allowed under the justice model. Moreover, the code emphasizes incapacitation and deterrence to a much greater degree than the Fogel-Walker proposal.

The movement of technical policy proposals into the political arena usually means that they will be subjected to the tug and pull of various interest groups as well as partisan and ideological conflict. Occasionally, the formulation of new sentencing policies is at least partially insulated from this political environment through the creation of special commissions whose task is the development of new policies and laws. This was the case, for example, with sentencing reform in Maine, Minnesota, and North Carolina. In Illinois, however, even though the

governor initiated the process of reform, the legislature assumed for itself the task of developing a comprehensive new criminal justice policy. In addition, sentencing reform became embroiled in partisan conflict as a result of a gubernatorial election, and subsequent election of a new Republican governor at odds with a Democratic legislature. Consequently, the ideological clarity and consistency informing the debate among criminal justice professionals did not translate into the same consistency and clarity in the ultimate design and implementation of the new Illinois code. For these reasons, the fate of the justice model in Illinois is an instructive case study of contemporary sentencing reform. Because of this, we detail it extensively below.

The fate of the justice model in Illinois. Somewhat surprisingly, the Fogel-Walker proposal was favorably received by many criminal justice practitioners. For example, the Washington Post reported that the plan was initially supported by both the National Association of District Attorneys and the Illinois Association of Chiefs of Police (Weisman, 1975). Nonetheless, the legislature decided to steer its own course of reform and in October of 1975, a special subcommittee was appointed by the House "to investigate problems in the correctional system and to develop legislative proposals for the overall improvement of the correctional system" (Subcommittee on Adult Corrections, 1976).

While seeking to distinguish its work from the Illinois Justice Model and proposals considered in other states, the subcommittee's initial findings and proposals were similar in many respects to the Fogel plan. Like Fogel, the subcommittee (officially the Subcommittee on Adult Corrections of the Illinois House Judiciary II

Committee) justified its version of determinate sentencing as a way of combating the ineffectiveness and capriciousness of sentencing, rehabilitation programs, and parole as well as a perceived widespread public distrust of the criminal justice system. Moreover, as with the justice model, the initial legislative proposal (hereafter referred to as the H.J. II proposal) contained a schedule of sentence ranges which were grafted into the old classification system (Subcommittee on Adult Corrections, 1976). The H.J. II proposal provided a wider sentence range for Class 1 offenses than in the Fogel plan (4 to 12 years as opposed to 6-10 years), stayed away from actual presumptive terms, and proposed a series of extended terms for certain repeaters. In addition, the H.J. II plan called for vested good-time credits to promote prison discipline as well as longer periods of reentry supervision than envisioned by Fogel. Nonetheless, in many respects, the initial H.J. II proposal was more similar to the justice model than to the legislation which ultimately emerged. The H.J. II proposal was in fact supported by Fogel, albeit not without reservations.

As mentioned earlier, two central features of Fogel's model were the establishment of presumptive sentences with narrow ranges and the abolition of parole. The first of these proposals was vigorously opposed by judges anxious to preserve some form of individualized sentencing (The Council of State Governments, 1976). The second one was attacked by the Illinois Trial Bar Association and the John Howard Association on the grounds that parole supervision is an "...effective device in retaining people in the community and in preventing crime" (The Council of State Governments, 1976). While these groups may not have been satisfied with the final

product of the legislature, they were nonetheless partly responsible for the dilution of the justice model proposal, especially regarding the elimination of the presumptive standards, the wider Class I sentence range, and the expansion of the reentry supervision.

In addition to these insider fights among criminal justice professionals, and in contrast to the political context in many other states, sentencing reform in Illinois generated a large amount of public and media attention (Zalman, 1978). In 1976, when Fogel's model was still being seriously considered, sentencing reform became embroiled in election year politics. In the midst of a party fight between Governor Walker and the forces of the late Mayor Daley, the justice model legislation foundered. Moreover, in the process, Fogel was rejected by the Senate for the position of Director of the Department of Corrections (Cole, 1977; Zalman, 1978). After Republican James Thompson became Governor and offered a mandatory sentencing bill, another impasse developed. According to one observer, "Neither the Republican governor nor the Democratic legislators would pass a sentencing reform for which the other could claim credit" (Cole, 1977).

After Thompson was elected governor, the proposed law changed further. Under the Thompson plan, determinate sentencing was to apply only to murder and to a new felony offense category known as Class X. Included within Class X were rape, kidnapping for ransom, arson, indecent liberties with a child (which was later dropped), all transactions involving hard drugs, and the commission of any felony with a weapon. Generally, these offenses had been included in the Class 1 category of the H.J. II proposal. However, under

the Thompson plan, these offenses would have had only mandatory minimum terms of imprisonment (six years less good time) with no maximum limits. In addition, persons convicted three times of Class X would automatically receive a life sentence and persons convicted of three lesser felonies would, upon the third conviction, be adjudicated as a Class X felon (Memorandum by James Bagley, Majority Counsel for House Judiciary II Committee, 1977).

The injection of the Class X proposal into the debate crystallized partisan and ideological differences. As a former prosecutor, Thompson not only stressed deterrence as a rationale for punishment, but the importance of public relations (or communication) in the effort to reduce crime. In a speech to the General Assembly, Thompson said "Class X' has an important ring to it. Deterrence requires communication...Class X is a message from the people of Illinois, through their elected representatives to criminals, to prosecutors and to judges." When he announced his crime program, Thompson declared that he "wouldn't mind seeing every gasoline station and grocery store in Illinois with a sign in the window: This store is protected by Class X. Armed robbery will get you a minimum sentence of six years" (Memorandum by Jim Bagley, Majority Counsel for Judiciary II Committee, 1977).<sup>46</sup>

Eventually, of course, legislation was passed and on February 1, 1978, the revised code went into effect. The legislation which finally emerged was the result of a series of compromises between supporters of the H.J. II bill and those who supported the Thompson plan. The result was further deviation from both the form and the content of the original

Fogel-Walker presumptive sentencing proposal. To see the course of reform in Illinois, the provisions of the revised code may be contrasted with the justice model.

The revised Illinois code. For one thing, as mentioned above, the parole board is not eliminated as proposed by Fogel, but is reconstituted with a new name: the Prisoner Review Board. In addition, the code does not establish presumptive sentences for each offense class with a narrow range of aggravating and mitigating circumstances as suggested by Fogel. Instead it creates two schedules--one for regular terms and one for extended terms--each of which has legislatively fixed minima and maxima for the various offense classes. Judges are to decide on the appropriate fixed sentence within the broad limits. The factors and guidelines in the code to be used in determining aggravation and mitigation are generally very vague. (In this respect, at least, the code resembles Fogel's model). Included among the 11 factors for mitigation are harm involved, provocation by the victim, lack of prior record, and likelihood of recurrence of the act. For aggravating circumstances there are four general criteria. These are to be used in indicating dangerous or violent offenders, repeat offenders, or offenders who committed a felony through the use of his or her public office.

The new code contains two felony classes which were not in the old classification system used by Fogel and the H.J. II subcommittee. The first of these is the controversial Class X which was discussed above. In its final version, Class X included the forcible felonies of treason, attempted murder, rape, deviate sexual assault, armed robbery, aggravated arson,

and aggravated arson for ransom. The offenses are non-probationable. The range of penalties within the regular term schedule for Class X is 6-30 years; for the extended schedule it is 30-60 years.

The second new class in the revised code is a revamped version of an old habitual criminality statute. Essentially, the final form of this provision is drawn from the Thompson proposal. The House bill had called for the doubling of the maximum after a third conviction. Under the code, however, habitual criminality is defined as persons convicted of two or more Class X felonies.<sup>47</sup> For this class of offenders, there is a mandatory term of life imprisonment.

In addition to Class X and the habitual criminal category, the revised code also established extended terms for each class (other than murder) whereby the maximum terms were doubled for repeaters with prior convictions for offenses of the same

or of a greater class than the instant offense, and if it was determined that the offense was accompanied by "exceptionally brutal or heinous behavior indicative of wanton cruelty" (Illinois Code and Bagley memorandum, 1977). As with most other aspects of the revised code, the final form of the extended terms was the result of compromise. Thompson had proposed that all three-time repeaters be sentenced as Class X offenders while the H.J. II proposal had called for extended terms only when there was a previous conviction for murder or either a Class 1 or Class X offense. In addition, Thompson had called for an extended term when it was determined that the extended term was necessary to "protect the public" (Bagley, 1977).

All told, the new code established seven offense categories. In addition to creating the two new ones, the code consolidates murder into one offense category.

Illinois: Regular and Extended Term Schedule

Class	Regular Term	Extended Term	Examples
Murder	Life or 20-40 years	Life or 40-80 years	
Habitual Criminal	Mandatory Life Term		
Class X	6-30 years	30-60 years	Rape, Armed Robbery
Class 1	4-15 years	15-30 years	Dealing in major narcotics
Class 2	3-7 years	7-14 years	Burglary, Arson Robbery (unarmed)
Class 3	2-5 years	5-10 years	Theft (over \$150) Inv. Manslaughter
Class 4	1-3 years	3-6 years	Poss. of Cannabis (30-50 grams)

In retaining parole supervision, Illinois followed the course taken by Indiana. The Illinois system is unique, however, in that judges must specify a "mandatory supervised release term" of one, two, or three years depending on the class of the offense. (A three-year term for Class 1 or Class X offenders was added as a concession to Thompson forces.) Sentences in Illinois are determinate insofar as the supervised release term begins after the expiration of the prison term less good time. However, as Lagoy, Hussey, and Kramer have noted (1978), in determining the conditions of release, issuing sanctions for violations, and deciding upon revocations, the Prisoner Review Board may significantly affect the actual amount of time served. In fact, upon revocation, the Board may recommit a prisoner to up to a year of the original sentence which was not served because of the accumulation of good time. Also, when a prisoner is re-released, the Board is empowered to commit a prisoner to the full mandatory release term. On the other hand, the Board may release and discharge an offender at any time before completion of the period of supervision if it determines that the person is likely to remain at liberty without committing another offense. In any event, the Prisoner Review Board retains a considerable amount of discretion, particularly in terms of the time when a criminal is a risk.

Probation, under the code, represents a similar combination of determinacy and discretion. Probation is to be imposed if the offender does not represent a "threat to the public" and when a nonincarcerative penalty does not "depreciate the seriousness of the offense." On the other hand, probation is prohibited for murder and all Class X felonies as well as for Class 1 and 2 felony repeaters. For other cases,

the burden is placed on judges to explain the IN/OUT decision. This, it will be recalled, represents a departure from the Fogel plan which would have placed the burden on the state to prove the danger to society inherent in a nonincarcerative penalty.

Under the code, good time is awarded on the basis of one day for each day served. However, in contrast to Fogel's proposal, good time is not vested. The legislature did attempt to establish some procedural safeguards for the revocation process. Thus, while the Department of Corrections makes the determination as to whether an infraction occurred, it must request approval from the Prisoner Review Board to revoke more than 30 days for one offense or more than 30 days for any 12 month period. The Board may concur with the request, deny the request, or reduce the amount of time to be revoked, provided that the reduction does not go below 30 days. The Board is not authorized to increase the request (Bigman, 1979).

Finally, in addition to establishing appellate review procedures, the new code created a Criminal Sentencing Commission. As stated in the Commission's first report, "This Commission was created to assure that the state would have an on-going mechanism for reviewing the implementation of determinate sentencing, for assessing its fiscal impact, and for making suggestions for both legislative and policy changes which may serve to strengthen (the Illinois) criminal justice system" (Criminal Sentencing Commission, 1980). Moreover, while the Commission is empowered to promote uniformity, certainty, and fairness through "standardized sentencing guidelines", it has not yet done so.

### Impact

Even without Class X and the habitual criminal class, the severity of sentences under the new code is potentially not only much greater than would have been possible under Fogel's plan, but also, when one considers former policies, substantially greater than under the old code. The range of possible sentences within the three classes below Class X has been narrowed by raising the minima and lowering the maxima. (Class 4 remains the same.) However, this is a somewhat spurious change in that the vertical range of possible sentences is increased substantially with the addition of the two classes, and particularly Class X. Moreover, when one includes the enhancements of the extended schedule, the ranges increase dramatically. For each class, the upper limit of the regular schedule is at least equal to the minimum of the extended terms and the maximum of the extended term is twice the maximum of the regular term.

Turning now to the question of how this potential severity has been realized in practice, data collected by the Criminal Sentencing Commission (1982) indicate that the revised code has resulted in a "trend toward an increase in short- and long-term sentencing." In other words, sentences for Class X and most Class 1 offenses as well as for misdemeanors and some Class 4 offenses have increased, while sentences for other offenses have generally decreased. (Interestingly, these trends seem to have held statewide and, in fact, according to the Commission, there is some tentative evidence that the new code has lessened whatever sentence disparities that may have been between Cook County and other areas of the state.) With respect to projections of actual time served, the

Commission estimates that the new law has resulted in an increase for murder and Class X felonies and a decrease for Class 3 and 4 felonies.

At first glance, then, it would appear that, with the exception of offenses at the extreme lower end of the sentencing structure, judges and prosecutors are generally applying the more severe sanctions available within each class to the more serious offenders. However, several important caveats to this conclusion must be noted. First of all, the data have not been analyzed with the use of statistical controls. Secondly, there is no information on how the code has affected charging and bargaining practices. Finally, and importantly, the aforementioned trends do not encompass cases where extended terms have been invoked.

Unfortunately, there has been no analysis done relating to the circumstances under which extended terms have been used. The available data do indicate that the application of extended terms has so far varied considerably from one offense to another. For example, in 1980, 20 percent of the attempted murder cases resulted in extended terms, while only four percent of armed robbery cases and seven percent of rape cases resulted in extended terms. (All of these offenses are in Class X.) Similar disparities occurred within other classes. The percentage of extended terms for both burglary and robbery cases in 1980 was four percent compared to 18 percent for all other Class 2 offenses (Criminal Sentencing Commission, 1982).

While the inclusion of these extended term cases probably would not drastically alter the basic trends discovered by the Criminal Sentencing Commission, the variability in the application of these terms under-

scores an important fact about the new code--namely, that a considerable amount of discretion still exists within the system. In this respect, Illinois is similar to other states which have adopted so-called determinate sentencing reform. In terms of the apportionment of discretion to the judiciary, the Illinois code more closely resembles the flat-time system in Maine than it does other presumptive models. Moreover, the existence of the schedule of enhancements gives prosecutors in Illinois a discretionary tool not available in Maine. In the area of prosecutorial discretion, the Illinois code resembles the Indiana code.

Unlike Maine, of course, Illinois has retained a form of parole supervision, which is consequently an additional source of discretion. A study done by Paul Bigman of the Chicago Law Enforcement Study Group concluded that, while members of the Prisoner Review Board were generally "performing their responsibilities to the best of their abilities," they had failed to "provide adequate hearings on revocation of good conduct credits" (Bigman, 1979). This failure is attributed to contradictory statutory language and to a narrow interpretation of the Board's power to hold hearings.

The constitution and functions of the Prisoner Review Board established in the new code represent a legislative compromise between groups favoring the abolition of parole and those urging the continuation of parole supervision. The upshot was a somewhat incongruous combination of determinacy and discretion. The focal point of this combination is the mandatory supervised release term. According to the Chicago Law Enforcement Study Group, "Mandatory supervised release is the most obvious consequence of legislative compro-

mise, embracing the most dubious aspect of parole (coercive services and revocation violations) while rejecting the most beneficial (release based on preparedness for outside living)" (Bigman, 1979). The study goes on to recommend, among other things, the abolition of mandatory supervised releases, the increased use of work-release centers, making the revocation of good time a quasi-judicial decision, and guaranteeing inmates access to information and counsel in preparation for hearings.

Overcrowding. Like most other states that adopted determinate sentencing systems, the revised Illinois code contains a sentencing structure which promotes the incapacitation of more dangerous and habitual offenders. As with the new Indiana code, this policy is explicitly built into the code through enhancements and mandatory sentencing provisions. The existence of this policy and its implementation has exacerbated several problems in the state's criminal justice system. For one thing, there are indications that more defendants are now exercising their right to a trial, resulting in an additional strain on already overburdened courts (Wingert and Zielenziger, Chicago Sun Times, 1981). More serious than this, however, is the role the new code is playing in the state's prison overcrowding problem.

Illinois has experienced a steady increase in its prison population since 1974. According to the Criminal Sentencing Commission (1982), between 1974 and 1982, the population increased by 98 percent while bedspace increased by 23.5 percent. In 1981 alone, the number of inmates increased by 13.4 percent, from 11,899 to 13,499 (Gardner, 1982). Corrections officials estimate that there will be 16,420 inmates by January of 1985 (Wingert and

Zielenziger, 1981). These officials also estimate that even though 2,000 new bed spaces will have been added between 1981 and 1984, the system will still be 2,000 beds short.

While it would be inaccurate to attribute Illinois' overcrowding problem entirely to the new code, the application of the mandatory provision as well as the extended terms contained within the code is clearly contributing to the problem. In 1980, 34.5 percent of the prison population was sentenced for Class X felonies (Criminal Sentencing Commission, 1982). In all likelihood, this percentage will increase rather than decrease. Consequently, it is probable that the full effect of Class X on the prison population is just beginning to be experienced.

So far, corrections officials have been attempting to alleviate population pressures through the use of an administrative device known as early release. Between July of 1980 and July of 1981, 4,331 good risk inmates were given early release ranging from a few days to 18 weeks (Wingert and Zielenziger, 1981). However, this practice has drawn criticism from many judges and prosecutors. Moreover, the pool of good risk candidates will not be large enough to solve the problem, particularly as the number of Class X

felons increases. Faced with the prospect of prison unrest and federal intervention in the prison system, the Illinois legislature has refrained from making any major changes in the code. In fact, the most important revision has been the passage of a law establishing a mandatory minimum sentence of four years (with an upper limit of 15 years) for the new Class 1 offense of residential burglary (Illinois Code, 1982). It remains to be seen how this law will be enforced, however.

Summary. If there is a lesson to be learned from the fate of the justice model in Illinois, it is that equity, just deserts, and certainty of punishment are subject to a variety of interpretations, particularly in a political context. In contrast to Fogel's original plan of reform, the new code of Illinois has largely turned out to be an instrument for retribution, deterrence, and incapacitation, particularly for repeaters and certain types of offenders deemed to be dangerous. The degree to which the code serves these purposes remains, to a great extent, however, a function of the discretionary decisions of the various actors in the system. Thus, in Illinois, at least, it is clear that the ghost of individualized sentencing stalks so-called determinate sentencing reform, even though it is no longer recognized as a legitimate mode of punishment.

## INDIANA

### Context and content of the reform

On October 1, 1977, Indiana became the third state (after Maine and California) to adopt a determinate sentencing system. As with Maine, the new sentencing provisions were part of a comprehensive reform of the state's criminal law. The last major revision of the criminal code had been in 1905, and piecemeal change had created, by the 1970's, over 5,000 statutory offenses in Indiana. Consequently, one of the major tasks of the state's Criminal Law Study Commission (appointed in 1970) was to rationalize the system of offense classification. In this regard, the commission and the legislature consolidated the old offenses into 200 new offenses and created a sentencing structure containing five classes of felonies, two classes of misdemeanors, and three classes of infractions.

In addition to establishing this offense classification system, the legislature, following the recommendations of the commission, also created a form of determinate or fixed sentencing. Under the old Indiana code, with the exception of four serious offenses (e.g., rape), sentencing was largely indeterminate. Judges specified a range such as 1 to 10 years, and the parole board determined the actual amount of time to be served (Ku, 1980). The new system instituted in 1977 contained the mechanics of presumptive sentencing--that is, it specified penalties, provided allowable ranges for sentence departures due to aggravating or mitigating factors, and sharply restricted the parole function. However, in contrast to many of the presumptive sentencing proposals, most notably the presumptive system in California, the ranges for

aggravating and mitigating circumstances in the Indiana schedule allowed for a considerable amount of discretion in the sentencing decision particularly where aggravating circumstances were involved.

It is important to note that the code also contained the potential for extraordinarily severe sanctions through its comparatively harsh presumptive terms, its extended terms for aggravating circumstances and repeat offenders, and its restrictions on the use of suspended sentences. On the other hand, the legislature did provide for the possibility of more lenient treatment of less serious offenders. In addition, the legislature established a good time formula which could result in liberal reductions in time served. However, one of the effects of these more lenient sentencing and correctional options was to create new areas for the exercise of discretion, a result which was antithetical to the original goals of the original presumptive sentencing proposals.

The new Indiana Penal Code was formulated and enacted during a period of widespread dissatisfaction with rehabilitation and indeterminate sentencing. As mentioned above, a Criminal Law Study Commission was appointed in 1970. The first task of the commission was to develop a Code of Criminal Procedures, which was proposed in 1972 and enacted in part by the 1973 General Assembly. The next product of the commission was a new Penal Code, which was proposed in 1974 and reviewed by the legislature in its 1975 and 1976 sessions.

By the time the code was formulated and considered by the legislature, crime had become a prominent issue in the nation, and Indiana was no exception. Statistics on crime rates had shown dramatic

increases and the media had responded by giving crime-related subjects more attention. It was in this atmosphere that the Indiana legislature revised its criminal code. According to one student of sentencing reforms during this period, the Indiana legislature was "faced by fierce public passions over crime issues." (Zalman, 1979).

Much of the public arousal over crime issues has focused on the presumed leniency of judges, corrections personnel, and parole boards. In the seventies this perception was increasingly linked to the belief that the treatment model of corrections, with its emphasis on indeterminacy and rehabilitative programs, was a failure. As is by now well known, it was also during this period when several alternative models of sentencing and corrections appeared. As discussed elsewhere in this book these models were proposed by criminologists and reformers who sought a greater degree of determinacy as a way of promoting goals of increased equity, certainty, and accountability in the criminal justice system.

In Indiana, as in other states that moved towards determinacy in this era, the context for reform was defined by a confluence of public arousal over crime, dissatisfaction with rehabilitation and indeterminate sentencing, and the availability of alternative, determinate models of sentencing and corrections. Moreover, during the period when the Indiana legislature was considering the new code, both Maine and California enacted new determinate sentencing systems, lending credence to the notion that determinate sentencing was the wave of the future. These various influences were revealed by James Smith, an administrative aide to the governor at the time of the reform, in an

interview published in the New York Times on October 12, 1976. As Smith put it, "We felt we strongly needed a new criminal code, and philosophically we believed in determinate sentencing. The parole system as practiced now is a farce and just doesn't work...The thrust that we used (sic) was that (the determinate sentencing legislation) provided the prosecutors and the judiciary with an up-to-date tool in the administration of the criminal justice system. We felt strongly that it would help reduce crime."

There was, of course, some opposition to the new sentencing system. In addition to some general opposition to the severity and determinacy of the new system among some criminal justice practitioners, there was also a group of reformers that lobbied in favor of a form of determinate sentencing with less severe sanctions, less judicial discretion, and more possibilities for nonincarcerative alternatives. Two of the most active of these organizations were the American Friends Service Committee (which took an advocacy position regarding determinate sentencing as a means of achieving equity) and an organization known as P-A-C-E (Public Action in Correctional Effort). The pressure of these groups in the debate over Indiana's code is indicative of the nature of sentencing debates in general during the mid-seventies. Attention had not yet focused on the problem of prison overcrowding to the extent that it has in recent years and, while dissatisfaction with indeterminate sentencing cut across the political spectrum, the direction of determinate sentencing movements was far from clear. However, in Indiana, at least, determinate or fixed sentencing became associated with at least potentially severe sanctions, while retaining a relatively large amount

of judicial, prosecutorial, and correctional discretion.

Public Law 148. Early in 1976, the General Assembly enacted Public Law 148, which incorporated most of what the Criminal Law Study Commission had proposed. Originally, the code was scheduled to go into effect in July of 1977, with the interim period designated for additional debate and fine-tuning of the provisions in the code. The debate intensified in the last few months before the code was scheduled to go into effect, and the date was postponed until October 1. According to Clear, Hewitt, and Regoli (1978), "In the final stages of legislative debate, the penal code was severely criticized as much too lenient." As a result, several amendments were introduced to increase the presumptive sentences for most classes in addition to making several other sentencing provisions more severe (Ku, 1980). Opponents of the legislation were successful in keeping the presumptive term for Class D felonies, which account for about one-half of all felony convictions, at two years. However, analysis of the effect the new code would have had on a sample of first offenders sentenced before the new code went into effect (N=234), indicated that, if the sample had been sentenced after the last round of amendments, their sentences would have been 50 percent more severe rather than 25 percent more severe (Clear, Hewitt, and Regoli, 1978).

As mentioned earlier, Indiana's new penal code established a sentencing schedule with ten crime categories, five of which applied to felonies. Most of the more common offenses span a number of felony classes, depending on the circumstances of the crime--e.g., whether a weapon was used or injury was inflicted.

Under the schedule, judges retained a great deal of discretion. As can be seen from Table 6, there was a wide margin for the lengthening of terms due to aggravating circumstances and a much more narrow range for shortening terms as a result of mitigating circumstances.

The code established a two-fold sentencing process whereby a separate sentencing hearing was to be held after the trial. At this hearing, the prosecutor could present evidence for aggravating or mitigating circumstances and make corresponding recommendations regarding departures from the relevant presumptive term (ICA, sec. 35-4.1-4.3). The code provided lists of appropriate aggravating and mitigating circumstances but allowed prosecutors and judges to consider other factors as well (sec. 35-41-4-7). Examples of aggravating factors included: 1) the offender had recently violated conditions of parole or probation; 2) the offender had a history of criminal activity; 3) the victim was over 65 years of age or mentally or physically infirm; 4) a reduced or suspended sentence could depreciate the seriousness of the crime. Mitigating factors might include: 1) the circumstances of the crime were unlikely to recur; 2) the offender was strongly provoked; 3) grounds existed to excuse or justify the crime; 4) the offender was likely to respond positively to probation or a short term imprisonment; 5) the offender had promised, or made restitution.

Although required to provide a written justification for departures from the presumptive sentence, a judge was generally free to impose whatever fixed term within the possible ranges he or she felt was warranted by the circumstances of the offense. According to Ku (1980) "...variation from a base or presumed sentence

Table 6

Examples of Indiana's Sentencing Code

Offense	Presumptive sentence	Aggravating	Mitigating
Murder	40 years (or death)	+1-20 years	-1-10 years
Class A felony i.e.: Child molesting Kidnapping Major narcotics	30 years	+1-20 years	-1-10 years
Class B felony i.e.: Rape Robbery with injury Lesser narcotics	10 years	+1-10 years	-1-4 years
Class C felony i.e.: Armed robbery Forgery Drug possession	5 years	+1-3 years	-1-3 years
Class D felony i.e.: Simple burglary Credit card deception	2 years	+2 years	-1-3 years
Class A misdemeanor	0-1 years	N/A	N/A
Class B misdemeanor	0-6 months	N/A	N/A

length is largely in prosecutors and judges' hands in Indiana, whereas such variation is specified by the legislature in California."

There were some restrictions on judges relating to the use of suspended sentences, probation, and certain multiple-charge cases. Sentences could not be suspended if the offender had a prior felony conviction, if the instant offense involved the use of a deadly weapon or resulted in serious bodily injury, if it was committed against a child, or if the conviction was for delivering narcotics (ICA, sec., 35-50-22). In addition, if a defendant had previously been convicted of two or more prior unrelated felonies, the state could petition the court to find the offender a habitual offender. In these cases, judges were required to impose a fixed term of 30 years to be served consecutively to the sentenced offense (ICA, sec., 35-50-2-8). In addition, if a defendant committed an offense while on pre-trial release, probation, or parole, the code required that the sentences be served consecutively (35-30-1-2).

While most of the sentencing provision of the code would seem to encourage greater severity, there are some provisions which mitigated against this tendency. For one thing, offenses which were designated as non-suspendable could be charged as "attempts," and therefore outside the scope of the mandatory imprisonment provision (ICA, 35-41-5-1). In addition, a person convicted of a Class D Felony could be sentenced as if for a misdemeanor (35-20-2-7). The code also stipulated that within 180 days after the imposition of a sentence, the court could reduce the sentence or suspend it provided that it was not a mandatory term.

Clearly, these provisions must be seen not only as a means of providing offenders with the possibility of more lenient treatment, but also as a way of providing prosecutors with more bargaining leverage and judges with more flexibility and discretion (Ku, 1980; and Clear, Hewitt, and Regoli, 1978).

Similarly, several of the new provisions relating to corrections policies in institutions had the dual function of affording inmates some opportunities for more lenient treatment while simultaneously giving corrections officials more flexibility in the areas of inmate discipline and bedspace.

While Indiana's determinate sentencing system is different than those in California and Maine in that it retains a limited form of parole, parole in Indiana generally can no longer be used as a disciplinary tool within the prisons. Its main use is restricted to parole supervision for the remainder of an offender's term after he or she has served the fixed sentence less reductions for good time. Consequently, good time (or credit time as it is called in Indiana) has assumed more importance. Under the code, inmates are placed in three classes for purposes of receiving credit time; Class I--50 percent reduction or one on one; Class II--33 percent sentence reduction or one on two; and Class III--no credit time. All incarcerated inmates are initially Class I. Reassignments to Class II or III occur because of violations of prison rules or regulations. Since credit no longer vests, an inmate can be deprived of any part, or all, of credit time earned if he or she has violated the prison rules.<sup>50</sup>

In addition to the increased importance of good-time provisions, the Department of Corrections has also acquired the authority to designate security levels, with minimum security designations not necessarily involving a penal facility (ICA, 35-4, 1-5-3 and 4). As with the good-time provisions, this authority not only provided inmates the possibility of less severe conditions, but also gave corrections officials more flexibility in the areas of discipline and management.

Finally, if a parolee is revoked, he or she is imprisoned for the remainder of the original sentence, less any good time earned after revocation. For these cases, however, the parole board functions as it would under an indeterminate system. For other parolees the law requires that they be discharged, if they have not been revoked after a year.

Additional changes. In the time since the code was enacted, the legislature has refrained from making any major additional changes in the code. In 1979, it added a few due process guarantees to the good-time provisions (ICA, 35-50-6.4, 1982 Supplement). In 1980, it changed the habitual offender statute so that if ten or more years had elapsed between the date when the defendant was last discharged from probation, imprisonment, or parole and the date of the current offense, up to 25 years could be subtracted from the 30 year fixed term (ICA, 35-50-2-8, 1982 Supplement). In these cases, aggravating and mitigating circumstances could be used to determine the actual amount to be deducted. Finally, in 1982, the legislature changed the sentencing provisions for Class D felonies so that a person could not be sentenced as a misdemeanor if he or she had a prior unrelated felony which was sentenced as a misdemeanor and which

was committed less than three years before the present offense.

#### Assessing the impact

Despite the controversy which has consistently surrounded the Indiana code since its adoption in 1977, there has been surprisingly little research done on the effect of the code. Researchers have instead focused on other states with determinate sentencing or on the effect of specific types of changes such as mandatory minimum gun laws. In any case, given the paucity of available research, it is difficult to assess the effect of the Indiana code.

There has not been a shortage of reactions, opinions, and predictions regarding the new code, however. Since its passage, the Indiana code has meant many things to many people. While supporters are generally agreed that the code is a more modern and efficient means of combatting crime--a view reinforced by the fact that the code does in fact rationalize criminal law in the state--their views on the more specific issue of the impact of the code on sentencing have been somewhat contradictory. As Clear, Hewitt, and Regoli put it shortly after the code was implemented: "In the eyes of one interest group or another, the new Indiana Penal Code is variously expected to increase prison populations, make penalties more appropriate to the offense, equalize penalties, reduce arbitrariness, increase public protection, increase system efficiency, reduce harshness, and reduce leniency."

Critics of the code, on the other hand, have been more consistent in their appraisal. While often coming from different perspectives, these critics have generally been united in their emphasis on

the substantial amount of discretion engendered by the new system as well as the severity of the sentencing provision. In the period immediately following passage of the new code, the variety of options available for sentencing as well as the wide ranges of sentence lengths led many insiders and observers to refer to the new code as a prosecutor's law. For similar reasons, an organization opposed to the code characterized the new sentencing structure as indeterminate flat-time sentencing. As Clear, Hewitt, and Regoli (1978) put it:

The new Indiana Penal code provides such wide discretion, coupled with untenably heavy penalties, that a most likely result will be the reaction and solidification of a formal system of decisions and rules that barely conceals a low-visibility, busy, and pragmatic system of informal decisions regulating the actual sentences, largely in the control of prosecutors, judges, and correction officials.

Some critics went so far as to suggest that the new code produced little in the way of substantive change. For example, Zalman (1979) argued that "The Indiana legislature...seems to have found the greater wisdom in appearing to create change while actually doing little or none at all." Similarly, Clear, Hewitt, and Regoli suggested that as a result of the informal system of decision making engendered by the code, "The new sentencing scheme may come to bear a strange resemblance to what reformers hoped to eliminate."

Of course, as these authors also suggested, there was little initial consensus

among these reformers as to what should be eliminated, except perhaps parole and crime, itself. Nonetheless, there is some truth in the argument advanced by the critics--namely, to say that Indiana adopted determinate sentencing is misleading insofar as the new system contains substantial room for discretionary decisionmaking by judges, corrections officials, and particularly, prosecutors. In fact, in light of the wide ranges for aggravating and mitigating circumstances as well as the variety of mandatory and nonmandatory options available to prosecutors and judges, the sentencing structure can be characterized as determinate only after the point of sentencing. In this respect, despite the form of presumptive sentencing, Indiana's code is actually more akin to Maine's code than to the more clearly presumptive system in California. However, in contrast to Maine, Indiana's system is substantially less determinate than Maine's in the area of good-time policies.

As several critics have pointed out, the new code was simultaneously an effort by the legislature and other persons involved to effect substantive change and to "get tough" on crime or at least, create that impression. As Clear, Hewitt, and Regoli said: the new code "...is at once an attempt at criminal justice and an effort at public relations." These authors concluded that the legislature achieved neither of the goals. In other words, the label of determinate sentencing seems to have been used in Indiana to solidify and legitimize a reform effort which was largely motivated by the desire to get tough on crime and to project the corresponding political image. From this perspective, there was nothing disturbing about providing prosecutors or other criminal justice personnel with a substan-

tially greater amount of discretion than envisioned by the likes of Fogel or Von Hirsch. The goals of greater equity, certainty, and visibility were subsumed under this perspective, and as a result, were greatly compromised. Moreover, in Indiana, just deserts had quite simply become associated with the possibility of giving certain (violent and repeat) offenders very severe sentences.

The upshot has been the creation of what has been called a hybrid approach to sentencing (Lagoy, Hussey, and Kramer, 1978). The label of determinate sentencing actually encompasses several philosophical orientations towards sentencing, with an emphasis on incapacitation of statutorily defined serious offenders. Indiana's hybrid system is reflected in its limited use of parole, and particularly in its traditional use of parole with those offenders whose paroles have been revoked--that is, the same type of serious (repeat) offender with which the indeterminate system of parole is alleged to have failed. However, this admixture of sentencing orientations is perhaps best seen by the curious manner in which the code treats offenders who are deemed in need of rehabilitation. Specifically, the code treats the need for rehabilitative treatment as if it were an aggravating circumstance: Judges may increase but not decrease a sentence if it is determined that rehabilitative treatment can "best be provided by his commitment to a penal facility" (35-8-9-7 (c) (3)).

Clearly, then, the new Indiana code has engendered a hybrid system which is characterized by a substantial amount of informal discretionary decision making. However, one need not conclude from this that the new system is essentially the same as the old one. For one thing, it

must be kept in mind that discretion does not exist in a vacuum, but is exercised in the process of choosing among concrete alternatives. Consequently, the potential severity of the sentencing structure can have a very substantial impact on sentencing patterns. Moreover, as Orland (1979) said with respect to prison staffs and corrections officials, the abandonment of indeterminacy "can lead to the ascendancy...of custodial and punitive perspectives."

There is some evidence that in the first year or so of the code's existence, there was little change in the state's sentencing patterns. In an analysis of the first 705 offenders sentenced under the new code, Ku (1980) found that the minimum projected time served for these cases in comparison with pre-code cases was shorter for robbery, longer for burglary, and about the same overall. In addition, Ku found no notable increase in the number of admissions to prison during the initial eight-month period after the code went into effect.

However, Ku's findings may present a picture of continuity and relative leniency which was shortlived and perhaps even non-existent. As Ku admits, his analysis is based on the "best case" for determinate sentencing. For one thing, his projections assumed the most liberal good-time reductions possible. In addition, his sample may not have included those cases involving the more severe sanctions of the new code because those defendants were more likely to have exercised their right to a trial. Finally, it is likely that the cases in Ku's sample were processed during a period when practitioners were adjusting to the code. For example, prosecutors and defense lawyers

were probably still in the process of developing negotiating strategies.

In any event, the rate of admissions, as well as the number of inmates in state prisons began to move rapidly upwards after implementation of the 1977 law. In 1979, the rate of prisoners per 100,000 civilian population jumped from 82 to 105 (Sourcebook of Criminal Justice Statistics, 1981). In 1981 alone, the prison population grew by 20.5 percent, going from 6,683 inmates to 8,054 (Gardner 1982). While it is difficult to trace all of this increase to the new code--particularly in light of nationwide trends of this kind, by 1981 several state corrections officials were publicly attributing overcrowding and the attendant danger of prison unrest to the new code. As Robinson noted in a newspaper article written for the Chicago Sun Times in the summer of 1981:

Many experts believe the chief cause of crowding is the state's three-year-old reformed criminal code, which mandates specific prison terms for many crimes and allows judges little flexibility to grant alterna-

tive punishment. Thus, prisons are receiving more young people facing long jail terms with little hope for early release--people Midkiff (a former corrections ombudsman) calls the new lifers.

Again, it must be pointed out that there are ways for prosecutors and judges to avoid many of the mandatory provisions and the extended terms, if they so choose. Clearly, however, at least some prosecutors and judges do not view these provisions as the "untenably heavy penalties" which Clear, Hewitt, and Regoli described them as, and are in fact enforcing them. Moreover, it appears quite possible that this situation can result in a significant amount of sentencing disparity.

In recent years, the Indiana legislature has refrained from any major revisions of the code. Several programs relating to non-incarcerative alternatives for non-violent offenders were discussed in 1981, but were not acted upon. In the meantime, prison officials continue to worry about prison conditions and the lack of money and programs to ameliorate them.

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## IOWA

### The context of reform

At a time when much of the rest of the nation is preoccupied with determinate sentencing or with sentencing guidelines which are based on judicial patterns, Iowa has turned its attention to the possibility of incorporating risk assessment into its sentencing decisions. Currently, legislation which would gradually phase risk assessment into sentencing decisions is being seriously considered in the 1983 legislative session. The proposal, called the "Classified Sentencing System," passed the Iowa House in 1982 by a large margin, but died in the Senate when time ran out at the end of the legislative session. Under the system, a Habitual Offender Classification based on both prior record and a statistically-based assessment of risk would be established as part of a sentencing scheme which attempts to distinguish between habitual, potentially violent offenders, and those offenders who are less serious. In addition, sentencing guidelines different from those originally developed by the Albany group (Kress, 1980) were tested in Polk County in 1981. These guidelines are unique in that they combined measures of general risk and violent risk with the more conventional factors of offense severity and prior record. A similar set of guidelines has been employed by the Iowa Board of Parole since March of 1981. Subsequent to the Board's decision to use the guidelines, the legislature passed H.B. 849, requiring the Board to develop and use "... criteria which statistically have been shown to be good predictors of risk to society of release on parole" (Fischer, 1982b).

Much of the recent interest in Iowa in risk assessment appears to be a reaction

to a rather sharp increase in the state's prison population. In particular, between 1979 and 1980, the number of inmates increased by 18 percent, from 2,099 at the end of 1978, to 2,479 at the end of 1980 (Fischer, 1981). In the meantime, the Statistical Analysis Center of the Office for Planning and Programming completed the development of its Offender Risk Assessment Scoring System. According to Darryl Fischer, who directed the project, this system "could significantly increase the efficiency with which decision-makers make judgments of risk" in Iowa (Fischer, 1980a). In fact, "[at] the extreme, SAC (the Statistical Analysis Center) has taken the position that, with effective risk assessment providing input to sentencing and parole decision, it is possible to reduce commitments to adult correctional institutions and to reduce the average length of prison terms, ...while at the same time reducing recidivism rates and better protecting the general public." Naturally, in an era of renewed public concern over crime, prison overcrowding, and general fiscal crisis, expert claims such as these will receive a considerable amount of attention.

Due largely to the arguments of SAC that the increase in prison population was primarily the result of a reduced rate of parole and that the use of risk assessment in parole release decisions could increase the number of paroles while simultaneously increasing public protection, the legislature put a cap of 2,650 on the institutional populations (Fischer, 1982a).

To put the Iowa risk assessment system in perspective, we turn now to a review of sentencing under Iowa's criminal code.

Iowa's criminal code. The current code of Iowa was enacted by the legislature in

1976 and became effective January 1, 1978 (Iowa Code Annotated, 1978). Under the code, there are four classes of felonies (A, B, C, and D) and three classes of misdemeanors (aggravated, serious, or simple). For Classes B, C, and D, the code established a schedule of indeterminate sentences. Persons convicted of a Class B offense (including 2nd degree murder, 2nd degree sexual abuse, 2nd degree kidnapping, 1st degree robbery, and 1st degree burglary) are subject to a sentence of not more than twenty-five years. Class C offenders may receive a sentence of up to ten years. Examples of offenses in this class are 1st degree theft (over \$5000), attempted murder, 3rd degree sexual abuse, 2nd degree robbery, and 2nd degree burglary. For persons convicted of Class D offenses (e.g., 2nd degree theft, lascivious acts with a child, and extortion), the maximum sentence is five years imprisonment. By contrast, the Class A offenses (1st degree murder, 1st degree sexual abuse, 1st degree kidnapping, and 1st degree arson) have a determinate penalty of life imprisonment. Persons convicted of these offenses are not eligible for parole unless the sentence is commuted by the governor.

The legislature also created several mandatory minimum sentencing provisions when it enacted the new code. Under the code, there is a mandatory minimum sentence of five years for anyone convicted of using a firearm while committing a forcible felony (ICA, 1978, par. 902.7). A forcible felony includes any felonious assault, murder, sexual abuse, robbery, arson in the first degree, or burglary in the first degree (ICA, 1978, par. 907.3). For habitual offenders, defined as anyone convicted of a Class C or D felony who has twice before been convicted of a felony, there is a mandatory minimum sentence of

three years (ICA, 1978, par. 902.8). The code also stipulates that an offender who has a prior conviction for a forcible felony must serve half of the maximum for the instant felony conviction before being eligible for parole. Similarly, defendants convicted of delivery of controlled substances (other than marijuana) must serve a minimum of one third of the applicable maximum before being eligible for parole.

In addition to these mandatory minimum provisions, the code also prohibits probation (regardless of whether it results from a deferred judgment, a deferred sentence, or a suspended sentence) for anyone convicted of a forcible felony or of possession with intent to deliver a controlled substance (ICA, 1978, par. 907.3).

Finally, the code includes a provision for split sentences. Under this provision, judges may sentence offenders to a period of shock probation whereby an offender receives a short term of incarceration to be followed by a period of probation (ICA, 1978, par. 907.3).

#### Impact of new provisions

Unfortunately, there has been little analysis of the impact of the new code and the mandatory minimum provisions on sentencing practices. The information which is available suggests that the effect of the mandatory sentencing provisions has been marginal. As mentioned previously, there was an 18-percent increase in Iowa's prison population during 1979-80. Since the new code went into effect on January 1, 1978, it would appear at first glance that the increase was attributable to the stiffer penalties continued in the new code. However, the state's Statistical Analysis

Center has estimated that 79 percent of the 18-percent increase was due to a reduced rate of parole release and not to increased commitments, (Fischer, 1982a). Furthermore, Fischer estimates that, while 10 percent of Iowa's inmates are serving mandatory minimum sentences, the overall effect of these sentences on the prison population is 5 percent or less. Fischer gives two reasons for this situation.<sup>48</sup> First of all, it appears that prosecutors and judges have often chosen not to invoke the new mandatory minimums. Secondly, the new provisions do not contain prohibitions on the earning of good time, which in Iowa may be earned at the rate of one day for each day served. Consequently, the actual amount of time served for a mandatory minimum term may be considerably less than the sentence provided in the statute. Fischer notes, however, that the allowance of good time for offenders serving mandatory minimum sentences has drawn considerable criticism recently and may be changed by the legislature.

#### Risk assessment in Iowa

Since 1974, Iowa has had an integrated statewide data collection system. On the basis of this system, Darryl Fischer and his associates at the Statistical Analysis Center have developed the Offender Risk Assessment Scoring System mentioned earlier. The system was constructed on the basis of information relating to numerous characteristics of 6,337 adult probationers and parolees released from supervision during the three year period of 1974 to 1976. An additional data set consisting of 9,387 probationers and parolees released from supervision between 1977 and 1979 was used to validate the risk assessment system.

The Iowa risk assessment system defines recidivism as any new arrest within a specified period. While Fischer developed the system using several time based frequencies for new criminal charges, it appears that his scoring system was primarily based on frequencies of new arrests within an 18-month period following placement on probation or release on parole (Fischer, 1980a; 1980b; Fischer, 1980c). These frequencies were then weighted by the offense severity of new charges. The weighted frequencies were analyzed using a variety of offender characteristics in order to determine the statistical/actuarial probabilities of recidivism among certain types of offenders. These "configurations" were used to develop two scales of risk: one for general risk and one for violent risk. The first scale has eight levels of risk, ranging from "Super Recidivist" to "Very Low Risk," while the second scale has nine levels ranging from "Super Recidivist" to "Nil Risk" (Fischer, 1980a). As can be seen from the "model guidelines" in Tables 7 and 8, the entire general risk scale and the upper levels of the violent risk scale were incorporated into the sentencing guidelines that were tested in Polk County, as well as the parole guidelines currently being tested. (Note that in Table 7 "shock" refers to shock probation and "RC" refers to residential corrections programs.)

Using "configural analysis," Fischer concluded that high-risk offenders tend to be young with prior adult and juvenile records. The intensity of the prior record--that is, its concentration in a relatively short period of time--was shown to be more predictive of recidivism than the absolute length of prior records. Also, among all variables employed, age at first arrest was the best predictor of recidivism (Fischer, 1980b). The younger

TABLE 7

State of Iowa  
 Prescriptive Sentencing Guidelines  
 Felony and Aggravated Misdemeanor Convictions  
 Based on Offense Severity, Prior Felony Record, and General/Violence Risk Assessment

General risk rating/ prior felony record	Offense severity							
	Class A felony	Class B felony	Class C		Class D		Aggrav. misdemeanor	
			Against persons	Not against persons	Against persons	Not against persons	Against persons	Not against persons
<b>High-medium risk</b>								
Two+ prior prison terms	Prison	Prison	Prison	Prison	Prison	R.C.	Prison	Max. prob.
One prior prison term	Prison	Prison	Prison	R.C.	Prison	Max. prob.	R.C.	Med. prob.
No prior prison term	Prison	Prison	Shock+R.C.	Max. prob.	Shock <u>or</u> R.C.	Med. prob.	Max. prob.	Min. prob.
No prior felony conv.	Prison	Prison	Shock <u>or</u> R.C.	Med. prob.	Max. prob.	Med. prob.	Med. prob.	Min. prob.
<b>Low-medium risk</b>								
Two+ prior prison terms	Prison	Prison	Prison	R.C.	Prison	Max. prob.	R.C.	Med. prob.
One prior prison term	Prison	Prison	Prison	Max. prob.	R.C.	Med. prob.	Max. prob.	Min. prob.
No prior prison term	Prison	Shock+R.C.	Shock <u>or</u> R.C.	Med. prob.	Max. prob.	Min. prob.	Med. prob.	Min. prob.
No prior felony conv.	Prison	Shock <u>or</u> R.C.	Max. prob.	Min. prob.	Med. prob.	Paper prob.	Min. prob.	Paper prob.
<b>Low risk</b>								
Two+ prior prison terms	Prison	Prison	Prison	Max. prob.	R.C.	Med. prob.	Max. prob.	Min. prob.
One prior prison term	Prison	Prison	R.C.	Med. prob.	Max. prob.	Min. prob.	Med. prob.	Min. prob.
No prior prison term	Prison	Shock <u>or</u> R.C.	Max. prob.	Min. prob.	Min. prob.	Paper prob.	Min. prob.	Paper prob.
No prior felony conv.	Prison	Max. prob.	Med. prob.	Min. prob.	Min. prob.	Paper prob.	Min. prob.	Paper prob.
<b>Very-low risk</b>								
Two+ prior prison terms	Prison	Prison	R.C.	Med. prob.	Max. prob.	Min. prob.	Med. prob.	Min. prob.
One prior prison term	Prison	R.C.	Max. prob.	Min. prob.	Med. prob.	Min. prob.	Min. prob.	Paper prob.
No prior prison term	Prison	Max. prob.	Med. prob.	Min. prob.	Min. prob.	Paper prob.	Min. prob.	Paper prob.
No prior felony conv.	Prison	Med. prob.	Min. prob.	Paper prob.	Min. prob.	Paper prob.	Paper prob.	Paper prob.

TABLE 7

State of Iowa  
 Prescriptive Sentencing Guidelines  
 Felony and Aggravated Misdemeanor Convictions  
 Based on Offense Severity, Prior Felony Record, and General/Violence Risk Assessment  
 (continued)

General risk rating/ prior felony record	Offense severity								
	Class A felony	Class B felony	Class C		Class D		Aggrav. Misdemeanor		
			Against persons	Not against persons	Against persons	Not against persons	Against persons	Not against persons	
Super recidivist	Prison	Prison	Prison	Prison	Prison	Prison	Prison	Prison	Prison
Ultra-high risk									
<u>Violence risk</u>									
Super recidivist	Prison	Prison	Prison	N.A.	Prison	N.A.	Prison	Prison	N.A.
Ultra-high risk	Prison	Prison	Prison	Prison	Prison	Prison	Prison	Prison	Prison
Very-high risk									
Prior prison term	N.A.	N.A.	N.A.	Prison	N.A.	Prison	N.A.	Prison	Prison
No prior prison term	N.A.	N.A.	N.A.	Prison	N.A.	Prison	N.A.	Shock+R.C.	Shock+R.C.
High risk									
Prior prison term	N.A.	N.A.	N.A.	Prison	N.A.	Prison	N.A.	Prison	Prison
No prior prison term	N.A.	N.A.	N.A.	Prison	N.A.	Shock+R.C.	N.A.	Shock or R.C.	Shock or R.C.
No prior felony conv.	N.A.	N.A.	N.A.	Shock+R.C.	N.A.	Shock or R.C.	N.A.	Max. prob.	Max. prob.
Very-high risk									
Two+ prior prison terms	Prison	Prison	Prison	Prison	Prison	Prison	Prison	Prison	Prison
One prior prison term	Prison	Prison	Prison	Prison	Prison	Prison	Prison	Prison	R.C.
No prior prison term	Prison	Prison	Prison	Prison	Shock+R.C.	Prison	Shock or R.C.	Shock+R.C.	Max. prob.
No prior felony conv.	Prison	Prison	Prison	Prison	Shock or R.C.	Shock+R.C.	Max. prob.	Shock or R.C.	Max. prob.
High risk									
Two+ prior prison terms	Prison	Prison	Prison	Prison	Prison	Prison	Prison	Prison	R.C.
One prior prison term	Prison	Prison	Prison	Prison	Prison	Prison	R.C.	Prison	Max. prob.
No prior prison term	Prison	Prison	Prison	Prison	Shock or R.C.	Shock+R.C.	Max. prob.	Shock or R.C.	Med. prob.
No prior felony conv.	Prison	Prison	Prison	Shock+R.C.	Max. prob.	Shock or R.C.	Med. prob.	Max. prob.	Med. prob.

TABLE 8

State of Iowa  
 Prescriptive Parole Guidelines  
 Expected Months to be Served Prior to Parole  
 Based on Offense Severity, Prior Felony Record, and General/Violence Risk Assessment  
 (continued)

General risk rating/ prior felony record	Offense severity						
	Class B felony	Class C		Class D		Aggrav. Misdemeanor	
		Against persons	Not against persons	Against persons	Not against persons	Against persons	Not against persons
Super recidivist							
<u>Violence risk</u>							
Super recidivist							
Two+ prior prison terms	82-86	58-62	----	38-41	----	20-22	----
One prior prison term	78-82	55-59	----	36-39	----	19-21	----
No prior prison term	74-78	52-56	----	34-37	----	18-20	----
No prior felony conv.	70-74	49-53	----	32-35	----	17-19	----
Ultra-high risk							
Two+ prior prison terms	70-74	49-53	41-44	34-36	31-33	18-20	17-18
One prior prison term	66-70	46-50	39-42	32-35	29-31	17-19	16-17
No prior prison term	62-66	43-47	37-40	30-33	27-29	16-18	15-16
No prior felony conv.	58-62	40-44	35-38	28-31	25-27	15-17	14-15
Very-high risk							
Two+ prior prison terms	----	----	38-41	----	29-31	----	16-17
One prior prison term	----	----	36-39	----	27-29	----	15-16
No prior prison term	----	----	34-37	----	25-27	----	14-15
No prior felony conv.	----	----	32-35	----	23-25	----	13-14
High risk							
Two+ prior prison terms	----	----	35-38	----	27-29	----	15-16
One prior prison term	----	----	33-36	----	25-27	----	14-15
No prior prison term	----	----	31-34	----	23-25	----	13-14
No prior felony conv.	----	----	29-32	----	21-23	----	12-13

**TABLE 8**  
**State of Iowa**  
**Prescriptive Parole Guidelines**  
**Expected Months to be Served Prior to Parole**  
**Based on Offense Severity, Prior Felony Record, and General/Violence Risk Assessment**  
**(continued)**

General risk rating/ prior felony record	Offense severity						
	Class B felony	Class C		Class D		Aggrav. Misdemeanor	
		Against persons	Not against persons	Against persons	Not against persons	Against persons	Not against persons
<b>Ultra-high risk</b>							
<b><u>Violence risk</u></b>							
<b>Super recidivist</b>							
Two+ prior prison terms	73-77	53-57	----	34-37	----	18-20	----
One prior prison term	69-73	50-54	----	32-35	----	17-19	----
No prior prison term	65-69	47-51	----	30-33	----	16-18	----
No prior felony conv.	61-65	44-48	----	28-32	----	15-17	----
<b>Ultra-high risk</b>							
Two+ prior prison terms	61-65	44-48	36-39	30-33	27-29	16-18	15-16
One prior prison term	57-61	41-45	34-37	28-31	25-27	15-17	14-15
No prior prison term	53-57	38-42	32-35	26-29	23-25	14-16	13-14
No prior felony conv.	49-54	35-39	30-33	24-27	21-23	13-15	12-13
<b>Very-high risk</b>							
Two+ prior prison terms	----	----	33-36	----	25-27	----	14-15
One prior prison term	----	----	31-34	----	23-25	----	13-14
No prior prison term	----	----	29-32	----	21-23	----	12-13
No prior felony conv.	----	----	27-30	----	19-21	----	11-12
<b>High risk</b>							
Two+ prior prison terms	----	----	30-33	----	23-25	----	13-14
One prior prison term	----	----	28-31	----	21-23	----	12-13
No prior prison term	----	----	26-29	----	19-21	----	11-12
No prior felony conv.	----	----	24-27	----	17-19	----	10-11
<b>Very-high risk</b>							
Two+ prior prison terms	55-60	40-44	26-29	26-29	19-21	14-16	11-12
One prior prison term	51-56	37-41	24-27	24-27	17-19	13-15	10-11
No prior prison term	47-52	34-38	22-25	22-25	15-17	12-14	9-10
No prior felony conv.	43-48	31-35	20-23	20-23	13-15	11-13	8-9

TABLE 8

State of Iowa  
 Prescriptive Parole Guidelines  
 Expected Months to be Served Prior to Parole  
 Based on Offense Severity, Prior Felony Record, and General/Violence Risk Assessment

General risk rating/ prior felony record	Offense severity						
	Class B felony	Class C		Class D		Aggrav. misdemeanor	
		Against persons	Not against persons	Against persons	Not against persons	Against persons	Not against persons
<b>High risk</b>							
Two+ prior prison terms	43-48	31-35	23-26	20-23	17-19	10-12	9-10
One prior prison term	39-44	28-32	21-24	18-21	15-17	9-11	8-9
No prior prison term	35-40	25-29	19-22	16-19	13-15	8-10	7-8
No prior felony conv.	31-36	22-26	17-20	14-17	11-13	7-9	6-7
<b>High-medium risk</b>							
Two+ prior prison terms	38-43	28-32	20-23	18-21	15-17	8-10	7-8
One prior prison term	34-39	25-29	18-21	16-19	13-15	7-9	6-7
No prior prison term	30-35	22-26	16-19	14-17	11-13	6-8	5-6
No prior felony conv.	26-31	19-23	14-17	12-15	9-11	5-7	4-5
<b>Low-medium risk</b>							
Two+ prior prison terms	35-40	25-29	18-21	16-19	13-15	7-9	6-7
One prior prison term	31-36	22-26	16-19	14-17	11-13	6-8	5-6
No prior prison term	27-32	19-23	14-17	12-15	9-11	5-7	4-5
No prior felony conv.	23-28	16-20	12-15	10-13	7-9	4-6	3-4
<b>Low risk</b>							
Two+ prior prison terms	32-37	22-26	16-19	14-17	11-13	6-8	5-6
One prior prison term	28-33	19-23	14-17	12-15	9-11	5-7	4-5
No prior prison term	24-29	16-20	12-15	10-13	7-9	4-6	3-4
No prior felony conv.	20-25	13-17	10-13	8-11	5-7	3-5	2-3
<b>Very low risk</b>							
Two+ prior prison terms	29-34	19-23	14-17	12-15	9-11	5-7	4-5
One prior prison term	25-30	16-20	12-15	10-13	7-9	4-6	3-4
No prior prison term	21-26	13-17	10-13	8-11	5-7	3-5	2-3
No prior felony conv.	17-22	10-14	8-11	6-9	3-5	2-4	1-2

the individual at first arrest, the greater the likelihood of recidivism. In general, the analysis supports the burn out hypothesis, the essence of which is that, as offenders mature, they are less likely to commit crimes.

According to Fischer, "Except for non-violent first offenders (no prior arrest) and 25- to 40-year-old offenders with long prison records, there was virtually no correlation whatsoever between the risk of recidivism and the probability of imprisonment. (Fischer, 1980b). To document this point, Fischer developed profiles of offender characteristics and their association with recidivism. As can be seen in the following list (Fischer 1980b), these configurations were then compared with the state's imprisonment rates for each group:

- 1) 18- to 19-year-old property offenders with prior arrests. (High risk and low rate of imprisonment.)
- 2) 20- to 29-year-old property offenders with long arrest records, but no prior imprisonment. (High risk and medium rate of imprisonment.)
- 3) Violent and drug offenders over age 20 with no prior imprisonment. (Low to medium risk and higher rate of imprisonment.)
- 4) 18- to 20-year-old violent offenders with no prior arrest. (Low to medium risk and higher rate of imprisonment.)
- 5) Offenders over age 20 with one prior prison term. (Low to

medium risk and higher rate of imprisonment.)

- 6) Offenders over age 30 with two or three prior prison terms. (Generally medium risk and high rate of imprisonment.)

In effect, Fischer suggested that sentencing practices in Iowa are usually in an inverse relationship to risk. Generally, the violent offenders and the ex-cons are the ones imprisoned at the highest rates. However, according to Fischer, it is this group which is least prone to recidivism. This inverse relationship is a result of the failure of judges to consider the burn-out effect or the increased danger posed by young offenders with prior adult, and particularly, juvenile records.

Based on these conclusions (and the value of incapacitation that is linked to risk assessment), Fischer has made several recommendations for reform. First of all, he proposes that equal weight in criminal justice decision-making be given to both juvenile and adult records for offenders under age 30, and that more weight be given to recent criminal justice system involvement for those 30 and over. Second, he urges that mandatory prison sentences be repealed since they often apply to offenders at the lower risk levels. Third, Fischer suggests a year or two of incapacitation for high-risk 18- or 19-year-olds, preferably in residential centers. Finally, in addition to the aforementioned sentencing and parole guidelines, Fischer urges the adoption of an inmate classification system which incorporates a risk assessment dimension (Fischer, 1981 and Fischer, 1982a).

The guidelines (and particularly the sentencing guidelines) are the centerpiece of

Fischer's proposed changes. Rather than effecting a reversal of sentencing and parole practices to bring them in line with risk assessment, the guidelines are intended to supplement traditional decision-making practices. In a word, they are offered as a practical and moderate way to structure discretion in a manner which considers risk. As Fischer comments with respect to the sentencing guidelines:

Actually, the model sentencing guidelines maintain much of the thrust of past policies, yet adjust them to be more consistent with public protection and cost effectiveness. Although fewer violent and so-called habitual offenders would be imprisoned under the model system, they would still be locked-up more frequently than other offenders (Fischer, 1980c).

Moreover, Fischer claims that the guidelines would result in a "24-percent safer sentencing system and 25-percent fewer prison commitments." (Fischer, 1980c).

As the Iowa risk assessment system has moved from the status of basic research to the political arena, several obstacles to its implementation have appeared. For one thing, the narrow focus on an incapacitative theory of punishment which is implied by risk assessment is at odds with the multifaceted approach which most practitioners bring to the decision-making process. In particular, sentencing and parole decisions are often informed by just desert criteria (e.g., severity of offense) which do not correlate that strongly with risk. Some practitioners are troubled by the definition of recidivism as a new arrest rather than a new conviction. Other practitioners have found that coding procedures make the system cumber-

some and that some of the factors included in risk classification (e.g., marital status and skill level) are irrelevant.

Fischer and his associates are now in the process of modifying the risk assessment system in order to meet these and other objections. For example, in an effort to make the proposed Classified Sentencing System more acceptable to legislators and criminal justice practitioners, SAC is moving away from non-violent general risk factors and is emphasizing instead the development of more sensitive measures of violent risk factors which are associated with desert criteria such as habitual criminality. Fischer has tentatively estimated that these changes will translate into a 15-percent reduction in the incarceration rate rather than the 25-percent reduction envisioned under the original system.

Unfortunately, analysis of the risk assessment sentencing guidelines experiment in Polk County had not yet been completed. However, initial analysis of the effect of the parole guidelines suggests that Fischer's claims for the system may be too optimistic. In fact, as of June of 1982, SAC concluded that "the effect of the parole guidelines system developed by the Statistical Analysis Center has been to reduce paroles, rather than increase them as originally intended" (Fischer, 1982). Apparently, the unintended consequence was the result of "the Parole Board's willingness to follow recommendations when release is not recommended for high-risk candidates, but not follow them when release is recommended for low-risk inmates." As a result of the problems encountered in the first year of the parole guidelines system, SAC is currently in the process of revamping the guidelines, so that the various factors in them

(e.g., prior record, offense severity, and current and prior violations of probation and parole) will more accurately reflect the needs and practices of the Board.

Finally, following the advice of Peter Hoffman, Research Director for the U.S. Parole Commission, SAC is presently engaged in an additional validation of the risk assessment system. The validation sample includes 1,000 ex-prisoners who will be tracked for a two-year period. In a departure from previous research (and on the advice of Hoffman and others), attention will be focused on new convictions rather than arrests. In addition, efforts will be made to reduce the complexity of the system, eliminate factors of questionable reliability (e.g., marital status and skill level), and finally "make the system more logical and equitable in order to avoid possible lawsuits" (Fischer, 1982).

Problems with risk assessment in Iowa. While it is difficult to dispute Fischer's claim that his risk assessment system has more predictive efficiency than any other risk assessment system developed so far, there are several problems associated with both the research supporting the system and the policy proposals made on the basis of this system.

The effect of Fischer's configural analysis is to construct modal scenarios for recidivism which associate specific offender characteristics with actuarial probabilities of rearrest. The advantage of this approach is that it is not dependant on samples of cases or on the partial explanations of probabilistic relationships between variables which characterize correlation and regression techniques. On the other hand, the method is not geared toward explanation of variance within a distribution of values, but rather, it

attempts to derive the probability of an event (i.e., recidivism) through the association of this event with other discrete events (i.e., offender characteristics). As a result, there are no controls in a statistical sense. Thus, one must be careful not to confuse the configurations of offender characteristics and risk of recidivism with causal inferences regarding the relationship between these characteristics and recidivism.

The lack of statistical controls does not mean that Fischer's system is not valid from an actuarial point of view or that it does not have a high measure of predictive efficiency. However, the system does not allow us to say with confidence that a particular factor shown to be associated with recidivism is not a reflection of other factors, or of the interactive effects of such factors. This is a very serious problem, particularly when the risk assessment system derived from this configural analysis is introduced as a policy tool into sentencing decisions. It is also a serious weakness from an empirical point of view. For instance, in using configural analysis to answer the question of whether sentencing disparities exist, Fischer and his associates corrected actual sentences by weighting them in accordance with offender prior record characteristics and then examined the variation of these corrected sentences by jurisdiction (Statistical Analysis Center, 1980). In addition to being based on an extremely narrow definition of disparity, this approach does not enable the analyst to explain variation systematically, an essential requirement for research on sentencing disparities.<sup>49</sup>

The general methodological problems discussed above are compounded by the reliance on recidivism as the outcome, particularly when recidivism is defined simply as rearrest. For one thing, recidivism as an accurate measure is notoriously problematic. Unless we can account for the variation among unreported and unarrested offenders, recidivism as a general measure may be biased against some groups. For instance, it may be that older offenders are simply better at not getting caught than younger offenders. As this last point suggests, the reliance on recidivism may mean that Fischer's findings with respect to age are confounded. Young offenders are always arrested more than those without criminal records. Without statistical controls, the reliance on recidivism defined as rearrest begs the question of the relationship between age and risk to the community.

Fischer defended his use of recidivism in the following manner:

'judgements' as to what constituted success, failure, guilt, etc., were of little or no concern to the researchers. Rather, the concern was with the identification of groups of offenders showing either atypically high or atypically low rates of unfavorable outcome of reinvolvement with the criminal justice system (Fischer, 1980a).

In addition, Fischer responded to methodological criticism by claiming that the risk assessment system is predictive of outcomes other than rearrest (e.g., new convictions or revocations). However, regardless of the validity or reliability of the measure from a methodological point of view, the reliance on recidivism de-

finied in terms of rearrest raises some more serious normative questions.

To increase the predictive efficiency of the system by using data on rearrest is one thing, but to have the quest for predictive efficiency dictate sentencing policy considerations is quite a different matter, indeed. Even if one adopts a purely incapacitative view of sentencing, it must be asked whether we are concerned with protecting the community from alleged criminals or from criminals who have been legally convicted. In other words, by incorporating recidivism, defined as rearrest, into sentencing decisions, a system may be created which is fair in a very crude way to those offenders who had committed crimes without being arrested or convicted, but unfair to those who had not done so. To put the matter bluntly, there is a statistical presumption of guilt (at least in the aggregate) at the heart of the system.

This is not to say that Iowa's guidelines are written so as to circumvent the legal process, or to be inhumane. On the contrary, risk assessment is a concomitant of most, if not all, sentencing decisions. Moreover, if Fischer's system was adopted, it would have many humane consequences (e.g., the increased use of residential treatment centers for serious offenders and the alleviation of prison overcrowding). Nonetheless, the issue is of grave importance. The concern with crime prevention must not take place without consideration of legally and constitutionally established processes, rights, and principles. Hopefully, recent efforts to move away from recidivism defined as rearrest to an emphasis on convictions (Fischer, 1982) will obviate some of the problems discussed here.

Finally, it must be pointed out that the use of systematic risk assessment in sentencing may have unintended consequences which result in an alteration of the relationship between risk and offender characteristics. In other words, the system itself may end up being a factor influencing patterns of risk. Such interactive effects combined with the methodological problems already discussed and with larger, less predictable social forces which will undoubtedly have some effect on the criminal justice system may mean that

Fischer's projections regarding reductions in crime rates and prison population will be invalidated in practice. In any event, it is probable that the risk assessment system will require periodic and possible costly validation efforts and revisions.

The purpose of this section has not been to dismiss unequivocally Iowa's risk assessment system, but rather to give reasons for caution. There are no panaceas for criminal justice. Risk assessment is no exception.

**KANSAS**

Indeterminate sentencing

The philosophy of sentencing in Kansas is articulated in the state statutes--the sentence should fit both the offense and the person being sentenced; incarceration shall be used for dangerous offenders, probation for others; sentencing is for the public good and the welfare of the defendant. Kansas has an indeterminate sentencing system with five classes of felony offenses. When sentencing a defendant to incarceration, the court may choose a minimum from a range of minimums, and a maximum from a range of maximums as shown below.

Kansas Sentencing Structure for Felonies

	<u>Minimum Range</u>	<u>Maximum Range</u>
Class A	Life Imprisonment	
Class B	5-15 years	20-life
Class C	1-5 years	10-20 years
Class D	1-3 years	5-10 years
Class E	1 year	2-5 years

Non-incarcerative sentences may also be given by the court. Pre-sentence investigations are required for every felony offense.

A parole board determines the actual release date for those who receive incarceration sentences. Good-time credits are allowed, and in some cases are quite liberal--for example, for the third or subsequent year of imprisonment a sentence may be reduced by six months a year. Meritorious good time is also awarded (except for certain offenses) at the rate of 30 days per incident.

Piecemeal sentencing reforms: mandatory minimum. Though the basic indeterminate

sentencing structure has remained intact in Kansas, in recent years several changes have occurred to require stricter sentences for certain offenders and offenses. The 1976 Legislature, responding to public concern over crime and to crimes committed with a firearm, in particular, as well as to the national gun control movement, decided that mandatory minimum sentences for offenses committed with a firearm would be a more advantageous alternative than gun control legislation. Therefore, any person convicted of committing an offense using a firearm cannot be sentenced to less than the statutory minimum for that offense. Essentially, the minimum sentence is non-suspendable, the offender cannot receive a probation sentence for an offense committed with a firearm, and parole may not be granted until the minimum term has been served. Originally this meant that the defendant was not entitled to earn good-time credits until the minimum was served. However, legislation passed in 1982 repealed this provision and allowed these defendants to earn good time at the same rates as other inmates. Similar legislation applied to the crimes of rape and aggravated sodomy.

Repeat offenders. The 1980 Kansas Legislature made major revisions to the habitual criminal sentencing statute in order to insure more severe sanctions for repeat offenders. Persons convicted of a second felony offense, upon motion of the prosecuting attorney, may be sentenced to a minimum sentence of not less than the least minimum nor more than twice the greatest minimum term (see Exhibit 18-1). The maximum sentence will not be less than the least statutory maximum nor more than twice the greatest maximum allowed for the offense. Upon conviction for a third or subsequent felony offense, the court may sentence to a minimum term not less than

the least statutory minimum nor more than three times the greatest statutory minimum. The maximum sentence given cannot be less than the least statutorily set maximum nor more than three times the greatest statutory maximum provided for such offense. If a sentence is increased because of prior convictions, these convictions must be supported on the record. The 1982 Legislature also passed legislation to increase the likelihood of consecutive sentences for repeat offenders.

Good time/parole eligibility changes.  
From 1970 to 1974, parole eligibility was based on the minimum sentence minus standard calculations for good-time credit. This changed in 1974 when parole eligibility was made a discretionary decision of the Secretary of Corrections based on rehabilitation considerations. From 1979 to 1982, the minimum minus good time determined parole eligibility for some offenses; the decision of the Secretary of Corrections in conjunction with the parole board determined parole eligibility for other offenses. Starting in 1982, however, statutory change, rather than administration regulation, changed parole eligibility as the minimum minus good time for all offenses. For some sentences of over three years, the legislation reduced the amount of good time that could be earned.

#### Impact

All three revisions discussed above could potentially result in increased sanctions for certain offenders and offenses. Concerned about the effects on prison populations, both the legislative and executive branches of the Kansas government estimated the cost and effect of these changes on the state's correctional system. As a result of these projections, a new medium

security prison is currently being built in Kansas.

#### Senate Bill 690--Sentencing Guidelines Commission

Based on recommendations of the Governor, Senate Bill 690 was drafted which would have provided for the establishment of a Sentencing Guidelines Commission. Senate Bill 690 is virtually identical to the legislation enacted in Minnesota in 1978 which established Minnesota's sentencing guidelines. In Kansas, the Governor apparently made a recommendation for sentencing guidelines for a number of reasons. First, sentencing guidelines were seen as a middle ground between indeterminate and determinate sentencing. It was also perceived that sentencing guidelines would reduce disparity in sentencing in that similarly situated offenders would receive similar sentences. Guidelines would also, then, allow for more accurate predictions of the correctional population. Proponents of guidelines said that they would promote more consistent sentencing and would appear to be tougher on crime than existing penalties, but also felt that guidelines would be advisory, permit judicial discretion, and allow for departures. The Governor's office determined that the establishment of a Sentencing Guidelines Commission by legislative action would be the most rational method to develop guidelines.

However, the Criminal Law Advisory Committee of the Kansas Judiciary Committee felt that it would first be advisable to study the possibility of establishing the sentencing guideline system within the framework of the Kansas Judiciary Council rather than establishing a separate committee to develop the guidelines. The Judiciary Committee is, therefore, now

engaged in looking at whether or not Kansas should adopt sentencing guidelines, how the guidelines should be developed, and how the guidelines should be implemented and used. The Kansas Judiciary Council is not, of course, constrained by the particular provisions of the proposed legislation in SB 690. A report from the Council is not expected until the spring of 1983.

Kansas, with the Governor's blessing and with a major piece of legislation proposing the establishment of a sentencing guidelines system, has come very close to developing sentencing guidelines. However, action taken by the Kansas Judiciary Council has postponed this decision for the immediate future and whether or not Kansas will adopt a guidelines system is uncertain.

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KENTUCKY

Indeterminate sentencing and reform attempts

In 1975, Kentucky revised its indeterminate sentencing system from one with individual offense penalties to one with a range of sentences based on the class of crime. Minimum and maximum limits were set for each offense class with considerable judicial discretion retained. The amount of time an inmate served continued to be dependent upon the parole release decision and good-time allotments. Sentencing by jury remained in the code for the few cases in which a jury trial was held. Otherwise, the decision as to sentence type and length continues to be subject to judicial discretion.

Though no major changes have occurred to revise Kentucky's basic indeterminate sentencing scheme, efforts have been made in the past to change both to a determinate sentencing structure, as well as to a guidelines system. Each of these proposed changes originated, of course, with different interest groups, but neither perspective has actually been adopted. Other piecemeal changes affecting the severity of sentences have been enacted within the past five years.

The Special Commission on Sentencing.

In 1977, the Office of the State Attorney General, responding to charges that Kentucky's indeterminate sentencing system was ineffective, arbitrary, and discriminatory, began work on major modifications to the state's sentencing system. House Bill 442 was drafted (referred to as the Determinate Sentencing Bill), and was introduced to the General Assembly in February of 1978. This determinate sentencing bill was based on the then current

ideas that rehabilitation was no longer viable, and that certainty of punishment would be the best and most equitable system of sentencing. Heated legislative debate over H.B. 442 highlighted the complexity of what was seen to be sweeping sentencing reform, and it subsequently did not pass. However, the attention which had been focused on sentencing reform as an issue led to the establishment in 1979 of a commission entitled "The Special Commission on Sentencing and the Release of Criminal Offenders." This fourteen member Commission was instructed to: 1) examine current sentencing practices in Kentucky; 2) study the parole system; 3) look at good-time procedures; and 4) examine alternative systems of sentencing and release. The Commission heard from academicians, theorists, and correctional practitioners, and focused primarily on the determinate versus indeterminate sentencing debate.

In order to look at actual sentencing practices in Kentucky, the Commission gathered data on a random sample (20 percent) of all inmates released from correctional facilities in 1978, and data collected from the Administrator's Office of the Courts. Focusing solely on length of sentence, without using sophisticated analysis, the Commission examined sentence lengths and frequencies of imposed sentences that concluded that the majority of sentences fell within the acceptable range of legislatively set limits. Other findings were that: 1) most offenders served 30 percent of their sentence; 2) the average time served was slightly over a year; 3) parole decisions seemed to depend on the seriousness of the offense; and 4) 47 percent of all inmates were released at the time of their first parole hearing, whereas 15 percent serve their entire sentence (minus good time). Although these

findings are interesting and despite the fact that the study provided some information to those concerned with sentencing practices in Kentucky, it could not provide detailed information about sentencing variability. Frequencies relating to sentence length decisions in Kentucky may be useful, but the data analysis focused only on sentence length, and made no attempt to look at the entire sentencing decision. Further, since no statistical controls were used, the study did not address the broader issue of sentencing disparity in Kentucky.

In addition to examining sentencing data, the Commission also solicited judicial opinions on sentencing reform in a mail survey sent to all of Kentucky's circuit court judges. The questionnaire oddly enough did not ask judges what they thought about a change to a determinate system of sentencing, but did ask them if they would favor sentencing guidelines. Seventy-seven percent of the judges responded favorably to this question.<sup>51</sup> In spite of this seemingly judicial endorsement of sentencing guidelines, no steps have been taken to develop sentencing guidelines in Kentucky. Other judicial responses to the survey indicated that judges also favored guidelines for the incarceration/probation decision; preferred judicial over jury sentencing; favored modifications to the legislation concerning firearm use; and favored modifications to the Persistent Felony Offender statute.

The Commission concluded that because of fiscal and time constraints a more thorough study of Kentucky's sentencing system was not possible. It also found that no conclusion could be reached on the advantages to be gained with a change to a determinate sentencing system, even after

examining data on the effects of the determinate sentencing legislation adopted in California, Indiana, Illinois, and Maine. Further, the Commission was concerned about what it determined would be the considerable cost of the implementation of a determinate sentencing structure.

Among the most tangible results of the study conducted by the Commission were some practical conclusions and suggestions for changes to the existing system. Some of their recommendations have been acted upon and are discussed below.

Parole changes. Since much of the discretion related to sentencing is deferred to the parole decision, the parole decision-making process was scrutinized by the Commission. The Commission decided that an alternative to completely revising the parole system was to require that offenders serve a certain percentage of their sentence prior to parole. Indirectly this strategy has some of the same effects as mandatory minimum sentencing, but these effects occur after the sentencing decision has been made, and do not necessarily affect all offenders who are sentenced and convicted of a crime, but only those persons who are adjudged as serious enough to be sentenced to a term of incarceration. The parole board still maintains discretion as to when to release after the minimum percentage of the sentence is served.

Following the recommendations of the Commission, parole eligibility requirements were changed in 1980, requiring that most offenders must serve 20 percent of their sentence before they can be considered for parole. A minimum time to be served before parole consideration was established at four months, and a maximum set

at eight years. Considering the Commission's findings that most offenders serve 30 percent of their sentence before release, the 20 percent minimum, barring other actions of the Parole Board, should not in and of itself increase time served. In fact, for many offenders it may decrease time served.

Persistent Felony Act. Another area of great concern to Kentucky's legal practitioners was the Persistent Felony Offender Act. Adopted in 1975, this Act provided for stronger penalties, restricted probation and parole for persistent offenders, and a minimum of ten years served before repeat offenders could be considered for parole. A repeat offender was defined as an offender with two prior convictions or more. When the Commission's judicial survey was completed in 1979, many judges expressed concern that this Legislation should be changed to clarify portions of the Bill. The Commission also felt that there were several omissions in the statute contributing to problems which hampered its use by prosecutors. Modifications, encouraged by the Attorney General's office, were made in 1982 to provide for two classes of persistent felony offenders based on prior convictions, and to include those persons who committed crimes while in custody or while on some form of controlled release. Legislation was also passed in 1982 requiring consecutive sentences for those who escaped from custody.

Other provisions. The only other major provision in Kentucky's statutes relating to sentencing is that persons convicted of Class A, B, or C felonies must be incarcerated if a firearm is used in the commission of the offense.

#### Extra-legal variables and sentencing in Kentucky

Following Hagan's (1974) notion that legal variables may account for much of the variation in sentencing (although regional differences in sentencing were acknowledged), Keith Crew (1980) conducted a study to look at extra-legal variables and how they related to the sentence length decision in Kentucky. Crew selected a random sample of 300 male inmates sentenced in 1978 and 1979. Extra-legal variables were defined as age, race, education, occupation, and location (which was dichotomized as urban or rural). The legal factors used in the analysis were prior record (whether a first offender or an offender with a prior record), offense seriousness (measured on the 1964 Sellin and Wolfgang scale), type of counsel, plea ratification versus trial, ability of the defendant to make bail, and pre-sentence report's assessment of the defendant's likelihood of attaining early parole.

Using step-wise regression analysis, Crew did not find associations between race, age, or occupation and length of sentence. However, location seemed to have some effect. Those with a higher education also were found to receive significantly longer sentences. Interestingly, the study found that the degree of violence of the offense explained more variation in sentence length than all of the other variables combined.

Crew further replicated Hagan's (1977) analysis of sentencing in Canadian urban and rural courts by conducting further analysis on the rural/urban differences in the Kentucky sample. Crew, using separate path analysis and splitting the sample into rural and urban subsamples, employed regression analysis again and found that

race was a significant factor. Controlling for other legal variables, the analysis indicated that blacks sentenced in the urban areas generally received a year and a half more imposed length of incarceration. This effect disappeared, however, when level of violence of offense was controlled for. Whether or not a defendant could make bail also had more of an influence in the rural areas. The study suggests that some of the differences

between rural and urban sentencing may be the higher density of crime and the accompanying size of the court caseloads. Overall, Crew concludes that his study does not demonstrate significant variation in Kentucky sentencing based on extralegal variables. The study supported the position of Hagan (1974) that offense seriousness accounts for much of the variation in sentencing.

## LOUISIANA

### Indeterminate determinacy

Felony sentencing statutes in Louisiana have undergone few significant changes in recent years. Both indeterminate and determinate sentencing are employed. Some offenses carry mandatory minimums. Statutory "Sentence Guidelines" (Louisiana Statutes, Article 894.1) exist only as very general aids to the court in the sentencing decision related to imprisonment or an alternative sentence. The court sentences an offender to a fixed term of years within the limits prescribed by statute for the particular offense. This sentence represents the maximum time the offender must serve. Good-time credits may reduce this maximum, and where parole is allowed the actual release date is determined by the Parole Board.

Statutory sentence limits vary greatly among different offenses. Some provide a wide range of judicial discretion by setting only maximum limits or very broad maximum and minimum sentences. Other offenses carry a set punishment for conviction. For example, an armed robbery conviction may bring a sentence of anywhere from 5 to 99 years of hard labor without parole while simple robbery carries a maximum sentence of a \$3,000 fine and/or 7 years imprisonment with parole privileges retained.<sup>52</sup> Second degree murder and aggravated rape and kidnapping convictions require life at hard labor without the possibility of parole. Louisiana does classify possession or use of a firearm in the commission of a felony as a separately punishable offense. Louisiana retains the death penalty.

Parole. In Louisiana the majority of sentences allow for parole privileges.

First time offenders are eligible for parole consideration upon serving one-third of their sentence. Earlier parole may be granted to first offenders sentenced to less than five years imprisonment. Parole consideration is not allowed for life sentences unless the sentence is commuted to a fixed term of years.

Habitual or repeat offenders. Repeat offenders receive harsh treatment in Louisiana through more restrictive parole procedures, longer sentences, and the elimination of the possibility to earn good-time credits. State statutes provide that persons convicted of a second felony offense shall not be eligible for parole until serving one-half of their sentence. Parole consideration is denied for third and subsequent felony convictions.

Repeat offenders must receive sentences between minimums and maximums based on the longest sentence prescribed by statute for first convictions. A second felony offense results in a sentence which is not less than one-third nor more than twice the maximum term for a first conviction. A third felony conviction entails a sentence not less than one-half nor more than twice the maximum sentence for a first conviction. Fourth convictions bring sentences which must not be less than the maximum first offense penalty nor less than 20 years. A 1978 amendment strengthened the third and fourth offense sentences requiring that if the third or fourth and two of the prior felony convictions involved crimes punishable by more than 12 years imprisonment the offender would be imprisoned for life without the possibility of probation or suspension of sentence.

Good time. Diminution of maximum terms of imprisonment through the earning of

good-time credits may be granted for good behavior and performance of work or self improvement activities. Maximum allowable credits are as follows: two months for the first year of imprisonment; two months for the second year; three months for the third and fourth years; and four months for each subsequent year. Good-time credits do not reduce life sentences unless they are commuted to fixed term sentences, and cannot be earned by repeat

offenders or by persons convicted of certain offenses.

Assessment. We know of no studies of sentencing in Louisiana. As with many southern states, rates of imprisonment (per 100,000 civilian population) are higher than in states located in other regions of the country. Also, as with all states, there has been a steady increase in the past years in the numbers of persons sentenced to incarceration.<sup>53</sup>

## MAINE

It has now been seven years since Maine became the first state to replace an indeterminate sentencing system with one based on determinate or fixed sentences. As the first state to take this step, Maine became the focal point for much of the debate over sentencing reform in the United States. In light of the intensely ideological nature of this debate, with the entrenched defenders of rehabilitation and individualized sentencing polarized in a struggle with a new guard advocating retribution and determinate sentences, it is hardly surprising that there was a propensity among observers of the criminal justice system to overlook the complexities and peculiarities of Maine's experience with reform. Indeed, many saw Maine as a harbinger of a new era in criminal justice or, at least, as a test case of reform (Corrections Magazine, 1975).

The passing of time has tended to mute some of the more extreme hopes and fears once attached to the changes in Maine. While bolstering the cause of reform in many respects, the implementation of Maine's new criminal code did not become the catalyst which started a series of similar determinate sentencing reforms. As the details of Maine's new law were learned, it became clear that it was substantially different in several important areas from the prevailing proposals for determinate or definite sentencing in the literature.<sup>54</sup> Moreover, as other states followed Maine with their own reforms, it became apparent that the label of determinate sentencing could encompass a number of disparate policies and laws. Finally, the passing of time has allowed for an initial analysis of the effect of the new provisions on actual sentences. Attention to these empirical considerations must

give pause to those who expected dramatic changes to result from the Maine code. On the other hand, notwithstanding the fact that conclusions regarding the impact of the code must still be considered tentative, it is safe to say that the new sentencing provisions have wrought several important changes--e.g., more multiple offense convictions and greater use of the split sentence. Moreover, there is some evidence that sentencing under the code has resulted in longer sentences and an increase in sentencing variation. In the following discussion, major findings of the available research are summarized. First, however, it is necessary to examine the nature of the reform.

### The context of the reform

Paradigms and statistical models are seldom the solution to political ferment of policy choice and this fact is particularly illustrative of sentencing reform in Maine. For one thing, as has often been noted in discussions of Maine, the demographic contours of the state's population--and particularly, the state's prison population--make the state's experience with sentencing reform a somewhat unusual one. The state is relatively rural and racially homogeneous and these characteristics, at least, are reflected in the prison population. Consequently, Maine's prisons are relatively free of the violence and racial tensions which characterize prison populations in most other states. In addition, Maine's prisons contain "...comparatively few intensely anti-social aggressive offenders of the kind frequently associated with large, more urban states..." (Kramer, Hussey, et. al., 1978). In other words, the bulk of the prison population is comprised of offenders who have committed property offenses.

This is not to say that Maine has been immune to all of the problems besetting criminal justice systems in other states. For one thing, the age and general condition of many of the state's correctional facilities have been the subject of controversy for several years.<sup>55</sup> And recently at least, the state has experienced an overcrowding problem (see below). Furthermore, it is important to keep in mind that the issue of sentencing disparities is not unique to more urbanized and racially heterogeneous states. Nonetheless, it remains true that in several respects, Maine's criminal justice system does not typify the situation to which most of the proposals and arguments for reform were addressed. Moreover, the formulation of criminal justice policies in a state such as Maine proceeds under qualitatively different circumstances than in states such as California or Illinois. Thus, while it is true that Maine was the first state to abandon the indeterminate sentence, the parole system, and in general, the treatment model of corrections, the relationship of Maine's particular sentencing reforms to the national debates over sentencing is a problematic one.

In addition to Maine's uniqueness relative to many of the nation's criminal justice problems, the problematic relationship of Maine's reforms to the thrust of the debates in the seventies is also attributable to the time during which the criminal code was formulated.<sup>56</sup> As Anspach and Kramer have noted (1980), revisions to the Maine code were developed at a pre-ideological stage in the evolution of the just desert theories of punishment which have come to be referred to as the justice model for reform. In fact, between its inception in 1971 and 1974, the Maine Revision Commission was primarily influ-

enced by the Model Penal Code and the individualized, rehabilitative system contained therein (Kramer, Hussey, et al., 1978). Of the major critiques of individualized justice to appear in the seventies, the Commission was only exposed to Struggle for Justice by the American Friends Service Committee (1971).<sup>57</sup>

It was not until sometime in 1974 that the Commission began to reconsider the rehabilitation model. Apparently, the Commission was motivated to a great extent by its perception of political exigencies. According to one member of the Commission:

Judgments were made sometime after the first sentencing proposal that the whole thing would be rethought in light of the political realities. The straw that broke it all was the question of cost to implement the system. We had absolutely no reason to hope that we were going to be able to influence the legislature to commit the kind of resources that would be necessary to permit that flexible system to operate (Kramer, Hussey, et al., 1978).

The Commission also believed that it must respond to demands within the legislature and the public for harsher sentences. The alternative, in the opinion of one Commission member, was for the Commission's proposal to be placed on the shelf (Kramer, Hussey, et al., 1978). Significantly, the demands for more severe sentences were linked to hostility towards a too-liberal parole board. This hostility was apparently shared by several members of the Commission as well. One member expressed it in the following way:

We decided that it (the parole board) was ridiculous... (just) ministers and

do-gooders sitting around and deciding which prisoner.. (should get) some consideration. The parole board interfered with the type of certainty that we were after, too (Kramer, Hussey, et al., 1978).

As this quote suggests, the attitude of the Commission towards the parole board dovetailed with two other objectives: increased visibility of the decision-making process and a reduction of uncertainty regarding the actual length of an offender's sentence. The former objective was met through the abolition of parole and the delegation of almost unlimited sentencing authority to the judiciary. By making judges almost entirely accountable for determining the actual length of sentences, the Commission also attempted to respond to public demands for stiffer penalties.

The objective of increased certainty was also to be served by the abolition of parole.<sup>58</sup> In addition, the code developed by the Commission empowered judges to impose any fixed sentence within broad statutory limits. The certainty thus attained is certainty after the point of sentencing. Even this certainty is not absolute however. In addition to the usual good-time provision, the Commission included a provision making any sentence in excess of one year tentative and subject to resentencing upon petition by the Department of Mental Health and Corrections. The provision alone makes it fair to say that the Commission's conception of certainty differed substantially from those in most other proposals for fixed or flat sentences.

To summarize, the movement towards the determinate sentencing in Maine was born of a variety of theoretical and political

concerns. The result was that Maine's new sentencing provisions were grounded in an anomaly: while they have been appropriately labelled a judicial model of determinate sentencing (Lagoy, Hussey, and Kramer, 1978), they also represent what might be called a pluralistic model of sentencing in general. In effect, the Commission combined mechanisms and tenets from several models and sought to shape them into a politically feasible proposal. In this task, of course, the Commission was successful. The upshot, however, was a code which deplores disparities while encouraging individualized sentences, eliminates parole while retaining the possibility of sentence reductions, and requires flat sentences while providing judges with immense discretionary powers.

The pluralistic approach of the revision commission is reflected in the code's formal theory of punishment: deterrence, incapacitation, rehabilitation, and retribution are all cited as legitimate ends of punishment. However, in a more practical sense, it seems clear that the code was designed in such a way as to produce the development of a de facto theory of punishment. As Hussey, Kramer, Katkin, and Lagoy predicted in 1976, "Because the new code allows and even encourages more discretion, an informal system of sentencing is bound to develop."

#### The content of the reform

In contrast to other states that have instituted sentencing reform, the major emphasis of Maine's new code was not the articulation and implementation of new principles of punishment and sentencing, but rather the rationalization and simplification of the state's body of criminal law. Prior to the passage of the new code, criminal law in Maine consisted of

"...hundreds of separate and often contradictory statutory enactments and common law principles" (Kramer, Hussey, et al., 1978). Not surprisingly, the chaos afflicting criminal law in Maine extended to its sentencing provisions as well. According to one observer, the 60-plus sentencing provisions in existence before the revision represented the ad hoc judgments of the legislature. Thus, sentencing reform was linked to the larger task of codification.

Confronted with this morass of statutes and case law, the revision commission abolished the traditional distinction between felonies and misdemeanors and replaced it with a classification system which established five offense categories plus murder (see Table 9). With the exception of murder and those cases where the state can prove that a crime involved the use of a firearm against a person, the new code stipulated only the upper limits of sentences for each class of offense.

In the original version of the new code (i.e., the unamended version which went into effect in 1976), murder was broken down into 1st and 2nd degree homicide, with a mandatory life sentence for 1st degree homicide and a mandatory minimum of 20 years (with no upper limit) for 2nd degree homicide. In addition, persons receiving a life sentence could petition the sentencing court for a sentence reduction after serving 25 years and persons receiving a sentence of twenty years or more could make such a petition after serving four-fifths of their sentence. In the interests of clarity, equity (previously, persons convicted of 2nd degree homicide could serve more time than those convicted of 1st degree), and certainty, the legislature changed this sentencing structure in 1977. As a result,

there are now the offenses of murder and felony murder, with murder carrying a mandatory minimum term of 25 years imprisonment (minus good time) and felony murder classified as a Class A offense (M.R.S.A., Title 17-A, sections 201, 202, and 1251). The provision regarding sentence reductions was also repealed.

With respect to crimes involving the use of a firearm, the code established minimum unsuspendable sentences of four years for a Class A offense, two years for a Class B offense, and one year for a Class C offense (M.R.S.A., Title 17A, section 1252). Moreover, if a Class B, C, D, or E offense was committed with a dangerous weapon, the sentencing class for the offense is raised by one level.

In addition to creating a new classification system, the new code introduced a variety of other changes aimed at the overall rationalization of Maine's criminal law. Several of these changes have had a significant effect on sentencing patterns in the state. Those which are of particular interest are the following:

1) Some offenses were consolidated. For example, larceny, extortion, shoplifting, and receiving stolen property were consolidated into the single offense of theft.

2) Other offenses which combined two or more criminal activities were broken down into distinct offenses. Most important is the change of what has been the single offense of breaking/entering and larceny into the two offenses of burglary and theft.

3) Offenses, such as burglary and theft, which has previously had one indeterminate sentence attached to

Table 9  
Comparative Assessment of Determinate Sentencing-Maine  
Crime Categories and Sentencing Ranges in Maine

Class	Maximum term	Fine	Example(s)
Murder	Life or any term of imprisonment that is not less than 25 years.		
Class A	20 years		Felony murder; kidnapping; rape; armed robbery.
Class B	10 years	Not more than \$10,000.	Trafficking in narcotic drugs; robbery (unarmed); theft in excess of \$5,000.
Class C	5 years	Not more than \$2,500.	Manslaughter by motor vehicle; burglary (unarmed no injury).
Class D	1 year	Not more than \$1,000.	Unlawful gambling
Class E	6 months	Not more than \$500.	Prostitution; theft (less than \$500).

them, were graded according to specific offense and offender characteristics. Thus, theft is classified in the aforementioned classification scheme according to the amount or value of the property stolen, whether a dangerous weapon was involved, and whether the offender had previously committed a similar offense. Similarly, burglary is now treated as a Class A offense if a weapon was involved, a Class B offense if the offender inflicted or attempted to inflict bodily harm and otherwise as a Class C offense.

4) The new code created some new offenses (e.g., criminal restraint), decriminalized others (e.g., certain sexual acts between consenting adults and status offenses) and depenalized others (e.g., small amounts of marijuana) (Kramer, Hussey, et al., 1978).<sup>59</sup>

With regard to the new sentencing provisions, it has by now become commonplace in discussions of Maine's new code to emphasize the central role of the judiciary. Clearly, there is ample support for this view. For one thing, the abolition of parole very nearly ensures that the sentence imposed by the judge (minus good time earned in prison) will be the length of time actually served. The code does provide for executive clemency and appellate review of sentences, but these forms of external review are rarely invoked.

As was mentioned earlier, there is one potentially significant institutional check on judicial control over the actual amount of time served. Under the code, any sentence in excess of one year is deemed tentative and subject to modification if the Department of Mental Health

and Corrections, upon its evaluation of an inmate's progress toward a non-criminal way of life, petitions the court to resentence the offender (M.R.S.A., Title 17A, section 1255). In the years immediately following the implementation of Maine's new code, many observers saw this provision as something which would obviate the determinacy of the system. As Zalman (1978) put it, the law "merely shifts the prison release function from the parole board to the corrections department and the judge." However, the provision has only rarely been invoked by corrections officials (Cooper, 1982), and there is no reason to expect any change in this pattern. Initially, the provision was subject to a state constitutional challenge. This challenge was dismissed on procedural grounds in 1981<sup>60</sup> and, according to Matthew Dyer, Maine's Assistant Attorney General in charge of the Criminal Division, there are no additional cases which question the constitutionality of the provision.<sup>61</sup>

In addition to the abolition of parole, judicial discretion in sentencing is enhanced by the lack of stringent legislative stipulations regarding both the length and type of sentence. With respect to the former, judges are empowered to impose fixed sentences which are limited primarily by the broad statutory upper limits for each of the offense categories discussed earlier. Even for those cases with minimum unsuspendable sentences, the range is sufficiently broad to allow judges a considerable amount of latitude.

The code also establishes broad conditions regulating the imposition of probationary sentences, but importantly provides that, as long as these conditions are met, probation shall be an option for any classified crime. In addition, the option of

probation in combination with a period of incarceration--the split sentence--has been expanded under a new provision. According to the code, the purpose of this provision is to provide a brief experience of imprisonment--that is, to shock the offender into a non-criminal way of life (M.R.S.A., Title 17A, section 1203). In the original (1975) version of this split sentence provision, a judge could suspend any portion of a custodial sentence with the option of placing the offender on probation. The only limitation on the use of the split sentence was that, if an offender receiving a split sentence was initially sent to prison, it could only be for a period of 90 days. The provision has since been changed so that offenders sentenced under it may only be imprisoned for an initial period (the limit of which has been raised to 120 days) to be followed by a suspended portion of the sentence (1982 pamphlet). In 1979, the legislature also created a new provision allowing judges to suspend any portion of the last two years of a Class A or B sentence which is four or more years, provided that the term of probation did not exceed one year (1982 pamphlet).

These, then, are the most important provisions of the new code. They reflect the pluralistic context and approach of the revision commission. Against this pluralism, however, must be set the more practical intention of the Commission to provide judges with the option of incapacitating the more serious offenders, while sentencing ordinary offenders at the lower end of each class. Anspach and Kramer (1980) have referred to this approach to sentencing as an "incapacitative bifurcated penal policy". It is their contention that this is the policy underlying the ambiguity in Maine's code with respect to

both individualized and determinate sentencing.

To some extent, this policy was directly incorporated into the code. In part, at least, this would seem to be the case with the minimum unsuspendable sentences already discussed. Similarly, it is part of the rationale for the requirement that offenders receiving a sentence of twenty years or more must serve four-fifths of the sentence before being able to seek a reduction. More important than these provisions, however, remains the fact that the new code gives judges the option of adhering to the bifurcated incapacitation ideology. In fact, the commission assiduously avoided stipulations which would have guaranteed that its intentions in this regard would be fulfilled. To summarize, so long as a judge stays within the broad statutory limits, he or she is free to impose any type or length of sentence without having to justify it in terms of any legislated standards (as with presumptive sentencing) or any judicially established sentencing guidelines. Furthermore, the arsenal of sentencing options available to judges--incarceration, probation, restitution, and especially the split sentence--has been expanded considerably.

#### Assessing the impact

Since the enactment of Maine's new criminal code, there has been a steady increase in the state's prison population (Sourcebook, 1982). In comparison to many other states, the rate of increase has been relatively moderate. For example, in 1981, the inmate population grew by 4.5 percent, compared to a national rate of 12.5 percent (Gardner, 1982). Nonetheless, the increase has been enough to

strain the capacity of the state's correctional facilities and to spark a public debate over the need for a new prison. At the end of 1981, twenty-three of the state's inmates sentenced to state facilities were being held in county jails due to overcrowded conditions. The situation is exacerbated by the fact that the county jails, many of which are over a hundred years old, are themselves crowded.

The question of the impact of Maine's new criminal code on the prison population and sentencing in general has been the subject of three empirical research efforts. Unfortunately, the most recent and comprehensive of these undertakings (Anspach and Kramer, expected 1983), was not yet available at the time of this writing. Consequently, we are only able to present general and preliminary results for this latest study. On the other hand, the research is in many respects an expansion of earlier work done by Anspach and Kramer (1980). Consequently, some of the discussion which follows will compare both Anspach and Kramer studies with the first study, which was done by Kramer, Hussey, Lagoy et al., in 1978.

The 1980 research of Anspach and Kramer was based on analysis of 489 cases disposed of in Cumberland County in 1975 (pre-code) and 1978 (post-code). Their more recent research, by contrast, involved analysis of approximately 10,000 pre- and post-code cases in seven (out of 16) counties. Finally, the first empirical study addressing the question of the impact of the new code (Kramer, Hussey, Lagoy et al., 1978) analyzed 2,620 pre-code cases (from May 1970 to April 1979) as well as 957 post-code cases (from May 1976 to August 1977).

In reviewing these studies, one is struck by the divergence of results that have been obtained. Kramer, Hussey, Lagoy, et al., concluded that "Post-code sentencing can be characterized as generally less severe but also more disparate than pre-code sentencing." Anspach and Kramer concluded in 1980 that the "evidence seems fairly clear that the movement to determinacy in the State of Maine has been accompanied by an increase in the proportion of those receiving custodial penalties and in the length of those penalties." In contrast to the first study, these authors also concluded that, "there is little difference under the old code and new code in the amount of variation in sentence lengths despite some reduction in the range of custodial penalties imposed." Finally, preliminary results from the latest study by Anspach and Kramer indicate that there has been an increase in both sentencing variation and in lengths of sentences served.

While all of these studies appear to have used comparable methods for converting pre-code offenses to post-code classes and for estimating actual time served, there are several methodological differences which may account for this discrepancy of findings. For one thing, each study employed a different data base. As mentioned above, the research of Kramer, Hussey, Lagoy et al., was based on a sample of pre- and post-code cases in six counties including both urban and rural jurisdictions, while the first Anspach and Kramer study collected data for Maine's only urban jurisdiction. While this would seem to indicate that the former study was more representative, it must be kept in mind that subsequent research by Anspach and Kramer was based on a sample of seven rural and urban counties. Moreover, the ongoing Anspach and Kramer study is based

on analysis of 10,000 dispositions while the study of Kramer, Hussey, and Lagoy, involved a sample of 2,620 cases.

The data bases for the Anspach and Kramer research efforts differ from the earlier study in several other ways as well. For one thing, Kramer, Hussey, Lagoy, et al., only analyzed cases falling within Classes A, B, and C, while Anspach and Kramer have included data from all classes except murder. In addition, the study by Kramer, Hussey, Lagoy, et al., did not include multiple offenses in its analysis. This is significant because all research has indicated that new offense definitions have resulted in a significant increase in the number of multiple offense cases. For example, Kramer, Hussey, Lagoy et al., found that the number of multiple offenders receiving incarceration rose from 12.7 percent before the code to 35.6 percent after its implementation. Moreover, in their earlier work at least, Anspach and Kramer found that the increase in custodial penalties and their length was partly an artifact of this unintended consequence.

Finally, the studies collected data from different periods. Kramer, Hussey, Lagoy, et al., sampled cases from May of 1976 to August of 1977, while Anspach and Kramer gathered information on cases sentenced after the code had been in effect for almost two years. If there was an adjustment lag in the judicial response to the code, this difference may be significant. Also, some judges may have altered their sentencing practices in response to the findings of the earlier study. Alternatively, by using data for several pre-code years, Kramer, Hussey, Lagoy, et al., may have introduced historical effects into their analysis.

Notwithstanding these caveats, we do know some things. For instance, the use of the split-sentence has increased substantially. (Again, however, more analysis is necessary, for example, to determine how much of this usage is for "shock" incarceration.) In addition, it is fairly safe to say that substantial sentencing variation continues even if it has not increased. In this regard, Kramer, Hussey, Lagoy, et al., were only able to account for 7.9 percent of the variance in the distribution of post-code sentence lengths with the relevant variables of offense severity, number of offenses, prior incarcerations, age, education, and occupation. These variables accounted for 20.5 percent of the variance in the pre-code analysis. (More data are probably needed on judicial variation, since both of the available studies, at least, attribute much of the variance in sentencing to the different practices of judges). Finally, an increase in the prison population as well as the findings of Anspach and Kramer's research suggest that some judges are indeed employing the bifurcated incapacitation strategy discussed earlier.

In conclusion, it appears that while there may be no consistent and uniform sentencing policy emerging under the code, the code has nonetheless had a significant impact on sentencing in the state. The fact that this impact has been indirect as well as direct, unintended as well as intended, is hardly surprising given the lack of clear standards for sentencing in the code. Indeed, sentencing in Maine is determinate only insofar as parole is abolished along with those rehabilitative programs formerly linked with release from prison. While a proposal for the reinstatement of parole is receiving renewed

attention as a result of prison overcrowding it is unlikely that it will be passed by the legislature. In fact, it is unlikely that the basic sentencing system established by the code will be fundamen-

tally altered in the foreseeable future. In recent years, the legislature has concentrated on making minor changes in the system. Generally they have been of a technical or administrative nature.

#### MARYLAND

Despite a burgeoning prison population, Maryland has been comparatively free of the political battles which have characterized the controversy over sentencing practices in many other states. To a great extent, this is due to the legislature's decision to defer consideration of any major changes in the state's sentencing system until the state's sentencing guidelines project has been completed.<sup>62</sup> At the time of this writing, sentencing guidelines for four jurisdictions were in the second year of implementation. The original one year implementation test period, which began on June 1, 1981, was extended until June 1, 1983. Sometime before the expiration of the test phase, the state's Supreme Court is expected to decide whether or not to implement the guidelines on a permanent statewide basis.

The original impetus for the development of sentencing guidelines came from the Sentencing Study Committee of the state's Judicial Conference. The Committee, with support from the Administrative Office of the Courts, urged the Conference to explore the possibility of constructing guidelines for the state. The Committee's recommendation appears to have been motivated by the increasing attention being given to sentencing guidelines by policymakers in other states. This concern was stimulated by the apparent potential for sentencing disparities under Maryland's Criminal Code.

The Sentencing Guidelines Project of the Administrative Office of the Courts was established on September 30, 1979, after the state was awarded a grant by LEAA which enabled the Court Administrative Office to participate in the agency's

multi-jurisdictional field test program. During the first year or so of its existence, the Sentencing Guidelines Project collected and analyzed sentencing data from Baltimore City, Montgomery County, Prince George's County, and Harford County. After this phase was completed, the project turned to the construction of guideline matrices. Working in conjunction with an Advisory Board composed of ten circuit court judges from the jurisdictions included in the study, and seven ex-officio members appointed by the judges, the Maryland Sentencing Guidelines Project developed guidelines for three categories of offenses: crimes against persons, drug offenses (excluding possession of marijuana), and property offenses.

While the legislature has enacted a few mandatory minimum sentencing provisions during the period of development and testing of the guidelines, attention has been focused primarily on the problem of prison overcrowding. In 1981, the prison population grew from 7,731 to 9,335, an increase of 20.7 percent (Gardner, 1982). In 1982, largely as a result of a federal court order to reduce the prison population, Maryland allocated 35 million dollars--approximately one-third of its capital construction budget--to prison construction. Despite four new prisons, however, it is unlikely that the state will be able to keep up with the population pressures. Gardner reports that a new maximum-security reception center in downtown Baltimore designed for 400 inmates was double-celled to hold 760 as soon as it opened, and a medium-security facility in Jessup, also opened in 1982, holds 874 inmates in a space designed for 512.

The criminal code and recent changes

Criminal law in Maryland continues to exist as a combination of common law principles and statutory enactments. (Until 1976, for example, rape was a common law offense in the state.) The last major revision was in 1951. The Maryland code is similar to other indeterminate systems in several respects. Under the code, probation may be granted for any offense other than first degree murder or for several types of repeaters, provided that the period of probation does not exceed five years (Annotated Code of Maryland, Act. 27). Moreover, any offender who has not been convicted of first degree murder and certain offenses with mandatory minimums may be released on parole, subject to the rule and judgment of the parole board.

Selected Offenses and Indeterminate Sentences in Maryland\*

Burglary (daytime)	10 years
Burglary (nighttime, common law)	20 years
Felony theft (over \$300)	15 years
Robbery (unarmed)	3-10 years
Robbery (armed)	20 years
Assault with intent to rape	2-20 years
1st degree rape	Life
2nd degree rape	20 years
Assault with intent to murder	2-30 years
1st degree murder	Life or death
2nd degree murder	20 years
Distribution of Sch. I or II narcotics	20 years

\*Adapted from the Annotated Code of Maryland, Art. 27.

The indeterminate sentencing structure contained within the code gives judges in Maryland a large amount of discretion. The preceding table provides the maximum

sentences, or, when appropriate, the sentence ranges for several offenses under the indeterminate structure. As can be seen from this table, there is a large amount of possible variation built into the code, not only for each particular offense, but between offenses. There are several instances where the schedule of maximum penalties is not commensurate with the usual gradations associated with the increasing severity of offenses. Thus, under the Maryland code, any felonious theft is subject to a maximum sentence which is greater than the maximum for robbery. Similarly, burglary at nighttime carries with it the same maximum penalty as armed robbery or second degree rape.

In the last ten years, the legislature has seen fit to pass mandatory minimum sentencing provisions for certain offenders and/or offenses. Since 1972, repeaters of the offense of illegal wearing, carrying, or transporting a handgun have been subject to a one to ten year sentence, with a one year mandatory minimum term which is raised to three years if the offense was committed on a public school ground (Art. 27, sec. 36B). In 1976, the legislature enacted mandatory minimum sentencing provisions for crimes of violence:<sup>63</sup> when an offender has served two separate periods of confinement for deviations on any of the enumerated offenses, there is a mandatory minimum term of imprisonment of 25 years. With an additional conviction of this sort, there is a mandatory life term without parole (Art. 27, sec. 643B).

In 1982, the legislature enacted a mandatory minimum sentence of five years--to be served consecutively to any other sentence--for repeaters of the offense of unlawful use of a handgun in the commission of a crime (Art. 27, sec. 36B, 1982 Supplement). In addition, the maximum

sentence for a first offense was raised five years so that the indeterminate sentence is now 5 to 20 years.

During the same session, the legislature also enacted a series of mandatory minimum sentencing provisions for repeaters of the various offenses relating to the manufacture or distribution of controlled substances. Previously, such repeaters were subject to twice the allowable maximum for first offenders. Now, however, there are mandatory minimum terms of imprisonment of ten years for the manufacture or distribution of Schedule I or II narcotics and phencyclidine as well as a two year mandatory minimum for repeaters manufacturing or distributing any other controlled substances (Art. 27, Sec. 286, 1982 Supplement).

These are the major changes in the sentencing provisions of the Maryland code.<sup>64</sup> The rate for good-time credits continues at five days per month, with the exception of persons convicted of first degree murder or under the various mandatory minimum sentences outlined above. Maryland law requires that the Parole Commission grant parole consideration before one-quarter of an inmate's sentence has been served. Beginning in 1979, formal parole guidelines have been used as an alternative means of satisfying this requirement.

Development of guidelines

Maryland's initial approach to the construction of guidelines is by now a standard procedure. Like other sentencing guidelines, the Maryland project had planned to develop matrices on the basis of historical sentencing patterns. However, numerous problems relating to the collection and analysis of historical sen-

tencing data forced the project to adopt a somewhat novel approach. Separate grids were constructed from two different data bases. The first set of grids was developed in the conventional manner, relying on multiple regression analysis of past sentencing decisions, while the second was based on multiple regression analysis of data attained from a sample of simulated sentencing decisions made by the ten judges on the Advisory Board.

Historical sentencing data for the project was attained from a sample (N=1,800) of the more than 4,500 cases sentenced in the four participating jurisdictions during the calendar year of 1979. Early on, it had been decided that generic type guidelines would be developed for the three classes of offenses mentioned earlier. The judges on the Advisory Board were asked to rank offenses within each generic class according to seriousness. These rankings were then transformed into seven seriousness categories within each class for the purpose of analysis and, eventually, for guidelines scoring.

Information was collected on a large number of variables, including among others: the extent of injury to the victim, weapon usage, the status of the defendant at the time of the offense and at the time of sentencing, prior record, previous incarcerations and supervisions, employment history, race of the defendant, and, of course, the seriousness of the instant offense. Multiple regression analysis indicated that the seriousness of the offense was the only variable which consistently accounted for a significant amount of variation, at times explaining almost forty-five percent of the variance. Initially, race appeared to be significant, but this finding was erased when analysis focused on particular offenses.

While comparison with research on sentencing patterns in other states shows that the analysis of sentencing data in Maryland yielded reasonably high levels of explained variance, it must be kept in mind that other than seriousness of offense, this research failed to reveal statistically significant variables which explained more than a fraction of the variance. Moreover, the project was hampered by difficulties in obtaining information for a large number of cases. For instance, in Baltimore, pre-sentence investigations were not available for approximately one-half of the cases in the sample. Consequently, there was a large number of missing values, resulting in several cells with extremely small N's when guidelines matrices were constructed.

These considerations led the Maryland project to consider the development of an additional data base. The decision to do so was also influenced by the Advisory Board's decision to include juvenile record and victim vulnerability in the guidelines, both being variables for which insufficient information was available for statistical analysis.

As was mentioned earlier, the additional data base was constructed by having the judges on the Advisory Board sentence hypothetical cases. Four-hundred and fifty-eight cases for this simulation sample were developed in such a way as to supplement the historical sentencing data. Emphasis was placed on developing cases which would hypothetically fall in those cells of the grids (constructed from historical data) that had insufficient numbers of cases. In addition, cases were developed which would enable the project to obtain information on sentencing patterns including the variables of juvenile record and victim vulnerability.

Analysis of the simulated sentencing data produced results very similar to those for the historical data, with offense severity once again being the most important variable. Grids were developed for this analysis to supplement the grids constructed from the historical data. The actual guidelines were drawn from both of these sets of grids, as modified by the Advisory Board's normative or prescriptive judgments regarding both the appropriate factors in sentencing and the proper ranges for particular cells.

The Advisory Board decided to use a matrix with separate axes for offense and offender scores only for the class of crimes against persons. It was thought that the determination of offense scores for property and drug offenses would become mired in the difficulties associated with estimating the real value of drugs or property. Consequently, guidelines for these classes consist only of offender scores for each particular type of offense within the class.

Since the implementation test phase of the Maryland guidelines project began on June 1, 1981, the guidelines have gone through several modifications, with a major revision done after one year of the implementation test. Table 10 shows the original set of offense and offender factors and their possible scores which were used by the Maryland project. Early on in the implementation test, the project's advisory board decided to drop the ambiguous employment factor. Within this first year, the Advisory Board also established rules for the treatment of sentences resulting from plea bargains as well as sentences arising from multiple counts. In addition, it was decided that all injuries in rape cases were to be scored as permanent.

Table 10

Maryland: Factors Used in Determining Offense and Offender Scores Under the First Set of Experimental Guidelines

<u>Offense score</u>	
A. Seriousness of offense	1-8
B. Victim Injury	0 (no injury) 1 (non-permanent) 2 (permanent or death)
C. Weapon	0 (none) 1 (other than firearm) 2 (firearm)
D. Special vulnerability of victim	0 (none) 1 (mental or physical handicap, under 10, or over 60)
<u>Offender score</u>	
A. Relationship to criminal justice system at time of offense	0 (none or charges pending) 1 (on paper)
B. Juvenile delinquency	0 (not more than 1 adjud.) 1 (not more than 2 adjud.) 2 (more than 2 adjud.)
C. Prior record	0 (none) 1 (moderate) 2 (major)*
D. Prior conviction for offense against persons (or property and drug offenses, when relevant)	0 or 1
E. Employment record	0 (unknown, N/A) 1 (unstable) -1 (Stable)
F. Prior adult probation or parole violation or escape	0 or 1

\*Determinations were made on the basis of a point system used by the parole board.

After approximately a year of experience with the guidelines, the Maryland project undertook a systematic revision of the guidelines. This process was completed in October of 1982, at which time the worksheets and matrices that were in use at the time of this writing were made available to practitioners. (Copies of the worksheets and the matrices are presented here as Tables 11, 12, 13, and 14.) In addition to trying to clarify and simplify the worksheet and the overall scoring procedure, the Advisory Board adjusted several of the sentence ranges within the cells of the matrices to bring them more in line with actual sentencing patterns that were indicated by the first year of the implementation test.

As can be seen from the matrices, the In/Out decision has been incorporated into the guideline grids. Under the guidelines, judges have the option of granting probation to a defendant whose score places him or her in a cell where most of the cases in the project's samples (as modified by the Advisory Board), were sentenced to probation. In these cells, the appropriate sentence range is stated either in the form of probation up to a certain amount of jail time or probation up to a certain period of incarceration.

As with sentencing guidelines in other states, departures from the prescribed sentence ranges must be justified in writing by the judges participating in the project. The guidelines do not include specific aggravating and mitigating factors which may be used as justification for such departures. Rather, they refer only to certain reasons which may not be used, including factors already in the guidelines and defendant characteristics such as sex or race.

Unlike some states experimenting with guidelines, Maryland's project has sought to directly confront the thorny problems of plea bargains and multiple counts. With respect to plea bargains, it is an explicit policy that a sentence bargain is not considered a sufficient reason for departing from the guidelines (Maryland Sentencing Guidelines Project, August, 1981). In other words, judges must justify "sentences which are outside of the recommended sentence range regardless of whether the sentence was the result of a bargain." Moreover, for bargained sentences where there is no PSI available, the Sentencing Guidelines Project has encouraged judges to make use of the guidelines worksheet to guarantee more reliable information and to promote greater equity among the large number of sentences of this kind.

With respect to multiple counts, the official policy of the guideline program is that "(In) most cases, the guidelines will recommend concurrent ranges for multiple counts growing out of a single criminal event" (Maryland Sentencing Guidelines Manual). Moreover, the "highest of the guideline ranges for any of the counts is the recommended range." For multiple counts growing out of separate events, the recommended guideline range is the sum of the upper and lower limits of recommended range for each count.

As the matrices in Tables 12, 13, and 14 indicate, the ranges in the cells of the Maryland guidelines are extraordinarily wide; compared, at least, to guidelines developed in other states. The ranges are particularly wide in the lower right-hand corners of the matrices--that is, in those cells applying to the more serious offenders. (Note also that there is a significant amount of overlap between cells.)

TABLE 11

MARYLAND SENTENCING GUIDELINE WORKSHEET

<b>MARYLAND SENTENCING GUIDELINES WORKSHEET</b>		OFFENDER NAME (Last, First, Middle)		DOCKET NUMBER	
BIRTHDATE / /		<input type="checkbox"/> Male <input type="checkbox"/> Female	<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Hispanic <input type="checkbox"/> Other	JURISDICTION	DATE OF OFFENSE / /
NUMBER OF CONVICTED COUNTS AT THIS SENTENCING EVENT		WORKSHEET # _____ OF _____	PSI <input type="checkbox"/> Yes <input type="checkbox"/> No	DATE OF PLEA/VERDICT / /	
INSTANT COUNT TITLE		CRIMINAL EVENT # _____		SENTENCING JUDGE	
				MD. CODE, ART. & SECTION	
DISPOSITION TYPE (Check Only One)					
<input type="checkbox"/> Binding Plea Agreement as to Actual Sentence <input type="checkbox"/> Binding Plea Agreement as to Sentence Maximum Or Range of _____		<input type="checkbox"/> Non Binding Recommendation of _____ <input type="checkbox"/> No Plea Agreement <input type="checkbox"/> Other		<input type="checkbox"/> Contested Facts, No Plea Agreement <input type="checkbox"/> Uncontested Facts, Contested Legal Issue	
				<input type="checkbox"/> Court Trial <input type="checkbox"/> Jury Trial	
OFFENSE SCORE (Offense Against a Person Only)			OFFENDER SCORE		
A. Seriousness Category of Instant Count 1 = V - VII 3 = IV 5 = III 8 = II 10 = I B. Victim Injury 0 = No Injury 1 = Injury, Non-Permanent 2 = Permanent Injury or Death C. Weapon Usage 0 = No Weapon Used 1 = Weapon Other Than Firearm Used 2 = Firearm Used D. Special Vulnerability of Victim 0 = No 1 = Yes			A. Relationship to CJS When Instant Count Occurred 0 = None or Pending Cases 1 = Court or Other Criminal Justice Supervision B. Juvenile Delinquency 0 = Not More Than One Finding of Delinquency 1 = Two or More Findings Without Commitment or One Commitment 2 = Two or More Commitments C. Prior Adult Criminal Record 0 = None 1 = Minor 3 = Moderate 5 = Major D. Prior Adult Parole/Probation Violations 0 = No 1 = Yes		
TOTAL OFFENSE SCORE			TOTAL OFFENDER SCORE		
GUIDELINE RANGE		ACTUAL SENTENCE			
OVERALL GUIDELINE RANGE					
REASONS (If Actual Sentence Differs From Guideline Sentence)					
INSTITUTIONAL/PAROLE RECOMMENDATION					
DEFENSE ATTORNEY			STATE'S ATTORNEY		
WORKSHEET COMPLETED BY			JUDGE'S SIGNATURE		

JUDGE (White); AOC (Blue); PROBATION (Green); FILE (Yellow); PROSECUTION (Pink); DEFENSE (Gold)

Table 12  
Maryland Sentencing Matrix for Offenses Against Persons

Offense score	Offender score							
	0	1	2	3	4	5	6	7 or More
1	P	P	P-3M	3M-1Y	3M-18M	3M-2Y	6M-2Y	1Y-3Y
2	P-6M	P-1Y	P-18M	3M-2Y	6M-3Y	1Y-5Y	2Y-6Y	3Y-8Y
3	P-2Y	P-2Y	6M-3Y	1Y-5Y	2Y-5Y	3Y-7Y	4Y-8Y	5Y-10Y
4	P-3Y	6M-4Y	1Y-5Y	2Y-5Y	3Y-7Y	4Y-8Y	5Y-10Y	6Y-12Y
5	3M-4Y	6M-5Y	1Y-6Y	2Y-7Y	3Y-8Y	4Y-10Y	6Y-12Y	8Y-15Y
6	1Y-6Y	2Y-7Y	3Y-8Y	4Y-9Y	5Y-10Y	7Y-12Y	8Y-13Y	10Y-20Y
7	3Y-8Y	4Y-9Y	5Y-10Y	6Y-12Y	7Y-13Y	9Y-14Y	10Y-15Y	12Y-20Y
8	4Y-9Y	5Y-10Y	5Y-12Y	7Y-13Y	8Y-15Y	10Y-18Y	12Y-20Y	15Y-25Y
9	7Y-12Y	8Y-13Y	8Y-15Y	10Y-15Y	12Y-18Y	15Y-25Y	18Y-30Y	20Y-30Y
10	10Y-18Y	10Y-21Y	12Y-25Y	15Y-25Y	15Y-30Y	18Y-30Y	20Y-35Y	20Y-L
11	12Y-20Y	15Y-25Y	28Y-25Y	20Y-30Y	20Y-30Y	25Y-35Y	25Y-40Y	25Y-L
12	15Y-25Y	18Y-25Y	18Y-30Y	20Y-35Y	20Y-35Y	25Y-40Y	25Y-L	25Y-L
13	20Y-30Y	25Y-35Y	25Y-40Y	25Y-L	25Y-L	30Y-L	L	L
14	20Y-L	25Y-L	28Y-L	30Y-L	L	L	L	L
15	25Y-L	30Y-L	35Y-L	L	L	L	L	L

P= Probation M=Months Y=Years L=Life

Offense	Offender Score							
	0	1	2	3	4	5	6	7 or more
Controlled Dangerous Substance (Marijuana) <ul style="list-style-type: none"> <li>Unlawful possession or administering to another.</li> <li>Obtaining, etc., substance or paraphernalia by Fraud, Forgery, Misrepresentation, etc.</li> <li>Affixing forged label, altering, etc., label.</li> <li>Unlawful possession or distribution of controlled paraphernalia.</li> <li>Etc.</li> </ul> Other Drug Misdemeanors	P	P	P	P-1M	P-3M	P-6M	3M-6M	6M-12M
Controlled Dangerous Substance (Non-Marijuana) <ul style="list-style-type: none"> <li>Unlawful possession or administering to another.</li> <li>Obtaining, etc., substance or paraphernalia by Fraud, Forgery, Misrepresentation, etc.</li> <li>Affixing forged label, altering, etc., label.</li> <li>Unlawful possession or distribution of controlled paraphernalia.</li> <li>Etc.</li> </ul>	P-6M	P-12M	3M-12M	6M-18M	1Y-2Y	1.5Y-2.5Y	2Y-3Y	3Y-4Y
Controlled Dangerous Substance, (Schedule I-V, not PCP nor Schedule I, II Narcotics) - <ul style="list-style-type: none"> <li>Manufacture, distribution, etc.</li> <li>Counterfeiting, etc.</li> <li>Manufacture, possession, etc., of certain equipment for illegal use.</li> <li>Keeping common nuisance.</li> </ul> Controlled Dangerous Substance <ul style="list-style-type: none"> <li>Paraphernalia 2nd offense</li> <li>Paraphernalia to juvenile by person 3 or more years older.</li> </ul>	P-12M	P-18M	6M-18M	1Y-2Y	1.5Y-2.5Y	2Y-3Y	3Y-4Y	3.5Y-5Y
Controlled Dangerous Substance (Schedule I or II Narcotic or PCP) <ul style="list-style-type: none"> <li>Manufacture, distribution, etc.</li> <li>Counterfeiting, etc.</li> <li>Manufacture, possession, etc., of certain equipment for illegal use.</li> <li>Keeping common nuisance Schedule I, II Narcotic or PCP.</li> <li>Etc.</li> </ul>	6M-3Y	1Y-3Y	2Y-5Y	3Y-7Y	4Y-8Y	5Y-10Y	7Y-14Y	12Y-20Y
Controlled Dangerous Substance <ul style="list-style-type: none"> <li>Importation</li> </ul>	1Y-4Y	2Y-5Y	3Y-6Y	4Y-7Y	5Y-8Y	6Y-10Y	8Y-15Y	15Y-25Y

P = Probation M = Months Y = Years

Table 14

Maryland Sentencing Matrix for Property Offenses

Offense seriousness category 0	1	2	3	4	5	6	7 or More	
VII	P-3M	P-6M	3M-9M	6M-12M	9M-18M	1Y-2Y	1Y-3Y	3Y-5Y
V and VI	P-3M	P-6M	3M-2Y	1Y-4Y	2Y-5Y	3Y-7Y	4Y-8Y	8Y-15Y
III and IV	P-2Y	6M-3Y	9M-5Y	1Y-5Y	2Y-8Y	3Y-10Y	7Y-15Y	12Y-20Y

P=Probation M=Months Y=Years L=Life

To some extent, the wide ranges in the Maryland guidelines are a function of the generic nature of the system. If the Guidelines were constructed around specific offenses, the ranges would undoubtedly be smaller. Apparently, however, a significant reason for the wide range is that most judges are opposed to the imposition of a more structured guideline program, particularly before the system has been approved for statewide implementation.

Perhaps due in part to these wide ranges, initial indications are that the rate of agreement between actual sentences in the four test jurisdictions and the recommended guideline ranges is fairly high.

As of February 8, 1982, 71 percent of the single count cases in the test program (N=1299) were in agreement with the guidelines, with five percent above the recommended range and 24 percent below. The agreement rate for multiple counts growing out of a single event (N=434) was 61 percent, with 30 percent above and 10 percent below (Maryland Sentencing Guidelines Project, May, 1982).

In conclusion, the experience of Maryland's Sentencing Guidelines Project serves as a reminder of the gap that often exists between the theory of sentencing guidelines and their actual construction in the real world. One could conceivably find fault with the Project's decision to employ the data from the sample of simulated cases on the grounds that methodological rigor was sacrificed for

expediency. However, in light of the difficulties confronting the project, the decision seems to have been a necessary and correct one. One could also find fault with the ranges contained within the matrices or even with the decision to develop generic-type guidelines. Again, however, these decisions were also constrained, to some extent, by political realities.

In the preface to the most recent Maryland Sentencing Guidelines Manual, it is stated that substantial progress has been made by the project towards its goals of "articulating an explicit sentencing policy, providing information to new or rotating judges, promoting increased visibility and understanding, and increasing equity." To this is added the caveat that less progress has been made with respect to the goal of increased equity than has been made with the others. While it is impossible for us to confirm or deny these assertions (not to mention assessing the impact of the guidelines on the prison population), it does appear that the guidelines will help to rationalize sentencing in the state, particularly if they are implemented statewide and are not rendered irrelevant by mandatory minimum sentencing provisions. On the other hand, prima facie indications are that the guidelines would better promote equity if the recommended ranges within them were narrowed. Needless to say, however, it is too early to assess the ultimate impact of the Maryland guidelines.

## MASSACHUSETTS

Traditionally, Massachusetts has had one of the lowest rates of sentenced prisoners per 100,000 civilian population in the country (Sourcebook, 1982). For example, as of December 31, 1979, only Vermont and North Dakota had lower rates. This is particularly surprising in view of the degree of urbanization in the state. This situation has, however, begun to change. In 1981, the inmate population increased by 18.4 percent, compared to an increase of 12.3 percent for all states (including Washington, D.C.). While it would be inappropriate to speculate here on the causes of this increase, it is important to keep in mind that this rate of inmate population growth parallels efforts by the state legislature to pass tougher sentencing laws for particular types of crimes and criminals. As with many other states, these laws have generally taken the form of mandatory minimum sentencing provisions.

### An overview of criminal justice in Massachusetts

Criminal justice in Massachusetts is administered through a two-tiered court system. The lower courts have exclusive jurisdiction over all minor offenses with a maximum sentence of five years or less, although the lower court is only authorized to impose a sentence of up to two and one half years. The remaining cases may be tried only by the superior court, after indictment by a grand jury.

One of the most important features of the Massachusetts court system is that all defendants convicted in the lower courts have the right of appeal to the superior court for a trial de novo which will

dissolve the lower court verdict. If a defendant is subsequently found guilty by the superior court, he or she may receive a longer sentence, provided that it does not exceed two and one half years.

Most defendants seek a trial de novo if any sentence of imprisonment is made by the lower court. The resulting combination of appealed cases and indictments creates a substantial backlog of cases for many superior courts, which in turn generates increased pressure for plea bargaining at the superior court level. This effect is especially pronounced in the jurisdiction which includes Boston--the Suffolk County Superior Court. As Professor James Beha has noted, "The result is that a trial on the merits is less frequent in Suffolk Superior Court than in the lower courts of Boston, although it is only at the superior court level that a jury trial is available" (Beha, 1977).

The criminal code of Massachusetts has not been systematically revised for several decades. Vestiges of common law pervade the code--as, for instance, with the distinction between burglary in the nighttime and burglary during the day. Sentencing under the code has generally occurred within a framework of broad indeterminate penalties, whereby judges establish indefinite terms by setting minimums and maximums.

Even by the standards of indeterminate sentencing in other states, judges in Massachusetts have an extraordinary amount of discretion in determining sentence lengths. For example, for the offenses of second degree murder, armed robbery, unarmed robbery, armed assault within dwelling houses, rape, and rape of a child under sixteen, the sentence may be life

imprisonment or any other term of years. The maximum sentence for manslaughter, assault with intent to rob while armed, and unarmed burglary at nighttime is 20 years. A ten-year maximum sentence exists for assault with intent to murder or maim, assault with intent to rob, and daytime burglary, while a five-year maximum applies to a variety of other property offenses (Massachusetts General Laws Annotated, Chapters 265-269).

Judicial discretion is limited by prohibition of probation for certain cases and by the existence of several mandatory minimum sentencing provisions. Probation is prohibited for any crime punishable by life imprisonment, any crime where a dangerous weapon was invoked, and for persons previously convicted of a felony. Persons convicted of armed robbery with a concealed or "distorted" identity must receive a sentence of not less than five years, and one not less than ten years for subsequent similar offenses. Minimum sentences of five years also exist for persons convicted of burglary who have previously been convicted of any property offense. In addition to these provisions, the code raises the maximum penalty for felonious larceny (over 100 dollars) from five years to twenty years for persons with a prior larceny conviction and for those convicted at the same time of at least three charges of larceny. Since 1978, there has also been a habitual criminality provision which requires judges to sentence offenders with at least two felony convictions for which a sentence of three or more years was received to the maximum term of years allowed by the statutes (MGLA, Chapters 265-269, 279).

**Recent changes.** The code also contains parole eligibility requirements (initially established in 1955) which generally

require that violent offenders, offenders convicted of arson or arson-related crimes, and persons committing crimes while on parole, must serve two-thirds of their sentences and never less than two years before being eligible for parole (MGLA, Ch. 127, sec. 133). Non-violent offenders are required to serve one-third of their sentences or at least one year before being eligible for parole.

Since 1973, good time provisions have existed on a scale according to the length of the sentence, ranging from 2.5 days per month for sentences of 4 months to a year to 12.5 days per month for sentences over four years. Additional sentence reduction credits are available for participation in special programs, except for sex offenders and persons serving life sentences. Under the code, any portion of sentence reduction credits may be revoked for violations of prison rules.

In 1974, the legislature moved beyond the previously legislated prohibitions of probation and minimum sentencing provisions to the establishment of minimum unsuspendable sentences for certain types of offenses. The first of the two new provisions stipulated that anyone convicted of using a firearm in the commission of a felony must receive an additional sentence of not less than two years in jail or between two and one-half and five years in prison. In addition to making the sentence non-suspendable, the provision also prohibits parole until the original sentence has expired. Moreover, for second and subsequent convictions, the sentence is fixed at five years in prison (MGLA).

In 1980 and 1981, the legislature passed a series of special mandatory minimum sentencing provisions for particular offenses and/or offenders--namely, repeaters. In

1980, a mandatory minimum prison sentence of one year was established for persons convicted of their second motor vehicle theft (MGLA, Ch. 266, sections 28 and 29, 1982 supplement). Also during this session, the legislature created a new structure of penalties for violations of the Controlled Substance Act (MGLA, Ch. 94C, sections 32 through 32F). The new provision contains a graded schedule of mandatory minimums for: trafficking different amounts of marijuana, cocaine, and narcotics; the distribution of various substances to minors; and for repeat offenders convicted of either trafficking offenses or the distribution or manufacture of Class A substances (e.g., heroin),

Class B substances (e.g., cocaine), or Class C substances (e.g., LSD). The table below provides an illustration of these schedules (Chapters 265, Sec. 18B, 1980 Supplement).

The second provision, also known as the Bartley-Fox amendment, changed the Massachusetts law prohibiting the carrying of a firearm without a permit by establishing (again, in 1974) a mandatory minimum prison sentence of one year without parole or furlough. The mandatory minimum sentence exists within an indeterminate range of two and one-half to five years in prison (MGLA, Chapter 269, Section 10).

Type of sentence	Indeterminate sentence		Mandatory minimum	
	1st offense	2nd & subsequent offense	1st offense	2nd or subsequent offense
Class A (heroin and other narcotics)	1-10 yrs.	5-15 yrs.	1 yr.	5 yrs.
Class B (including cocaine & one narcotic phencyclidine (PCP) <sup>†</sup>	1-10 yrs. 1-10 yrs.	-	1 yr.	3 yrs. 3 yrs.
Class C (LSD)	2 1/2-3 yrs.*	-	-	2 yrs.
Class D	1-2 yrs.	2 1/2 yr. Max.	-	-

\*The indeterminate penalty for this class was actually lowered to 2 1/2 from 5 years.

†The provision dealing with the distribution of Class B reform of PCP was passed in 1981.

In a study of the effect of the Bartley-Fox amendment, Beha concluded that while judges resented the constraints placed on them by the law, there was no evidence that they were attempting to circumvent its provisions (Beha, 1977). According to Beha, in the first year after the law took effect, the number of acquittals and dismissals in the Boston courts did indeed increase, but primarily as a result of the loss of the informal disposition option previously available to judges. Generally, however, the Boston judges did not change their approach to sentencing, other than, perhaps, to devote more attention to the technicalities of defense arguments.

Beha also found that, with the exception of firearms assaults not resulting in injury, there was not a noticeable increase in the number of prosecutions of the firearm law as a charge accompanying other crimes involving the use of a firearm. Beha attributed this to the stiff provisions for gun-related crimes discussed previously and to the widespread belief among police and prosecutors that a firearms violation does not increase the chances of conviction for a gun-related crime. However, the number of prison sentences for those convicted of the firearms violation determined by the lower courts increased substantially, contributing to the backlog of cases in the superior court.<sup>65</sup>

In 1981, the legislature passed a series of mandatory minimum sentencing provisions relating to violent crimes against the elderly (MGLA, Ch. 265, Sections 15A, 15B, 18, 19, and 25). Two-year mandatory minimum terms of imprisonment were established for repeaters of the following offenses where the victim was 65 years or older: assault and battery with a dangerous weapon; assault; assault with a dangerous

weapon; unarmed robbery; and theft. In addition, a two-year mandatory sentence with a one-year mandatory minimum term of imprisonment was established for repeaters of the offense of larceny from an elderly person.

Other legislative changes relating to sentencing in the last ten years included the creation of some new offenses (e.g., the distribution of drug paraphernalia), the increase of maximum penalties for certain offenses, and the passage in 1975 of a provision allowing judges to suspend any portion of a sentence (MGLA, Ch. 94C, 265, and 279, 1982 Supplement). Parole eligibility requirements remain essentially the same as before. As mentioned above, good time regulations were revised in 1973.

To summarize, the current structure of sentencing in Massachusetts represents a combination of extreme indeterminacy and statutory severity for certain offenses and offenders. Generally, the criminal code provides both judges and parole authorities with a great deal of discretion in determining the amount of time served by offenders. However, discretion is restricted for cases of violent offenders, some types of repeat offenders, and particularly for offenders convicted of carrying or using firearms. At the present time, it appears that Massachusetts will retain this system, at least in its general form.

#### Sentencing guidelines in Massachusetts.

The Massachusetts Superior Court System used non-binding, statewide sentencing guidelines on an experimental basis for one year beginning on May 15, 1980. The guidelines were developed by the Superior Court under a grant from the Massachusetts Committee on Criminal Justice. The data

base for the project consisted of a random sample (N=1,440) of 4,500 Superior Court sentences imposed in the state's largest counties between November, 1977, and October, 1978. Information for these cases was gathered from probation reports, court files, and district attorney files.<sup>66</sup> At the present time, guidelines are not being used in the state; nor are there any efforts underway to implement them.

In Massachusetts, guidelines were unique in that they applied only to those cases where conviction resulted from a trial. There was, however, no corresponding effort to limit the data base to those cases where the defendant was convicted after trial. In other words, the data base was a sample of all cases in the aforementioned period in which a sentence was imposed. Thus, the data and statistical analysis could just as easily have been used to construct guidelines for all felony cases.

The reason for this limited application of the guidelines is unclear. It does appear that there was concern, particularly among researchers, about the possibility of sentencing disparities between trial and non-trial groups of defendants. Specifically, some members of the Sentencing Guidelines Project were interested in the question of racial disparities between these two types of cases. In addition, special interest in trial cases may be attributable to the de novo trial system discussed above. In any event, the limited scope of the guidelines was indicative of the experimental nature of the policy.

The guidelines were constructed on the basis of four variables: 1) use of weapon, 2) injury to victim, 3) seriousness of current offense and 4) seriousness

of prior offenses. As can be seen from this list, the guidelines for all offenses were developed around one formula. In other words, instead of constructing a matrix for each guideline offense based on certain offense and offender characteristics, the Massachusetts project factored the seriousness of the current offense into one equation. This approach is consistent with the relatively small sample size, and the limited scope of the project. However, it may also mean that the guidelines did not adequately discriminate among the different sentencing patterns for different offenses.

Analysis of the data indicated that the four factors chosen were important in previous sentencing practices in Massachusetts. However, in a portion of this research dealing with sentencing disparities among racial groups, a more comprehensive analysis of a large subset of the entire sample (N=931) indicated that six variables were "consistently related to sentence length".<sup>67</sup> These variables were: 1) seriousness of the offense, 2) amount of bail, 3) prior prison time served, 4) extent of injury to the victim, 5) whether the defendant was confined at the time of sentencing, and 6) the sentence recommended by the district attorney. According to Thomas Jakob Marx of the Sentencing Guidelines Project, when combined in a regression equation, these six variables accounted for 68 percent of the variation in sentence length after trials and 86 percent of the variation in sentence length after plea ratifications. Of these six variables, the district attorney's recommendation had the most explanatory power, at least in the non-trial cases. In fact, it accounted for over 90 percent of the explained variance in this group. It was also found to be important in the trial group, but the num-

ber of cases where this information could be obtained was too small to permit statistical analysis (Marx, 1980).

Clearly, then, the factors used in the guidelines were generally not the most significant factors from a statistical point of view. (The amount of explained variance reported by Marx is extraordinarily high.) There are of course, necessary trade-offs in the development of sentencing guidelines between those factors which are statistically important and those which are appropriate for sentencing. Understandably, for example, the Massachusetts project did not use variables such as the amount of bail or the defendant's status at the time of disposition. Moreover, the fact that the trade-offs must occur is not necessarily indicative of improper sentencing decisions. In other words, the statistical significance of a particular variable "does not necessarily indicate that the judge consciously considered that factor when sentencing" (Marx, 1980). For example, the significance of a variable such as amount of bail may be an artifact of the analysis insofar as it captures characteristics of the offender or the offense not otherwise captured by the data.

As with most other sentencing guidelines research, the Massachusetts project combined its factors in a formula in order to weight each factor on the basis of its relative importance within the formula. Thus, when a defendant was sentenced he received a score for each factor. In Massachusetts, the score represented a

number of months of effective time or real time--that is, the amount of time actually spent in prison between imposition of the sentence and the date of parole eligibility, not counting good time. For the use of weapons factor, the score or penalty was nine months of incarceration if a dangerous weapon was used.<sup>68</sup> With respect to the second factor, injury to the victim, the penalty ranged from 9 to 45 months, depending on the seriousness of the injury. The third factor, seriousness of the offense, had penalties from 2.1 to 8.4 months, depending on the statutory maximum for the particular offense. For the last factor, the seriousness of prior offense, the range was from 1.6 to 6.4 months.

The Massachusetts guidelines were similar to sentencing guidelines developed in other states in that the total score for the factors was the basis for a guidelines range. In Massachusetts, this range was from 50 percent below to 50 percent above the total score of months. As with other guideline plans, when a judge imposed a sentence outside of this range, his or her reasons were to be stated in writing. In addition, a panel of Superior Court judges was created to periodically review sentences which were outside the range and to consider modifications of the guidelines.

While there was general compliance during the experiment, some judges thought that the guidelines were too mechanical and complicated. In any event, it does not appear that guidelines will be introduced again in the state.

## MICHIGAN

In the late seventies, it appeared that Michigan was one of the states in which comprehensive reform of an indeterminate sentencing system was certain to occur. In addition to several isolated statutory changes which went into effect during this period, there were also several major determinate sentencing proposals which received serious consideration.<sup>69</sup> However, attention eventually focused on empirically based sentencing guidelines as an alternative means of reform and in 1978 the Michigan Felony Sentencing Project (MFSP) was established in order to develop and test guidelines for all felony offenses in the state. Since that time, guidelines have been developed, tested, revised and subsequently implemented on a voluntary basis by 25 of the state's 165 trial judges.<sup>70</sup> Yet at the time of this writing, the future of the guidelines project was extremely uncertain. Efforts have been underway since June of 1982 to get the State Supreme Court to implement the guidelines on a statewide basis. However, a combination of political opposition and changes in the composition of the court have resulted in an indefinite delay in the court's consideration of the guidelines system.<sup>71</sup>

While it is impossible for us to predict at this time whether or in what form sentencing guidelines will ultimately be implemented in Michigan, it is clear that the momentum of the project has at least temporarily slowed down. Regardless of the future of sentencing guidelines, however, there have been several significant statutory revisions in recent years which affect sentencing policy in the state. Before returning to a more detailed discussion of the sentencing guidelines

project, the nature of these revisions is briefly outlined.

### Recent reforms

Until 1977, sentencing in Michigan was almost exclusively indeterminate. In February of that year, a two year gun law (M.C.A.A., Sec. 750.227) became effective. Under this law, a mandatory two-year prison term is prescribed for any person convicted of possession of a firearm during the commission of a felony. Five- and ten-year prison terms are mandated for subsequent convictions. These sentences are to be served consecutively to the predicate felony.

In May of 1978, the state reinstated harsh penalties for drug law violations which had been eliminated in 1971. The revised Controlled Substances Act specifies consecutive mandatory terms without parole, suspension, or probation other than lifetime probation. Also in 1978, Proposal B was enacted into law by virtue of being passed in a statewide referendum. This law established a class of felony sentences (encompassing a total of 76 offenses) for which no good time or special parole releases are allowed (M.C.L.A., Sec. 750.92). In other words, the effect of the law was to require that persons convicted of the enumerated offenses must serve the minimum sentence to which they have been sentenced. Included among the enumerated offenses were a variety of arson-related crimes, numerous types of assaults, breaking and entering, several firearm offenses, three degrees of criminal sexual conduct, as well as several other sexual offenses, and both armed and unarmed robbery.

In recent years, Michigan has also enacted a Prison Emergency Powers Act which

authorizes the governor to declare an emergency when the prison population remains above capacity for 30 consecutive days. Under the law, which was the first of its kind in the nation, minimum sentences for approximately 85 percent of all inmates are shortened by ninety days (Gardner, 1982). In 1981, invocation of the law resulted in the release of 900 inmates.

Notwithstanding these recent changes, sentencing in Michigan remains largely indeterminate. Unless otherwise stipulated, the court imposes a minimum term to go along with the maximum penalty which is provided by statute: if the sentence is life imprisonment, no minimum term is imposed. Probation is available for most cases. For repeat offenders, the maximum term may be increased up to 1 1/2 times for a first-time repeater, and up to twice the original maximum term for felons convicted of their third or subsequent offenses. For felons who have had three or more previous felony convictions, judges may impose a life sentence if the maximum for the offense as a first offense is more than five years, and life to fifteen years for other offenses. Finally, except for those cases governed by the aforementioned mandatory provisions as well as three-time repeaters, offenders are eligible for parole after serving the minimum term minus reductions for good time.

#### The Michigan sentencing guidelines project

Sentencing guidelines were implemented on a three-month trial basis in March of 1981, culminating almost three years of research and development. The guideline matrices were designed by the MFSP researchers working in conjunction with

the Michigan State Court Administration Office, and with the assistance of the judiciary and the state bar. The project operated independently of the state legislature.

The Michigan guideline effort has been grounded in the belief that a system of carefully developed guidelines, used within an indeterminate sentencing structure, was the best alternative for sentencing reform. The following rationale for a guidelines system was contained in the MFSP's final report:

A guidelines system can provide an understanding of sentencing practice, unambiguous guidance to judges, flexibility in decision, and a method to continuously monitor the sentencing process. This system provides a level of rational policy input, oversight, and accountability that is not available in other sentencing alternatives (Zalman et al., 1979).

The guidelines were the result of an extensive empirical analysis of sentencing patterns found to exist in 1977 in Michigan. The research was based on a stratified random sample of approximately 6,000 cases, representing about 25 percent of all sentences imposed in 1977. The sample was stratified for geographic region to adequately represent rural areas, resulting in three strata designated metropolitan, urban, and rural. Further stratification selected five offense severity categories according to maximum penalty. This process allowed the researchers to draw cases randomly from a total of 15 stratifications. More than 400 variables were included in the data

collection instrument, of which 110 were deemed by an advisory group of judges to be "potentially relevant determinants of sentencing" (Zalman et al., 1979). These factors were divided into two groups-- offense and offender characteristics.

Multiple regression analysis of the data showed statistically significant patterns in judicial sentencing, although they were not pronounced. The researchers noted that their data showed offender characteristics to be the most salient determinants of whether a person is incarcerated or not, suggesting that in Michigan prior record and social stability factors were the primary determinants of the IN/OUT sentencing decision. With respect to the length of sentence, the researchers reached similar conclusions. While patterns were faint, offender characteristics were the most important in non-violent crime categories, whereas the offense characteristics were the most salient for violent and drug offenses. Certain inappropriate variables such as race and age were found to be significantly related to some sentencing variation, and the authors stated that the results of the study strongly indicated the presence of sentencing disparity in Michigan in 1977. The authors concluded that sentencing patterns were discernible but "fuzzy". They reasoned, however, that this was "the result of many judges making decisions carefully and rationally but without any explicit guidance," and further suggested a guidelines approach as an appropriate starting point in structuring judicial decision-making (Zalman et al., 1979).

The guidelines developed for use in Michigan were based in large part on the prior sentencing research. The most frequently occurring felonies, which also had a stat-

utory maximum of at least two years, were categorized into eleven broad crime types: homicide, negligent homicide, assault, robbery, sex crimes, drug offenses, burglary, larceny, fraud, property destruction and arson, and weapons possession. Within each crime group, a guidelines matrix was developed for each set of crimes that shared the same statutory maximum penalty. Grids were developed for penalties that range from 24 months to life or term of years. Departing from the earlier research recommendations, the IN/OUT and length decisions were combined in each grid. A grid consists of a prior record index with six categories (except for the negligent homicide grid which has only three), and an offense severity scale with three divisions. Thus, a typical 3 x 6 grid consists of 18 sentencing cells (see chart on following page).

The numbers in each cell indicate the guideline range, which includes the appropriate minimum sentence within the indeterminate sentence structure. Thus, any cell with a "0" as the low end of the range leaves the sentencing judge with broad discretion as to type of sentence.

The prior record and offense severity dimensions were formed by using the regression coefficients of each significant variable from the sentencing study data. That is, with the variables statistically weighted in terms of their salience to the sentencing decision, their relative importance in making future decisions was preserved. The authors believed that sentencing disparity or variance was thus minimized by excluding inappropriate factors.<sup>72</sup> Furthermore, they felt that this method could insure that there was not a sudden or drastic change in sentencing patterns. Sentencing

Michigan Guideline Grid Sample

Sex crime group	Prior record						Life or term of years statutory maximum					
	A		B		C		D		E		F	
	0		1-2		3-4		5-6		7-8		9+	
L 0-3	0-36		12-48		12-48		36-60		48-84		72-120	
M 4-7	36-72		48-84		60-102		72-120		96-180		120-240	
H 0+	72-120		96-180		120-240		180-240		180-300 or Life		180-300 or Life	

outside of the guideline ranges was permitted provided reasonable mitigating or aggravating factors were indicated.

The Michigan guidelines were developed from an exceedingly thorough and comprehensive research effort. However, the transition from guideline research and development to guideline implementation has been somewhat cumbersome in Michigan. The actual scoring and sentencing procedures involve a myriad of forms, some of which have proved to be complicated to use. Adequate training of court personnel to insure standardized use has also been difficult. It is generally felt that the complexity of scoring offenders for guideline sentencing has slowed implementation efforts.

The project attempted to alleviate many of these problems after the three-month trial period was completed in May of 1981. In addition to fine-tuning the matrices, the training manual was revised to make it clearer and generally easier to use. The revised Sentencing Guidelines Manual was completed and presented to the State

Supreme Court in June of 1982. Since that time, there have been no major changes.

Notwithstanding improvements in the design of the manual and adjustments in scoring procedures, the guidelines now awaiting action by the State Supreme Court remain essentially the same as those first developed for use in 1981. Critics have suggested that while fulfilling the intent of providing structure to the sentencing decision, the guidelines may fall short of the goal of reducing disparity. The Michigan guidelines provide extremely wide sentence ranges. In addition, overlapping ranges between adjoining cells in the Michigan matrices have raised questions regarding the validity of defendants with different prior records receiving the same guideline sentence. Despite these criticisms, the Michigan guidelines are founded on a reliable research methodology and were developed with the assistance of legal practitioners. They represent research and legal sophistication well beyond that used in the earliest guideline research.

### Impact

While Michigan's prison population went up substantially in the mid-seventies, by 1978 it had begun to level off (Sourcebook, 1981). Gardner (1982) reported that there was only a 1.8 percent increase in 1981, a year when the national average increase was 12.5 percent. Observers attribute this relatively moderate growth to a declining rate of commitments and to the Prison Emergency Powers Act discussed above.

On the face of it, then, it appears that, so far, the sentencing changes of recent years have not had a significant impact on the overall severity of sanctions or the aggregate amount of time served by inmates. This conclusion is supported by evidence obtained by Heumann and Loftin (1979) on the effect of the Felony Firearms Statute and a concurrently enacted county-wide plea bargaining ban on case processing and dispositions in Wayne County (Detroit). The research consisted of interviews with court personnel and statistical analysis of data from both Detroit's computerized court information system and prosecutorial files. With respect to case information, the data base was comprised of before and after samples for the offenses of armed robbery, felonious assault, and all other assaults. The first period included cases disposed of between July 1, 1976, and June 30, 1977, while the second period encompassed offenses committed and disposed of in the six-month period after the law went into effect.

A word of caution is in order regarding the small sample sizes employed by the authors, particularly with respect to the after samples.<sup>73</sup> With this caveat in mind, the authors found that prosecutors

were generally enforcing the state's new gun law and were adhering to the county's ban on plea bargaining. It was found that while there was "some slippage" at the warranting stage, the "exceptions were relatively infrequent and made only in borderline cases."

The analysis indicated little change in the disposition patterns of armed robbery or felonious assault cases. However, for the offenses categorized as other assaults, there was a tendency toward increased early dismissal as well as a decline in the percentage of convictions after the gun law went into effect. While there was also a slight increase in the likelihood of imprisonment for defendants in this category whose cases did not result in dismissal or acquittal, overall, the data suggested that after the new law went into effect, a limited amount of discretion was being exercised to protect some of these offenders from prison.

Heumann and Loftin discovered that there was only a slight upward shift in the average sentence as a result of the new law. Specifically, the study found:

- 1) For every 100 robbery cases, an average of seven defendants who would have received a two-to-five year sentence...now receive a sentence of five years or more.
- 2) For every 100 defendants charged with felonious assault, an average of 9 received a sentence of two years or more...who would have received a less severe sentence....
- 3) An average of 11 other assault defendants per hundred who would have received a lighter sentence in Segment One (before the new law went

into effect) received a sentence of two years or more in Segment Two (after the new law went into effect).

In addition, the analysis indicated that the "...only increase in the proportion of cases that go to trial is in the felonious assaults, and these trials are associated with light sentences."

These findings, (relating to type and length of sentence), were confirmed in a study done by Loftin and McDowall (1981).<sup>74</sup> This study was based on the dispositions of 8,414 cases in the period from 1976-78 where the initial charge was a violent felony. A modified form of

multiple regression analysis indicated that the gun law had a negligible effect on both the length of time served and the probability of incarceration for offenders charged with murder or armed robbery. On the other hand, the analysis showed slight increases along both of these dimensions for offenders charged with felony assaults and other assaults involving guns.

In conclusion, the available evidence indicates that the Michigan mandatory minimum gun law has had only a modest impact on both case processing and court disposition patterns. Unfortunately, there is no available research relating to the impact of the new good-time law.

# CONTINUED

# 2 OF 4

## MINNESOTA

Since the Minnesota Sentencing Guidelines went into effect in May of 1980, the presumptive sentence for approximately 80 percent of all felony convictions is a stayed sentence. Minnesota, then, is in a significant minority of states that have undergone sentencing reforms which did not generally increase sanctions. Also, Minnesota is in the minority in the deliberation, care, and methodological soundness employed to establish the content of the reform. Regardless of whether just deserts is the only appropriate rationale for punishment, or whether on-going criminal justice systems and practices eventually absorb some of the reform, the Minnesota guidelines present a uniform and articulated goal for sentencing. Finally, the Minnesota reform is unique in that it was based on a decision that prison populations should not exceed the capacity<sup>75</sup> existing when the reform was drafted.

### Context of Reform

Prior to 1980, Minnesota had an indeterminate sentencing system that stressed a rehabilitation model of sentencing. As in most states with an indeterminate sentencing structure, the court made the decision whether to incarcerate an offender or grant probation, and if the offender was to be incarcerated, the judge would set a maximum term that could be as low as one year and one day and as high as the statutory maximum.<sup>76</sup> The decision as to the length of time actually served in the institutions was left to the parole board.

Earlier, Minnesota had a part-time parole board which the legislature abolished in 1973 by creating the Minnesota Corrections Board (MCB), consisting of four full-time

members and one full-time chairperson. In response to a law suit by the Legal Assistance for Minnesota Prisoners (LAMP) group, the MCB developed parole guidelines similar to those in use in the federal system to facilitate the equitable treatment of inmates and assist the board in assessing parole release.<sup>77</sup> The parole guidelines became effective in May of 1976, making Minnesota the first state in the nation to implement empirically developed parole guidelines. The development of parole guidelines, however, did not end legislative interest in different sentencing reforms. Between 1975 and 1978, the Minnesota Legislature considered a variety of different approaches regarding sentencing. As in many states, the interest in sentencing reform resulted in political battles and created unexpected alliances between certain members of the state legislature, including coalitions of law and order conservatives and correctional liberals.<sup>78</sup>

In 1975, Senator McCutcheon introduced a determinate sentencing bill which eliminated parole and stipulated fixed terms. It did not mandate prison sentences, or structure discretion as to the IN/OUT decision. Although not dissimilar from other determinate sentencing bills in other states, this bill raised considerable controversy, and was eventually tabled by the Senate Judiciary Committee which expressed concerns over the elimination of judicial discretion and other potentially negative side effects. However, funds were appropriated for an interim study on the ideas in the bill, and near the end of 1975 the Senate Select Committee on Determinate Sentencing reviewed the issue, heard testimony, and drafted a greatly modified version of the bill which was then introduced in early 1976.

The new bill slightly altered the idea of determinate sentencing. Flat or determinate sentences were seen as the ideal, if sentencing equity was to be achieved, but judges were to be allowed to deviate plus or minus 15 percent of the determinate sentence to take into account aggravating or mitigating circumstances. Also, the bill had a provision for extended terms for habitual violent offenders. Even this new bill had critics, however. Those in opposition to the bill felt that it was not sensitive to variations in offense types or in offender characteristics. That is, one armed robbery was not seen to be the same as all other armed robberies, and one offender might have a different motivation or background than another. The flat time provisions of the bill were criticized as not discriminating enough to be fair in determining equitable punishments. Also, those opposing it felt that the new law would impact only on those who were to be imprisoned. If there were inequities involved in the determination of sentence length, there could also be inequities in the determination of prison, probation or jail and probation. The new bill did not address these questions. However, it passed late in the legislative session only to be vetoed by the Governor because "...the enabling clause for the extended term provision was inadvertently omitted during final revision" (Parent, 1978).

Dale Parent, then the research director of the Minnesota Sentencing Commission, described the situation well.

...With the opening of the 1977 session, many observers expected a quick repassage of the vetoed bill, but frustrated legislators interested in sentencing reform led members of the House Criminal Justice Committee to a con-

sideration of sentencing guidelines. Thus, in 1977, the two houses of the Minnesota legislature passed substantially different bills on sentencing. The Senate adopted an amended version of the 1976 bill, while the House adopted a sentencing guidelines bill. Since 1977 was the initial year of a two-year session, there was enough time to reconsider a meshing of the two bills, and in 1978 a conference committee eventually came to an agreement about them and reported out a bill which was quickly approved by both houses and signed into law by the Governor.

It is important to note that the new law essentially left the 1963 Criminal Code intact, making no major changes to the intent of the Code or the statutory offenses or their penalty structure. Also, of importance, the Commission created by the new law was primarily composed of criminal justice practitioners who did not completely share the political interests in the sentencing reform debate as did legislators. Although the Commission was given specific charges by the legislature, the legislature was, in effect, returning the problem of how to resolve the details of sentencing reform back to those who worked most closely with sentencing. Finally, the Commission was not given detailed or specific instructions as to what aspects of sentencing had to be included in the sentencing guidelines. (Parent, 1978).

As stated in the preceding paragraph, the Minnesota Guideline Commission was created in the 1978 legislation and charged with the development of uniform statewide sentencing guidelines. The Commission, which

was responsible to the legislature, consisted of nine members representing the criminal justice system and the public.<sup>79</sup> They were assisted by a permanent research staff. The guidelines developed by the Commission (discussed below) became effective May 1, 1980. They made recommendations with regards to the IN/OUT decision and the length of incarceration for those to be incarcerated based on reasonable offense and offender characteristics. The length of incarceration was considered a presumptive sentence which, once imposed, could only be diminished by good time which is one day for every two of good time. There is no parole and both the state and the defense may seek appeal of sentence. To develop the guidelines, the Legislature mandated that the Commission consider 1) combinations of appropriate offender and offense characteristics, 2) past sentencing, and 3) release factors. Also, available correctional resources were to be considered in drafting the guidelines.

#### The Minnesota sentencing guidelines

Research. Because there existed no adequate and usable data base to determine what actual sentencing practices were, the Commission did two studies to determine past practices:

1. A dispositional study to look at past judicial sentencing patterns.
2. A durational study to look at past MCB paroling practices.

Both studies collected the same set of information on current offense, prior record, juvenile history (for those 21 years old and younger), social history, court processing data, and sentencing

information. For the durational study, variables pertaining to institutional behavior were also collected. Although some guideline studies use past sentencing practices almost exclusively in developing guidelines (Wilkins, et al., 1978), the Commission felt that there were several problems in relying solely on past practices. Thus, the Commission felt informed but not bound by past sentencing practices, and the resultant guidelines are prescriptive rather than descriptive.

For the dispositional study, the Commission collected data on 50 percent of all Minnesota felons convicted in 1978. This included all females and a 42 percent random sample of males. All counties were sampled, with oversampling of counties with a large Indian population. The total sample included 2,339 felons.

In analyzing this data, the Commission's research staff looked for factors associated with the IN/OUT decision in sentencing. They found that the most significant factor was criminal history, followed by the severity of offense. The most important criminal history factor was the number of prior felony convictions, followed by whether or not an offender was on probation or parole at the time of the instant offense. For younger felons, the extent and severity of juvenile record proved to be important. The analysis also indicated that social status items were not associated with sentencing decisions except for employment at time of sentencing. Since these items were not significant, they could be excluded from the guidelines without creating variation from past sentencing practices. (See Table 15 for various findings from the dispositional study.) The result of the dispositional study was the development of a

TABLE 15

Findings of the Dispositional Study  
Minnesota Sentencing Guidelines Commission\*

Age	37.1 percent	20 years old or younger
	45.8 percent	Between 21 and 30
	17.0 percent	Over 30
Sex	88.3 percent	Male
	11.7 percent	Female
Race	84.1 percent	White
	8.8 percent	Black
	4.8 percent	Indian
	1.5 percent	Mexican American or miscellaneous
Marital status	59.4 percent	Single
	22.6 percent	Married or co-habitation
	17.1 percent	Separated, divorced, or widowed
Education	45.9 percent	Have not finished high school
	12.9 percent	GED
	26.9 percent	High school diploma
	14.3 percent	Some college or vocational school
Employment	55.7 percent	Unemployed at time of offense
	60.1 percent	Unemployed at time of sentencing
Drugs	23.7 percent	Moderate users
	21.0 percent	Heavy users
	4.1 percent	Addicted
Alcohol	34.5 percent	Heavy users
	6.2 percent	Addicted
Drugs and alcohol	45.3 percent	Under the influence at time of offense

Minnesota imprisoned 26.4 percent of all convicted felons in 1978. For property crimes, 15.2 percent were incarcerated, for crimes against persons, 38.5 percent were incarcerated.

\*Taken from the Summary Report, Preliminary Analysis of Sentencing and Releasing Data, by the Minnesota Sentencing Guidelines Commission, 1979.

"dispositional line" to determine whether to incarcerate a defendant or not, (see Table 16).

The second study, the durational study, conducted by research staff of the Commission, examined information on every person released from the state institutions in 1978 at first release, either on parole, or at end of sentence served. This sample consisted of 847 cases.<sup>80</sup> Seriousness of offense and criminal history (in reverse order from the dispositional study) proved to be the most significant factors affecting sentence length. The durational study also found significant regional variations in sentencing. A slightly lower proportion of persons were committed from urban areas than non-urban areas. Also, some racial differences were found, in that blacks were incarcerated at a slightly higher rate than whites for property offenses, though the Commission officially reported that it had found no significant racial bias in sentencing. These results supported the concern of the legislature that sentencing patterns for similar offenders differed from place to place.

Development of sentencing guidelines: policy decisions and research. Because severity of offense and prior record were found to be the most relevant aspects of past sentencing practices in the initial research conducted by the Commission's researchers, a single two dimensional grid to display these factors was developed. The construction of the offense severity table by rank ordering techniques included all commonly occurring felonies. These were arranged into six categories (property crimes, crimes against persons, sex offenses, drug offenses, arson offenses, and a miscellaneous category). Each offense was placed on an index card--for a total of 104 cards--and each Commission

member was asked to sort the cards in each of the six decks in order of offense severity. An average rank was then computed for each card. Following this, the Commission had to determine which of the six decks was most severe overall. This process continued until all 104 cards were ranked from highest to lowest severity. Finally, the cards were divided into smaller numbers of severity levels, within which generally equivalent offenses were located. The results included ten different levels of offense severity. These levels were not, of course, related to the empirical findings relative to their significance in past sentencing practices.

The importance of prior record was documented with the development of the criminal history index. With this index, the Commission sought to mirror past sentencing practices, base prior record considerations on objective and readily available records, and rely on factors other than social or economic variables. Two core variables emerged as a result of the analysis of these considerations--the number of prior felony convictions, and custody status at time of convictions. Other variables were added because the Commission felt they should be included. For example, the Commission decided to include misdemeanors in the index, even though the number of misdemeanors in a defendant's prior record was not found to be significant in the research. Also, in developing the index, some items were weighted more heavily than others. Clearly, the Commission made policy decisions informed by, though sometimes departing from, the research findings.

Because the dispositional study found that a large number (70 percent) of convicted felons had no prior felony record, it was felt that juvenile record was an important

element in sentencing young offenders. For some, juvenile record was the only information on past offenses. However, there was considerable opposition among Commission members to including juvenile records in the guidelines. The major problem appeared to be the state of juvenile record-keeping. Record-keeping practices differed widely across the state, and there were different court rules regarding disclosure of juvenile record.

The Commission held two public hearings on this issue at which time juvenile court judges, district court judges, prosecutors, defenders, law school professors, law enforcement representatives and correction officials debated the pros and cons of inclusion. The Commission decided to include juvenile record in the guidelines mainly as a means to identify the serious and persistent juvenile offender. The Commission, however, put strict limits on its use (it is only considered with defendants who are 21 or younger) and standardized the types of records to be considered.

The dispositional line. As stated above, the Minnesota guidelines were developed for both the IN/OUT decision in sentencing, and the decision as to sentence length. The legislature, clearly desiring to limit judicial discretion, required that the Commission establish criteria for the IN/OUT decision based on offense and offender characteristics. The Commission defined these as severity of offense and prior criminal history and then had to determine which combination of these factors would make imprisonment proper. This was accomplished by establishing a "dispositional line" on the sentencing grid.

In developing the dispositional line, the Commission considered past judicial practices, philosophies of punishment (just deserts, incapacitation),<sup>81</sup> legislative intent (which included some recently proposed mandatory sentencing laws as well as the Community Corrections Act), and criminal justice systems impact. This dispositional line adopted by the Commission was based on a modified just deserts model of punishment. The line indicates a presumptive sentence of incarceration for all violent offenses against a person. For these offenses it was assumed that the severity of the offense alone justifies a term of imprisonment.

Importantly, the dispositional line also provided for a presumptive sentence against incarceration. The most frequent offense in this category is unauthorized use of a motor vehicle. The presumptive sentence includes the potential for use of jail sentences or work release sentences for up to one year for these types of crimes. In other severity levels, the dispositional line varied between prior criminal history and offense severity (see Table 16 below).<sup>82</sup> Although there is room for departure for aggravating or mitigating circumstances, these must relate to substantial and compelling circumstances. The judge must provide written reasons for any departures from the normal guideline range.

In developing the sentence length portion of the guideline grid, the Commission looked at past sentencing practices in Minnesota, adjusted these practices to fit legislative intent and attempted to project the impact that guidelines would have on the criminal justice system in general.<sup>83</sup> The results of these considerations were the presumptive sentences included in the guideline matrix. The

TABLE 16

MINNESOTA

PRESUMPTIVE SENTENCE LENGTH IN MONTHS

Bold face numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

SEVERITY LEVELS OF CONVICTION OFFENSE	CRIMINAL HISTORY SCORE						
	0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle Possession of Marijuana I	12*	12*	12*	15	18	21	24**
Theft Related Crimes (\$150-\$2500) Sale of Marijuana II	12*	12*	14	17	20	23	27 25-29
Theft Crimes (\$150-\$2500) III	12*	13	16	19	22 21-23	27 25-29	32 30-34
Burglary-Felony Intent Receiving Stolen Goods (\$150-\$2500) IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
Simple Robbery V	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Assault, 2nd Degree VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated Robbery VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
Assault, 1st Degree Criminal Sexual Conduct, 1st Degree VIII	43 41-45	54 50-58	65 60-70	76 71-81	95 89-101	113 106-120	132 124-140
Murder, 3rd Degree IX	97 94-100	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
Murder, 2nd Degree X	116 111-121	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

\*One year and one day

\*\*the dark heavy line is the dispositional line, above the line indicates probationary sentences (OUT), under the line indicates sentences of incarceration (IN).

legislature had permitted a range of up to 15 percent sentence deviation around the presumptive sentence, but the Commission chose to narrow this range because they wished to insure the limitation of judicial discretion and felt that a wider range would encourage disparate treatment of similar cases.

Under the old indeterminate system, Minnesota allowed reduction of imposed sentence by one-third good time. This was not changed by the guidelines. However, this credit was taken into account when developing the presumptive sentences. That is, a presumptive sentence of six years would mean that a person would only spend four years in prison. Under the guidelines system, judges can also stay a sentence, and add a variety of conditions (such as probation, work release, etc.). The stayed sentence may exceed the presumptive sentence and can be as long as the statutory maximum. If the stayed sentence is revoked, however, the presumptive prison term is the one that is imposed. This provision was to insure that those persons who received stayed sentences, if revoked, would not spend longer times in prison than if they had received an incarceration sentence initially.

The Minnesota guidelines also apply to sentence terms and probation revocations. The legislature did not authorize the Commission to develop guidelines for consecutive sentences or revocations. However, as the main task of the Commission was to reduce apparent disparity in sentencing, the Commission felt it could not ignore important areas that could result in differences in sentencing and in time actually served. The consecutive sentence guidelines subsequently developed by the Commission define a small sample of cases, basically multiple offenses against

persons, in which consecutive sentences may be applied. They are not mandatory. The use of consecutive sentences in other instances constitute departure from the guidelines, and written reasons must be given. The Commission also articulated a policy requesting restraint in the imprisonment of persons who violated probation or conditions of a stayed sentence. It is important to note, however, that the Commission has no power to enforce or sanction this policy.

The Minnesota guidelines also apply to attempts and conspiracy charges. The Minnesota Criminal Code requires that attempts and conspiracies receive one-half of the statutory maximum of the completed offense.<sup>84</sup> This, of course, only applies to those receiving a prison term and there are no provisions regarding attempts or conspiracy charges for the IN/OUT decision.

#### Systems Impact

One of the mandates from the Minnesota legislature for developing the presumptive guidelines was that the Commission keep in mind the availability of correctional resources. The Commission felt that this was a valid request for a variety of reasons including: 1) the obligation of the state is to provide humane conditions for confined citizens; 2) the Commission could not in and of itself appropriate funds for additional prison space; and 3) it did not seem appropriate that the state of Minnesota should operate on an implicit policy that the prisons operate beyond capacity. Also, the sentencing system under the guidelines plan no longer had a parole board whose functions sometimes included a safety valve capacity to accelerate release at the time of prison overpopulation.<sup>85</sup>

The projection model developed by the Commission to estimate the impact of the new sentencing law on prison populations served two basic functions: 1) to estimate the impact of sentencing guidelines, and 2) to serve as part of the monitoring effort of the guidelines. The projection model was used throughout the development of the guidelines in such areas as the creation of the "dispositional line". Using the different sentencing models that the Commission considered, statistical projections resulted in a workable model that did not predict an increase in prison populations that would exceed capacity.

After the sentencing guideline grid was established, the Commission held two statewide meetings at which the guidelines were presented and explained. There was a great deal of criticism and comment as a result of these meetings and though no major structural changes resulted, three amendments were added to the guidelines. The first was a limit on the number of points in the criminal history score that an inmate could accrue as a result of misdemeanor offenses. Thus, the Commission modified the criminal history index by limiting the number of points to one for misdemeanor offenses. Second, a limit of one point for any juvenile record was established. The third amendment was to increase the severity level for subsections of the second degree sexual assault offenses. This amendment was demanded by advocacy groups including those composed of victims of sexual assault offenses.

The hypothetical results of the sentencing guidelines legislation in Minnesota are based on five-year projections statistically developed by the Commission. Since the guidelines have been in effect for three years (since May 1980), there is a growing amount of post-implementation

data. Based on their original projections, the Commission felt that the guidelines would result in increased incarceration for more person offenders (an increase from 32 percent to 42 percent) and decreased incarceration for property offenders (projected to decrease from 62 percent to 49 percent). This change in commitment patterns was expected to result and did result in a substantial change in the type of offenders in the state prisons. According to the original projection, persons serving terms of over five years would increase from 18 percent to 26 percent, those serving terms of three to five years would decrease from 40 percent to 30 percent, and for those serving terms of two years or less, the percentage should remain basically the same. It was assumed that these changes would be gradual and manageable. Also, because of these changes, it was thought that the state institution population would become more metropolitan, older, and less racially biased. Not all of these expectations have been borne out, however.<sup>86</sup>

The Minneapolis Tribune (September 5, 1982) noted that, despite guideline use statewide, in some counties minorities and the unemployed continued to receive harsher sentences. Also, departure rates from the guideline range in general were somewhat higher than the Commission expected (see Table 17). This information was gathered by the Commission as part of its on-going research and evaluation effort.<sup>87</sup>

In order for the guidelines to be implemented fairly and effectively, the Commission recommended the following modifications to the legislature: that there be improved provisions for recording juvenile court history, that minimum

TABLE 17

DEPARTURES FROM THE MINNESOTA SENTENCING GUIDELINES  
BY TYPE OF SENTENCE

All Departures		
Race	1981	1978
Whites	5.2 percent	18.5 percent
Blacks	9.6 percent	21.5 percent
Indians	12.4 percent	28.5 percent
Harsher Departures (sent to prison when guidelines called for a stayed sentence)		
Race	1981	1978
Whites	2.6 percent	12 percent
Blacks	4.9 percent	12 percent
Indians	7.5 percent	11.5 percent
More Lenient Departures (stayed sentence when guidelines called for imprisonment)		
Race	1981	1978
White	2.7 percent	6.5 percent
Black	4.7 percent	9.3 percent
Indians	4.9 percent	17.1 percent
(Although the guidelines were not in effect in 1978, the convictions that year were examined for comparison purposes.)*		
Departures from Sentencing Guidelines by Job Status in 1981		
Unemployed	8.9 percent total departures	
	5.0 percent harsher	
	3.9 percent more lenient	
Employed	3.4 percent total departures	
	0.2 percent harsher	
	3.2 percent more lenient	

\*Refers to all three categories.

Minneapolis Tribune  
September 5, 1982

standards for presentence investigations be developed, and that regulatory provisions for adequate data collection be given to the Commission for monitoring purposes. It was the Commission's intent that the sentencing guidelines would be monitored and modified as necessary, and a reporting network was developed so that data on every felony sentence is available to the Commission for review and subsequent analysis to determine departure rates. If sentences depart from the guidelines in concentrated areas, there was to be examination for possible modifications of the guidelines.

Other long-term impacts of the guidelines on the criminal justice system and plea negotiations have been examined. Rathke (1982) reports that the guidelines altered rather than eliminated negotiated pleas--charges, not sentences, are bargained--and Falvey (1982) indicates that the defense bar finds the equity and predictability of the guidelines helpful. Also Knapp (1982) reports that despite dire predictions, there have been no increases in trials and relatively few sentence appeals. She also reports, however,

Charging and negotiating practices have not totally subverted the intent of the guidelines--there are definitely more serious person offenders being imprisoned now than prior to the Sentencing Guidelines. However the potential for undermining legislative and Commission policy clearly exists and must be monitored.

The results of what is probably the most thoughtfully constructed statewide sentencing reform, then, are still not completely known. It may be that Minnesota has been able to draft and implement a new sentencing system that will insure similar treatment of similar offenses while containing prison populations and costs at the same time. It may be that the careful articulation of a just deserts rationale for punishment--if it is indeed the wisest--is actually maintained and followed throughout the discretionary stages in criminal case processing. It may be that despite early disappointments (race continues to affect sentencing), omissions (there are no guidelines for probationary sentences), or unanticipated effects (jail, not prison populations have unexpectedly jumped), Minnesota has achieved true sentencing reform.

## MISSISSIPPI

### Indeterminate sentencing

No major changes in the basic indeterminate sentencing system used in Mississippi have occurred within the last ten years. Statutory penalties are provided for each felony offense. Minimum and maximum terms of imprisonment are prescribed in most cases; only maximum terms are specified in others. For example, robbery carries an incarcerative term not to exceed 15 years while arson has a minimum sentence of not less than two years and a maximum of not more than 20 years. The death penalty is allowed for certain offenses, and life imprisonment is the punishment for such offenses as murder and rape. Fines, probationary terms, and specified maximums for county jail sentences are also provided in the statutes for felony offenses. The court has the discretion to sentence an offender to an incarcerative or non-incarcerative sentence. If a defendant is to be incarcerated, the sentence imposed by the court is definite and becomes the maximum term. In addition, the judge may also impose a minimum term which a defendant must serve before being released on parole.

The parole board in Mississippi determines the release date for incarcerated offenders. There is no parole release prior to serving a minimum term if a minimum has been specified. Most other offenders become eligible for parole release after serving one year in the penitentiary. Parole supervision occurs after release from the institution. Most inmates have been eligible for parole after serving one-third of their sentences, but this was recently changed so that most persons are eligible for parole release after serving one-fourth of their

term. Restrictions of parole release are provided for certain offenses. Since 1977, Mississippi has had an earned release program whereby certain defendants could be released on supervision after completing at least one year of incarceration. Approval of the parole board, the warden of the state prison, and the commissioner of the department of corrections was required for participation in this release program which might have been important to help ease overcrowding in the state prison had it been used as intended. It was not, however, and department of corrections officials have received criticism for not using this program more liberally (Gettinger, 1979). Mississippi's earned release program was abolished with the 1982 parole eligibility change.

Good time credits are earned for good conduct and performance. Inmates are classified into one of four groups with different allowances as follows:

- Class I Up to 30 days reduction for every month served.
- Class II Up to 20 days reduction for every month served.
- Class III Up to 8 days reduction for every month served.
- Class IV No good time reductions.

Up to 30 percent of earned good time may be deducted also from the defendant's parole eligibility date. (Ten days credit may also be given for each pint of blood donated.)

Additional penalties. For persons who are convicted of the use of a deadly weapon in the commission of a robbery,<sup>88</sup> a jury may fix the death penalty as the punishment. If the court is sentencing these offenders, a mandatory minimum term of no

less than three years must be imposed. The normal incarcerative sanction for robbery is a sentence of not more than 15 years with no minimum specified. Legislation passed in 1977 restricts the parole eligibility of these offenders. Persons serving a sentence of ten years or more for robbery must serve ten years before parole release. Persons receiving a sentence of less than ten years for this offense may not be paroled. Mississippi also enhances the punishment for persons with prior convictions found guilty of carrying a deadly weapon. The normal sanction for this offense would be a fine or a county jail term not to exceed six months. However, for a third or subsequent conviction for this offense, the defendant must be sentenced to a term not less than one year nor more than five years. Any persons with a prior conviction for any felony who are convicted of this offense must also receive the one- to five-year sentence.

Recent legislation

Legislation passed in 1976 reflects Mississippi's legislative attempt to provide harsher punishment for repeat offenders. Senate Bill 2230 required that the defendant be incarcerated to the maximum term allowed by law upon the third conviction for a felony offense arising out of separate instances. The repeat offender law is further qualified in that the defendant must have been sentenced to a

term of one year or more to a state or federal penal institution for the prior felony conviction in order for the conviction to count towards the habitual offender status. If any one of these past convictions was a crime of violence, the defendant must be sentenced to life imprisonment. Thus, defendants in Mississippi who have one prior violent felony conviction which resulted in a prison sentence of at least one year must be institutionalized for life. Persons sentenced as habitual offenders may not have their sentences suspended or reduced--these defendants are not eligible for probation or parole.

Impact

No study has been done to investigate the impact of the habitual offender legislation in Mississippi's prison population. Data on the numbers of inmates in prisons in Mississippi indicate that there has been a sharp increase in population. Between 1980 and 1981, this increase was 24 percent. Many of these defendants are being held in county facilities because of overcrowding problems. Even though a new prison is scheduled to open soon, it is anticipated that it will be quickly filled with this back-up (Krajick, 1981).

Disparity in sentencing may also exist in Mississippi,<sup>89</sup> but sentencing guideline legislation that would address this problem has died in the legislature.

**MISSOURI**

Sentencing reform and its context

In order to develop a more rational and effective sentencing system that would minimize disparity, but still remain flexible enough to allow sentences to fit specific circumstances, the Missouri Committee to Draft a Modern Criminal Code began work in 1969 to revise the criminal laws of Missouri. This was the first attempt to do a comprehensive revision of Missouri's criminal law since 1835. Revisions that had occurred prior to 1960 were piecemeal, inconsistent, confusing, and led to "disparity in the sentencing of offenders of comparable culpability" (Anderson, 1973). The Missouri Committee began with three basic objectives: (1) the classification of offenses into distinct categories based on the seriousness of the offense; (2) the movement of sentencing authority from the jury to the court; and (3) the provisions for appellate review of sentences.

The work of the Committee went on for many years. The code revisions drafted by the Committee became law during the 1977 Legislative session with an effective date of January 1, 1979. Two departures were also made from the original goals of the Commission--some jury sentencing remained intact, and appellate review of sentences was rejected.

A new criminal code and system of sentencing was developed by the Committee. Previously, each offense carried its own specific range of penalties. The new code consisted of a classification system with ranges of penalties as follows:

Class A	10-30 years Life imprisonment
Class B	5-15 years
Class C	Not more than 7 years
Class D	Not more than 5 years

In the new system, the court sets a maximum term within these ranges and may also impose a non-incarcerative term. Missouri also has a mandatory death sentence for some offenses.

Good time provisions were also abolished by the new criminal code. Each person sentenced to prison receives a prison term and a conditional release term. After serving the prison term, a defendant must serve the specified conditional release term which means supervision--subject to the rules, terms, and conditions imposed by the Board of Probation and Parole. The conditional release time is determined automatically by statute as follows:

<u>Conditional Release</u>	<u>Prison Sentence</u>
One third	9 years or less
Three years	9-15 years
Five years	Sentences greater than 15 years (including life sentences)

It was felt that even though the conditional release system would mean an increase in probation and parole personnel because it provided for supervision of all persons released from prison, it would provide help in the transition period from prison to civilian life and would therefore result in a better chance for rehabilitation. The term set for conditional release is independent of the parole release decision.

The 1977 Missouri criminal code also provided extended terms and special terms of imprisonment for those defendants labeled "persistent" and "dangerous". Criteria defining a "persistent" offender included anyone who had pled or been found guilty of two or more felonies committed at different times which are unrelated to the instant offense. A "dangerous" offender was defined as: (1) a person sentenced for a felony who knowingly murdered, endangered, or threatened the life of another person or attempted to inflict serious injury on another person; and (2) has pled or been found guilty of a Class A, B, or other dangerous felony. Dangerous felonies included murder, forcible offenses. The chart below shows the statutory terms for those defendants sentenced as persistent or dangerous compared with the sentence ranges for defendants not so labeled.

A presentence report is required for all persons convicted of a felony and the criminal code also specifies certain procedures for the imposition of the extended terms. It is important to remember that while the criminal code provides for extended terms for dangerous and persistent felons, the court is not bound to sentence persons under these terms. Such sentencing comes from the initiative of the prosecuting attorney rather than from the court. The parole board may also

classify inmates into the persistent and dangerous categories. Subsequently, if the board feels that such persons present a danger to the community, they will not be eligible for parole consideration. However, a five-year reconsideration is granted by the parole board. Further changes were made to this law in 1981, broadening the definition of a dangerous felony to include such offenses as arson. Other provisions are also provided under Missouri law for the sentencing of habitual offenders.

Parole. As described above and provided in the criminal code, defendants sentenced to prison in Missouri receive a maximum term from the court, as well as a conditional release term. An inmate may, however, be released by the parole board before the maximum prison term is served. Parole eligibility requirements have been specified to include such provisions as: (1) no offender shall be paroled until they have served one-half of the maximum term; (2) those offenders labelled "non-dangerous" may be paroled after serving one-fourth of the maximum term; (3) no offender serving a life sentence may be paroled before serving 30 years; and (4) no offender shall serve more than two-thirds of the maximum sentence. The Missouri Parole Board has recently developed parole guidelines, based on the Federal Model, which became effective in

Persistent or Dangerous Sentence Ranges

	<u>Persistent or dangerous</u>	<u>Regular</u>
Class A	10-30, Life imprisonment	Same
Class B	Not more than 30 years	5-15 years
Class C	Not more than 15 years	Not more than 7
Class D	Not more than 10 years	Not more than 5

July of 1982. The philosophy behind the guidelines was to establish a more uniform parole policy, and to promote more consistent and equitable decision-making without eliminating individual case consideration. The guidelines developed by the Parole Board were based on past parole decisions, and indicate the customary release time based on combinations of offense and offender characteristics. Good institutional behavior and program progress are a precondition for consideration under the guidelines. Mitigating and aggravating conditions may also justify release outside the guideline range--if the decision is above the range, the reasons must be noted.

Further sentencing enhancements

Armed criminal action. The revised Missouri criminal code also used a dangerous weapon in the commission of a felony. The sanction imposed for weapon use is also conditioned by prior convictions for armed offenses. Offenders may be sentenced as shown in the chart below:

These extended terms are to be in addition (consecutive) to any punishment given for the crime committed. Clearly, when the legislature passed these provisions, its intent was to authorize punishment for armed action beyond the penalty for the underlying offense. However, this provision has been subject to varied court

interpretations, and has posed many problems related to the issue of double jeopardy. A large number of cases have been appealed. The finding of the Greer case indicated that:

- Double jeopardy prohibits punishment for armed criminal action in connection with any 'underlying felony' upon which the armed criminal action is based (State v. Greer, 1980).

In such cases the added time imposed for the armed criminal action has been overturned. These problems make it difficult to assess whether the enhancement is having any real effect on sentencing because most of the cases where the additional term was actually added have been appealed. An amendment was added to this statute in 1981 (effective August, 1982) to clarify the armed criminal action provision. Now some of the offenders charged with armed criminal action are prosecuted and given increased punishment because they can be described and sentenced as "dangerous" offenders.

Persistent sexual offender. The Missouri criminal code provides for a mandatory minimum sentence of not less than 30 years for a person found to be a persistent sexual felony offender. A persistent sexual felony offender is defined as someone convicted of rape, forcible rape, sodomy, forcible sodomy, or any attempt at

	<u>Sanction</u>	<u>Parole or Other Release Eligibility</u>
First offense	Not less than 3 years	Not less than 3 years
Second offense	Not less than 5 years	Not less than 5 years
Third or subsequent offense	Not less than 10 years	Not less than 10 years

these offenses who has been previously convicted of one of these felonies. The 30-year term must be served without probation or parole.

Capital murder. Missouri's new criminal code specifies that those offenders convicted of capital murder may be punished by death. However, a defendant convicted of capital murder may also be sentenced to life imprisonment and is not eligible for parole release until a minimum of 50 years has been served. Aggravating and mitigating factors are listed to help in the determination of this sentence. (This list was revised in 1981.)

#### Impact of Legislation

To our knowledge, no major study has been done on the impact of Missouri's new criminal code. It is clear that the code provides for a more systematic sentencing system than existed previously. The Missouri Coalition for Alternatives to Imprisonment has recently been funded by the Edna McConnell Clark Foundation to examine alternatives to incarceration in Missouri. One of their main objectives is to reduce prison overcrowding. The Coalition has discussed adding sentencing guidelines to legislation for the next session of the Missouri General Assembly.

#### MONTANA

Montana has an indeterminate sentencing system. Maximum penalties are specified for each statutory offense, and judges impose a fixed sentence not to exceed the maximum. This fixed sentence becomes the maximum time served, minus good time and subject to paroling decisions. Various legislation has been proposed from time to time to change this system of sentencing, and various parole release changes have been made.

#### Sentencing reform and its context.

The Montana Criminal Justice Standards and Goals Council was established in 1974 by the Governor to improve the Montana criminal justice system. The conclusions it reached on sentencing policy were based on the belief that reintegration of the offender into society was the best way to deal with crime. The Council did not recommend specific sentences, but it did say that the least drastic punishment possible be given in each case. Along with each sentence, judges were required to give a written explanation of the purpose of the sentence, articulating rationale such as retribution, deterrence, or rehabilitation. The Council subsequently recommended that sentencing guidelines be created by the legislature. A feasibility study was done, but no guidelines were developed.

Instead, the Montana legislature considered a presumptive sentencing bill which was approved by the Legislative Committee on the Judiciary. This bill (Senate Bill 219) provided for enhanced sentences for repeat offenders--a 30 percent increase in sentence length over the presumed sentence for someone with one prior felony and a 50 percent increase over the presumed sen-

tence for a defendant with two or more prior felonies. Under SB 219 the Montana Supreme Court would be mandated to establish the length of sentence and judges would be required to adhere to these lengths except in the case of aggravating or mitigating circumstances specified by the bill. According to SB 219, if judges did not give the presumed sentence, they had to give explanations. In these cases, the prosecution would be allowed to appeal. SB 219 did not pass.

Additional legislation calling for fixed sentences, and for strict mandatory minimum sentences for most major crimes have caused considerable debate in the Montana Legislature in the past few years, but as yet, there have been no major sentencing reforms.

Sentencing enhancements. Legislation has been passed within the last few years, however, providing for various sentencing enhancements for specific offenders and offenses. A court may designate an offender as non-dangerous or dangerous for purposes of determining parole eligibility. Normally, inmates are eligible for parole after serving one-fourth of their sentence. Non-dangerous defendants may apply for parole after serving one-third of their sentence or after one year. Dangerous offenders are not eligible for parole until they have served at least one-half of their sentence. Provisions are also made for persons who use a firearm in the commission of an offense. In addition to the sentence for the instant offense, offenders must serve a consecutive term of imprisonment of not less than two years or not more than 10 years for the use of a firearm. If someone is convicted of a second or subsequent offense involving the use of a dangerous weapon, they shall be sentenced to a consecutive

term of four to 20 years. A few exceptions to this rule are provided in the law. Montana also has provisions for repeat offenders allowing for additional consecutive time of from five to 100 years.

Parole changes. In 1979 an amendment was made to the parole laws requiring that a parolee convicted of a new crime begin the new term only after completion of the original sentence. Thus, new offenses committed by parolees must now be consecu-

tive sentences rather than concurrent terms. The parole board also instituted a policy of allowing an individual only one parole in his or her lifetime. This means that if a defendant is once paroled and commits other crimes, he or she is not eligible for parole in any subsequent imprisonment. These paroling changes are seen as an attempt by the parole board to exert more control over offenders in an effort to deter future crime. The impact of this policy has yet to be determined.

## NEBRASKA

### Sentencing reform

In 1977 a new sentencing code was enacted in Nebraska classifying all criminal offenses in six felony and six misdemeanor classifications, most specifying a statutorily prescribed minimum and maximum term of incarceration. The felony classes and terms are listed below:

<u>Felony class</u>	<u>Incarcerative term min/max</u>
Class I	Life or Death
Class IA	Life
Class IB	10 years to Life
Class II	1-50 years
Class III	1-20 years
Class IV	0-5 years

This new sentencing scheme did not become effective until 1979. Previously, the minimum and maximum ranges were provided in the statutes for each individual offense, and the court would sentence the offender to an indeterminate sentence within this range, if a non-incarcerative sentence was not issued. The parole board and good-time credit allotments would determine actual release.

This indeterminate type of sentencing was not changed with the new criminal code. However, the statutory minimum term in the new code becomes the minimum sentence automatically unless the judge chooses to sentence to a minimum sentence of incarceration other than the one prescribed by the statutes. This minimum cannot be less than statutory minimum and not more than one-third of the maximum. When examined by offense class, particularly for Class IV offenses which make up a large percent of the caseload,<sup>90</sup> the court is not left a great amount of discretion for the length of the minimum term as shown.

<u>Felony class</u>	<u>Minimum as one-third of the maximum</u>
Class II	1-16 2/3 years
Class III	1-6 2/3 years
Class IV	0-1 2/3 years

The court retains the option of imposing a non-incarcerative sentence for all but Class I felonies.

In 1975 the good time procedures were changed so that automatic reductions occur in the defendant's minimum and maximum sentence from the date of sentencing for each year of imprisonment and for good behavior. Two months of credit are allowed for the first two years of imprisonment, three months for the third year, and four months credit per year for each succeeding year. Two months credit for faithful performance of duties may also be deducted per year from the maximum sentence. The defendant thus becomes eligible for parole release after serving the minimum term less these good-time reductions. The parole board still retains the discretion as to when to release a defendant after the parole eligibility date is reached. To be released prior to the parole eligibility date requires approval of the sentencing judge. If an incarcerated defendant reaches the maximum term, minus good time reductions, release becomes automatic. Class I and Class IA felons are exempt from these provisions and may only be released upon the decision of the parole board.

Other provisions. Nebraska has had a habitual criminal statute for over ten years and requires a sentence of from ten to 60 years for persons with two or more prior felony convictions unless a greater sanction is provided by law. A 1978 first degree sexual assault statute also

requires a mandatory minimum of 25 years for a second conviction for this offense. A defendant who uses a firearm in the commission of an offense may be sentenced to an additional term of from three to ten years. Recent law also provides for mandatory minimum sentences for offenders convicted of driving while intoxicated.

#### Movement towards sentencing guidelines

Like many other states, Nebraska has recently taken steps to scrutinize the indeterminate sentencing system and consider the feasibility of adopting felony sentencing guidelines to insure similar sentences for similarly situated offenders. In 1980 a comprehensive study of sentencing in Nebraska was commissioned by the Nebraska District Judges Association Committee on Sentencing Alternatives and Parole. The scope of the project was to look at sentencing patterns and examine the feasibility of developing sentencing guidelines.

Data was collected for one year (May 1, 1979 through April 30, 1982) on 1,052 felony convictions. This represents almost the universe of felony convictions for this year. The study used multiple regression and path analysis to determine if unwarranted variability existed in sentencing in Nebraska. The analysis focused both on the sentence length decision and the IN/OUT decision. Since the court issues a minimum/maximum term for incarcerative terms, sentence length was based on when an offender would be first eligible for parole release.<sup>91</sup> In the analysis of the sentence length decision, the class of the offense or offense seriousness factor seemed to be the most important predictor of sentence length. The second most important predictor was the jeopardy of the victim, followed by the

race of the offender, prior felony convictions, prior revocations and type of plea. Most of these predictors may be appropriate legal factors accounting for the increase in the length of a sentence term except, of course, for race. After controlling for all other variables, the study found that non-white defendants would receive an additional six months incarceration than white defendants in Nebraska (Sutton, 1981). Further statistical analysis was used to try and explain the race finding, but although it was found that most non-whites were sentenced more harshly in one particular county, the race finding continued to be significant statewide. The authors of the study suggested that perhaps indirect factors--such as the high unemployment rate in general for minorities--might possibly explain the race finding. For the sentence type decision, the study found that victim jeopardy, prior convictions, employment status, and the class of the offense were the prime predictors of whether a defendant was placed on probation or given an incarceration sentence.

Other findings from the study include: Class III and Class IV felonies accounted for 75.2 percent of all the felony offenses for the year of the study; 86.5 percent of the offenses were single charge cases; 15 percent of the felonies involved a weapon; and over 60 percent of the defendants had at least one prior felony conviction as an adult with 17.5 percent having more than seven prior felony convictions. In general, offenders in Nebraska were not given lengthy prison sentences in that 76.4 percent of the incarcerated felons were eligible for parole release after serving only a little over a year. It was found that only 23 offenders had over a five-year wait before becoming eligible for parole release (Sutton, 1981).

The authors of this study recommended that the results of the empirical investigation of sentencing should serve only as a point of departure for the development of sentencing guidelines in Nebraska. They recommended that while policy makers should be informed by what actually occurs in sentencing, actual sentencing guidelines should not be structured only on past sentencing practices. The authors felt that this is important because if sentencing guidelines are to be designed to reduce unjustified variability in sentencing, they cannot be based on what has been the past experience, especially when research shows that there may be disparity in sentencing. The authors also recommended that the sentencing guideline reform must change sentencing and that guideline development should focus on how sentencing ought to be.

Sentencing guidelines legislation. Two legislative bills were recently introduced

in the 1983 Nebraska Legislature calling for the creation of a Sentencing Guidelines Commission--LB 455 and LB 489. Though there are some differences in the two bills, they both call for a Sentencing Guidelines Commission with clearly defined duties of establishing and monitoring sentencing guidelines in Nebraska. These guidelines would be advisory only, and based in part on past sentencing practices. Importantly, LB 489 specifies that the guidelines should take into consideration the capacities of the state's correctional system. LB 455 also allows for the development of parole guidelines in conjunction with sentencing guidelines. As far as we know, neither of these bills has yet passed the Nebraska legislature but it seems that the momentum for sentencing guideline development does exist in Nebraska, and if either of these bills becomes law, it appears that comprehensive work will be done to develop and implement sentencing guidelines.

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## NEVADA

### Indeterminate sentencing

Nevada's criminal code has undergone no major reforms since 1967. Penalties are prescribed separately for each felony offense--either delineating a minimum and maximum term, or specifying an exact term. Judges set exact terms with the actual release date determined by a pardons and parole board. Judges may also sentence to non-incarcerative terms and impose fines for felonies. Good-time allotments are also provided for incarcerative terms.

Parole eligibility occurs after an inmate serves one-third of a sentence or one year, whatever is longer, except for certain offenses such as sexual assault. Assembly Bill 198, passed in 1979, changed this parole requirement. Previously, it was set at one-fourth. Good-time allocations for the first two years are two months for each year, for the third and fourth year they are four months for each year, and for each remaining year, five months per year. Extra good time may also be granted for diligence in labor, study merits or blood donations; however, these credits may be lost for rule violations. Good conduct credit of any sort is not allowed for sexual assault offenders.

No statistics have been kept on actual sentences given in Nevada but it is generally thought that most judges generally choose a sentence somewhere in the middle of the minimum maximum range.<sup>92</sup> If a penalty is not specified by the criminal code, the court may impose a term of not less than one year nor more than six years. Nevada also has the death penalty for murder, but this may be imposed only after a separate sentencing hearing and after automatic review by the Supreme

Court. A person serving a life term must serve a minimum of ten years before they may be paroled. In 1978 a legislative subcommittee studied the penalties for criminal offenses allowed in the statutes, and concluded that the sanctions provided in the 1967 criminal code, except for a few exceptions, seemed appropriate. They did make recommendations for a few changes, but for the most part, nothing of significance was changed.

Sentencing enhancements. The only significant changes to Nevada's sentencing laws in recent years have been in the area of sentencing enhancements for certain offenses and certain offenders. As in other states, most of these changes have occurred because of public pressure on the legislature to get tough on crime and, indeed, these provisions add considerable length to prison terms.

Legislation passed in 1973 provides for increased punishment for offenders who commit offenses while armed with a deadly weapon or firearm when the weapon use is not an element of the felony offense. These offenders must be sentenced to a consecutive term of at least the minimum for the offense itself. Further, persons using a deadly weapon in murder, kidnapping, sexual assault, and robbery offenses are not eligible for probation or suspended sentences.

Other legislation provided for enhancements for those offenders with prior felony convictions. For the felony offender with two prior felony convictions, a mandatory minimum sentence of ten years must be imposed. These offenders remain eligible for parole release. Offenders with three or more prior felony convictions must be sentenced to life imprisonment, with or without parole. If

a defendant is parolable, they must serve at least ten years before becoming eligible.

In 1979 legislation was also passed that allows increased sentences (up to twice as long a term) for certain offenses committed against the elderly. For crimes of assault, battery, kidnapping, robbery, sexual assault, and the taking of property or money of a person 65 years or older, a convicted defendant may receive a consecu-

tive term equal to the term prescribed by statute for each offense.

#### Sentencing guidelines

Although there has been some discussion about the feasibility of developing statewide sentencing guidelines for Nevada, no legislation or administrative steps have yet been undertaken to establish guidelines.

## NEW HAMPSHIRE

### Sentencing reform and its context

The criminal justice system in New Hampshire has by and large been free of the turmoil which has engulfed other states in recent years, particularly the most populous, urbanized states. As of 1980, it ranked 49th in the rate of sentenced prisoners (35) per 100,000 civilian population (Sourcebook, 1982). And while the state has experienced some problems with prison overcrowding--at the end of 1981, 19 of the 384 inmates sentenced to state facilities were being held in county jails due to overcrowded conditions--the prison population has remained relatively stable. In 1981, the population increased by a modest 4.5 percent compared to a national increase of 12.5 percent (Gardner, 1982).

In this context, New Hampshire has taken action in two different areas of sentencing reform. In 1975, a sentence review process was created to deal with the issue of sentencing disparities. More recently, there has been a trend towards the establishment of more severe sanctions. Specifically, the legislature has upgraded certain offenses, tightened parole eligibility requirements, and passed a mandatory minimum gun law. Despite these changes, however, the basic sentencing structure which was established in 1973, remains intact. At that time the legislature passed legislation creating an indeterminate sentencing system with two general felony classes along with special provisions for capital murder, first degree murder, second degree murder, and attempted murder. For Class A felony offenses (including, among others, rape, deviate sexual relations, kidnapping, night-time and armed burglary, armed

robbery, theft over \$1,000 and 1st degree assault), the maximum may not exceed 15 years and the minimum may not be more than one-half of the maximum. For Class B felonies (for example, negligent homicide, day-time burglary, unarmed robbery, theft between 100 and 1,000 dollars, membership in a subversive organization, and felonious sexual assault), the maximum term may not exceed seven years and the minimum term may not be more than one-half the maximum. The penalty for first degree murder is mandatory life imprisonment; for second degree murder, the maximum is life imprisonment without a limitation on the minimum sentence; and for attempted murder, the maximum is not to exceed thirty years and the court may impose any minimum.

The 1981 legislature upgraded the assault offenses by creating the offenses of first and second degree assault rather than having only a Class B aggravated assault offense. In addition, it created the Class B felony offense of sexual assault. (See N.H.R.S.A., 1981 Supplement.)

Under the code, judges are generally free to impose any minimum and maximum terms within these statutory limits. In addition, with a couple of exceptions (see below), judges are free to sentence any offender to prison, probation, conditional discharge, a fine, and/or restitution according to statutory terms of eligibility. In this respect, terms of probation may not exceed five years and periods of conditional discharge may not exceed three years. The New Hampshire code also requires that a sentence investigation be done unless it is waived by both the defendant and the state.

Since 1971, the code has contained a provision for repeat offenders (N.H.R.S.A.,

651:6 and 1981 Supplement). Unlike most statutes of this kind, the New Hampshire law allows for a large amount of judicial discretion regarding its application to particular cases. The law enables judges to impose an extended term with a minimum term of not more than ten years and a maximum of not more than thirty years for any felony if any of the following conditions apply:

1. The circumstances of the instant offense indicate that the defendant is a career criminal.
2. A court-ordered psychiatric examination indicates that the defendant is a serious danger to others due to a gravely abnormal mental condition.
3. The defendant has two prior convictions which resulted in sentences greater than one year.
4. The defendant manifested exceptional cruelty or depravity in inflicting death or serious bodily harm on the victim of his crime.
5. The instant offense involved the use of force with the intention of taking advantage of the victim's age or physical handicap.

In addition to adding the last condition listed in the preceding paragraph, and lowering the minimum age for the application of the statute from 21 to 18, the 1981 legislature also established the requirement that notice of the possible application of this section must be given prior to the commencement of trial (N.H.R.S.A., 1981 Supplement).

Following the lead of its neighbor, Massachusetts, the New Hampshire legislature passed in 1981 a mandatory minimum sentencing law for the felonious use of a firearm (N.H.R.S.A., 651:2, 1981 Supplement). Since August 22, 1981, persons convicted of this offense have been subject to a mandatory minimum term of imprisonment of one year for a first offense and three years for subsequent offenses. The sentence imposed under the statute is exclusive of any other sentence imposed for any felony committed while the offender was armed.

In 1981, the legislature also amended parole eligibility requirements so that offenders are now required to serve the minimum term of imprisonment to which they were sentenced, minus good conduct and other credits, before being eligible for parole (N.H.R.S.A., 615:451). Good-time credits continue to be given at the rate of 90 days for each full year of the minimum term of the sentence served, and five additional days are deducted from the minimum and the maximum terms for meritorious service (N.H.R.S.A., 615:55B). These credits are not vested and may be revoked at the discretion of the warden for serious acts of misconduct, insubordination, or persistent refusal to conform to prison regulations.

Persons serving life sentences in New Hampshire continue to be eligible for a life permit after serving 18 years minus sentence reductions. Anyone serving life for first degree murder is ineligible for parole until 40 years have been served and they are recommended for release by the Superior Court.

#### Sentence review in New Hampshire

Although there have been no efforts to develop sentencing guidelines in New Hampshire, the issue of sentencing disparities has received the attention of policymakers in the state. At the urging of the Chief Justice of the State Supreme Court in 1975, the Legislature created a Sentence Review Division comprised of three superior court justices (not including the sentencing judges) to review sentences of one year or more, except when the sentence is by law a mandatory term. According to two observers of the reform, the "...goals were to coordinate uniform criminal sentencing to prevent unrest in the state prison as a result of inmates' perceptions of arbitrary sentencing and to eliminate frivolous appeals of sentences on collateral issues to the supreme court because the sentences were considered unjust" (Douglas and Barnes, 1980).

Under the statute (N.H.R.S.A., 615:57-61), the Sentence Review Division is authorized not only to decrease, affirm, or modify the original sentence, but also to increase it. The option to increase sentences was included to prevent the panel from being inundated with inappropriate appeals. In 1977, the State Supreme Court ruled that the provision enabling the Division to increase sentences was constitutional (117 N.H. 474 (1977)). However, Douglas and Barnes report that as of August 1980, the Sentence Review Division had increased sentences in only seven of the 210 cases it had heard. At that point, the Division had received 263 applications for review. In addition to the seven increases, 42 sentences had been decreased, 159 affirmed, and 2 had been modified. The remainder were still pending at the time of their survey.

Generally, the sentence review statute only indirectly promotes the attainment of a sentencing rationale in New Hampshire. For example, sentencing judges, while entitled to provide the Sentence Review Division with their reasons for imposing sentences which have been appealed, are not required to do so unless such reasons are specifically requested by the Sentence Review Division. According to Douglas and Barnes, this request was seldom made in the first five years of the Division's existence. Moreover, the Sentence Review Division was initially not even required to state its own reasons for sentence alterations. In 1977, this was changed by the approval of a special court rule requiring the judges on the review panel to state their reasons for any changes.<sup>93</sup> Under the rules of the Sentence Review Division, the review judges are to consider (although not exclusively) the following objectives of the sentencing decision:

1. Isolation of the offender from society
2. Rehabilitation of the offender
3. Deterrence of other members of the community
4. Deterrence of the offender
5. Reaffirmation of social norms for their own sake

In addition, the Sentence Review Division is to consider relevant and affirmatively recorded information relating to the individual characteristics of the defendant prior to the imposition of the sentence as well as the facts and circumstances of the crime (or crimes).

Finally, and in contrast to other states with sentence review panels (e.g., Connecticut), the rules allow the review judges to consider "statistical information concerning the sentences imposed for the same crime committed by other individuals in the State of New Hampshire." To the best of our knowledge, there has been no systematic analysis of the effect of the Sentencing Review Division.

## NEW JERSEY

### Sentencing reform and its context

Although New Jersey was the site for two major studies leading to sentencing guidelines, and actually implemented guidelines for a period in the late seventies, the 1979 Model Penal Code adopted by the state legislature called for presumptive or fixed sentences. Public and legislative pressures to increase sanctions were certainly a part of the shift from an indeterminate sentencing system to one more determinate. But, practitioner dissatisfactions with the New Jersey guidelines due to their insufficiencies as well as their striking complexities surely helped to create the climate for change. The following paragraph summarizes the New Jersey experience.

In the early 1970's, several New Jersey judges were involved as observers in the project to develop sentencing guidelines for the Denver District Courts. (See the discussion of sentencing reform for Colorado.) They became interested in having a similar study done in New Jersey, and in 1974 encouraged the Albany guideline researchers to initiate research on sentencing practices in Essex County as part of their study of sentencing guidelines in four counties.

The sample used in the Essex County study involved 1,250 cases drawn randomly from 2,800 cases assigned to the Probation Department for investigation in 1975 (Kress, 1980). Gambling and welfare cases were excluded because it was felt that sentencing considerations for these offenses differed significantly. Several different statistical models were developed and tested. The guidelines accepted by Essex County judges included separate

matrices for violent, property, drug, and miscellaneous offenses. For each offense category, there was a separate set of score sheets to calculate the seriousness of the offense or offense score, and the past criminal history of the defendant or offender score. Once the two scores were calculated, the recommended range of sentences for each combination of offense and offender scores were found in the appropriate matrix (see Table 18). Each cell in the matrix gave information on the IN/OUT decision and length of incarceration. Within a cell, each row represented sentences given to offenders in different correctional institutions and the numbers in each row represented the low, median, and high maximum terms given to offenders sentenced to each institution. This model was involuntarily implemented by the Essex County judiciary in June 1977.

The Essex county guidelines were not the only sentencing reform under consideration in New Jersey, however. In 1976, the New Jersey Administrative Office of the Courts started a statewide evaluation of sentencing. This project was distinct from the Essex County project, although the experiences of the Essex County study were taken into consideration when formulating statewide guidelines. The sentencing guidelines project used presentence reports from all felony cases tried in New Jersey courts (almost 16,000) in a one-year period (McCarthy, 1978a). After eliminating variables which seemed to have little relationship to the data, the remaining variables were divided into five groups: criminal history, amenability to non-custodial care, community background, actions since arrest, and presence of exacerbating factors. The first four groups were similar across all offense types while the fifth varied considerably from offense to offense.

TABLE 18

Essex County Decision-Making Matrix: Drugs

Offense Score	4	2 6 Out	2 5 Out	7 7 (1) 52.5 60.0 67.5 (3) 10.5 12.0 13.5 (3) 52.5 60.0 67.5	10 9 (1) 52.5 60.0 67.5 (6) 11.8 13.5 15.2 (3) 52.5 60.0 67.5	18 7 (1) 252.0 288.0 324.0 (6) 15.7 18.0 20.2 (11) 52.5 60.0 67.5	7 2 (2) 52.5 60.0 67.5 (2) 10.5 12.0 13.5 (3) 31.5 36.0 40.5
	3	6 51 Out	6 55 Out	8 26 Out	15 28 Out	21 12 (1) 52.5 60.0 67.5 (15) 10.7 18.0 20.2 (5) 31.5 36.0 40.5	12 2 (3) 52.5 60.0 67.5 (6) 10.8 12.0 13.5 (3) 31.5 36.0 40.0
	2	1 1 Out	0 1 Out	0 1 Out	0 1 Out	0 0 Out	0 0 Out
	1	0 2 Out	0 0 Out	1 0 Out	0 0 Out	0 0 1 Out	0 0 Out
		0	1	2	3	4	5

Rows represent:  
 1st line = Yardville sentence  
 2nd line = Essex County Correctional Center  
 3rd line = New Jersey State Prison/Trenton

Offender Score  
 Columns represent:  
 1st column = Lower range of maximum  
 2nd column = Median range of maximum  
 3rd column = Upper range of maximum

Offenses were divided into eleven different categories for which there were enough data to provide statistically significant results: breaking and entering, assault, rape, robbery, sale of CDS, possession of CDS, lewdness, forgery, fraud, and weapons. Subsequently, guidelines were developed for five additional categories: homicide, gambling, escape attempts, conspiracies, aiding and abetting, and low volume offenses (those offenses which occurred too infrequently for statistical analysis) (McCarthy, 1978b). Each category had different scoring sheets for each group of variables and the combined score for all five groups was used to locate the proper cell in a matrix. Each category used a different matrix ranging from twelve to forty-eight cells.

Outcome. One criticism of the guidelines developed in the statewide project was that they were needlessly complex, requiring several different matrices and different methods of calculating offense and offender scores for each offense category. In addition, once a specific cell was located, it contained so much information that it was not really a guide for sentencing. Each cell contained information on the number of cases and median sentence time for offenders sentenced to the State prison, Yardville Youth Reception and Correction Center, county jail for more than 12 months, and county jail for 12 months or less. The differences in median sentences between institutions was often large and the judges were given no information on why the sentences varied so much among offenders who were supposed to be similar (Sparks and Stecher, 1979).

Presumptive sentencing. Despite these problems, however, the guidelines for the first eleven categories were implemented in October, 1978, and those for the last

five categories in March, 1979. They were not in use very long, for in September of 1979, a new criminal code was adopted by the New Jersey legislature. The new code, which specified presumptive sentences, replaced the guidelines for all offenses except drug-related offenses. Further, the 1979 code divided offenses into four categories or degrees. The first degree included murder, kidnapping, and armed robbery. The second included arson, sexual assault, and robbery, if the victim was unhurt. Third degree included burglary and theft of \$500 or more, and fourth degree included resisting arrest and theft of less than \$500. For each degree there was a presumed sentence that could be varied within a certain maximum and minimum depending on aggravating and mitigating circumstances listed in the code. The statutory provisions and penalties in the New Jersey code are shown in the chart on the following page.

The trial judge is limited, therefore, by the presumptive sentence that must be imposed unless other circumstances exist and are explained by the judge in writing. The court has the authority to set the minimum parole eligibility date which may not exceed one-half of the maximum sentence imposed. If the court does not set such a date, the parole board retains release discretion. An appellate division of the Superior Court has authority to review the findings of fact of the sentencing court and its support for mitigating and/or aggravating circumstances and may modify this sentence if it was not sufficiently supported.

There are increased sentences for weapon use and repeat offenders, and mandatory sentences for repeat sexual offenders. Good-time is now earned at a rate of one

Statutory Provisions and Penalties  
in the New Jersey Criminal Code

<u>Offense classification</u>	<u>Sentence range</u>	<u>Presumptive sentence</u>
First degree murder	30 years to life	15 years
all other 1st degree (kidnapping, armed robbery)	20 years to life	15 years
Second degree	10 to 20 years	7 years
Third degree*	5 to 10 years	4 years
Fourth degree*	up to 18 months	9 months

\*Incarceration for 3rd and 4th degree is not presumed.

day per five days served. First offender's good-time is calculated differently, with one-fifth credit for one year sentence, increasing for longer sentences as specified by statute.

Impact. To our knowledge, there have been no studies of the effect of New Jersey's presumptive sentencing law. However, Cohen and Helland (1981) included an evaluation of the short-lived New Jersey guidelines in their analysis of the impact of sentencing guidelines.

NEW MEXICO

Sentencing reform

The 1977 Criminal Sentencing Act, which established presumptive sentencing for New Mexico, was the response of the legislature to public pressure to get tough on crime as well as to correct perceived disparities in New Mexico's parole release practices. The impetus for this Act came from the state's Criminal Justice Study Committee, composed of legislators. The Committee held public hearings focusing on possible changes to the criminal law and drafted legislation mandating a single maximum sentence and the elimination of the parole board. This legislation was debated in the state's House and Senate with members of the Senate pushing for longer sentences and members of the House wanting more lenient sentence lengths because of the cost of implementation. Also, the House did not want the bill to become effective until 1979, so that changes and amendments to the bill could be made prior to implementation. The result of this debate was that the Senate won the sentence length decision and the House got the 1979 effective date.

The Criminal Sentencing Act was primarily punitive in nature, set presumptive sentences, and focused on restricting the boundaries of the parole board's authority by abolishing discretionary parole release. Under the old law, sentences were very indeterminate in nature and judges would sentence to a range of years. For example, robbery, a third degree felony, was punishable by a sentence of from two to ten years, with the parole board determining the release date. Most offenders were eligible for parole after serving one-third of their sentence. The parole board was not abolished by the Act

but was stripped of most of its power. The Act also denounced the ideas of rehabilitation and stated that incapacitation and deterrence should be the main goals of sentencing.

Under the new sentencing law, the offender is required to serve the court-imposed term minus good-time credit. Offenses are statutorily categorized, as before, into four levels with a separate category for capital offenses. A comparison of sentences before and after the new sentencing act are given below. As comparisons in the table on the following page indicate, the presumptive terms are, indeed, much harsher than the average time served prior to the Sentencing Act.

The court may also increase or decrease the presumptive term by one-third upon finding of aggravating or mitigating circumstances. The reasons must be stated in writing. Judges still have the discretion to suspend all or part of a sentence and place a defendant on probation. Even though this Act eliminates parole release decision-making (except for capital offenses) upon completion of a sentence, a first, second, or third degree felon must serve two years under supervision by the parole board. Fourth degree felons must serve one year of supervision upon release.

Good time. Good time takes on more significance in determining time served since parole release has been abolished. New Mexico's 1977 Sentencing Act also changed significantly the way good-time credit may be earned and gave prison authorities more discretion in determining release dates. Prior to the Act, automatic good-time was statutorily granted. This is not so under the new Act. The 1977 provision provides

Comparison of Sentences Before and After The 1977  
Criminal Sentencing Act in New Mexico

Felony	Before 1977 act*	After 1977 act
Capital	Life (10 years for parole eligibility)	Life (30 years for parole eligibility)
First degree	10 years to Life (11 years average time served)	10-25 years (18 years presumptive sentence)
Second degree	10-50 years (3 years 3 months average time served)	7-15 years (9 years presumptive sentence)
Third degree	2-10 years (18 months average time served)	2-10 years (3 years presumptive sentence)
Fourth degree	1-5 years (8 months average time served)	1-5 years (18 months presumptive sentence)

Reprinted from the New Mexico Law Review, Vol. 9, Winter 1978-1979, New Mexico Department of Corrections figures.

only for "meritorious good time". Good-time credit is not earned automatically and may be withdrawn at any time by prison authorities. It appears that these provisions are in keeping with the enhanced punishment goals of the Sentencing Act. In 1981 the amount of good-time that could be earned was further reduced from 12 days per month to 10 days. Good time calculations are counted according to the type of work performed as listed below:

Support Service	0-5 days per month
Industrial Good-Time	0-10 days per month
Extra-industrial Good-time	0-10 days per month.

Industrial good-time credit is based on both attendance and performance; extra-industrial good-time may be in addition to the other credits and is based on performance. As mentioned above, good-time credit may be withdrawn by correctional

authorities, but lost credit may be regained if no subsequent rule violations occur over a six-month period.

Sentencing enhancements

Weapon use. Prior to the Sentencing Act of 1977, New Mexico provided enhancements for persons who used a firearm in the commission of a noncapital offense. The provision was such that for the first offense, the minimum and maximum sentence would be increased by five years. Further, the first year of the sentence was nonsuspendable. For the second or subsequent firearm offense, the minimum and maximum would also be increased by five years, but this five years could not be deferred or suspended in any way. For these offenders, parole could not be considered until the minimum sentence had been served. The 1977 Sentencing Act provided enhancements

for offenses committed with a deadly weapon after a separate finding of fact. For the first offense, a one-year term is added and for the second or subsequent offense, three years are added to the basic sentence term. These additional terms are consecutive and nonsuspendable. It was thought that this change would mean stiffer penalties for more people (Karslake, et al., 1979).

Repeat offenders. For habitual offenders who commit noncapital offenses, the Criminal Sentencing Act provides enhancements from one to eight years based on the number of prior felony convictions as follows:

One prior felony conviction	One year
Two prior felony convictions	Two years
Three or more prior felony convictions	Eight years

These consecutive enhancements are nonsuspendable, but it is not mandatory that the court impose these increased terms.

Other enhancements. New Mexico's criminal code also allows for an increased (but not mandatory) term if the victim of the crime is 60 years or older. The increased term is for a minimum of two years.

Committee on sentencing guidelines

Responding to perceived inequalities in sentencing, and concerned with the possibility of disparate sentences for similarly situated offenders even under the presumptive sentencing scheme, Chief Justice Easley appointed a Sentencing Guidelines Committee in 1981 to study the feasibility of developing statewide sentencing guidelines in New Mexico. The Committee began work by reviewing the form sentencing guidelines have taken in other

states. They also looked at appellate review of sentences in New Mexico as a means to check disparate sentencing.

Before beginning any reform effort, one of the first questions the Committee dealt with was whether sentencing disparity existed in New Mexico and to what extent. No empirical study had been done previously and the Committee lacked the money and facilities to conduct such a study.

As an alternative, the Committee surveyed judges at a workshop on sentencing guidelines held at the State Judicial Conference in June of 1982. Thirty-five judges attended this workshop and each was given the same PSI and asked to sentence the defendant within the options allowed by law. A wide range of different sanctions was given with only one-third of the judges sentencing the defendant to the presumptive term.

Based on these findings and on other concerns regarding disparity, the Sentencing Guidelines Commission recommended that empirical data should be gathered and analyzed to first determine current sentencing practices before any policy changes were made. They further recommended that if additional study was to be done, the Sentencing Guidelines Commission should review the data collected, make sentencing guideline recommendations, and eventually monitor the use of the guidelines if they were developed. Because large-scale study and the creation of a more permanent Guidelines Commission would require legislative approval and funding, the Commission suggested that in the interim the New Mexico Supreme Court should authorize appellate review of sentencing with the power to reduce excessive sentences.

### Impact of Legislation

Although it was feared that the Criminal Sentencing Act would add greatly to New Mexico's prison population (Karslake, et al., 1979), this has not yet happened. The increase in the prison population from 1980 to 1981 (immediately after the new sentencing law went into effect) was only 4.3 percent, which is low especially when compared to other states. However, the

long-term effects of New Mexico's new law may not yet be appreciable with regard to prison population since the new sentencing scheme does not alter the judicial decision on whether or not to incarcerate. Rather, the law will impact on length of incarceration, especially since the release powers of the parole board have been eliminated. The true impact of New Mexico's 1977 Criminal Sentencing Act may not be felt until 1984 or later.

### NEW YORK

#### Sentencing reform and its context

Criminal sentencing in New York may be characterized as a

...patchwork of indeterminate sentences sometimes combined with legislatively prescribed mandatory minimum terms of varying length depending on the type of offense and offender (The Executive Advisory Committee on Sentencing 1979).

Felonies are divided into five classes and may also be further divided into violent or non-violent classes, as illustrated in Table 19.

As indicated in Table 19, many felony classes carry a mandated prison term. Judges retain the discretion to set the length of imprisonment for these sentences. In certain cases, where a probation term remains an option, the sentencing judge may sentence to a non-incarcerative term or a prison term. The court sets both a minimum and maximum term. A minimum sentence of incarceration must be for at least one year but no more than one-third of the maximum imposed. A maximum term cannot be less than three years. The special classification for violent felony offenders was added in 1978 when the Omnibus Crime Control Bill was passed. For first time offenders, a determinate sentence may be imposed for some Class C offenses and for Class D and Class E felonies. Further provisions are provided for repeat offenders.

Parole reform. Following the serious prison uprising in Attica, the Citizens Inquiry on Parole and Criminal Justice, Inc. was founded in 1971. Focusing on the

parole decision, this group published a report on New York's parole practices (1975) and concluded:

...parole in New York is oppressive and arbitrary, cannot fulfill its stated goals, and is a corrupting influence with the penal system...the parole system has virtually no rules, standards, or mechanisms to insure consistency and fairness. The criteria used by the parole board are numerous, ambiguous, inconsistent in purpose, and in some cases, illegal (Citizens Inquiry on Parole and Criminal Justice, 1975).

This report initiated debate about the amount of discretion in the hands of the parole board. In part, the reason for spotlighting the parole board was the fact that New York's prisons were becoming dangerously overcrowded. Judges were responding to public pressure to send more and more criminals to prison, at the same time that the parole board was under this same pressure to be more conservative in its releasing practices. Also, the parole board did not feel that it was their responsibility to base release decisions on the size of the prison population or to relieve overcrowded conditions.

The parole board does not see the explicit regulation of the prison population as one of its mandates; indeed it insists that the decision about individual cases not be affected by prison management concerns (McDonald, 1980).

Most of the criticism of the parole board called for the abolition of the indeterminate sentencing system including the elimination of the parole board and the establishment of a determinate sentencing

Table 19

## Felony Sentencing in New York

<u>Probation/ Incarceration</u>	<u>Offense Class</u>	<u>Minimum Sentence</u>	<u>Maximum Sentence</u>
	AI Felony (Murder 1st degree)	Death Sentence	
Incarceration mandatory	AI Felony (i.e., Att. Murder 1st degree, Att. Criminal possession of drugs 1st degree, Murder 2nd degree)	15-25 yrs.	LIFE
Incarceration mandatory	AII Felony (i.e., Criminal sale of drugs 2nd degree, Criminal possession of drugs 2nd degree)	6-8 1/2 yrs.	LIFE
Incarceration mandatory	AIII Felony (i.e., Criminal sale of drugs 3rd degree, Criminal possession of drugs 3rd degree) Probation is allowed for offenders who give assistance in drug cases	1-8 1/2 yrs.	LIFE
Incarceration mandatory	Class B Violent Felony (i.e., Burglary 1st degree, Rape 1st degree, Robbery 1st degree)	1/3 of the maximum	6-25 yrs.
Probation allowable	Class B Non-violent Felony (i.e., Criminal mischief 1st degree, Criminal possession of drugs 4th degree, Conspiracy 2nd degree)	Min. cannot exceed 1/3 of max.	6-25 yrs.
Incarceration mandatory	Class C Violent Felony (i.e., Assault 1st degree, Burglary 2nd degree, Robbery 2nd degree)	1/3 of the maximum	4 1/2-15 yrs.
Probation allowable	Class C Non-violent Felony (i.e., Arson 3rd degree, Crimi- nal Solicitation 1st degree) Some drug offenses in this class require prison terms require prison terms	1-5 yrs. Min. cannot exceed 1/3 of max.	3-15 yrs.
Probation allowable	Class D Violent Felony (i.e., Sexual abuse 1st degree, Att. of Class C Violent Felony) (Assault 2nd degree requires a prison term)	1-2 1/2 yrs. Min. cannot exceed 1/3 of max.	3-7 yrs.
Probation allowable	Class D Non-violent felony (i.e., Burglary 3rd degree, Forgery 2nd degree, Criminal possession of marijuana 2nd degree)	1-2 1.2 yrs.	3-7 yrs.
Probation allowable	Class E felony (i.e., grand larceny 3rd degree, Rape 3rd degree, Criminal possession of drugs 7th degree)	1 yr.	3 yrs.

system. This debate continued until 1978 when a Blue Ribbon Committee on Sentencing again called for the abolition of the discretionary powers possessed by the parole board. Most of this criticism did not realistically look at the potential effects that abolishing the parole board might have on New York's prison population.

As part of the widespread criticism, a legislative committee--The Codes Committee of the New York State Assembly--issued yet another critical report on the paroling system. Instead of calling for the elimination of the parole board, however, the Committee recommended parole reform in the form of establishing parole guidelines. Legislation was subsequently passed mandating that parole guidelines be developed in New York. Funded by a grant from LEAA, parole guidelines were developed in 1978. Parole release would no longer be based on record of rehabilitation or predicted future behavior, but rather on offense seriousness and prior record factors. The main purpose of the guidelines was to structure the parole board's decision-making and to serve as a guide to the release decision. Importantly, the New York parole guidelines were to be used to assist in the setting of parole eligibility dates, but final discretion was still to be left with the board.

Currently, however, the future of paroling policy remains uncertain in New York. Inmates become eligible for parole release after serving the minimum term, and are conditionally released after serving two-thirds of the maximum term if allowable good time credit has been earned. The maximum sentence is almost never fully served.

**Probation.** Persons may be sentenced to a non-incarcerative sentence if specified in the statute, and if incarceration seems "not necessary for the protection of the public" (New York Code, 1980-1981). For many felonies, probation is not allowed and in the past few years, the proportion of persons receiving probationary sentences has declined. In 1974, 46.3 percent of convicted felons received probation; in 1979, this figure dropped to 32.4 percent (McDonald, 1980). Observers feel that this decline may have been a response to the drug and second felony offender legislation passed in 1973.

**Good time.** A prison term may be reduced by up to one-third by good-time credits. This is primarily based on good behavior. Beginning in 1972, New York instigated a vast temporary release program for inmates. Inmates could become eligible for this program when they were within 19 months of parole eligibility. These inmates could participate in educational or volunteer programs, overnight furloughs, and community-based corrections programs. In 1976, over 8,000 persons were involved in this program in one way or another. The legislative commitment for the temporary release program, however, always remained tentative and in 1977, legislative action severely limited the program. By 1978, very little was spent on the program and many community-based institutions were closed (McDonald, 1980). This was seen by many as unfortunate because the program offered a community-based alternative to many inmates who otherwise would be housed in overcrowded state prison facilities.

**Rockefeller Drug Law**

In order to reduce the incidence of drug-related crime, the New York Legislature in

1973 passed some of the most severe drug laws in the country providing for sanctions of from one year to life for certain drug offenses. The New York State Drug Law--also known as the Rockefeller Drug Law--provided for increased sanctions for second felony offenders and curtailed some aspects of plea-bargaining. A 1977 study evaluating the effectiveness of this law found that for a variety of reasons, none of its provisions reduced the rate of crime or deterred prior felony offenders from committing additional crimes (Joint Committee on New York Drug Evaluation, 1977).

There were actually fewer arrests for drug offenses after the new law than before; a smaller percentage of repeat offenders who were arrested were indicted; a smaller percentage of these offenders who were indicted were convicted; and the time to process cases increased considerably (The Executive Advisory Committee on Sentencing, 1979).

However, even though the likelihood that a person arrested for a drug offense would actually be incarcerated remained about the same (because indictment and conviction rates declined),<sup>94</sup> sentence lengths increased substantially with the new law. In other words, though the number of persons sent to prison under the drug laws did not change, those that were incarcerated received lengthier sentences. Between 1972 and 1974, only three percent of those convicted of drug offenses received minimum sentences that were over three years. By 1976, more than 22 percent of those convicted of drug offenses received sentences with minimums greater than three years (McDonald, 1980).

Heroin use did not decline as a result of the law, recidivism rates stayed about the same after the law, and the plea-bargaining restrictions related to the law became counter-productive. The New York Drug Law was therefore modified three years after it was passed.

Habitual offender sentencing. Increased punishment for habitual offenders has a long history in New York, dating back before the Civil War. Recently, as a response to widespread fear and alarm over increasing crime rates, additional sanctions for repeat offenders were included in a supplement to the 1973 New York State Drug Law. This provision had extreme and far-reaching effects and provided for mandatory prison terms for offenders with one previous conviction for any felony offense within ten years of the current offense. The minimum term for second offenders was set at one-half of the maximum. An example of the maximums follows:

Offense class	Maximum sentence
Class B	9 to 25 years
Class C	6 to 15 years
Class D	4 to 7 years
Class E	No more than 4 years

Further, a second felony offender cannot have a felony pled down to a misdemeanor.

Upon a third felony conviction, a defendant is labeled a persistent felony offender. Defendants in this classification may be incarcerated from a minimum of 15 to 25 years to a maximum of life. However, imposition of this sentence is left to the discretion of the sentencing judge. If a defendant is not sentenced by the court as a persistent offender, he or she must be sentenced as a second felony offender. A defendant may also be classi-

fied as a persistent violent felony offender if they have had prior convictions of two or more violent felonies. Imposition of increased sanctions for this category are mandatory and are as follows:

Offense class	Maximum sentence
Class B	12 to 25 years
Class C	8 to 15 years
Class D	5 to 7 years
Class E	At least 4 years

Firearm enhancements. New York also provides an enhanced sentence for offenders convicted of using a firearm in the commission of a felony. The enhanced terms are as follows:

Offense class	Maximum sentence
Class B	6 to 25 years
Class C	4-1/2 to 15 years

For Class B offenses, the minimum term must be between one-third and one-half of the maximum. For all other felony classes, the minimum must be one-third of the maximum.

Impact of the 1973 and other legislation.

New York's prison population has been increasing rapidly since 1973 as a direct result of the harsher sentencing laws.

Between January 1, 1973, and October 16, 1978, the state prisoner population increased 60 percent, from 12,444 to 20,500. To house these prisoners the State Department of Correctional Services opened fourteen new prisons between 1973 and 1978 (McDonald, 1980).

Ironically, new prison space was created by converting drug abuse treatment centers into prisons to house the drug offenders now being sentenced to mandatory incarcer-

ations rather than treatment (McDonald, 1980).

Passage of the 1978 Omnibus Crime Control Bill also meant more persons were sent to prison for longer terms. New York's prison population continues to skyrocket and from 1980 to 1981 increased by 17.5 percent--3,829 inmates (Gardner, 1981). It is estimated that New York's prison population will reach 40,000 by 1985 (Gardner, 1982).

Morgenthau committee. In December of 1977, Governor Hugh Carey of New York established the New York State Executive Advisory Committee on Sentencing. Robert M. Morgenthau, District Attorney of New York County, was appointed Chairman of the Committee. The Morgenthau Committee was composed of State officials, members of the judiciary and the legislature, and other distinguished attorneys. The Committee was created in order to "evaluate the effectiveness of existing laws relating to imprisonment, probation, and parole in achieving legitimate sentencing goals" and to examine alternatives for change in New York (Executive Advisory Committee of Sentencing, 1979). The Committee commissioned independent research groups for assistance in researching matters relating to sentencing and for purposes of conducting extensive interviews with legal actors state-wide.

The Morgenthau Committee premised their examination of the sentencing process in New York state on the belief that sentencing disparity existed. The study concluded that disparity was the result of too little guidance for judges in the exercise of their discretion and was related to an overly complex statutory scheme for criminal sentences. The final report of the Committee noted that legis-

lative dissatisfaction with indeterminate sentencing had resulted in a confusing combination of indeterminate sentencing and legislatively designed mandatory minimum sanctions in New York's sentencing laws. The Morgenthau Committee felt strongly opposed to the 1973 Drug Laws and recommended their abolition, deeming the Drug Laws "incompatible with a system of fair and consistent criminal sanctions" (Executive Advisory Committee on Sentencing).

In its final report to the Governor, the Committee evaluated various sentencing models and then presented a comprehensive proposal to formulate sentencing guidelines for New York. In a statement of principles, the Committee recommended a guideline sentence by "the least severe sanction necessary to achieve sentencing objectives" (emphasis in the original). The Committee further stated that "sentences not involving confinement should be preferred" unless incarceration was deemed necessary to protect the public, to punish the offender, or avoid depreciating the seriousness of an offense." The Committee implicitly argued for an empirical basis in establishing guidelines, asserting that:

Sentencing guidelines should, as a starting point, attempt to replicate average sentences actually served by offenders for various crimes. The reason for this is simple: the length of sentences cannot be drastically altered, at a single stroke, without severely disrupting the criminal justice system. In particular, we strongly oppose the formulation of guidelines in such a manner as to increase suddenly and substantially the average sentence lengths served by inmates (Executive Advisory Committee on Sentencing, 1979).

While the Committee did not recommend a specific guideline model, they did present a hypothetical matrix derived from the Denver Demonstration Model. In order to promulgate effective guidelines, an ongoing Sentencing Commission was seen to be a key element of the guidelines model. As the report noted:

Unlike the legislature, such a commission would have the time, the expertise, and the flexibility to establish guidelines on the basis of careful and exhaustive study of existing sentencing practices...and periodically alter them on the basis of on-going research regarding their effectiveness and impact on other components of the criminal justice system (Executive Advisory Committee on Sentencing, 1979).

As of this writing, however, New York state has not made substantive progress toward developing and instituting sentencing guidelines. In general, it would appear that political sentiment is for the use of sentencing guidelines, although alternative methods of attacking the problem of disparity (such as a sentence review court which would automatically review criminal sentences) have been proposed. A major concern is whether the guidelines should be developed by the legislature, the judiciary, or the sentencing commission recommended by the Morgenthau Committee. There is also a question as to whether the guidelines should be instituted at individual county levels or on a statewide basis. Problems inherent in adapting statewide guidelines to fit New York's many large urban centers, as well as its numerous rural areas are foreseen.<sup>95</sup>

## NORTH CAROLINA

North Carolina's Fair Sentencing Act, which went into effect on July 1, 1981, represents yet another permutation of what has come to be known as the determinate sentencing movement. As with most other determinate sentencing laws, the origins of North Carolina's legislation are to be found in the ferment which affected the criminal justice system in the early to mid-seventies. Confronted with prison overcrowding and unrest as well as public anxieties over the effectiveness of the system, reformers in North Carolina, as elsewhere, drew upon the proposals that had gained prominence during this period. United by a concern with equity, certainty of punishment, and visibility of the process, these proposals--often condensed as the justice model--attacked treatment-oriented, indeterminate sentencing as both ineffective and unjust.

The influence of this orientation is clearly evident in North Carolina's new law. Presumptive sentences were established for most felonies, parole was sharply curtailed, and judges were held accountable for their sentences by being required to explicitly state their reasons for any deviation from the presumptive sentences. Even the name of the act bears testimony to the influence of advocates of the justice model. On the other hand, the law contains many provisions which run counter to the intentions of most justice model advocates. For one thing, judges retain a significant amount of discretion. Under the law, they are not required to impose the relevant presumptive sentence if they can produce findings of aggravating or mitigating nature to justify departure. Consequently, under the new felony classification system, the range of possible sentences remains wide. In addi-

tion, the law leaves judicial discretion in the area of sentence type (e.g., suspended sentences, multiple sentence structure, and youthful offender) unchanged. Finally, the law contains a provision which exempts plea arrangements as to sentence from the requirements of the presumptive sentencing procedures (Clarke and Rubinsky, 1981).

Like most other states that have moved in the direction of greater determinacy, North Carolina has adopted a new sentencing policy which, while clearly being influenced by justice model proposals, is nevertheless a distinctive hybrid of old and new ideas and practices. To better understand this, we turn now to a brief examination of the history of the act.

### Historical Background

The effort to change North Carolina's sentencing practices spanned a seven-year period. Legislation was initially drafted by the General Assembly's Commission on Corrections Program, otherwise known as the Knox Commission. After several years of examination of the state's criminal justice system, the Commission reached three general conclusions (Nichols, 1982):

1. Prison unrest is directly related to disparities in sentences and time served.
2. Certainty in sentencing is more effective at deterring crime than uncertainty.
3. The existing system provided an excessive amount of discretion to judges.

In seeking to draft legislation which addressed these concerns, the Knox Commission was apparently influenced by the report of the Twentieth Century Fund Task Force on Criminal Sentencing (Nichols, 1982). In accordance with the recommendations of this report, the Commission recommended the adoption of a presumptive sentencing system which would narrow judicial discretion and eliminate the authority of the Parole Commission. Under the proposal, the presumptive sentences for each felony class were to be increased incrementally according to the number and type of prior felony convictions on the defendant's record. In addition, the Knox Commission recommended the establishment of lists of specific aggravating and mitigating circumstances to be considered in sentencing.

The Knox Commission's proposal was introduced in the legislature in 1977, but died in both House and Senate committees. According to one observer, this was "...in part because of time pressures caused by consideration of other proposed legislation and in part because of opposition from the legal community" (Nichols, 1982). According to a major newspaper in the state, critics of the original bill and subsequent versions "argued that the law could lengthen the time it takes to try a case, increase the number of appeals before the burdened North Carolina Court of Appeals and the North Carolina Supreme Court, and increase the state prison population" (Nichols, 1982). In addition, Nichols reported that several judges opposed the legislation because of the limits placed on their discretion.

Over the next three years, the original bill underwent several revisions, largely as a result of the objections of lawyers and judges. In this regard, the progress

of determinate sentencing reform in North Carolina more or less parallels that of similar efforts in other states (Price, 1982); the primary difference being that lawyers and judges in North Carolina had even more influence vis a vis other interest groups (most notably corrections officials) than has been the case in other states. In fact, after the original Knox Commission bill failed, the governor enlisted the North Carolina Bar Association to redraft the legislation. In addition to several minor changes, the list of specific aggravating and mitigating circumstances was deleted (Clarke, Kurtz, et al., 1982). However, the list was restored by the governor's staff as were various mandatory minimum sentencing provisions which had been enacted in 1977 but which both the Knox Commission and the Bar Association had opposed. This bill was enacted by the General Assembly in 1979 with the following amendments:

1. Entering a plea of guilty pursuant to a formal plea arrangement was made a mitigating factor, and,
2. the presumptive prison term for Class H felonies (including larceny, breaking and entering, etc...) was reduced from 4 to 3 1/2 years (Clarke, Kurtz, et al., 1982).

Even though this legislation was scheduled to go in effect on July 1, 1980, there was yet another round of revisions and debate before the Fair Sentencing Act took on its final form. During this period, there continued to be some opposition from legal personnel over such issues as the list of aggravating and mitigating circumstances and the treatment of negotiated sentences under the presumptive system. In addition, there was concern in the House that

the new act would exacerbate the overcrowding in North Carolina's prisons.

Before the new law was to go into effect, the governor and the Chief Justice of the state's Supreme Court appointed a committee which, among other responsibilities, was to review the effect of the new law and recommend any needed changes. Several of the committee's recommendations were passed as amendments to the Fair Sentencing Act. Of particular importance here are the exemption of plea arrangements as to sentence from the requirement that judges explain departure from the presumptive sentence and several changes in the use of aggravating and mitigating circumstances. With regard to the latter, the list was extended and clarified. However, the treatment of the defendant's prior record was also changed so that it became only one of the sixteen aggravating factors, rather than being tied directly to the presumptive sentencing schedule (Clarke, Kurtz, et al., 1982).

In addition to these amendments, there were two other significant changes resulting from this final round of debate. To meet the objections of House members who believed the law would contribute to prison overcrowding, the governor agreed to appoint a special commission to study sentencing patterns in the state and, furthermore, to reduce the presumptive sentences by about twenty-five percent (Clarke, Kurtz et al., 1982). With these amendments, the Fair Sentencing Act went into effect on July 1, 1981.

#### The new law

Like other states that have recently altered their sentencing practices, North Carolina has adopted a new system which incorporates a significant measure of

determinacy while retaining important areas of discretion. With the notable exception of several mandatory minimum sentencing provisions, the evolution of the Fair Sentencing Act outlined in the preceding section may be characterized as a gradual dilution of the determinacy contained in the original Knox Commission proposal. As mentioned above, pressure from the legal community resulted in the exemption of negotiated pleas as to sentence from the presumptive sentencing requirements and the eventual treatment of a defendant's prior record as one of several aggravating circumstances rather than as an integral part of a graded presumptive sentencing schedule. With these changes, many of the similarities between the North Carolina legislation and the Twentieth Century Fund's model disappeared. On the other hand, it should be kept in mind that even the Knox Commission's proposal had allowed for a substantial amount of discretion by retaining large ranges for variation from the presumptive sentences. In any case, the Fair Sentencing Act, as it was finally passed, must be seen as a move towards greater determinacy rather than as a wholesale substitution of one system (and philosophy) for another. One could characterize the new law as an attempt, first of all, to make judicial discretion more accountable and structured and, secondly to increase the certainty of actual time served through a sharp curtailment of the parole function.

The law establishes ten felony classes (A through J) and sets maximum penalties for each class.<sup>96</sup> In addition, presumptive prison terms are established for eight of the ten classes (C-J). Generally, the maximum penalties for offenses within each class are the same as they were before the law went into effect. For classes A and B

(first degree murder, first degree rape) sentencing is unchanged under the new law. For the other offense classes, judges must impose the presumptive sentence unless they can produce findings of aggravation or mitigation which are "...proved by a preponderance of the evidence." These findings, which must be in writing, are to be made even if the term is suspended or if the defendant is sentenced as a Committed Youthful Offender--that is, as an offender who is under 21 at the time of conviction and is consequently eligible for parole at any time. No findings are required if the presumptive sentence is imposed; nor are they required for the decisions to suspend prison terms, impose consecutive sentences, or to sentence defendants as Committed Youthful Offenders (CYO's).

The new law stipulates that while judges may consider any aggravating or mitigating factor that is "reasonably related to the purposes of sentencing," they must consider any evidence of the aggravating and mitigating factors which are listed in the act. With the exception of the aggravating factor of prior record, the law does not provide standards of proof for these factors. A prior conviction may be proved by a stipulation, the original record, or a certified copy of the prior record. Otherwise, it is up to the judge to determine, for example, that the offense was "especially heinous, atrocious, or cruel," that the victim was very young, or very old, or mentally or physically infirm, or to provide an example of a mitigating factor, that the "defendant's immaturity or his limited capacity at the time of commission of the offense significantly reduced his culpability for the offense." Moreover, the decision as to whether a presentence report is needed remains in the hands of the judge.

In addition to the exclusion of Classes A and B, there are several other important exceptions to the presumptive sentencing scheme. For one thing, the act establishes a fourteen-year mandatory minimum sentence with a seven-year mandatory minimum prison stay for the offense of habitual felon. A habitual felon is defined as any person who has been convicted of three felony offenses in any federal or state court. Prior to passage of the new law, the offense had carried a penalty of twenty years to life. In addition, the North Carolina legislature had recently enacted several mandatory minimum sentencing provisions which were not altered by the Fair Sentencing Act. In 1977, the legislature enacted mandatory minimum sentences of fourteen years for first and second degree burglary, armed robbery, and repeat felonies with a deadly weapon. Defendants convicted under these provisions must serve a minimum of seven years in prison, excluding gain time. The provisions override the presumptive sentences for the respective classes in which the offenses are placed by the act. (First degree burglary is in Class C, second degree burglary and armed robbery are in Class D, and the repeater offense is not assigned to a class.)

The legislature also established several drug trafficking offenses in 1979 and 1980 which, while being assigned to offense classes, carry mandatory minimum sentences and minimum periods of incarceration which override the presumptive sentences.

Finally, as was mentioned in the preceding section, the act exempts any plea arrangement as to sentence from the requirement that a judge produce findings of aggravation or mitigation to justify departures from the presumptive sentence. This exception is particularly important given

North Carolina's statutory approval of the participation of trial judges in plea bargaining discussions (Lefstein, 1981). In fact, the incorporation of this exception in the new law is undoubtedly attributable in large part to the unusual degree of judicial involvement in the bargaining process.<sup>97</sup>

This situation has not been changed by the Fair Sentencing Act. In fact, the exemption of plea arrangements as to sentence raises several new issues which are not addressed by the act. As Clarke and Rubinsky have observed:

The question posed by the 'plea arrangement as to sentence' language of the Fair Sentencing Act is whether the exception to the judicial findings requirements applies only to plea arrangements in which the prosecutor agrees to recommend a particular sentence--such as 'five years', for example--or whether it also includes plea arrangements involving 'less particular' recommendations such as 'not more than five years' and perhaps arrangements in which the prosecutor simply agrees not to oppose a particular sentence.

There have also been several changes relating to prisoner release practices which will affect the sentences of felons regardless of whether they have been sentenced under the presumptive sentencing scheme. As was mentioned at the outset, parole has been virtually abolished for the great majority of cases. For offenders convicted of Class A and B felonies, parole eligibility remains the same as under the former law: judges may impose both minimum and maximum terms which, subtracting for good time and gain time, establish broad ranges within which

offenders may be paroled. As before, offenders receiving a sentence of life imprisonment--also an option for Class C offenses--are eligible for parole after twenty years. For these cases, the period of supervision may be up to five years. In addition, offenders sentenced as Committed Youthful Offenders are still eligible for parole at any time.

For the remainder of cases, parole is now limited to a ninety-day adjustment period called a re-entry parole. Each prisoner sentenced to more than 18 months must be released within ninety days of the end of his or her term, taking into account good time and gain time credit. If a parolee violates the terms of the re-entry parole, he or she is returned to prison to serve ninety days, less good time and gain time. After this time, the prisoner must be unconditionally discharged. For offenders receiving sentences of less than eighteen months there is no re-entry parole. The act also changes the procedures for calculation of good time. Formerly, the Secretary of Corrections had broad discretion in the determination of good time and gain time. The system that had evolved before the new law was one where good time was awarded at the rate of 8.94 days per 30.4 days for avoiding misconduct and an additional gain time of up to 30 days per month for various kinds of work. Under the Fair Sentencing Act, good time is granted at the rate of one day for each day served, with forfeitures only for serious misconduct. Moreover, a charge of misconduct requires notice and a hearing. Gain time calculations remain the same as they were before. Good time may not be awarded to persons serving terms of life imprisonment. In addition, mandatory terms of incarceration are not to be reduced by good time--although they may be reduced by gain time.

Finally, it should be noted that the act expands appellate review of sentences to include cases where the imposed sentence is greater than the presumptive term, unless the sentence was the result of a negotiated plea.

#### Impact

Sentencing reform in North Carolina is unique in that it has been purposely accompanied by extensive analysis of sentencing patterns in the state both before and after passage of the Fair Sentencing Act. The research has been conducted by the Institute of Government of the University of North Carolina under a grant from the National Institute of Justice. At the time of this writing, only preliminary results of the second phase (i.e., the post-Fair Sentencing Act phase) were available. The analysis of sentencing prior to implementation of reform had been completed and published by the Institute of Government. (See Clarke, Kurtz, et al., 1982). The reader is referred to this study for a detailed examination of sentencing patterns before the new law went into effect. In this section, the methods and results of the study are briefly sketched before moving on to the preliminary results relating to the effect of the new law.

The North Carolina study group employed three sets of data in the first phase of analysis. The first set consisted of official court judgments imposed on felons in North Carolina from April 1 through September 30, 1980. In addition, statewide Department of Corrections data was collected from all felons sentenced in 1979. Finally, a twelve-county sample of 378 defendants charged during a three-month period in 1979 was used to collect

more in-depth information on case processing, dispositions, and sentences.

Multiple regression analysis was used for both the Department of Corrections data and the twelve-county sample. For the statewide DOC sample, analysis revealed that the severity of the instant offense was the most influential variable affecting both minimum and maximum terms, controlling for all other variables. The number of instant charges along with the defendant's prior record also had a significant effect on sentence lengths, but to a much lesser extent. In addition, slightly shorter sentences were associated with younger offenders (under 21), females, those with more formal education, and somewhat surprisingly, unmarried offenders.<sup>98</sup> On the other hand, blacks were likely to receive longer sentences. Blacks were found to receive 6 percent longer minimum terms and 27 percent longer maximums. The amount of time served in pretrial detention was also found to be positively associated with the length of sentence. Alcoholics and drug abusers were more likely to receive longer minimum terms while unemployed offenders received somewhat shorter minimum terms.

With respect to the twelve-county sample, analysis indicated that the principal charge was a significant predictor of the length of maximum terms and time served for Class 1 and 2 defendants. For Class 1 defendants, the principal charge was also associated with the probability of receiving a prison sentence. Both the number of instant charges and the defendant's prior record were associated with the severity of the sentence, while the former variable was also associated with the likelihood of dismissal. The authors found that Class 2 defendants over 20 years of age were somewhat more likely to have charges dismissed

and that the severity of sentences was generally associated with older defendants. Moreover, race was once again significantly related to sentencing. Although race was not associated with the probability of dismissal, black defendants had a "greater likelihood of receiving an active sentence, a longer expected active maximum prison term, and a longer time to serve before earliest possible release from prison" (Clarke, Kurtz et al., 1982). Further analysis showed that the disadvantage of black defendants was apparently due to the fact that blacks were more likely to have assigned counsel and spent a longer average time in pretrial detention. The effects of race disappeared when these variables were added to the statistical models.

Post Fair Sentencing Act. Preliminary results of the continuing research by the Institute of Government study group indicate that the Fair Sentencing Act (FSA) "...has not had certain detrimental effects that some critics feared it would have, and also that it appears to be accomplishing one of its intended purposes: reducing variation in prison sentences" (Clarke, 1982).

At the time of this writing, Clarke and his associates had been able to compare the sentences of 1,187 post-FSA defendants with those of 1,297 pre-FSA defendants. Both groups were taken from the twelve counties discussed above. Analysis has yielded the following results:

1. The percentage of felony defendants completing jury trials declined from 5.7 percent before FSA to 3.2 percent afterwards.
2. The percentage of felony defendants pleading guilty was

unchanged. There was an increase in formal bargains, but the percentage sentence bargains (exempt from the presumptive sentencing system) actually decreased, going from 62 percent of formal bargains to 45 percent.

3. The average time from arrest to trial court disposition decreased, going from a median of 58 to 48 days (Clarke, 1982).

The preliminary indications are that the new law is having the desired effect on sentencing variation. While there does not appear to have been "any major change in overall felony sentencing severity," Clarke reports that "sentences under the new law tended to cluster around the presumptive term" (Clarke, 1982). On the other hand, it was found that the use of both the Committed Youthful Offender sentences and consecutive prison terms for multiple charge cases had increased somewhat under the FSA. Finally, Clarke (1982) reports that a Department of Corrections analysis of prison population trends indicates that while the prison population will continue to rise throughout the eighties, the projected increase will be less (approximately 800 inmates less) as a result of the Fair Sentencing Act.

In conclusion, it appears that North Carolina may be one of the few states among those that have attempted systematic sentencing reform that has achieved what it sought to do in changing its sentencing structure--namely, to reduce unjustified sentencing variation without severely constraining judicial discretion or otherwise overburdening the criminal justice system. Of course, the success of the reform is partly as a result of the relatively

limited objectives of the law that ultimately emerged, particularly in comparison with the original proposal of the Knox Commission. In any event, it remains to be seen whether the preliminary research

findings outlined here will be confirmed by more rigorous analysis. In this regard, however, North Carolina is fortunate to have the capacity for evaluation of its new system.

## NORTH DAKOTA

### Indeterminate sentencing

Sentencing in North Dakota is basically indeterminate. The criminal code which was revised in 1975 was patterned after the federal model. There are four classes of felony offenses as follows: Class AA--life imprisonment with a 30-year minimum sentencing required before parole eligibility; Class A--a maximum of 20 years and/or a \$20,000 fine; Class B--a maximum of 10 years and/or a \$10,000 fine, and Class C--a maximum of five years and/or a \$5,000 fine. The court retains the discretion to sentence an offender to any alternative to incarceration. If an offender is to be incarcerated, the judge sentences to a maximum term. Unless specifically authorized, the court does not set a minimum term. The court must provide a written explanation of the sentencing decision that becomes part of the record.

The parole board has complete discretion in deciding when to release an offender from prison. An inmate becomes eligible for parole immediately after he is incarcerated. However, a written application for parole must be made by the offender. Parole release decisions are based in part on the offender's history, the seriousness of the offense, and the offender's institutional behavior. Once an inmate is released on parole, he or she remains under the supervision of the board until the expiration of the incarcerative term. If defendants violate parole, they may be imprisoned for the remainder of their term following due process procedures. Good time provisions are allowed in North Dakota according to the length of the incarcerated term, ranging from six days per month for up to a three-year term, to

10 days per month for sentences of 10 years or more. Additional time is allowed at the rate of two days per month for meritorious conduct.

### Other provisions

As mentioned above, Class AA felonies--life sentences--carry a mandatory minimum of thirty years before an inmate may be considered for parole release. The use or threat of use of a firearm during the commission of a Class A or Class B felony carries a four-year minimum sentence. The use or threat of use of a firearm for a Class C felony may carry a two-year minimum term. Offenders may also be classified as dangerous offenders if they have two prior felony convictions of Class B level or above, or one Class B conviction and two prior felony convictions lower than Class B. If the current conviction is for a Class A offense, the offender may receive an extended term of life imprisonment: for a Class B felony--20 years; for a Class C felony--an extended term may be 10 years. If a defendant is adjudged to be dangerous and mentally abnormal, a professional criminal, or threatened bodily harm or used a weapon, an extended term may be imposed.

### Movement towards guidelines

The North Dakota Supreme Court is currently collecting data on sentencing in order to eventually create sentencing guidelines. The North Dakota Parole Board is also in the process of adopting parole guidelines after 18 months of research. In addition, the parole board is studying sentencing practices in North Dakota to provide data for the purpose of addressing the issue of overcrowding in the state

prisons. The North Dakota State Legislature also received money during the 1979-1981 fiscal year to study existing correctional institutions in North Dakota, and, as a result, massive construction projects have begun at the state prisons. The

legislative study also recommended that the parole board add more personnel. Reports on the guidelines research are not yet available because the work is in progress.

**OHIO**

Sentencing reform

In 1974, the Ohio Legislature completely revised the criminal code and devised a system of uniform penalties for all offenses. The stated goals of this legislative change were to provide protection to the public and to promote the rehabilitation of the offender. All offenses were divided into degrees of seriousness and each degree had a specific penalty range assigned. The offense classes were ranked in terms of seriousness of physical harm or potential for physical harm as well as seriousness of property harm. A number of general and specific criteria were outlined in the statutes for determining sentences which included: 1) the nature and circumstances of the offense; 2) the history, character, and condition of the offender; 3) the offender's need for correctional and rehabilitative treatment; and 4) the resources and ability of the offender to pay fines. Judges were required to consider the statutory factors in imposing a sentence, not doing so constituted sufficient grounds to have a case appealed and to have the sentence reconsidered.

Four choices were fixed statutorily for a minimum term as well as for a maximum term, as illustrated below.

Felony Sentencing in Ohio

Offense Class	Minimum term	Maximum term
First Degree	4, 5, 6, 7 yrs	25 yrs
Second Degree	2, 3, 4, 5 yrs	15 yrs
Third Degree	1, 1.5, 2, 3 yrs	10 yrs
Fourth Degree	.5, 1, 1.5, 2 yrs	5 yrs

Judges retained the option to impose fines and to sentence probationary terms. Probation in Ohio, however, remained a modification to an incarcerative penalty first imposed and then suspended. There are several forms of probationary sentences, including split sentences and shock probation sentences. Probationary terms are not allowed by law for certain offenses such as rape and murder.

Judges also retained the discretion to sentence an offender to a reformatory or a penitentiary.<sup>99</sup> Reformatory inmates are eligible for parole earlier than penitentiary inmates. Reformatories are intended for persons between the ages of 16 and 30 who have been sentenced on a first felony conviction, and for convicted persons between the ages of 16 and 21, as well as for convicted persons between the ages of 21 and 30 at the discretion of the judge. The penitentiary is reserved for persons regardless of age convicted of a second felony conviction, persons convicted of aggravated murder, and persons over 30-- regardless of their prior record.

Habitual offender provision. The 1974 Revised Code also repealed the habitual offender laws and replaced them with special provisions designed to recognize the repeat offender as a characteristic that carried weight in the sentence decision, rather than treating repeater status as a separate offense. Repeat and dangerous offenders are therefore defined in the law. A repeat offender is classified as "a person who has a history of persistent criminal activity, and whose character and condition reveal a substantial risk that he will commit another offense" (Swisher, 1978). Specific prior record criteria are also included to aid in the classification

of a repeat offender. A dangerous offender is a "person who has committed an offense, whose history, character, and condition reveal a substantial risk that he will be a danger to others, and whose conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior, with needless indifference to the consequence" (Swisher, 1978). The classification of repeat or dangerous offenders is crucial in determining their sentence. Repeat or dangerous offenders are not eligible for any kind of probationary term, may be sentenced to the higher minimum terms, and are liable to an incarcerative term for a misdemeanor offense.

Other provisions. Mandatory prison sentences are required for certain drug and sex offenses. Parole is available after a person has served a minimum term, minus good-time allowances. Good-time reductions are calculated based on the minimum term; from 5 days to 10 days per month are allowed accordingly.

#### Sentencing guidelines

Sentencing guidelines were developed in 1977 by the Ohio State Bar Foundation in order to structure judicial discretion, to lessen sentencing disparity, and to help judges structure sentences under the new code. According to a Bar Foundation publication, the Denver Guidelines were used as a model, but were modified on the basis of "empirical research to reflect actual sentencing practices in Ohio." Data, collected at the Ohio Judicial Conference in 1977 where 60 percent of Ohio's general jurisdiction judges tested the guidelines and worksheets by sentencing hypothetical cases, were used to refine the guidelines.

In the Ohio sentencing guidelines, offender and offense characteristics are used to locate sentencing cells on a two-dimensional grid. The factors used to determine offense and offender ratings are those which have been shown to have had the most significance in determining past sentences in Ohio. The offender rating includes information on prior record, prior jail time, parole and/or probation revocations, and drug or alcohol use. The offense rating includes the seriousness of the offense, the number of charges, and the harm or threatened harm to the victim. Each cell on the guideline matrix gives a recommended minimum sentence as well as information on the possibility and length of probation (see Table 20). Written reasons for departure from the guidelines are also to be given.

Even though Ohio's guidelines are similar to those guidelines developed in other states in that persons are sentenced on a grid based on offense and offender characteristics, they are quite different in a number of ways. The IN/OUT decision is specified for many cells, but specified in that more information is provided for deciding probationary terms. A sentence of incarceration is indicated only in that the minimum term recommendation is specified. No actual sentence range is given and time to be served is still somewhere between the minimum term and maximum term, and is determined by the parole board. Recommendations as to concurrent and consecutive sentences are also included in some cells of the Ohio guidelines.

Impact of guidelines. Problems may develop in the use of the guidelines and in the way scoring will be done. Pre-Sentence Investigations are not required in Ohio except for cases where probation-

TABLE 20

OHIO SENTENCING GUIDELINES

Circle the box on the chart where the offense and offender ratings determined on the previous page intersect. This indicates a normal sentencing package. If the indicated sentence appears too severe or too lenient for the particular case, do not hesitate to vary from the indicated sentence in that event, however, list the reasons for the variance in the space provided at the bottom of the page.

Offense Rating	Offender Rating				
	0-2	3-5	6-8	9-11	12 or more
6+	Lowest or 2nd lowest min. term  No probation	2nd lowest or 2nd highest min. term  No probation	2nd highest or highest min. term  No probation	Highest min. term Make at least part of multiple sent. c/s No probation	Highest min. term Make most or all of multiple sent. c/s No probation
5	Lowest min. term  No probation Limited prob.* possible with unusual mitigation	Lowest or 2nd lowest min. term  No probation	2nd lowest or 2nd highest min. term  No probation	2nd highest or highest min. term  No probation	Highest min. term Make at least part of multiple sent. c/s No probation
4	Lowest min. term  Limited* or no prob. Regular prob. possible with unusual mitigation	Lowest or 2nd lowest min. term No probation Limited prob.* possible with unusual mitigation**	2nd lowest or 2nd highest min. term No probation	2nd highest or highest min. term No probation	Highest min. term No probation
3	Lowest min. term  Regular probation Limited probation* if special need	Lowest or 2nd lowest min. term Limited* or no probation Reg. prob. possible with unusual mitigation**	2nd lowest or 2nd highest min. term No probation Limited probation* possible with unusual mitigation**	2nd highest or highest min. term No probation	Highest min. term No probation
0-2	Limited min. term Regular probation Limited probation* if special need	Lowest or 2nd lowest min. term Regular probation Limited probation* if special need**	2nd lowest or 2nd high. min. term Lim.* or no prob. Regular prob. possible with unusual mitigation**	2nd highest or high. min. term No probation Limited prob.** possible with unusual mitigation**	Highest min. term No probation

\*Limited probation includes 1) shock probation, 2) split sentences, 3) probation requiring intensified supervision or some form of extended treatment or counseling.

\*\*Offenders with ratings in this range may be repeat offenders and thus ineligible for probation of any kind.

ary sentences are given. The Ohio State Bar Foundation Report (Sentencing in Ohio) suggests that some prior record information could be collected by the court by simply asking the offender about prior offenses. Some systematic change in obtaining complete and accurate prior record information seems in order, if these variables are important to obtaining an offender score on the guidelines and are to be used in sentencing.

Ohio's sentencing guidelines are voluntary, but highly recommended by the Ohio State Bar Foundation. It is hoped that

these guidelines will be a useful tool for judges and will aid them in making better-informed sentencing decisions. One effect "observed by the Ohio Bar Foundation on the use of the guidelines" has been the reduced use of extremes in sentencing.<sup>101</sup> Although there seems to be no firm data on guideline usage, the Bar Foundation reports that judges have responded favorably to the guidelines, and it is hoped that as usage increases, the guidelines will be a valuable tool in determining sentences. To our knowledge, there has been no independent evaluation of the Ohio guidelines on their effect on the prison population.

## OKLAHOMA

### Indeterminate sentencing

The indeterminate sentencing system has remained basically unchanged for many years in Oklahoma. Felony statutes provide minimum and maximum allowable terms for each offense leaving to the court the discretion as to the sentence length. Judges may either give a sentence as a range (e.g., 3 to 5 years) or a specific amount of time (e.g., 5 years). Judges may also impose a non-incarcerative sentence. For incarcerative terms, actual time served may be altered by decisions of the parole board and for good-time allowances.

Though the basic indeterminate sentencing form has remained unaltered by legislative decisions in Oklahoma, within the past few years, legislation affecting other aspects of the sentencing process has occurred. Sentencing guidelines are currently under consideration in Oklahoma, but, to date, nothing official has resulted.

Parole guidelines. Beginning in 1979, Oklahoma's Parole Board developed decision-making guidelines similar to the Federal Model, based on an assessment of risk and the severity of the offense. The parole guidelines establish a presumptive parole date for most inmates with some flexibility for aggravating or mitigating factors. Inmates will not be considered for parole release until they reach the presumptive parole date or have served one-third of their sentence, whichever comes first. Other specifications of the Oklahoma parole policy include: (1) inmates serving sentences greater than 45 years will have their eligibility calculated as if their sentence was 45 years--that is, they are eligible for parole

consideration after serving 15 years; (2) any person serving an indeterminate sentence will have the one-third eligibility date calculated on the minimum sentence; (3) persons serving sentences for Murder I and rape will not receive a presumptive parole release date, but will be eligible for parole consideration after serving one-third of their sentence; and (4) the presumptive parole date shall reflect any mandatory minimum sentence.

Oklahoma's parole system has received some criticism, as pointed out in a report completed in 1982 by the Oklahoma Board of Corrections. The report suggested various methods that could be adopted to streamline the parole release process, such as eliminating the delay of several months that occurs after the parole release decision has been made and actual release. Oklahoma is also one of the few states that requires the Governor's approval for every inmate released on parole. This also may take a few months for processing and is regarded as a more or less useless delay since the Governor generally approves almost all of the releases.<sup>102</sup> In addition, the report suggested that after it has been determined that maximum capacity in the state's correctional institutions has been reached, the parole board should be empowered to consider for parole all non-violent offenders within six months of their scheduled release dates. This provision was enacted in 1980 by the passage of House Bill 1064 at approximately the same time that the Board of Corrections report was being done.

Habitual offenders. Oklahoma, following the national trend to increase sanctions for repeat offenders, passed legislation in 1978 to increase terms for habitual offenders. According to Senate Bill 276,

persons convicted of the second or subsequent felony offense shall receive the following sanctions:

1. If the current convicted offense is punishable by a term of 5 years or less, the defendant is punishable by a term of not more than 10 years;
2. If the current convicted offense is for petty larceny or any attempted offense, the defendant is punishable by a term of not more than 5 years;
3. If the current convicted offense is punishable by a term of more than 5 years, the defendant is punishable by a term of not less than 10 years; and
4. If the defendant is twice convicted of a felony and commits a third (within 10 years of completion of the last offense) that person is punishable by a term of imprisonment of 20 years, plus the longest term allowable for the current offense.

These provisions still allow a great deal of discretion in the term imposed, but since no study has been done to look at how judges actually sentence habitual offenders, it is difficult to determine if these defendants do indeed receive longer sentences.

Senate Bill 505, effective October 1, 1980, modified the provisions for paroling habitual offenders. Under this law, the parole board may not recommend parole until one-third of a sentence has been served or 10 years (whichever is less) for any person convicted of three or more

felonies (separate convictions), or has two or more previous incarcerations. Since all other inmates must also serve one-third of their sentence before parole consideration, this provision for habitual offenders does not seem to add much to their incarcerative term. Legislation was introduced in 1981 to deny parole release to persons classified as habitual offenders, but the bill failed to pass the House.

Good time. As specified in House Bill 1918 of the 1976 Legislative session, inmates are allowed one day credit for each day that they are involved in work, school, or vocational training. Good time is subtracted from the maximum when an indeterminate sentence range has been imposed. Good time is not available for inmates serving life sentences.<sup>103</sup>

Mandatory minimums. As early as 1976, Oklahoma passed legislation providing increased sanctions for offenders who commit offenses while armed. House Bill 1633 of 1976 provides mandatory minimum sentences for offenses (or attempts) committed with a deadly weapon. For a first offense involving a deadly weapon, the defendant is subject to a sentence of not less than 2 years nor more than 10 years; for a second or subsequent weapon offense, the defendant is subject to a term of imprisonment of not less than 10 years nor more than 30 years. Senate Bill 376, passed just last year, provides for a life sentence or at least a mandatory minimum term of 10 years for any person sentenced on a third armed-robbery conviction.

#### Impact assessment

In 1980, over \$15 million dollars was appropriated to the Oklahoma Department of Corrections for new construction and

renovation of correctional facilities. Because of piecemeal legislative efforts, it is often difficult to assess what impact specific legislative acts have had on the correctional population. Oklahoma has passed, as have other states, laws increasing time for certain offenders and offenses while at the same time passing legislation decreasing amounts of time served and providing alternatives to incarceration for other felons. For example, in the past few years, the minimum penalty has been raised for certain violent offenses, such as assault and battery, child abuse, and rape. Other legislation, such as SB 477, allows for the extended use of weekend and night-time county jail incarcerations for non-violent offenders. Oklahoma has also developed an extensive Community Treatment-Work Release Program within the last 10 years.

Board of corrections study. Legislation passed in 1981 authorized the Oklahoma Board of Corrections in conjunction with the Department of Corrections to: (1) make projections on the inmate population over the next 5 years; (2) examine options to ease anticipated overcrowding; and (3) formulate recommendations to the Legislature about taking steps to combat overcrowding.

From 1980 to 1981, Oklahoma's prison population increased 9.4 percent (Corrections Magazine, 1981). Although this is not nearly as high an increase as experienced in many other states, it is high for a low population state, and Oklahoma's legislators and correctional personnel are understandably concerned. Additionally, Oklahoma's incarceration rate is one of the highest in the country at 95 per 100,000 persons (Department of Corrections, 1982). Further, Oklahoma is

currently under a Federal Court order to insure adequate cell space.<sup>104</sup>

Despite the fact that \$2.5 million dollars has been appropriated to build a new minimum security facility, the Board's study concluded that this might not be enough to meet future needs, based on the state's rate of growth, Oklahoma's commitment rates, and the average time served. One suggestion made by the Board was that there will be a growing need to create flexibility in the state's correctional system without relying on a massive building campaign.

Included in the Board of Corrections report was a paper (Mike Parsons, et al., 1981) recommending that alternatives to incarceration be made applicable to Oklahoma's correctional system. This paper suggested that there are ways to reduce the prison reception rate and to increase the release rate. Other suggestions included:

1. Community Corrections Act: based on the Minnesota model, this act would provide financial incentives to counties to retain non-violent inmates;
2. Felony limit modifications: raising the monetary loss criteria for felonies from \$20 to \$500;
3. Mandatory community supervision: discharging certain offenders six months early, thus providing for a supervised re-entry program;
4. Emergency overcrowding legislation: allowing extra earned credits to be given after 90 percent of prison capacity is reached;

5. Streamlining the parole process; this includes revoking the Governor's note on parole release decisions; and

6. Pretrial release programs: allowing for certain defendants to be released on their own recognizance before trial.

Model legislation was drafted to include many of these alternative suggestions.

Legislation. The impact study done by the Oklahoma Board of Corrections resulted

in several legislative recommendations and model bills. Reflecting the legislature's serious interest in the threat of overcrowding, and because the recommendations also had the backing of the Board of Corrections and the Department of Corrections, several of the model bills were quickly enacted in the 1982 Legislative session. Senate Bill 389 raised the felony limit for most property offenses from \$20 to \$500 and SB 388, the Mandatory Community Supervision Legislation, enacted the provision that inmates will be released to community supervision during the last six months of incarceration.

## OREGON

### Indeterminate sentencing

Oregon has an indeterminate sentencing system based on five felony classes. The five classes are punishable as follows:

Murder: Death or life imprisonment  
Treason: Mandatory life imprisonment  
Class A: Maximum term of 20 years  
Class B: Maximum term of 10 years  
Class C: Maximum term of 5 years

The court may sentence anywhere up to the maximum set by the legislature and may also give a non-incarcerative sentence. The maximum term becomes the greatest amount of time an offender may be incarcerated, but as in many states with indeterminate sentencing, the actual release date is determined by the Oregon Parole Board. The court may also set a minimum term of up to one-half of the maximum, but the parole board still retains final discretion of when to release the offender.

### History of reform

The above-described indeterminate sentencing structure, though still in use today, received harsh criticism from many sources beginning around 1975. Most of the criticism centered on the parole release decision. Oregon's indeterminate system was based on the idea of rehabilitation, and persons were not released from prison until they were deemed ready for release by the parole board. This system led to uncertainty in prison lengths and the resultant problems and frustration this can create, exacerbated by the problems of overcrowding in the prisons. Critics also maintained that the unpredictability of release made prison planning impossible.

In addition, the general feeling of the public was that the criminal justice system was too lenient, especially relative to prison "release." The judiciary was also troubled, alarmed by what they saw as the wide discretion of the parole board. Thus, widespread and diversified criticism of the sentencing system in Oregon focused on the parole release decision.

A number of groups, including the Governor's Task Force on Corrections, a research team from the Oregon Law Review, and the Interim Joint Judiciary Committee of the Oregon Legislature conducted studies of the Oregon criminal justice system. These three groups agreed that harsher sentencing and new prisons were not the optimal solution to Oregon's correctional problems, but rather that reform should come through community corrections programs and the parole process. They made recommendations primarily aimed at parole reform:

Recommendations aimed at the parole board included proposed requirements that the basis for parole decision-making be explicit; that the board develop guidelines articulating the weight given to specific factors considered and that these guidelines be made available to the public and that the uncertainty of terms be reduced.<sup>105</sup>

Simultaneously, there were a number of internal changes going on in the parole board itself. Four out of the five members were newly appointed and open to new ideas. The board started to review its decision-making policies and to develop its own guideline model.

### House Bill 2013: parole guidelines

The 1977 legislature received considerable public pressure to pass mandatory sentencing and stiffer penalties for felons. The legislature, however, decided to adopt a guideline model similar to the model the parole board had developed for itself. Thus, House Bill 2013 legislating parole decision-making guidelines was passed in 1977.

House Bill 2013 establishes a matrix of ranges for terms of imprisonment based on offense and offender characteristics. The primary objective is to punish according to the perceived seriousness of the criminal conduct with primary weights given to the present offense and the defendant's criminal history. The guidelines also include standards for variation from the range for aggravating and mitigating circumstances.

Within the first six months of a prison term, the prisoner has a hearing at which time a parole release date is set. Release may be delayed from the parole release date only if there is serious institution misconduct, the inmate suffers from a psychological disturbance, or has an inadequate parole plan--in which case release may be extended for 90 days. The judges were also given more discretion over time served in that they were allowed to set a minimum required term of up to one-half of the executed sentence, unless four of the five parole board members decided to over-ride the decision. An advisory commission consisting of the parole board members, five circuit court judges, the governor's legal counsel (an ex-officio member voting to break ties) and the Administrator of the Corrections Division (who serves in an advisory capacity)--was also created to advise the

parole board on ranges for sentence served and deviations for aggravating and/or mitigating circumstances.

The parole guidelines in Oregon reflect a good working relationship between the judiciary and the parole board. Because judges sit on the advisory Commission, there has been greater judicial involvement in the development of the parole guidelines and their impact on the imposition of sentence. Since many judges were favorably impressed by the parole guidelines, "sentencing standards" for judges were also developed. These are voluntary standards, and are only intended as suggestions for the sentencing judge. However, any judicial decision must now be carefully articulated to make the rationale of the sentencing judge apparent to the parole board. At sentencing the judge must state the reasons and factors for the sentence imposed. The parole board must rely on those facts and reasons in order to make their release decision. Proponents of the Oregon system feel that this approach recognizes the sensitivity to independence of the judiciary and the need for individualized sentences while hopefully reducing disparate sentences for like offenders.

### Results of the guidelines

"The main result of the adoption of parole guidelines in Oregon has been to reduce disparity in prison terms as well as uncertainty in time to be served" (Oregon State Board of Parole, 1980). Parole board decisions are now out in the open, criticism of the board's functioning can now be specific and hopefully constructive (Blalock, 1978). Some proponents argue that less serious offenders are given shorter terms, while those convicted of more serious offenses are receiving longer

terms. The average prison terms from 1976 to 1979 have changed drastically and upward--in 1976 the average was 18.7 months, in 1977 the average was 19.3 months, in 1978 the average was 19.1 months, and in the first eight months of 1979 the average was 31.1 months. However, the median term for the first eight months of 1979 was 20 months. The higher average may be reflective of the fact that inmates with more serious charges and crimes are indeed receiving longer sentences; it may also be reflective of a general increase in sanctions for all crimes. The only major criticism of Oregon's parole guidelines system that is currently apparent comes from inmate groups who claim that any hope of release for inmates with long prison terms have been removed by the bill and resulting parole system. There has been little change in the parole guideline system in Oregon since its inception in 1977. Currently, legislation on sentencing guidelines is under consideration by the House Judiciary Committee. Sweeping changes in the existing sentencing structure are not, however, anticipated.106

### Other provisions

Good time. Oregon has rather extensive good time provisions for inmates except those persons serving life sentences. Those inmates with sentences over one year are allowed one day for every two served. Offenders are also allowed further reductions depending on work assignments and educational program participation. These

rates of reduction are based on years of imprisonment.

Mandatory minimums. The court also imposes minimum terms of imprisonment if there was the use or threat of use of a firearm during the commission of a felony. For the first conviction there is a minimum of 5 years. However, the court may suspend the sentence or impose a lesser term of incarceration if mitigating circumstances justify the lesser sentence.

For a second conviction, there is a minimum of 10 years and for a third firearm conviction the minimum term of imprisonment is 30 years.

Habitual offenders. Oregon has a relatively limited habitual offender statute. The maximum term for a dangerous offender is 30 years. This may be imposed only if the court, in considering the dangerousness of the offender, feels that an extended period of incarceration is justified. Further and important restrictions require that the defendant must be sentenced on a Class A felony, have a personality disorder, or have previous felony convictions.

In 1977, 1979, and 1981, the Oregon Legislature provided judges with discretionary authority to impose one-half of the maximum sentence for any felony as a mandatory minimum. Impact analysis statements were presented to the committee considering each bill. Further changes in Oregon's sentencing system do not appear likely in the near future (Chambers, 1982).

**PENNSYLVANIA**

Pennsylvania had one of the earliest experiments in single jurisdiction sentencing guidelines, implemented in Philadelphia in 1979. Their use continued during a time of political debate regarding sentencing, although the adoption of mandatory minimum sentencing laws in 1981, as well as the subsequent adoption of statewide advisory sentencing guidelines in 1982 rendered them obsolete. Mandatory provisions relate to conditions present during the occurrence of certain felonies (third degree murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery, aggravated assault, and kidnapping) or their attempt. Gun use during the commission of these offenses or the commission of these offenses on or near public transportation facilities are punishable by mandatory provisions. Recent legislation requiring mandatory terms related to victim and offender age has also been passed.

Judges still retain discretion to set the minimum and maximum terms, but the maximum must not exceed that prescribed by law and the minimum must not exceed one-half of the maximum. Probation remains a sentencing option in cases not covered by the mandatory provisions. Penalties in Pennsylvania are as follows:

Murder I:	Death or life imprisonment
Murder II:	Life imprisonment
Murder III:	Life imprisonment
Felony first degree:	Imprisonment not greater than 20 years
Felony second degree:	Imprisonment not greater than 10 years
Felony third degree:	Imprisonment not greater than 7 years
Misdemeanor first degree:	Imprisonment not greater than 5 years
Misdemeanor second degree:	Imprisonment not greater than 2 years
Misdemeanor third degree:	Imprisonment not greater than 1 years

Sentencing reform and its context

In Philadelphia, interest in sentencing guidelines developed as a result of the first guidelines efforts in Denver, Chicago, Newark, and Phoenix. In 1976, the Philadelphia Court of Common Pleas commissioned a study on sentencing in Philadelphia in order to draw up guidelines.

One thousand cases sentenced in Philadelphia in 1975 were randomly chosen for the sample (Kress and Dillio, 1978). Information was collected on the instant offense, defendants' prior records, and their social background using court case and probation department files. Those variables that seemed to correlate with the sentence and which were considered appropriate by the judges were used to construct the guidelines. These guidelines used two grids, one for crimes against a person, and one for crimes not against a person. To locate the appropriate sentence on each grid, judges calculated an offense score and an offender score. The intersection of these two scores in the matrix indicated the appropriate sentence.

Every offense was assigned a point value depending on its severity. For crimes against a person, the score was added to

points given for injury to victim, weapon usage, amount of property involved, and the number of victims. For crimes not against a person, the offense points were added to points for injury to victim, weapon usage, victim classification (large store or organization, private citizen, small store), and amount of property involved (Manual for the Use of Sentencing Grids; Crimes Not Against a Person, 1978). These guidelines were implemented on the recommendation of the Judges' Advisory Committee in 1979. During their use, Philadelphia judges reportedly sentenced within the guidelines in 70 percent to 80 percent of the cases.

Interest in the work being done in Philadelphia and as a result of heated political debate, led to the passage of Act 319 by the Pennsylvania legislature in November, 1978, authorizing the establishment of a Sentencing Commission (Pennsylvania Bulletin, 1981).<sup>107</sup> The Commission, responsible to the legislature, was given broad mandates including charges to construct guidelines that would provide a range of sentences for crimes of a given degree of gravity, increase the severity of the sentence for repeat offenders and those who used weapons, and provide a list of possible aggravating and mitigating circumstances which might alter the range of sentences. There were no directives to the Commission regarding the limiting of prison population or costs. The Commission's staff initiated sentencing research using information from the pre-sentence investigations, probation files, and Clerk of Court files.<sup>108</sup> After examining data from other sentencing guidelines projects, the Commission chose approximately 100 variables which seemed relevant and for which information might be available (Pennsylvania Commission on Sentencing, 1980).

The sample used was a 28 percent random sample of all sentences imposed statewide in 1977. Half of this sample was held back and used as a replacement group for cases which could not be located. Using the data collected from this sample, the Commission developed three sets of guidelines. These guidelines were sent to 352 Pennsylvania judges who were asked to evaluate them. The judges were also asked to rate the importance and appropriateness of various sentencing factors such as prior adult felonies, weapon use, etc. These responses were then used to construct the first draft of the Commission's guidelines. These guidelines used an offense score and an offender score to locate the recommended sentence range on a chart. The offense score was composed of points given for the offense rank of each offense, plus one point for possession of a weapon, firearm discharge, and serious bodily injury. One point was subtracted for attempts, solicitations, and conspiracies. The offender score was composed of one point for one or two previous misdemeanors, two points for three or more misdemeanors, one to four points for one to four or more prior convictions or adjudications of delinquency, and one or two points depending on the seriousness of prior felonies.<sup>109</sup>

These guidelines listed a series of aggravating and mitigating circumstances which could shift the proper sentence range one box left or right on the chart. Sentencing outside the guidelines could occur if the guidelines were unreasonable because of special facts of the case, or if the crime involved major drug trafficking, organized crime, or breach of public trust. The guidelines did not apply to probation revocations but did provide dispositional lines for both the IN/OUT decision as well as for the jail/no jail decision if incarceration was not the

recommended sentence. Any sentence outside the guidelines had to be accompanied by a written explanation.

Because of opposition to these guidelines both within the Commission and from practitioners, the first guidelines were revised.<sup>110</sup> The second draft of guidelines generally increased penalties to meet criticism of rural and suburban practitioners. When the second draft was submitted to the legislature in April of 1981, however, it met with a hasty rejection. Guideline proponents were able to salvage the guideline concept, if not the specific guidelines, and the Commission was instructed to submit yet another set of guidelines in six months. The third draft of guidelines were submitted in early 1982 and made effective in July of the same year. The final guidelines eliminated the list of aggravating and mitigating factors and judges were allowed to consider social factors in sentencing. Also, guideline sentence ranges were widened. This final guideline draft was implemented after the legislature adopted the mandatory minimum sentencing scheme, and it is seen as supplementary to the mandatory provisions.

#### Measures of impact

In January, 1979, the School of Urban and Public Affairs of Carnegie-Mellon University issued a report entitled "The Impact of New Sentencing Laws on State Prison Populations in Pennsylvania." This study was designed to explore the impact of the then proposed mandatory minimum legislation and examined sentencing differences among people sentenced for felonies in 1975. The data included information on type and length of sentence, age and race of the defendant, and county of disposition. Additional data on the offender's age, race, use of firearm,

previous convictions, offense, and committing court was gathered from a random sample of offenders committed to the Bureau of Corrections between January, 1971 and June, 1976. Two additional sets of data from the Pennsylvania Association of Probation, Parole, and Correction were used, one with offenders sentenced to county jails in 1976 and one with offenders sentenced to probation in 1976.

Examining past sentencing, the study found that the probability of receiving a sentence of incarceration increased as the length of the prior record increased, as the seriousness of the offense increased, and if a firearm was used. It also found that sentences of incarceration were proportionally much less frequent in Philadelphia and its suburbs than in the rest of the state. This discrepancy was diminished when sentences to county jail were included as incarceration, but the difference in frequency of incarceration between Philadelphia and the rest of the state was still significant. Differences in sentences for whites and non-whites were statistically significant for first offenders in drug cases throughout the state and for first offenders in robbery cases in Allegheny County.

Using the same data to analyze the effects of the then proposed mandatory minimum legislation (subsequently passed), the study concluded that the offenders who would be most affected were those currently sentenced to probation or county jail and those currently given short prison terms. Also, a mandatory sentence bill was likely to increase the prison population and increase prison costs. The study recommended establishing sentencing guidelines as an alternative to mandatory sentences because guidelines could reduce disparity while allowing judicial discre-

tion. It was additionally recommended that guidelines allow regional differences to be preserved.<sup>111</sup>

Despite these cautions and recommendations, Pennsylvania adopted the mandatory minimum sentencing plan. To our knowledge, empirical work on the effect of the new sentencing structure is not yet available. The construction of new prisons has been approved by the legislature.

#### RHODE ISLAND

Rhode Island's sentencing system is essentially indeterminate, although there are some mandatory provisions for certain offenses (murder, manslaughter). The court sets a sentence within the statutory penalty, but the actual amount of time served is determined by the parole board. Rhode Island has a form of sentencing guidelines, called benchmark sentences, which are unique among guideline plans.

#### Sentencing reform

In 1979, the Chief Justice of the Rhode Island Supreme Court appointed a Sentencing Study Committee. The committee's mandate was "to review and analyze sentencing practices in Rhode Island state courts and develop appropriate recommendations for improvement" (Report of the Sentencing Study Committee, 1981). The establishment of this committee came at a time when the Rhode Island Legislature reacted, as did legislatures in other states, to political pressures to do something about crime and was considering mandatory sentencing proposals, at least for certain offenses. The committee commissioned a study to look at the previous year's sentencing data for three major categories of crime--breaking and entering, assault with a dangerous weapon, and robbery. Because legislation passed in 1977 (Judicial Sentencing Disclosure Act) required courts to keep a public register of all sentencing decisions, data were readily available.

The study found that a wide range of sentences had been imposed for these offenses. However, because the sentencing register provided only limited information (charge and sentence), the Committee concluded that the findings of the study were

inconclusive without the consideration of other variables (prior record, etc.) that were seen to be crucial to the sentencing decision. The committee did decide, because of the study, that the question of unjustified sentencing disparity should be addressed.

The Sentencing Committee considered the next logical step, widening the study of sentencing to gather more information from such sources as PSI's and court records. There were problems in this approach, however, because PSI's were seldom used in Rhode Island.<sup>112</sup> Further, it was determined that other sources contained too little systematic information to be reliable for an empirical study of sentencing practices in Rhode Island. The committee thus decided that it would be necessary to design yet another approach.

The committee began by reviewing methods used elsewhere and decided to do a study of sentencing based on hypothetical cases, using a model based on the experiment conducted by the second U.S. Circuit Court of Appeals.<sup>113</sup> In the Rhode Island study, judges were asked to sentence the same hypothetical cases. The cases chosen were based on actual offenses, and included a representative sample of the most common types of offenses. Input on development of the hypothetical cases also came from the prosecutor and the public defender serving on the committee. Fourteen hypothetical cases were constructed and distributed to all judges in the Superior and District Courts with almost 100 percent participation. The results of the hypothetical sentencing exercise led the committee to conclude that there was, in fact, the potential for wide disparity in sentencing in Rhode Island. In over half of the cases, the judges did not agree on the IN/OUT decision, and even when there

was agreement on the incarceration decision, there was a wide range of terms given. For example, the same hypothetical robbery offenses were given incarceration sentences ranging from 5 to 25 years. Based on these results, the committee concluded that some form of sentencing guidelines would address the problem of sentence disparity while allowing for judicial discretion.

Sentencing guideline development: benchmark sentences. Sentencing guideline development in most states has been based on past sentencing practices. Rhode Island's Sentencing Committee, acknowledging the drawbacks in their record-keeping systems, recognized that it would not be feasible to use similar means to develop sentencing guidelines in Rhode Island. The committee was also wary of the mechanical aspect of guidelines which was, as they saw it, the scoring of factors so that a sentence results from a sum of scores. In light of the finding of potential disparity of sentencing practices, the Committee also felt reluctant to base sentencing policy on any form of average sentences from the past. Thus, the committee chose to develop sentencing guidelines for Rhode Island similar to those developed for District Courts by the Second U.S. Circuit Court of Appeals. In the Second Circuit study, experienced judges agreed on appropriate sentences for typical cases.

In order to do this, a subcommittee was formed including three judges of the Superior Court, a representative from the Attorney General's Office, and the Public Defender. This subcommittee created a set of sentence ranges that they felt would be appropriate for 12 different crimes which represented over 70 percent of the caseload. A recommended sentence range was

chosen to correspond to the most common variations of each crime, such as two to two and one-half years for breaking and entering (night-time, unoccupied dwelling, no weapon). See Table 21 for an example of the sentence variations for the breaking and entering offense. The recommended sentences were called benchmarks. Even though 95 percent of Rhode Island's criminal cases are resolved with a plea bargain, the underlying assumption of the benchmark sentences were that the defendant has no prior record and has been found guilty by a trial. As the guidelines were intended to be used, however, judges may use the benchmark sentences in sentencing defendants who have pled guilty. A reduction of 25 percent was allowed for a guilty plea.

The benchmark sentences are basically based on offense characteristics alone. There are no criminal history variables included in the development of the sentences. As these guidelines work, then, prior criminal history represents legitimate reasons for departure from the benchmarks. Other specified substantial and compelling reasons (i.e., harm to victim, defendant's age, motivation, education, or employment) may constitute departure from the guidelines. An explanation for departures must be written for the record.

The benchmark sentences are specified lengths of time to be served and do not address the IN/OUT decision. Discretion is left to the court to give suspended sentences, split sentences, probation sentences, or fines. The benchmark sentences also leave intact the functions of the parole board, and made no changes or recommendations regarding good time.<sup>114</sup>

Table 21

Rhode Island Benchmark Sentences  
Breaking and Entering - Dwelling

<u>Benchmark #</u>	<u>Sentence</u>
<u>Benchmark #1</u> Breaking and entering-dwelling -in the daytime -no weapon -dwelling unoccupied	12 to 18 months
<u>Benchmark #2</u> Breaking and entering-dwelling -in the daytime -possession of a weapon -dwelling unoccupied	3 to 3 1/2 years
<u>Benchmark #3</u> Breaking and entering-dwelling -in the nighttime -no weapon -dwelling unoccupied	2 to 2 1/2 years
<u>Benchmark #4</u> Breaking and entering-dwelling -in the daytime -no weapon -dwelling is occupied	5 to 6 years
<u>Benchmark #5</u> Breaking and entering-dwelling -in the nighttime -possession of a weapon -dwelling is occupied	7 to 8 years

Reprinted from the Report of the Sentencing Study Committee, Rhode Island Supreme Court, January, 1981.

Implementation. Two meetings were held with Superior Court Judges to present and discuss the benchmark sentences developed by the sentencing subcommittee. The judges responded favorably to the concept of benchmark sentencing guidelines, and expressed a desire to have the benchmark sentences adopted by rule of court rather than relying on voluntary usage by judges. The judges also wanted the use of the benchmark sentences to be monitored.

Because of the favorable response by the judiciary, the benchmark sentencing guidelines were adopted by the Rhode Island Supreme Court and scheduled for use beginning January 1, 1982. The benchmark guidelines as they now stand are an administrative policy of the court, and are no longer to be used solely on a voluntary basis, although no provisions for sanctions have been developed for those who do not sentence within the benchmark guidelines. Rhode Island's new sentencing system is currently being monitored by the Office of the State Court. The benchmark sentences are expected to be revised if needed.

Results of the monitoring being done by the Office of the State Court may indeed lead to benchmark revisions. The Office of the State Court recently conducted interviews with eight Superior Court judges and seven attorneys (three Assistant Attorneys General and four defense attorneys). The results of the interview, conducted in an informal, conversational manner, included:

1. Both judges and attorneys feel that many of the benchmark sentences for breaking and entering offenses are too high. More

defendants are going to jail for this offense than did previously. Approximately 31 percent of persons sentenced for breaking and entering a business are not first offenders, and are not covered by the benchmark sentences.

2. Benchmark sentences may be too high for larceny offenses since 21 out of 24 defendants received sentences below the benchmark.
3. There are several offenses that occur frequently for which no benchmark sentences are developed (i.e. sexual assaults).

In general, the judges and attorneys agreed that the benchmark sentences are being used and do have a positive impact as a guide to sentencing. The Office of the State Court will continue to monitor the system, and may revise the benchmark sentences, but, thus far, no revisions have been made.

#### Other provisions

Rather stiff penalties are prescribed following the second and subsequent felony convictions requiring a prison term. A person may receive an additional, consecutive incarcerative term of up to 25 years. In these cases, parole eligibility begins after 5 years have been served. Specific requirements are provided for offenses committed with a firearm. The first conviction carries a sentence of not less than 2 years nor greater than 10 years; the second conviction, from 5 to 20 years; and for a third and subsequent conviction, 10 years to life.

## SOUTH CAROLINA

### Indeterminate Sentencing

South Carolina can best be described as currently having an indeterminate sentencing system. For a majority of felony offenses, circuit court judges have a wide range of discretion in determining the type and length of sentence. For some felonies, there is a statutory minimum and a maximum, but for the majority of offenses, only a maximum is statutorily defined. The judge, therefore, is free to set any sentence up to the maximum term, including a non-incarcerative sentence. Time actually served is determined by the State Probation, Parole, and Pardon Board and defendants are generally eligible for parole after serving one-third of their sentence. Offenders serving life sentences, or sentences over 20 years, must serve at least ten years before parole eligibility. Good time provisions also allow for a reduction in sentence.

Several far-reaching changes have recently occurred or are under consideration to alter some of the basic provisions of sentencing in South Carolina.

### Youthful offender act

South Carolina also provides for sentencing persons between the ages of 17 and 21--extended to 25 with the offender's written consent--under what is called the Youthful Offender Act. The judge must also rule that the offender will benefit from treatment provided under the Act. The Act provides for somewhat different treatment for young offenders as follows: 1) it allows the offender to be released to the Division of Classification and Community Services for up to 60 days for observation and evaluation prior to sen-

tencing; 2) it allows the court to sentence the offender to an indefinite term of supervision and treatment; and 3) if the young offender is incarcerated, it requires that the period of incarceration shall not exceed 10 years. If the court decides that an offender would not benefit from sentencing under the Youthful Offender Act, he or she may be sentenced under any applicable provision. As of June 30, 1981, 873 persons were serving an incarcerative term (an average of 12 months)<sup>115</sup> under this Act, while 938 persons were under community supervision under the Act. The Youthful Offender Parole Review Board--separate from the regular parole board--decides when to release incarcerated youthful offenders. This review board uses guidelines based on the type of offense and the number of offenses committed, as well as the institutional reports to determine release.

### Sentencing enhancements

Mandatory sentences. South Carolina provides for life sentences in murder cases when the death penalty has not been imposed. In these cases, parole eligibility does not occur until 20 years have been served. There are also mandatory life sentences for kidnapping and for some burglary cases--however, defendants in these cases would still be eligible for parole release at some point in their sentence.

Armed robbery act. Special provisions for sentencing armed robbers are also provided under the Armed Robbery Act of 1975. This Act provides for a ten-year mandatory minimum sentence, but only seven years must be served before parole consideration is given. A person sentenced for an armed robbery under the Youthful Offender Act

must receive a three-year mandatory minimum sentence, and must serve at least three years before release.

Firearm enhancements. Persons convicted of the use of a firearm for a first conviction are subject to an incarcerative term not greater than one year. Second convictions require a term of imprisonment not greater than two years. A third or subsequent conviction warrants a term of not greater than five years. These penalties are in addition or consecutive to any sanction imposed for the specific offense.

Habitual offender sentencing. The Habitual Offender Act was originally enacted in 1955, amended in 1976 and in 1982. The original Act provided that upon the third conviction for certain offenses, the offender was subject to the maximum penalty by law. Upon the fourth conviction, the offender could receive a life sentence. Prosecution would be at the solicitor's discretion. The House Bill, the 1982 revision, required that upon the third conviction for certain offenses (voluntary manslaughter, assault and battery with intent to kill, first degree criminal sexual conduct, burglary, armed robbery, and safecracking), a defendant should be sentenced to life imprisonment. Persons convicted of other felonies would receive a sentence of not less than 30 years upon the third conviction. Prosecutors still maintain the discretion to enforce this law.

While provisions of this Act seem particularly harsh, it appears that prosecution of offenders under this Act have been minimal. A survey completed by the Legislative Audit Council looking at the inmate population for November and December of 1981 estimated that though some inmates

had committed at least two prior offenses designated under the Act, no one had been prosecuted under the Act. State prosecutors suggest that it is unusual for an offender to have committed the prerequisite number and type of crimes defined in the Act. In a letter dated September 1982, William D. Leeke, Commissioner of Corrections, to Mr. George L. Schroeder, Director of the Legislative Audit Council, Mr. Leeke points out the dangers of full application of the Habitual Offender Act:

While it is acknowledged that the Habitual Offender Act has not thus far been widely used, ...any proposal to expand the application of the Habitual Offender Act must be costed out prior to implementation. It would be irresponsible state policy to accelerate the prison population further without making provisions to house, care for, and control the larger numbers that would result.<sup>116</sup>

#### Provisions reducing time served

South Carolina has experienced severe problems with overcrowded conditions in its prisons for a number of years. Since 1976, South Carolina has had the highest (or has tied for the highest) incarceration rate in the country--253 persons incarcerated per 100,000.<sup>117</sup> South Carolina's prisons are also considered the most overcrowded in the country, operating at approximately 34 percent over capacity. Acknowledging this fact, recent legislation has been enacted to deal with this problem though none of these provisions seem to have made a significant dent in reducing the incarceration rates.

Pre-trial intervention act. In July 1981, legislation went into effect which

allows for prosecutors to establish a pre-trial intervention program for first offenders. The program is designed to keep first offenders convicted of non-violent crimes out of the courts. The prosecutor determines the conditions of the intervention program and, in some cases, restitution must be paid to the victim. In return, the charge(s) against the defendant are dropped. If violation does occur, the defendant faces full prosecution.

Good time credits. Good time procedures were amended in 1976 allowing for 20 days credit for every month served. Inmates with sentences of less than one year may earn 15 days per month.

Earned work credits. In May of 1978, the Governor of South Carolina signed a law creating the Earned Work Credits Program. The Earned Work Credits Program allows for the reduction of prison sentences for inmates assigned to productive duty. The work credits are awarded on the basis of job performance as well as by the classification level of each job. During 1981, an average of 72 percent of the inmates in South Carolina's prisons earned credits in the program. The impact of this program on the prison population has been significant. In Fiscal Year 1980-1981, 59 percent of the inmates released had their time reduced because of participation in the program. This means that there was a decrease of over 600 inmates and a savings of over four million dollars in state operating costs for that fiscal year alone.<sup>118</sup>

South Carolina also has an Extended Work Release Program authorized by the Legislature in 1977. This program places inmates in communities (living with family spon-

sors) and opens up bedspace for other inmates in the work release program.

#### Towards sentencing changes

The Division of Public Safety Programs' Study. Indeterminate sentencing in South Carolina, as in many other states, came under some criticism in the late 1970's. Critics of South Carolina's system addressed the issues of disparity in sentencing and the failure of rehabilitation, as well as wide prosecutorial discretion in charging practices, sentence recommendations, and plea negotiations. Also, the lack of an offense classification system in the state allowed for inconsistencies in sentences for different types of offenses. (For example, some burglary offenses carried a life sentence, whereas assault with intent to kill only carried a maximum sentence of 20 years.)<sup>119</sup>

In 1980, the South Carolina State Office of Court Administration requested that the Division of Public Safety Programs analyze past sentencing data and develop procedures to rectify unjustified sentencing variations. The data base came from the Criminal Docket Reports from 1978 to 1979 and the researchers collected information on all criminal cases before the General Sessions Court for those years. This information included: the county of jurisdiction; docket date; sex, race, and date of birth of the defendant; type of defense; sentencing judge; initial and final charge; and dispositions. A second data base used was the State Law Enforcement Division's Computerized Criminal History which contained the prior record information of all offenders in South Carolina since 1978.

The analysis of this data was done in two stages. The first stage analyzed those

factors which affected the IN/OUT decision and the second stage analyzed the length or magnitude of each sentence. The offenses examined included assault and battery of a high and aggravated nature (ABHAN), carrying a pistol unlawfully, blue light violations, forgery, grand larceny, receiving stolen goods, and driving under the influence (second, third, or fourth offense).

Two variables were found to be strongly related to the IN/OUT decision for all of the offenses; the type of defense counsel and whether or not the imposed sentence was to run concurrently to any other sentence. No variables were found to be significantly associated across all nine offenses for the length of sentence. Whether or not the sentence was to run concurrent to another sentence was significant for every offense except ABHAN and carrying a pistol unlawfully. Going to trial rather than pleading guilty was significantly associated with length of sentence for ABHAN offenses. The mean sentence for those who went to trial was 71 months while the mean sentence for those who pled guilty was 38 months. When the initial and final charge were not the same--the charge had been reduced--the result was a significantly longer sentence for grand larceny and for some of the driving under the influence offenses. Multiple regression analysis was used to identify these variables related to length of sentence decision.

Three measures were derived regarding prior criminal history: number of prior arrests resulting in convictions, number of prior arrests resulting in imprisonment, and total amount of active prison time previously sentenced. These three measures strongly correlated with the IN/OUT decision.

Questionnaires asking judges which factors they considered most important in making the IN/OUT decision and length of sentence determination were completed by 37 judges. Factors were divided into three groups: 1) criminal history, 2) characteristics of the current offense, and 3) demographic factors. Criminal history factors included the number and seriousness of previous convictions, length of time previously served, length of time since last conviction, etc. Offense characteristics included degree of harm to victim, weapon use, property damage, etc. Demographic factors included among other things; age, sex, marital status, employment, and education. Analysis of these questionnaires indicated that the two most important factors used by judges in the IN/OUT and length of sentence decision were the use of a weapon and the threat of personal injury. However, there was a great deal of variation among individual judges on which factors were most important.

The study concluded that "sentences in South Carolina are not consistent nor do they follow any statewide rationale" (Cathcart, 1981). The study also recommended: 1) the establishment of clear sentencing goals and priorities to provide for a common objective for sentencing; 2) a system for placing each offense into a limited number of classifications based on the seriousness of the offense; and 3) the establishment of a structure which provides for sentences consistent with the established sentencing policy, the classification system, and other sentences for similar cases. The study suggested that sentencing guidelines were the best sentencing alternative to the indeterminate system because they were flexible, could be created administratively, and could therefore, be adjusted when necessary.

#### Legislative reform

Senate Act 234. South Carolina has the highest rate of incarceration in the United States. Senate Act 234, the Parole and Community Corrections Act, was signed into law on June 18, 1981, providing for an expansion of community supervision for non-violent offenders and made modifications to parole eligibility requirements. The Act addressed the problem of overcrowding in South Carolina's prison system as well as the prohibitive cost of building new prisons. Sponsors of the legislation sought to stabilize and reduce the already over-burdened correctional system. This Act was the result of cooperation between the Governor's Office, the South Carolina Division of Correction, and the Legislature.

SA 234 called for the expansion of the Probation, Parole and Pardon Board and renamed it the Department of Parole and Community Corrections and the Board of Parole and Community Corrections. Specific considerations that should impact on the prison population include:

1) Parole eligibility was changed to one-fourth rather than one-third of a sentence for inmates serving less than 40 years (previously 30 years). Ten years must now be served before parole eligibility for lifers and those inmates with sentences over 40 years. Certain assaultive offenses, however, still carry a one-third time eligibility requirement.

2) Work release programs have been expanded to include offenders with violent prior records, if they meet the other work release requirements.

3) A supervised furlough program was developed for persons who have not committed violent or assaultive offenses. Defendants have to serve six months of incarceration before being eligible.

4) Provisions were made requiring that information about offenders be automatically screened by computer so that those nonviolent offenders with sentences of less than five years are automatically placed on work release or furlough programs. Previous to this Act, inmates were required to apply for consideration in a work release program.

An impact analysis completed by the Division of Resources and Information Management Office of the Department of Corrections estimates that, by 1991, the prison population will be reduced by 12 percent if all the provisions of SA 234 are implemented and there are no further changes in sentencing patterns.<sup>120</sup>

Legislative audit council report. In 1981, the Legislative Audit Council was requested by the Chairman of the State Reorganization Commission to 1) identify the nature, causes, and implications of prison overcrowding in South Carolina, and 2) to develop recommendations for improvement to the sentencing system without compromising public safety and creating an additional financial burden on the state. The Legislative Audit Council (LAC) report was also to provide background material for the State's Reorganization review of the 1981 Parole and Community Corrections Act. The LAC conducted extensive interviews with criminal justice and related agencies, and also conducted an inmate survey to obtain a profile of the inmate population.

Extent of overcrowding. One of the main accomplishments of the LAC study was to conduct a thorough investigation of the overcrowded conditions in South Carolina's prison system. Prior to 1974, many of South Carolina's felony criminals were held in county detention centers. Legislation passed in 1974 transferred to state jurisdiction all adult offenders sentenced to more than three months. The transfer of long-term prisoners to state supervision and facilities was the cause of a substantial increase in the state prison population, and contributed to significant overcrowding that has yet to be remedied. Consequently, since 1976, South Carolina has had one of the highest incarceration levels in the country. At the same time, South Carolina's crime rate has been lower than the national average for the past ten years.<sup>121</sup>

Because the LAC thought that it was possible that the criminal justice policy of the state and not the crime rate determined the size of the prison population, it decided to conduct a survey of South Carolina's inmates to determine characteristics of those serving time in prison. The LAC looked at a representative sample of inmates admitted to prison during the Fiscal Year 1980-81 and also looked at the Department of Correction's data. The LAC report concluded that South Carolina is over-incarcerating a large number of persons convicted of property offenses. The 1980-81 admissions group was compared to those already serving time in the prisons and was found to be less seriously criminal than the total prison population. Nearly one-half of the 1980-81 admissions were anticipated to serve sentences of one year or less, and one-quarter of the 1980-81 admissions were committed for larceny.<sup>122</sup> The LAC went on to look at the risk of recidivism for those persons com-

mitted to an institution in 1980-81 and found that the inmates convicted of property offenses were comparable to offenders who were placed on probation.

The LAC report also made a fiscal impact assessment of the costs of incarcerating low-risk offenders and found that:

Approximately \$10.4 million could have been saved by placing low-risk offenders admitted in 1980-81 on intensive probation instead of prison (LAC Report, p. 45).

The LAC report concluded by making recommendations for legislative options to reduce prison overcrowding. Some of these suggestions include: 1) providing alternatives to custodial sentencing including several probation programs; 2) adopting presumptions for least drastic measures; 3) creating a sentencing guidelines commission to develop guidelines; 4) restructuring state and local responsibility for offenders; 5) adopting comprehensive community corrections laws; 6) revising the penal code; 7) reducing sentence lengths; 8) adopting presumptive parole on first eligibility; 9) revising good time credits; and 10) adopting emergency overcrowding measures.

The LAC report was a very thorough report assessing the causes of South Carolina's overcrowding problems, legislative response to these problems, and recommendations as to how to alleviate overcrowding in the future. The report has been taken seriously and several of its suggestions are now under consideration, the most sweeping being the move towards creating sentencing guidelines.

#### The sentencing guidelines commission

In January 1982, the Governor of South Carolina established the South Carolina Sentencing Guidelines Commission under the leadership of the State Supreme Court Justice. The commission was charged with the development of a rational and consistent sentencing structure, the development and implementation of sentencing guidelines, and the establishment of an offense classification system. The Guidelines Commission was appointed by the Governor and includes members of all three branches of government, all significant decision-makers in the South Carolina Criminal Justice System, as well as additional judicial representatives. Federal funds were received to support the effort and the Commission began work in mid-May of 1982.

South Carolina's sentencing guidelines will not be developed from data collected on past sentencing practices. Instead, the Guidelines Commission will develop a sentencing structure based on meeting several criminal justice system needs. The first six months of the Guidelines Commissions' work has been devoted to outlining the basic objectives and tasks of

the Commission. Objectives include insuring certainty of sentences, parity in sentencing, and accountability in sentencing. Tasks outlined by the Commission include the development of a sentencing policy, the development of advisory guidelines, the development of a classification system for all felonies, and the development of an appellate review process. The Commission has also recommended the creation of a legislatively enacted sentencing commission which would be empowered to promulgate sentencing guideline ranges within the statutory bounds set by the legislature.

Usage of the sentencing guidelines being developed by the commission will be voluntary. At this point, there has been no mechanism developed to project the possible effect of the guidelines on prison capacity and overcrowding. The commission has acknowledged, however, that they must consider prison capacity when formulating the guidelines. The commission plans to present the guidelines and reclassification recommendations to the General Assembly by July 1, 1983. It is anticipated that sentencing guidelines will be implemented in South Carolina sometime in 1984.

**SOUTH DAKOTA**

**Indeterminate sentencing**

South Dakota's indeterminate criminal code was changed from an individualized felony offense system to a classification system for all felony offenses in 1978. The sentencing scheme reflects the philosophy of being somewhat lenient on first time offenders and requiring harsher sentencing for offenders who repeatedly break the law. This philosophy underscores probation and parole requirements and the state's habitual offender law. The 1978 sentencing code classified felonies into one of eight classifications with sanctions as listed below:

Class A	Life imprisonment* or a death sentence
Class B	Life imprisonment*
Class 1	Life imprisonment
Class 2	25 years maximum
Class 3	15 years maximum
Class 4	10 years maximum
Class 5	5 years maximum
Class 6	2 years maximum

\*No lesser sentence may be given for these two classes.

For Class 1 through Class 6 offenses, a maximum sentence is provided in the statutes. The court sentences the offender to a maximum sentence not to exceed these prescribed limits. Class 5 and 6 offenders may be sentenced to a county jail. Probation and/or a suspended sentence are allowed for any offense not punishable by life imprisonment or death. An important distinction, however, is that only those persons who have been convicted of a first offense may receive a non-incarcerative sentence. If an inmate commits a felony offense while incarcerated, he or she may be sentenced up to twice the maximum term for the new offense. A separate hearing

may also be conducted prior to sentencing in which mitigating or aggravating circumstances may be heard.

The South Dakota's Board of Pardon and Parole determines release for incarcerated felons. Persons serving life sentences are not eligible for parole. Parole eligibility is based on prior convictions: first offenders become eligible after serving one-fourth of their sentences; second offenders after serving one-half; and third and subsequent felony offenders become eligible for parole after serving three-fourths of their sentence. Release after the eligibility requirement has been met is left to the discretion of the parole board.

Good time allocations are based on a graduated scale of reductions as follows: the first two years, a defendant may earn two months per year; the third year of incarceration--three months per year; from the fourth up to the tenth year of incarceration--four months per year; and the tenth and greater year of incarceration an inmate may earn six months good time per year. These credits are based on good conduct and may only be earned by those persons serving less than a life term.

Weapon enhancements. South Dakota provides for enhancements for offenses committed (or attempted) when a defendant is armed. For felonies committed or attempted while the defendant is armed with a machine gun or a short shotgun for a first conviction, the defendant is charged with a Class 2 felony.

For a subsequent conviction under these conditions, the offender would be charged under a Class 1 felony (which carries a life sentence). These sentencing enhancements must be served consecutively. Any

other firearm used in the commission (or attempt) of a felony requires that the defendant be prosecuted as a Class 3 felon if it is a first conviction. For a second or further conviction, the defendant must be charged with a Class 1 felony. This additional charge must also be served consecutively.

Habitual offender sentencing. South Dakota has had provisions for sentencing enhancements for habitual offenders for many years. For one or two prior felony convictions, a person may be sentenced to the next higher class felony. If a person has three or more prior felony convictions, they must be sentenced to life imprisonment as a Class I felon. Enhancing a sentence by a habitual offender conviction is under the discretion of the prosecuting attorney. Thus, application of this provision may be uneven and used only for certain offenders. It is also left to the discretion of the court whether to impose the enhanced punishment.

Further restrictions exist in that prior felonies will not be counted if 15 years or more has lapsed between the current offense and the punishment for the past conviction. And only one prior conviction may be counted for each felony event. As mentioned above, South Dakota also restricts probation to first-time offenders and prior record has a bearing on minimum parole release requirements.

Recent legislation. Legislation passed in 1982 provides for mandatory minimum sentences for many drug offenses. For unauthorized possession, distribution, manufacturing, and counterfeiting of most drugs, there is a 30-day mandatory minimum sentence upon the first conviction. For a second conviction, a mandatory minimum of one-year incarceration must be imposed. This was the only major legislation affecting sentencing passed in South Dakota in the last few years. We are not aware of any impact studies on South Dakota's sentencing practices.

## TENNESSEE

The Tennessee Sentencing Reform Act of 1982, effective July 1, 1982, has made several dramatic changes in sentencing in Tennessee. Prior to this Act, sentencing in Tennessee was indeterminate. In most felony cases, a jury would fix an indeterminate term. A defendant could waive the right to a jury trial and be sentenced by a judge, but in most cases defendants opted for jury sentencing. Thus, juries would decide both the guilt or innocence of the offender as well as the sentence within the statutory limits. Parole eligibility commenced after a felon served a minimum term of one year. Inmates were separated into classes, from I to IV, and good time was determined according to the class.

With the Reform act, Tennessee now has a more determinate sentencing structure, judicial rather than jury sentencing, no good time provisions, broadened probation options and alternatives to incarceration, as well as other substantial changes to sentencing.

### Sentencing reform

Prior to the Reform Act of 1982, a change was made in sentencing by the passage of the Class X Felonies Act of 1979. This Act reclassified 11 different felonies as Class X felonies, requiring that a minimum of 40 percent of sentences for these offenses be served before an inmate was eligible for parole. The Act also prohibited probationary alternatives for these offenses.

Changes were also made for the possession and use of firearms. The possession of a firearm requires a two- to five-year consecutive sentence with the principle

offense. The use of a firearm requires a five-year non-suspendable sentence for the first conviction, and a ten-year non-suspendable sentence for the second conviction.

The Sentencing Reform Act of 1982. The Tennessee Sentencing Reform Act of 1982 was initiated by the governor and a bipartisan group of legislators in the fall of 1981. Prosecutors, defense lawyers, and judges participated in working on the language and concepts of the Act.

Several major changes in sentencing became effective with the passage of the Reform Act.<sup>123</sup> The primary focus of the Act was to replace jury sentencing with judicial sentencing. This was regarded as a sentencing reform at a time when other states were taking steps to limit judicial discretion. Further, the Act makes sentences determinate rather than indeterminate. "There shall be no indeterminate sentences. Sentences for all felonies and misdemeanors shall be determinate in nature, and the defendant shall be responsible for the entire sentence undiminished by sentencing credits of any sort..." (Section 40-43-211, Senate Bill No. 1494). Tennessee's determinate sentencing scheme differs from other states because parole has not been abolished. Rather, a series of percentages have been developed to determine when a defendant will become eligible for parole. As mentioned above, an important and striking difference in Tennessee's reform was that good time credits were abolished.

Some jury discretion in sentencing has been retained by the Act. Juries may still impose fines, but the judge has the authority to remit any or all of the fines at a sentencing hearing. The jury still imposes the sentence in cases of first

degree murder when the state is seeking the death penalty. If the defendant is charged with being a habitual criminal, the jury retains the authority to decide whether or not this is allowable.

A set of guidelines have also been developed to assist judges in determining a sentence. These guidelines consist of two ranges (Range One and Range Two) differing from each other on dimensions of offense seriousness and seriousness of prior record. The following examples illustrate the use of the ranges. Burglary carries a statutory range of from 5 to 15 years. Range One sentences are figured as the minimum sentence plus one-half of the difference between the maximum and the minimum which in this case, equals 10 years. The judge would thus sentence a Range One burglar to a determinate sentence anywhere from 5 to 10 years. Range Two offenses are calculated as the minimum sentence plus one-half of the difference between the maximum and minimum sentence which, again in this case, equals 10 years. This would be the minimum sentence. The upper end of Range Two would be the statutory maximum for the offense. Thus, for burglary, the Range Two sentence would be anywhere from 10 to 15 years. The calculation of Range One or Range Two sentences are a matter of law, the crucial and discretionary question is how to determine which range a defendant shall be sentenced under.

Another series of classifications have been developed to further aid in determining the sentence for defendants. These classifications are crucial since they determine parole eligibility percentages. A series of five classifications, two for Range One and three for Range Two, have been developed. Under this system, a judge may determine that a Range One

offender is a mitigated offender. This means that the offense or offender has mitigating characteristics. A mitigated offender is eligible for parole after serving 20 percent of his or her sentence. Criteria for a mitigated offender are specified in the Act and include those persons with no prior felony convictions, no prior misdemeanor convictions of six months or more, or an offense with extreme mitigating factors. A standard offender is a defendant who would not be classified in any of the other classifications. These offenders are given a Range One sentence and have a parole eligibility date of 30 percent of the imposed sentence.

Range Two offenses have three possible classifications. The persistent offender is someone with at least two prior felony convictions within the past five years, or at least four prior felony convictions within the past 10 years. (The Act further specifies how these prior convictions are counted.) A persistent offender is eligible for release after serving 40 percent of his or her sentence. A Range Two offender may also be an aggravated offender. The offender is adjudged aggravated if an especially aggravated offense has been committed involving 1) injury or death to a victim when the offender has previously been convicted of a felony with injury or death to a victim, 2) when the defendant willfully inflicts serious bodily injury on another person, or 3) when a defendant is incarcerated and commits a felony with serious bodily injury or death to a victim. Defendants are also considered aggravated if they are on bail, probation, parole, or work release when they commit the offense. Defendants can also be classified as both an aggravated and persistent offender which carries a parole eligibility date of 50 percent of the imposed sentence.

A judge determines the IN/OUT decision. If the judge decides on an incarcerative sentence, offense seriousness and prior record are considered in order to determine the range and classification of the offender. For prior convictions, details of the offense including dates of convictions, dispositions, nature of release status and nature of the injury or threat of injury to the victim are considered. It is the responsibility of the defense to file a notice for mitigating factors.

The Release Eligibility Date determined for each sentence refers to the amount of time that offenders must serve in actual confinement before they are eligible for parole or any partial release programs such as work release. Upon reaching the RED, the offender has a hearing before the parole board. The RED represents the earliest possible date an offender may be considered for a release program. The parole board still maintains discretion in deciding when to release a person after the minimum sentence has been served.

The Sentencing Reform Act also broadens the eligibility for probationary sentences and provides for a number of sentencing options which include periodic confinement, split confinement, jail, or workhouse sanctions. Previously, defendants were either given probation or were incar-

cerated. There was not much of a middle ground for sentence alternatives. (Those offenders not eligible for probation include those sentenced to 10 years or more, certain drug offenses, Class X felony offenders, and the second or subsequent conviction for a burglary.) The probation term may include a sentence to a local or regional workhouse. At the time of the Act, no such workhouses existed, but it is anticipated that certain minimum security institutions will be designated as such by the Commissioner of Corrections.

#### Impact

Since the Tennessee Sentencing Reform Act is so new, it is difficult to foresee all of its ramifications. The question of the impact of the Act on prison population was not directly addressed by its drafters. Although the Act appears to balance broader provisions for probation and alternatives to incarceration for less serious offenders with increased sanctions and longer periods of confinement for more serious repeat offenders, the general increase in sanctions and the elimination of good time may very likely increase prison populations. To our knowledge, there has been no empirical work done on the effect of the 1982 Reform Act.

## TEXAS

### Indeterminate Sentencing

When Texas' Penal Code was revised in 1973, it was the first substantive change to the criminal law in 100 years. The change repealed thousands of statutes and replaced them with new laws and working tools to enforce these laws, but did not alter the basic sentencing structure or the philosophy of sentencing in Texas. In addition, very little has changed in Texas' criminal law since the passage of the 1973 code.

The new code divided felonies into four categories with minimum and maximum statutory limits given. Capital felonies carried the punishment of life imprisonment or death. The code set the minimum and maximum for first degree felonies at 5 to 99 years or life imprisonment. Second degree felonies were set at 2 to 20 years, and third degree felonies at 2 to 20 years. When sentencing a defendant to incarceration, the judge imposes a minimum maximum term. If a case goes to a jury, the defendant may request the jury to sentence in which case the jury would be required to sentence to a specific maximum term. Non-incarcerative terms are also an option. The parole board and the governor determine parole eligibility. In some cases, judges may remove a defendant from probation eligibility and deny parole, thus setting a type of mandatory sentence. The new code also provides for minimum sentences for certain offenses and for offenders with certain prior records.<sup>124</sup>

Parole. Prior to 1977, an inmate was eligible for parole after serving one-third of the maximum sentence, or 20 years (whichever was less) minus good time.

Changes were made in 1977, however, to insure a minimum term of incarceration for certain offenses. After 1977, those persons convicted of capital murder, aggravated robbery, aggravated rape, aggravated sexual assault, and aggravated kidnapping are not eligible for parole until one-third of the maximum sentence has been served or 20 years (whichever is less) without consideration of good time credits. It is also required that these defendants serve two years before they are eligible for parole.<sup>125</sup>

Good time. Good time in Texas is applied to reduce the one-third maximum sentence that is to be served before parole eligibility. Inmates are statutorily classified into four classes based on institutional behavior and obedience. No good time credits are allowed for inmates convicted of certain offenses or inmates classified into Class III. The other classes and credits are: Trustee--30 days for every 30 served; Class I--20 days for every 30 served; and Class II--10 days for every 30 served. (Inmates are allowed 30 days credit per year for voluntary blood donations.)

### Sentencing enhancements

Firearm use. Texas' statutes provide enhancement for offenses where proof has been shown that a firearm was used in the commission of the offense. If proof is established by the court, the court must sentence the defendant to the next higher penalty class. That is, if a defendant uses a firearm in committing a Class III felony (2 to 10 years), he or she must be sentenced as if he or she had committed a Class II felony (2 to 20 years). However, since these classes have overlapping sentence ranges, it does not necessarily follow that defendants will receive longer

sentences. Judges must sentence these defendants to incarceration, however. Probation or suspended sentences are not an allowable option. Conversely, juries may sentence these defendants to probation.

Habitual offenders. Texas' statutes provide for rather harsh punishment for repeat offenders. Incarceration is mandatory for offenders who have a prior record. If defendants in second or third degree felony cases have one previous felony conviction, no matter what that prior felony conviction may be for, they must be sentenced to the next higher class felony. Again, since there are overlapping sentence ranges for these two classes of felonies, being sentenced to the higher class does not necessarily mean that the defendant will be punished more harshly, although it may. Defendants must be sentenced to at least the minimum in each range and this could certainly mean longer sentences. If a person commits a first degree felony and has one prior felony conviction, he or she is subject to confinement for anywhere from 15 to 99 years.

The above sanctions are provided for defendants with one prior felony conviction. If the defendant has two prior felony convictions, the punishment is life imprisonment. This provision has received extensive criticism, and understandably is

pointed to as an explanation of why Texas has the highest prison population in the United States (Gardner, 1982).

Further legislation. In 1977, the Texas legislature passed a law allowing for the use of shock probation. If a defendant does not have a prior record, the judge may suspend the incarcerative sentence and place the defendant on probation after 60 days have been served, but prior to the expiration of 120 days. Persons convicted of criminal homicide, rape, and robbery are exempted from this clause. Other legislation was passed in 1981 revoking probation sentencing for certain drug offenses.

In 1982, the Governor commissioned a Blue Ribbon Commission to review the entire criminal justice system in Texas and make recommendations to him. This report should be available sometime in 1983.

#### Impact

Though we are aware of no major studies examining the impact of the 1973 sentencing code revision, it would be safe to say that the new code, especially with its enhancements for habitual offenders, has led to some increase in Texas' prison population. In 1981, Texas, with 31,502 persons incarcerated, had the highest prison population of any state in the country (Gardner, 1982).126

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## UTAH

Utah has had an indeterminate sentencing system since 1937 with three degrees of felony offenses plus a capital offense class as follows:

Capital Felony	Death or life imprisonment
1st Degree Felony	5 years to life
Second Degree Felony	1 year to 15 years
Third Degree Felony	0 to 5 years

The judge has discretion to determine the minimum and maximum times of confinement within the statutory limits. Non-incarcerative alternatives are also available to the court. The Utah Parole Board determines within months of commitment the date of parole or the date when a case will come up for parole consideration. There are no good time provisions in Utah.

### Move toward guidelines

Legislators in Utah, as in other states, were concerned with sentencing disparity under the indeterminate sentencing structure. In 1978, a Legislative Blue Ribbon Task Force was formed to examine sentencing patterns in Utah. The task force considered a change to determinate sentencing, but concluded that determinacy was as yet unproven and warranted further monitoring. The task force recommended that the Utah Judicial Council and the Board of Pardons develop guidelines so that judicial decisions could be guided, reducing disparity without eliminating discretion.

A committee of representatives from the Board of Pardons, the Judicial Council, and the Division of Corrections was formed. The committee hoped to develop guidelines for use within the indeter-

minate structure based on crime severity and risk of continual criminal behavior. Due to time and money constraints, the guidelines were not developed empirically, but rather were constructed by correctional psychologists (Wentz and Oldroyd, 1980).

The final product, the Suggested Dispositional Matrix (see Table 22) includes a History/Risk Assessment Scale and Degree of Felony scale. The History Risk/Assessment Scale was meant to predict the chance of an offender committing another crime. The variables used to calculate this scale include: age at conviction, age at first arrest, prior juvenile record, prior adult arrests, prior adult convictions, pending charges or those dismissed at plea bargain, correctional supervision history, supervision risk--previous escapes or absconding, preincarceration work record, educational record and attainment, and substance abuse. Some offenses are also considered high recidivism crimes such as robbery, forgery, and burglary.

Each cell on the matrix gives information on the IN/OUT decision, and the recommended length of incarceration should the defendant be incarcerated. These guidelines have been conjointly adopted by both the courts and the parole board. The guidelines are ambitiously comprehensive and cover all offenses from capital felonies to misdemeanors and traffic violations. For felony cases, the guidelines suggest the IN/OUT decision for the courts, and the length of time to be served for the Board of Pardons. By using the guidelines, it was expected that the courts could see how long an offender would serve and take this into account when deciding whether to incarcerate or place on probation. Sentencing outside of

Reprinted from "Predictive Validity of the History/Risk Assessment for Parolees, 1979, Report #1" by Alan Anthony and Richard J. Oldroyd, Utah Division of Corrections, 1980.

HISTORY RISK ASSESSMENT

**Table 22**  
**SUGGESTED DISPOSITION MATRIX**  
 (Based Only on History/Risk Assessment and Seriousness of Offense)

	FELONIES						MISDEMEANORS	
	Capital	FIRST DEGREE		SECOND DEGREE		THIRD DEGREE	Class A	Class B
		Serious	Moderate	Serious	Moderate			
POOR	Life	96-108 mos.	60-72 mos.	36-48 mos.	24-36 mos.	18-24 mos.	8-12 mos.	4-6 mos.
FAIR	25 yrs.	INCARCERATION 84-96 mos.	48-60 mos.	24-36 mos.	20-Day Evaluation 18-24 mos.	15-18 mos.	4-8 mos.	2-4 mos.
MODERATE	20 yrs.	60-72 mos.	36-48 mos.	18-24 mos.	12-18 mos.	9-15 mos.	2-4 mos.	1-2 mos.
GOOD	15 yrs.	48-60 mos.	30-36 mos.	12-18 mos.	8-12 mos.	6-9 mos.	PROBATION Days	Days
EXCELLENT	15 yrs.	36-48 mos.	24-30 mos.	8-12 mos.	4-8 mos.	1-6	Days	Only Fine or Restitution

Time in each square is recommended amount of time if incarceration is judged appropriate.

- First Degree Felony:**  
 Serious: Murder II  
 Moderate: All Others
- Second Degree Felony:**  
 Serious: Aggravated Assault by Prisoner, Mayhem, Manslaughter, Rape, Forcible Sodomy, Aggravated Arson, Causing Catastrophe, Burglary, Robbery, Controlled Substance (15 years), etc.  
 Moderate: Theft, Forgery, Bad Checks, Fraud/Credit Card, Unauthorized Abortion, Escape, Aiding Escape, Perjury, Sabotage, Infernal Machine, Gambling Fraud, Confidence Game, Aggravated Exploiting of Prostitution, Controlled Substance (10 years), etc.

the guidelines because of aggravating or mitigating circumstances is allowed, but must be based on factors listed as such and must be documented (Anthony and Oldroyd, 1980).

Thus, guidelines developed in Utah are both sentencing and parole guidelines in one matrix. The judge uses the guidelines to determine the IN/OUT decision. The parole board then uses the guidelines to help determine the length of incarceration term.

A study was done by the Utah Division of Corrections to see how well the History/Risk Assessment scale really predicted the possibility of further criminal acts. A sample of 100 felony probationers was used, 50 percent of whom successfully completed their probation and 50 percent who did not. The study also included 100 misdemeanor probationers with the same number of successes and failures. All these offenders completed their probation in 1979 and were randomly selected. The study found that the History/Risk Assessment Scale was very predictive of success/nonsuccess for felony probationers ( $r=.513$ ) but not very predictive for misdemeanor probationers ( $r=.153$ ). All of the variables in the History/Risk Assessment correlated positively for felony probationers, while four of the variables correlated negatively for the misdemeanor probationers. The study suggested that the scale not be used to predict the risk of supervising misdemeanor offenders, but could be useful as a guideline if individual cases took into account aggravating and mitigating factors. In spite of this recommendation, the History/Risk Assessment was left in the matrix for misdemeanor offenses.

Further study was done by the Division of Corrections looking at the predictive validity of the History/Risk Assessment Scale. A sample of inmates discharged to parole from January 1, 1976, through June, 1976, was selected. This sample consisted of 70 parolees. Five of the 11 variables on the assessment scale proved to be significant (at the .05 level) to successful completion of parole. However, the study concluded that even though the History/Risk Assessment Scale was one of the better instruments devised for this purpose, the assessment scale, because of the danger of false predictions, should not be used as a decision-maker but rather as a useful tool to assist decision-makers in sentencing (Anthony and Oldroyd, 1980). The History/Risk Assessment Scale, while useful in determining the seriousness of the offense, accounted for only a small amount of variance. The DOC researchers concluded that serious consideration should still be given to aggravating and mitigating factors. Further, they concluded that while the History/Risk Assessment Scale does address risk, it also addresses culpability. The study confirmed that the scale presupposes that those who previously failed supervision or those who committed many crimes are more responsible for their acts and more deserving of punishment.

In keeping with this study, the guidelines used for sentencing in Utah are supposed to suggest the appropriate decision. They are not mandatory sentences. It seems, however, that further evaluation of the methodology used to develop the History/Risk Assessment Scale and its impact on larger samples of inmates would be appropriate.

### Other provisions

Utah's statutes carry provisions for sentencing persons convicted of a felony involving the use of a firearm. For first and second degree felonies, the court imposes an additional term of one year or may impose a term of up to five years consecutively if a firearm is used. For third degree felonies, the court may impose an additional term up to five years.

For habitual offenders, Utah's law allows for a term of from five years to life for anyone with two prior convictions for felony offenses when at least one of these prior convictions has been a capital,

first, or second degree felony offense. This is upon conviction of at least a second degree felony. The decision as to whether to prosecute a defendant as a habitual offender rests with the Prosecutor's Office.

### Impact assessments

According to information provided by the Utah Division of Corrections,<sup>127</sup> sentencing guidelines in Utah have reduced the average time served in Utah. However, both early release programs and emergency release procedures have been implemented to alleviate overcrowding in Utah's prisons. Further study of sentencing in Utah is currently underway.

## VERMONT

### Indeterminate sentences

Sentencing in Vermont is based on the indeterminate model. The court sets a maximum term and may also set a minimum term within statutory limits. The minimum sentence represents the least amount of time the defendant must spend in jail before release, not counting good time. It also establishes when the offender is eligible for parole. In cases where no minimum sentence has been set, the minimum term of incarceration is assumed to be six months (unless this is more than the maximum) and this is the time when the offender is eligible for parole. The maximum sentence is always what the offender could serve. However, the maximum is usually not served because the sentence is either suspended or the person is paroled. If offenders violate probation or parole conditions, they may be required to serve the maximum term.

Vermont has mandatory sentences only for a few offenses. Death is mandatory for treason and for certain instances of first degree murder. First degree murder may also be punished by a mandatory life imprisonment sentence. Also, legislation was passed in 1981 requiring mandatory minimums for certain motor vehicle offenses. Other attempts at legislating mandatory minimums have failed.

### Sentencing reform

The Sentencing Guidelines Project in Vermont began under the auspices of the District Court Office of Vermont. The project had a steering committee of three judges and a project staff. The goals of the project were to provide judges with information on how similarly situated

offenders are sentenced and to promote consistency in sentencing. Guidelines were to be based on past sentencing practices.

Data were drawn from over two time periods. Because of the large number of property thefts and forgery/fraud crimes, a one-and-one-half-year time span provided a large enough sample for analysis (January 1979 to June 1980). Data for other less common offenses (robbery, assault, sexual offenses, drug offenses, and motor vehicle felonies) were collected to cover a two-and-one-half-year time span (July 1978 to December 1980). Offenses were grouped into offense classes to assist analysis. Where there were multiple convictions, the most serious convicted felony was used.

Worksheets were developed listing offense and offender characteristics found to be significant in the study. The Steering Committee decided the weight to be assigned to these relevant factors. Basically, they were interested in "...which elements of both the offense and the offender's history and personality seem to influence the resulting sentence most."<sup>128</sup>

A two-dimensional grid was developed for each class of offense with the Offense Class ranking the seriousness of the offense incident and the Offender Class being determined by the defendant's prior record (See Tables 23 and 24). Each cell contains the recommended sentence minimum time before release (the least amount of time that must be served before parole may be granted) not counting good time. This recommendation is a short range around the median minimum time. The sentencing guideline grids also contain

**Table 23**  
**ROBBERY AND PROPERTY CRIME SENTENCING FACTOR WORKSHEET**

Offender: \_\_\_\_\_ Docket Number: \_\_\_\_\_

Convicted Offense: \_\_\_\_\_

Offense Class (Check all that apply)		Class	Offender Class (Check all that apply)		Class
1. Victim(s) seriously injured	_____	A	1. Previous incarcerations under sentence which total over a year	_____	MAJOR RECORD
2. Victim(s) confronted with deadly weapon (If yes, specify _____)	_____		2. Previous incarceration under sentence for over 6 months for committing a crime against a person	_____	
3. Victim(s) confronted, with injury, but not serious	_____	B	3. Previous incarceration under sentence for over 30 days, except as in 1 and 2	_____	MODERATE RECORD
4. Victim(s) confronted, no injury	_____		4. Previous incarceration under sentence for no more than 30 days	_____	
5. Arson of a dwelling or occupied building	_____		5. Previous probation supervision	_____	
6. Property theft, fraud, damage exceeding \$5,000	_____	C	6. Current probation or deferred sentence supervision	_____	RECORD
7. Breaking and entering into dwelling or occupied building at night	_____		7. Current parole supervision	_____	
8. Possession of deadly weapon during offense (If yes, specify _____)	_____		8. Previous delinquency adjudication for felony offense	_____	
9. Arson of a building which is not occupied and not a dwelling	_____		9. Previous adult convictions resulting in fines	_____	
10. Breaking and entering into any building during the day	_____	D	10. Previous delinquency adjudication for misdemeanor offense	_____	PETTY RECORD
11. Breaking and entering into any building which is not a dwelling or occupied building at night	_____		11. No prior adult convictions	_____	
12. Property theft, fraud, damage exceeding \$500, less than \$5,000	_____		12. Previous convictions for offenses similar to current conviction (consider "real" offense behavior)	_____	
13. Property value less than \$500	_____	E			

OFFENSE CLASS \_\_\_\_\_ OFFENDER CLASS \_\_\_\_\_

Other factors considered at sentencing (optional):  
 .....  
 .....  
 .....

Date of Sentencing: \_\_\_\_\_ Sentencing Judge: \_\_\_\_\_

Reprinted from "Procedure for Use of Sentencing Data" January 25, 1982, by the Sentencing Data Steering Committee and Project Staff.

**Table 24**  
**Sentencing Grid: Robbery and Property Crimes**

**Offender Class**

		None or Petty Record	Minor Record	Moderate Record	Major Record
O F F E N S E  C L A S S	<b>A CLASS</b>	Guideline Minimum: <b>9-21 Months</b>  Median Maximum: <b>5 Years</b>	Guideline Minimum: <b>12-24 Months</b>  Median Maximum: <b>6½ Years</b>	Guideline Minimum: <b>1½-3½ Years</b>  Median Maximum: <b>10 Years</b>	Guideline Minimum: <b>3-5 Years</b>  Median Maximum: <b>10 Years</b>
	<b>B CLASS</b>	Guideline Minimum: <b>Out-1 Month</b>  Median Maximum: <b>3 Years</b>	Guideline Minimum: <b>5-7 Months</b>  Median Maximum: <b>3 Years</b>	Guideline Minimum: <b>9-15 Months</b>  Median Maximum: <b>4 Years</b>	Guideline Minimum: <b>9-21 Months</b>  Median Maximum: <b>5 Years</b>
	<b>C CLASS</b>	Guideline Minimum: <b>Out</b>  Median Maximum: <b>2 Years</b>	Guideline Minimum: <b>1-3 Months</b>  Median Maximum: <b>3 Years</b>	Guideline Minimum: <b>6-12 Months</b>  Median Maximum: <b>3 Years</b>	Guideline Minimum: <b>9-15 Months</b>  Median Maximum: <b>5 Years</b>
	<b>D CLASS</b>	Guideline Minimum: <b>Out</b>  Median Maximum: <b>1 Year</b>	Guideline Minimum: <b>Out-2 Months</b>  Median Maximum: <b>2 Years</b>	Guideline Minimum: <b>5-9 Months</b>  Median Maximum: <b>3 Years</b>	Guideline Minimum: <b>9-15 Months</b>  Median Maximum: <b>4 Years</b>
	<b>E CLASS</b>	Guideline Minimum: <b>Out</b>  Median Maximum: <b>Deferred</b>	Guideline Minimum: <b>Out-1 Month</b>  Median Maximum: <b>2 Years</b>	Guideline Minimum: <b>1-3 Months</b>  Median Maximum: <b>3 Years</b>	Guideline Minimum: <b>6-12 Months</b>  Median Maximum: <b>3 Years</b>

information on the IN/OUT decision. Mitigating or aggravating factors allow the judge to sentence outside the guidelines, but these reasons must be listed on the Sentencing Factor Worksheet. Factors that are already considered in the Offense Class should not count as additional aggravating or mitigating factors.

The offender's social characteristics, financial condition, and other circumstances that may affect the defendant's behavior may also be used in determining a sentence. Ultimate discretion is still left with the judge and the recommended guideline sentence is seen more as a starting point, the norm based on similar cases, and serves as one major factor to be considered at sentencing. Parole release also has not been touched by the guidelines.

#### Implementation and impact

Guidelines became effective in Vermont on a voluntary basis for a trial year beginning February 1, 1982. Built into the guidelines was the idea that the guidelines will be monitored and changed if necessary to adjust the sentencing grid ranges if significant changes in median sentences occur. If changes are necessary, the Sentencing Data Project Steering Committee will recommend the modifications to the District Court judges after consultation with other interested persons in the criminal justice system.

A study was done by the Court Administrator's Office of the Supreme Court of Vermont after six months of guideline implementation to update the existing sentencing data, to see if the median ranges needed to be changed, and to see if the implementation process needed any changes. Data were collected for robbery

and property crimes, since these are the most frequently committed offenses. Three time periods were used for comparison and analysis: 1) those collected for the original guideline development phase--January 1979 to July 1981; 2) the period after the data were collected and before implementation--July 1980 to November 1981, and 3) the six-month period of sentencing guideline use--February 1982 to August 1982.

In comparing these three time periods, it was found that there was an increase in the number of felonies sentenced per month and in the number of female offenders, that offenders were somewhat older, and that offenders had more serious prior records. Sentencing, especially when the median sentence was examined, did not seem to change. The proportion of sentences that fell within the median ranges also did not change much. There was, however, an increase from 21 percent to 32 percent in the frequency of jail sentences given to those offenders who placed "OUT" on the grid (those who received probation dispositions). In cases where incarceration was recommended, a greater percentage (28 percent to 38 percent) received sentences within the median range.<sup>129</sup> One may be cautious in comparing these three sets of data since they cover different spaces of time--from one-and-one-half-years to only six months. Also, since the guidelines were to be voluntary, it is not clear whether analysis was done on only those cases where the judge chose to use the guidelines. Further study of guidelines usage will be done later in 1983, after more use.

Impact analysis of the effect of Vermont's guidelines on the prison population has not been done. In 1975, Vermont closed its prison.

## VIRGINIA

The national focus on sentencing and debate over forms of sentencing reform has not missed the state of Virginia. As early as 1974 the state's Judicial Conference passed a resolution stating judicial opposition to the principles of mandatory sentencing, including in that opposition forms of determinate and presumptive sentencing. The conference maintained that it was necessary to retain judicial discretion and that the claims of great sentencing disparity were exaggerated. And the 1975 criminal code reorganization did not greatly alter the indeterminate type of sentencing which had existed in Virginia. It did, however, add mandatory sentences for offenses committed with a firearm.

In 1977, the election of an attorney general who was an active proponent for presumptive sentencing helped to create more debate over sentencing issues.<sup>130</sup> In January of 1978, amid significant personal and partisan aspects to the increasingly vehement debate, the Presumptive Sentencing Act was introduced. This Act would have provided maximum sentences by offense type with two or three separate maximum sentences for each offense depending on variations in offense severity. The Act called for the abolition of parole and elimination of all other programs designed to accelerate release dates. It also called for the establishment of a six-member administrative sentencing council to formulate and promulgate sentencing guidelines and a presumptively proper sentence for each specific crime.

This Act, and another that was essentially the same introduced a year later in January of 1979, were both swiftly defeated in the General Assembly.

A variety of sentencing studies done by legislative court committees using different methods and types of analyses contributed to the debate over sentencing reform.<sup>131</sup> Essentially, these studies showed differing levels of sentence variability with the Department of Corrections study using the most ambitious research design. Needless to say, the findings of these studies were used by various actors in the political debate over sentencing reform. The impact of the debate and of the studies was probably most apparent in the treatment of habitual offenders (discussed in the following paragraphs) and in the defeat of the proposed presumptive sentencing acts.

#### Sentencing reform

In 1975, Virginia adopted a major reorganization of its criminal code with the aim of eliminating unduly wide variations between minimum and maximum penalties and facilitating rational grading of crimes by comparative seriousness. However, the new Code resulted in little substantial change from prior Virginia law. Its most apparent effect was to raise the minimum punishment for some felonies which previously carried inordinately disparate minimum and maximum sentences.<sup>132</sup> The reorganization involved the classification of most criminal offenses into six felony classes, each class prescribing minimum and maximum sentences as listed in the following chart:

- Class I Life imprisonment or death
- Class II Twenty years' to life imprisonment
- Class III Five to 20 years' imprisonment
- Class IV Two to 10 years' imprisonment
- Class V One to 10 years' imprisonment or confinement in jail up to one year and a fine up to \$1,000
- Class VI One to five years' imprisonment or confinement in jail up to one year and a fine up to \$1,000

In Virginia, the trial judge or, less frequently, the jury,<sup>133</sup> sets the maximum and minimum terms of imprisonment within limits defined by statute. The parole board determines the actual date of release.

**Firearms.** The 1975 legislation made the use or display of a firearm in the commission of a felony a separately punishable felony offense with a one-year sentence for first offenders and a three-year sentence for subsequent convictions. The sentences were to be served consecutive to any other sentence and could not be suspended or reduced by parole. In 1982, the law was amended, increasing the penalties to mandatory sentences of two years for first convictions and four years for subsequent convictions.

**Habitual offenders.** In 1979, Virginia's rather unusual recidivist statute was repealed. Under that law, an additional penalty was imposed on multiple offenders in a supplementary court proceeding. A finding of one previous conviction resulted in a one-year sentence enhancement; two and three previous convictions resulted in three- and five-year enhancements, respectively. These sentence increases were served consecutively with

other penalties, and could not be suspended. Also, the offender was not eligible for parole while serving the enhancement term.<sup>134</sup> The 1979 legislation integrates treatment of repeat offenders into Virginia's parole system. Prior to 1979, most offenders were eligible for parole after serving one-fourth of their sentence or 12 years, whichever was smaller. The new law retained this provision only for first offenders. Now, repeat offenders must serve a longer term before parole eligibility, as follows:

1st time offenders	Eligible for parole after serving 12 years or 1/4 of the term, whichever is less
2nd time offenders	Eligible for parole after serving 13 years or 1/3 of the term, whichever is less
3rd time offenders	Eligible for parole after serving 14 years or 1/2 of the term, whichever is less
4th or subsequent convictions	Eligible for parole after serving 15 years or 3/4 of the term, whichever is less

**Good time.** Since 1942, Virginia has allowed 10 days of good conduct credit for every 20 served. The credits could be withheld for violation of any written prison or jail regulations.<sup>135</sup> In 1975, the law was amended to allow one to five days' credit per month for vocational and educational training. Good time credit was further changed in 1981 when Virginia adopted a new system governing the formulation and application of good time credit. Under the new law, the entire value of credits earned continues to be applied against a prisoner's maximum term of confinement, but now reduces by only one-half the sentence which must be served before parole eligibility. A four-level classification system was established

which awards good conduct allowance ranging from 30 days of credit for every 30 served in Class I to no credit granted in Class IV. Consideration for assignment to one of the four classes is based on supervision required, type and performance of assignments completed, and conformance to written rules of conduct.<sup>136</sup>

**Impact: alternatives to incarceration**

Like other states, and due to worries about overcrowding, Virginia has been expanding provisions for release from confinement for non-violent offenders. In 1980, in addition to work release for offenders committed to jail, provision was made for release from confinement for education or rehabilitation program participation. The Community Diversion Incentive Act passed in 1982 established the basis for sentencing alternatives for non-violent offenders who might require less than institutional custody, but more than probation supervision (Virginia Annotated Code, 1982). The Act's purposes as set forth in statute are:

1. To allow individual localities greater flexibility and involvement in responding to the

problem of crime in their communities;

2. To provide more effective protection of society and to promote efficiency and economy in the delivery of correctional services;
3. To provide increased opportunities for offenders to make restitution to victims of crimes through financial reimbursement or community service;
4. To permit communities to operate programs specifically designed to meet the rehabilitative needs of selected offenders; and
5. To provide appropriate post-sentencing alternatives in localities for certain offenders with the goal of reducing the incidence of repeat offenders.

Sentencing guidelines used as a guide to judges have been discussed as the reform of choice, but, to our knowledge, no steps have yet been initiated to develop or implement advisory guidelines.

## WASHINGTON

Since the early 1970's, Washington's most vocal proponent of determinate sentencing was the Seattle District Attorney. Determinate sentencing, first embraced in Seattle as a progressive concept, met with stiff opposition from superior court judges and the parole board. These critics of determinate sentencing vocalized fears of prison overcrowding and an indiscriminate increase in sentence lengths. Despite the opponents and the often repeated failures to change statutory law governing sentencing in Washington, the political climate for just desserts and increased judicial accountability kept the reform movement alive. In 1981 Washington adopted a presumptive sentencing structure which is scheduled to take effect in 1984.

### Historic context

Development of parole guidelines. Washington has a modified indeterminate sentencing structure with maximum terms regulated by statute. The court fixes the maximum term within the statutory limits, but the minimum term is left to the discretion of the Board of Prison Terms and Parole. As in many other states, this system has created much uncertainty and received much criticism. The power of the parole board especially was viewed by the public and by criminal justice system practitioners as too expansive.

In 1976, the Washington State Board of Prison Terms and Paroles initiated a three-year Parole Decisions Project to develop criteria for the Board's decision-making. Funding was provided by an LEAA grant. They developed two sets of guidelines--the first being minimum term guidelines based on the severity of the offense

and prior record. The second set of guidelines, the Public Safety Score, was developed for granting reduction of minimum terms and was based on risk assessment. Good time credit, which could reduce a sentence by up to one-third, was not affected by the parole decision-making guidelines.

To develop the minimum term guidelines the Project identified 230 factors pertaining to offense behavior, prior record, and the defendant's post-incarceration living situation. The project selected 70 of these factors for possible inclusion in the guidelines and created 835 hypothetical cases incorporating various combinations of these 70 factors. Acting individually, the Board of Prison Terms and Paroles set minimum terms for each case. Through statistical analysis, each factor's quantitative contribution was determined and developed into guidelines.

The minimum term guidelines were developed for seven felony offense categories. Each class carried a base term which became the minimum sentence. A list of aggravating factors was developed with a specified amount of time to be added to the minimum term for each aggravating condition. Each prior felony conviction also carried a specific length of prison time to be added to the base minimum term. A range of 12-1/2 percent around each minimum was allowed. If a parole board member chose to go outside of this range, a written reason had to be given.

Guidelines for establishing a Public Safety Score were also developed to allow for the reduction of the minimum term. To develop these guidelines, predictive tables were created which measured the likelihood of parole recidivism. A data

base of 450 items pertaining to the background of the offenders released between June 1, 1972, and December 31, 1975 was collected. The data were statistically analyzed and a Public Safety Score was developed to assess the probability of recidivism. The lower the Public Safety Score, the greater potential for a reduction of the minimum term.

The minimum term and the Public Safety Score were computed within six months of admission to a correctional institution. Thus, an inmate would know, early in his imprisonment, what amount of time he or she would actually be expected to serve behind bars.<sup>137</sup> However, the Parole Board retained power to reconsider a minimum term at any time during the inmate's incarceration and to resentence to a longer or shorter term than originally determined. Terms were usually increased for reasons such as serious prison misbehavior. Good time credit also had to be approved by the paroling authority. Despite the parole guidelines, then, the Board of Prison Terms and Paroles still had a great deal of discretion.

Development of sentencing guidelines. In spite of the efforts of the Board of Prison Terms and Paroles to direct its own discretion, critics of Washington's sentencing process continued to strive for a more determinate sentencing scheme. In 1978, Washington received another grant from LEAA to develop sentencing guidelines for use in the superior and limited jurisdiction courts. Under this grant, individuals from the Albany group were contracted to develop the guidelines. The resulting guideline grids were similar to those developed by the Albany group in other states--a two-dimensional grid based on offense and offender characteristics.

Controversy quickly surrounded the study when the guidelines were first introduced. The research consultants did not document their findings or, according to some observers, complete the work. The head of the statistical division of the Administrator of the Courts, for example, maintained he was given only statistical analyses with a directive to produce the guidelines scoring worksheet. Further, the sample used for analysis was small enough to warrant concern about the study's reliability. In addition, use of the guidelines was strictly on a voluntary basis with no enforcement mechanism to curb those judges who repeatedly sentenced outside of the ranges or who ignored the guidelines altogether. It was thought that judicial discretion was not changed with these guidelines and that concomitantly sentencing disparity remained a significant problem. The guidelines were also developed with very little input from key figures in the criminal justice system. In addition, these guidelines did nothing to alter the wide discretion held by the Board of Prison Terms and Paroles.

#### Sentencing reform

Since the first guidelines satisfied almost no one in the drive for sentencing reform, determinate sentencing proponents accelerated their work to develop a more certain sentencing system in Washington. In 1978, Seattle District Attorney Norm Mailing, in conjunction with Senior Deputy Prosecuting Attorney Robert Lasnick, started the push which culminated in the Sentencing Reform Act of 1981. Despite opposition from judges, Lasnick was successful in his attempt to pass the bill. Part of his success was due to Mailing's ability to persuade the state prosecutors' association to urge adoption of some of the bill's main components--development of

prosecutorial standards, abolishment of the Board of Prison Terms and Paroles (and thus abolishment of parole and parole revocations), and the establishment of presumptive terms.

Sentencing Reform Act. The Sentencing Reform Act of 1981 drastically changed Washington's indeterminate sentencing structure to one of presumption. No longer could a body, totally autonomous from the judiciary, set an offender's term of incarceration. The Sentencing Reform Act established a Sentencing Guidelines Commission as a state agency to carry out the provisions of the bill. The Reform Act<sup>139</sup> mandates include: (1) that the Commission devise a series of recommended sentence ranges for all felony offenses, and that the system for determining which range of punishment applied to each offender be based on "the extent and nature of the offender's criminal history"; (2) that the Commission devise recommended prosecuting standards; (3) that the guidelines include total confinement, partial confinement, community supervision, community service, or a fine; and (4) that the Commission recommend standards for concurrent and consecutive sentences.

The Commission was also asked to give consideration to the existing guidelines adopted by the Association of Superior Court Judges and the Washington Association of Prosecuting Attorneys, as well as the experience gained through the use of these guidelines. In addition to specific directions, the Commission also had to interpret the mandate to "emphasize confinement for the violent offender and alternatives to total confinement for the non-violent offender" (HB 440, 1981). The bill also directed judges to review the plea agreement, assessing its appro-

priateness according to the prosecutorial standards and consistent with the interests of justice. Suspended sentences were also eliminated by the bill. The Sentencing Guidelines Commission was also to develop an alternative set of guidelines if the implementation of the first guidelines would result in exceeding prison capacity. Good time provisions were not affected by the bill.

Sentencing guidelines. The Commission is currently conducting research for recommendations (including new sentencing guidelines) to present to the State Legislature by the 1983 session. Data for this research were collected using a 25 percent sample of all persons convicted of a felony in 1981. This sample was stratified and weighted by offense severity levels. Also, a sample of those returned to prison because of parole revocations was drawn in order to estimate the proportion of parole violators who may be processed once parole is abolished (Fallen, 1982).

Washington will not develop guidelines for repeat offenders. Rather, their guidelines presume mitigation for first time offenders and enhancement of sentence for repeaters.<sup>139</sup> The Washington Commission believed that the sanctions should emphasize the current offense and chose a modified just desserts model of punishment similar to the one developed for the Minnesota Guidelines. "The Commission chose to reduce the impact of criminal history on the IN/OUT decision and increase its effect on the durational decision" (Parks, 1982). The Commission also put the following restrictions on inclusion of juvenile record: (1) they must be felony type offenses; (2) the defendant was 15 years old or older at the time of the offense; and (3) the offender

was 23 years or less at the time he/she committed the offense.

#### Impact

The Sentencing Guidelines Commission is currently in the process of carrying out the mandates of the Sentencing Reform Act of 1981. Therefore, it is difficult to assess the impact that the bill will have on sentencing in Washington. Nonetheless, it seems obvious that the mandate from the legislature to change sentencing practices in Washington was an extremely thorough directive to change many of the key aspects of the sentencing system. Changes involve: (1) the development of presumptive sentencing guidelines; (2) the elimination of parole release and the parole

board; and (3) the process of plea ratifications. The presumptive sentencing system will not take effect until July of 1984, and despite sophisticated population projections, the impact on prisons may not be measurable until 1985. Of importance to the ultimate success of the proposed changes is the fact that the Sentencing Reform Act created the Sentencing Guidelines Commission as an independent state agency that will not disappear upon completion of the guidelines. Thus, the current sentencing in Washington is a comprehensive plan, with sufficient time allowed for the mandates of the Sentencing Reform Bill to be carried out, and with important input and support from key figures in the criminal justice system.

## WEST VIRGINIA

### Indeterminate sentencing

Little has changed in West Virginia's indeterminate sentencing code for the last 40 years. Each felony offense has a specific sanction and allowable minimum and maximum sentence. Generally, a judge is required to give a minimum and maximum sentence which is known as the indeterminate term. In no instance may a sentence be given that is below the minimum or above the maximum. The court may, in addition to giving the minimum or maximum term, designate a definite sentence which should be taken into consideration by the parole board as the recommendation of the judge. However, the parole board is not bound by this definite term. An example of West Virginia's indeterminate sentencing code for certain offenses is provided below:

Second Degree Murder	No less than 5 years nor more than 18 years' imprisonment
Arson	No less than 2 years' nor more than 20 years' imprisonment
Burglary	No less than 1 year nor more than 15 years' imprisonment

A small number of offenses may specify other sanctions than the general minimum maximum statutory requirements. For example, armed robbery offenders must be sentenced to a definite term of not less than 10 years up to a life sentence. First degree murder mandates a life sentence. If a person is convicted of two or more offenses, the sentences must run consecutively unless otherwise ordered by the court ( West Virginia Code , 1977).

Probationary terms are available for all felony offenses if the maximum sentence is

less than life imprisonment. However, in order to receive a probationary sentence, the defendant must not have been convicted of another felony offense within five years of committing the new offense. Probation terms may not exceed five years when given.

Parole eligibility. Inmates become eligible for parole consideration after serving the minimum term. In the case where a definite term has been applied, one-third of the sentence must be served before parole eligibility. A person sentenced to life imprisonment becomes eligible for parole release after serving 10 years. However, if a defendant's life sentence is the third felony conviction, he or she must serve 15 years before parole eligibility. In certain cases, such as conviction on a kidnapping offense, a defendant may not be paroled. When considering parole release, the West Virginia Board of Probation and Parole must take into account the inmate's prison industrial record, prison conduct record, and mental and moral condition. The sentencing judge and prosecuting attorney must be notified of upcoming parole releases. A paroled defendant remains under supervision until the maximum sentence has been served (less good time), unless otherwise discharged by the parole board. A person paroled on a life sentence must have at least five years of parole supervision.

Good time allotments are based on the length of the sentence as follows:

<u>Sentence</u>	<u>Good Time Allowed</u>
1-3 years	6 days per month
3-5 years	7 days per month
5-10 years	8 days per month
10 years or more	10 days per month

Persons serving a life sentence may not earn good time. West Virginia also has a

work release program for most offenders. Anyone serving a sentence of one year or less may leave the prison or jail for employment, schooling, and other worthwhile pursuits. (Women are allowed to attend to the needs of their family as part of the work release program.) Persons serving a sentence greater than one year must petition the court for this privilege.

Weapon enhancements. Perhaps reminiscent of its pioneer days, West Virginia has long had enhanced provisions for persons convicted of a second offense of carrying a dangerous weapon without a license. Conviction of this offense is punishable by imprisonment from one to five years. More recently, legislation has been passed enhancing the punishment for anyone who commits (or attempts to commit) an offense with a firearm. Passed in 1981, this legislation denies a probationary sentence for these offenders and restricts parole eligibility. Defendants are not eligible for parole release prior to serving three years or the maximum sentence, whatever is less. Persons using or brandishing a firearm during an armed robbery offense must serve a minimum of five years, or one-third of the definite term--whichever is greater--before parole consideration (West Virginia Code, 1981 Supplement).

Habitual offender sentencing. Since as early as 1943, West Virginia has had a harsh habitual offender law designed to deter criminal activity and act as a warning to first-time offenders. The law requires that conviction of a second felony--if the sentence is for a definite term of years (such as armed robbery)--increases the sentence by five years. Or, if an indeterminate sentence has been

given, five years will be added to the maximum. Life imprisonment is the required sanction for the third felony conviction. Two restrictions are placed on the habitual offender statute. First, the convictions must be for separate offenses, and second, punishment for the prior felonies must carry a penitentiary sentence (whether or not it was imposed).

It is up to the prosecutors to charge habitual offender status, and if it is appropriate, they are mandated to give this information to the court. Failure to do so invalidates any additional punishment that may be given to an offender. Further, if a person has already been convicted of an offense and incarcerated, but the warden of the prison has knowledge of previous felony convictions, the appropriate court must be notified of possible habitual offender status. The defendant may then be charged and sentenced at this time as a habitual offender.

West Virginia's criminal law also provides enhancements for a second conviction for a drug offense. A defendant may be imprisoned for twice the term authorized or fined up to twice the amount for a second or subsequent drug conviction. Misdemeanors are also enhanced for habitual offenders. A prison sentence is required upon the second conviction for the same misdemeanor offense.

#### Recent developments and impact

Within the past year, the West Virginia Legislature has considered a determinate sentencing bill. However, the bill has not yet come out of committee in either house of the Legislature.<sup>140</sup>

#### WISCONSIN

In a decade of sweeping changes in sentencing statutes throughout the nation, reversing almost a hundred years of penal and sentencing ideology espousing indeterminacy of sentence and the possibilities of rehabilitation, Wisconsin remains unique in two important ways. First, despite a variety of determinate sentencing bills that have been proposed over the past six years, no alteration in the extant indeterminate sentencing structure has passed both houses of the state legislature. Further, in a time of increased sanctions in almost every other state, the Wisconsin Legislature has refrained from increasing penalties, and, although there is a presumption of a prison term if an offense is committed with a firearm and the possibility of increased sanction for repeat offender status, there are no mandatory minimum provisions for any offense (excluding first-degree murder and drunk driving).

It is likely that indeterminate sentencing will remain in Wisconsin for the foreseeable future. Advisory statewide sentencing guidelines have been developed and are in experimental use, but these were designed for implementation within the existing indeterminate sentencing structure. Recently, the legislature enacted new laws slightly tightening parole eligibility requirements, but the changes more or less pattern changes already in effect in parole board decision-making.

Despite the legislature's reluctance to increase sanctions or mandate required minimum prison terms, Wisconsin prison officials report a growing problem with overcrowding, and at least one of the state's penal institutions has come to the attention of federal authorities concerned

with double-bunking and prison health care facilities. The state has recently purchased a site which will be converted to house a new prison in Milwaukee.<sup>141</sup> Since there has been no change in the sentencing statutes, explanations for the increase in prison population vary from those who maintain that there are more crimes committed and therefore more individuals being punished, to those who feel that prosecutors are prosecuting more stringently or that judges are sentencing more severely due partially to public concern about crime. Also, for a period of time in the late seventies, the parole board refused parole release to more inmates than previously, requiring more inmates to serve until their mandatory release dates.

#### Historic context

The development of the stability of the indeterminate sentencing structure in Wisconsin on the one hand, and the interest in sentencing reform on the other, reflect two strong trends in Wisconsin political history. In the first case, the expertise accorded to criminal justice practitioners, backed by the powerful and historically independent Department of Health and Social Services, has helped to keep alive the existing policies of indeterminacy. In the second case, as part of a self-consciously good government legislature, criminal justice agenda setters in state government were assertively in the vanguard of sentencing reform, but deliberate in their assertiveness, requesting research on the impact of proposed changes before rushing into the changes. The unanimity of positive opinion with which the existing system was reviewed partially explains its continuance, then, but the unanimity of cautious to negative regard

toward the suggested changes probably explains it better.

Over the years, the Division of Corrections and, more importantly, the Department of Health and Social Services of which it is a part,<sup>142</sup> have articulated a supportive, generally humane, and usually well thought out defense of the possibilities of rehabilitation and the advantages of community corrections and other alternatives to incarceration. (Indeed, an unusually large portion of the felony caseload in Wisconsin is disposed by probation sentences.)<sup>143</sup> Donald Percy, chief administrator for the Department for much of the period in which determinate sentencing proposals were debated in the state legislature, was not only a dedicated proponent of the values of the indeterminate system, but an influential and respected lobbyist for the autonomy and expertise of his Department. That position was essentially the one held by the Division of Corrections over the past two decades or more, as well as by the majority of practitioners, including not only probation and parole officials, but also many attorneys and judges. Evidently, some members of the legislature also felt this way. In February of 1983, the Deputy Director of State Courts, who had previously served in the state assembly, wrote:

The operation of the criminal justice system in Wisconsin, however, has long been marked by professionalism. The men and women who staff our prisons, administer the Division of Corrections, operate the parole board, and serve as probation and parole agents in Wisconsin have a proud tradition. They believe themselves to be professionals...Surely if there was ever a

state that should have been able to demonstrate that an indeterminate approach worked...Wisconsin was that state. (McClain, Report of the Wisconsin Felony Sentencing Guidelines Advisory Committee, 1983.)

The preference for indeterminacy was not merely a simple defense of discretion or professionalism, although that undoubtedly played a part. During the past 10 years, each system--judicial, probationary, and paroling--attempted to meet some of the criticisms of indeterminate sentencing. Although concerns about public relations motivated some of these self-critical developments, and despite occasional accusation of discretionary misjudgment in one of the systems by another, the practitioner-initiated reform efforts began with a strong commitment to the underlying assumptions of indeterminacy. The position regarding indeterminacy, however, was not taken without the thought that it needed some change. In the spring of 1980, the judiciary determined a need for, and subsequently established, empirically developed felony sentencing guidelines. The Bureau of Community Corrections devised a probation classification system in 1975 that called for increased supervisory contacts with higher risk probationers, and decreased supervisory contact with lower risk probationers. The parole board was reorganized in 1980, a new chairman appointed, and "parole ability" ranges (similar to parole guidelines) developed in 1982 to help make parole release decision-making more rational.

Legislative activity. Most of the legislative activity regarding sentencing reform was in the direction of increasing sanctions and implementing a determinate sentencing structure. Determinate sentencing was proposed in Assembly Bill 828

in 1977; in Assembly Bills 847, 1190, and 1194 in 1979; in Assembly Bills 29, 128, and 150 in 1980; and in Assembly Bill 29 in 1981. None of the proposed laws was approved by both houses of the legislature. Both the 1980 and 1981 version of Assembly Bill 29 were of special concern to those who wanted to maintain the current system. These bills included provisions requiring that any person convicted of a felony that had been committed "while on probation or parole...shall be sentenced to a determinate term of imprisonment equal to 50 percent of the maximum possible imprisonment for the crime (except that) the judge may provide that the determinate terms be a longer term not exceeding the maximum possible imprisonment for the crime" (AB 29, 1980 and 1981). Needless to say, proponents of the existing penalty schedule were pleased when this legislation failed to pass.

Legislative interest in sentencing has waned in the past year. This may be due to the growing acceptance of the statewide felony sentencing guidelines now in experimental use. It may also be due to the more general national dissatisfaction with some aspects of determinate sentencing which have only become apparent as increased information on the unexpected consequences of sentencing changes became known.

#### Indeterminate sentencing

Wisconsin has five classes of felony offenses. Judges impose a specific length of incarceration up to a statutorily defined maximum, and the parole board determines the actual length of time served within the context of the law governing parole eligibility, good time provisions, and the sentence initially set by the judge. The five felony classes are

punishable up to the following maximum terms.<sup>144</sup>

Class A: Life  
Class B: Up to 20 years  
Class C: Up to 10 years and/or up to \$10,000 fine  
Class D: Up to 5 years and/or up to \$10,000 fine  
Class E: Up to 2 years and/or up to \$10,000 fine

Special circumstances. If a Class A, B, or C felony offense is committed with a firearm, the maximum penalty can be increased by not more than five years. If the offense is a Class D felony, the penalty can be increased by up to four years, and if it is a Class E felony the penalty can be increased by up to three years. The firearm enhancements do not apply if the use of a firearm is an element of the crime.

Increased penalties are also possible but not required if the defendant is convicted of a habitual or repeat offender charge. The prior convictions must have occurred within five years of the conviction for the present offense. The increased penalties vary according to the class of the instant offense. Recent research on felony sentencing in Wisconsin indicates that increased penalties for repeater status or firearm use are rarely imposed (Shane-DuBow et al., 1979; Shane-DuBow et al., 1982; Shane-DuBow et al., 1983).

#### Felony sentencing guidelines

In June of 1980, the Administrative Committee of the Court initiated a funding request from the Wisconsin Council on Criminal Justice to begin work on felony sentencing guidelines. As in other states where the court took the lead in the development of the guidelines, there was no provision for a policy-determining sen-

tencing commission, and, although they were somewhat favorable to the guidelines concept, there was no directive or endorsement from the state legislature. Once the funds were authorized, a research group was chosen through competitive selection, and research on what became a two-and-one-half year effort began in October of 1980. Of importance to the effort was the establishment of an advisory committee composed of three legislators, nine trial court judges representing different jurisdictions and including the chief judge of Milwaukee county, the Director of the Bureau of Community Corrections, the Chairman of the Parole Board, the Deputy State Public Defender, a District Attorney, and the Deputy Director of the state courts. The advisory committee met regularly with the research group throughout all phases of research and guideline development, and eventually recommended that the Wisconsin Supreme Court adopt the guidelines on an additional experimental basis statewide for 18 months. The results of the high court's deliberation on the matter are not yet known.

Guideline research and policy. Data for guideline research were collected from individual case files at the Division of Corrections or in individual probation offices. The sample consisted of 7,240 felony charges sentenced statewide between January 1, 1977, and June 30, 1981. Cases that resulted in a term of imprisonment, as well as those that resulted in the imposition of probation, were included in the research sample. Sentencing guideline matrices were constructed for armed robbery, unarmed robbery, burglary, first degree sexual assault, second degree sexual assault, forgery, three classes of felony theft (including auto theft), and drug offenses. At that time, these

offenses comprised approximately 80 percent of the felony caseload in Wisconsin.

Construction of the guideline matrices was accomplished by analyzing information about the offender (sex, race, education, employment, detailed prior record information, etc.) and the offense (weapon use, victim harm, amount of contraband, etc.), to determine what factors were associated with variations in sentence length. This was done by using all possible sets of multiple regression and logistic regression techniques which enabled researchers to measure the relative weight of a given variable--such as prior felony convictions in a defendant's prior record--on the length of sentence imposed, controlling for the effect of all other variables. Using these techniques, the relative weight of a number of different variables was determined, and, for each offense, the best combination of variables--that is, the combination that explained the most variation in sentence length--was used as the equation from which the specific guideline scoring system was derived.

Only those variables that were deemed legally appropriate by the advisory committee, however, were used, and in some instances, variables that had not emerged as statistically significant factors affecting sentence length were reintroduced by the committee because they were substantively important. The result of this approach was a set of sentencing guidelines that were based on information about past sentencing practices, refined and substantively reviewed by an advisory committee of criminal justice practitioners.

The Wisconsin Felony Sentencing Guidelines were intended to be used as a guide in sentencing. They were designed to direct attention first to the legal factors of

prior record and offense severity, and provide more information about sentencing than had previously been available in Wisconsin. They were presented as recommendations and were not in any way mandatory.

The following statement of policy was adopted by the advisory committee:

#### Statement of Policy Underlying Sentencing Guidelines

The independence of the judiciary and the legitimate exercise of judicial discretion is necessary to maintain the balance of power among the branches of government. The judiciary is cognizant, however, that it must function within established rules and precedents to maintain public trust in the integrity of the judicial process. No judge is a law unto himself/herself. Nowhere is this more evident than in the criminal law.

The Wisconsin Felony Sentencing Guidelines System is designed to allow the exercise of judicial discretion while reducing variance by providing guideline sentences for similar offenders who commit similar offenses. These guidelines reflect previous sentencing practices in Wisconsin, and are a starting point for the exercise of judicial discretion in a particular case. Room is left for unique defendants or circumstances by providing the judge an opportunity to articulate reasons when she or he sentences outside the guidelines.

The ultimate responsibility in imposing sentence must and should remain with the sentencing judge. The judge

must weigh, consider and apply competing values in circumstances as diverse and complex as each individual defendant. To dispel any perception of unequal treatment in sentencing, these guidelines have been developed to assist the sentencing judge charged with that difficult duty (Wisconsin Felony Sentencing Guidelines Advisory Committee, 1982).

Guideline use. Similar to other matrix guidelines, the Wisconsin guidelines indicate a recommended sentence range in months. The scoring items vary by offense type, as do the points attached to the scoring items, and each offense has a different scoring sheet. Table 25 is an example of the armed robbery scoring sheet. Table 26 is the reverse side of the same scoring sheet and includes the armed robbery matrix as well as the non-inclusive list of aggravating and mitigating circumstances developed by the advisory committee. The figures in the matrix cells provide three kinds of information to sentencing judges. The top of the cell has the recommended range of incarceration length in months. Directly under that figure is a percentage figure indicating the percent of individuals whose scores placed them in the cell and who were actually incarcerated in past sentencing decisions. Since the guidelines have only been used experimentally for 18 months, the percentage figures in the matrix reflect a hypothetical resentencing of all individuals in the original research sample to determine what cell they fell into. Cells in which fewer than 50 percent of the individuals received incarcerative sentences--in the past--are deemed probation cells, indicating that persons whose scores place them in that cell are similar on the scored items to those who received probation in the past.

TABLE 25

STATE OF WISCONSIN  
(FOR USE BEGINNING 1/83)

FELONY GUIDELINES SCORING AND SENTENCING INFORMATION  
**ARMED ROBBERY - 1983**

1-Court Case No.	2-County	3-Sentencing Judge	4-Sentencing Date
5-Offender's Last Name	First	M.I.	6-Sex 1 <input type="checkbox"/> M 2 <input type="checkbox"/> F
7-High School Diploma or G.E.D.	8-Birthdate	9-Employed At Time of Offense 1 <input type="checkbox"/> Yes 2 <input type="checkbox"/> No	10-Race 1 <input type="checkbox"/> White 3 <input type="checkbox"/> Am. Indian 5 <input type="checkbox"/> Asian 2 <input type="checkbox"/> Black 4 <input type="checkbox"/> Hispanic 6 <input type="checkbox"/> Other
11-In Custody At Time of Adjudication 1 <input type="checkbox"/> Yes 2 <input type="checkbox"/> No	12-Offense Date	13-This is: 1 <input type="checkbox"/> an original sentence 2 <input type="checkbox"/> a new sentence imposed after a sentence modification hearing 3 <input type="checkbox"/> a sentence imposed after revocation of probation	14-Final Plea entered 1 <input type="checkbox"/> Guilty 3 <input type="checkbox"/> No Contest 2 <input type="checkbox"/> Not Guilty
15- Was pre-sentence investigation ordered before sentencing? 1 <input type="checkbox"/> Yes 2 <input type="checkbox"/> No If yes, name of agent who prepared it: _____			

**CRIMINAL HISTORY SCORING** POINTS

16-Did offender have legal status associated with an adult felony at time of current offense?  
1  Yes = 1 point  
2  No = 0 points

17-If yes, type of legal status:  
1  Probation 3  Parole/Supervised Release  
2  Bail 4  Other (e.g., escapee)

18-Does offender have MORE THAN three felony-type juvenile adjudications? (If yes, list four such adjudications below.)  
1  Yes = 4 points  
2  No = 0 points

(1)	DISPOSITION DATE		(3)	DISPOSITION DATE	
	Mo.	Yr.		Mo.	Yr.
(2)			(4)		

20-Number of offender's prior adult felony convictions: \_\_\_\_\_ Multiply by 2 = \_\_\_\_\_ points  
(List prior adult felony convictions below. If more than eight, list others on a separate sheet and attach.)

(1)	DISPOSITION DATE		(5)	DISPOSITION DATE	
	Mo.	Yr.		Mo.	Yr.
(2)			(6)		
(3)			(7)		
(4)			(8)		

22-Does offender have any prior convictions for violent felonies? (If yes circle at least one violent prior conviction on listing above.)  
1  Yes = 8 points  
2  No = 0 points

23- **TOTAL CRIMINAL HISTORY SCORE (A SCALE)**

**SEVERITY OF OFFENSE SCORING** POINTS

24-Did offender have an operable gun while committing offense?  
1  Yes = 1 point  
2  No = 0 points

25-Was offender convicted of concealing identity during offense?  
1  Yes = 2 points  
2  No = 0 points

26-Did the victim suffer "bodily harm" (as defined in the statutes)?  
1  Yes = 3 points  
2  No = 0 points

27-List all other charges an offender has been convicted of and is being sentenced on at this time, below.  
If more than eight, list others on a separate sheet and attach.

(1)	OFFENSE DATE		(5)	OFFENSE DATE	
	Mo.	Yr.		Mo.	Yr.
(2)			(6)		
(3)			(7)		
(4)			(8)		

28- Circle all charges listed above that are Class B or Class A felonies.  
Number of circled Class B or A felonies: \_\_\_\_\_ Multiply by 4 = \_\_\_\_\_ points

29- **TOTAL SEVERITY OF OFFENSE SCORE (B SCALE)**

TABLE 26

**ARMED ROBBERY MATRIX**

Offender Criminal History (A Scale)

Offense Severity (B Scale)	0	1-6	7-12	13+
	0	24-42 Months % Incar. = 45	42-60 Months % Incar. = 74	60-78 Months % Incar. = 100
1-2	42-60 Months % Incar. = 62	60-72 Months % Incar. = 95	78-90 Months % Incar. = 100	102-108 Months % Incar. = 95
3-7	60-72 Months % Incar. = 74	72-90 Months % Incar. = 95	90-108 Months % Incar. = 98	108-132 Months % Incar. = 100
8+	72-84 Months % Incar. = 91	90-102 Months % Incar. = 93	108-132 Months % Incar. = 91	132-156 Months % Incar. = 93

NOTE: Sentence ranges in the probation cells (the shaded cells) apply only if offenders are not placed on probation.

30- Does the matrix indicate probation for the offender?  
1  Yes 2  No

31- If no, what length of prison time is indicated? \_\_\_\_\_ to \_\_\_\_\_ Months

32- Was the offender placed on probation?  
1  Yes 2  No

33- If yes, what length of probation was imposed? \_\_\_\_\_ Months, and

34- Was prison time 1  Stayed, or 2  Withheld, and

35- Was county jail time imposed as a condition of probation?  
1  Yes 2  No

36- \_\_\_\_\_ Months

38- Terms of this Sentence:  
1  Single Charge 2  Concurrent with \_\_\_\_\_  
3  Consecutive to \_\_\_\_\_ 4  Other \_\_\_\_\_

**39-MITIGATING CIRCUMSTANCES**

**40-AGGRAVATING CIRCUMSTANCES**

- Victim does not want defendant severely punished.
- Defendant's involvement in actual offense minimal or due to coercion, duress, or ignorance of commission of crime.
- Defendant cooperated with authorities in apprehending or prosecuting other offenders.
- Defendant's life, conduct or behavior has become stable since offense.
- The defendant has maintained a substantial crime-free period, adult and/or juvenile, before this offense occurred.
- Offender has demonstrated responsible action and judgment in other aspects of his or her life.
- Defendant has made or will make restitution.
- Defendant will participate in drug or alcohol treatment, or emotional/mental treatment, and it has been determined that such treatment will likely deter further criminal activity.
- The offender lacked substantial capacity for judgment due to physical or mental impairment (does not include voluntary use of intoxicants, e.g., drugs or alcohol).
- Defendant's age impaired judgment (extreme youth or extreme age).
- Recommendation of the District Attorney.
- Other circumstances that are listed below.

- Special vulnerability of victim, such as victim young, elderly, handicapped or visibly pregnant.
- Extreme injury to victim, including permanent physical or mental injury, disfigurement, or permanently handicapped (blinded, for example).
- Wanton or extreme cruelty or depravity toward victim.
- Offender used or threatened to use a firearm or other particularly menacing or dangerous weapon (if not included in matrix scoring).
- Circumstances of offense indicate premeditation or extensive planning.
- Extensive property damage, or contraband of unusual or great value, (e.g., artwork) or large amount of money.
- If multiple participants, offender took major role or directed offense.
- Multiple victims involved.
- Prior juvenile offenses, especially prior violent juvenile offenses (if not included in matrix scoring).
- Prior adult misdemeanors, especially prior violent misdemeanors.
- Read-in offenses (if not included in matrix scoring).
- Attitude or behavior of offender shows lack of remorse.
- Other circumstances that are listed below and that are not included in the matrix scoring.

**41- JUDGE'S STATEMENT (Check one)**

- The sentence imposed for this offense fits within the guidelines as shown on the matrix above.  
 I have sentenced outside the guidelines. The aggravating or mitigating circumstances I have checked above plus any other factors listed here are the reasons for this decision.

Additional factors are:

Signature of Sentencing Judge \_\_\_\_\_ Date \_\_\_\_\_

Within five days, mail this scoring sheet to: Office of Court Operations, Felony Sentencing Guidelines Study, 110 E. Main St., Room 503, Madison, WI 53703

The Wisconsin guidelines have been developed for eight offenses. Guidelines for the remaining felonies may be developed in the future. The existing guidelines may be applied, however, in multi-charge cases in which there are more than one of the guideline offenses. Each guideline offense may be scored and a recommended range for each offense determined. The guidelines do not recommend terms of sentence; that is, determination of whether sentences for each offense in a multi-charge case should be concurrent or consecutive, etc., rests with the sentencing judge. Also, the guidelines do not restrict how much higher (up to the maximum by statute) or lower sentences outside of the guideline range may be. All sentences outside the guideline range, however, are supposed to be recorded with reasons for the sentence imposed on the guideline scoring sheet. Imposition of incarceration on those whose scores fall in shaded cells and, likewise, imposition of probation on those whose scores fall in unshaded cells, also are requested to be recorded, as above, by listing the aggravating or mitigating circumstances taken into account.

#### Impact

The Wisconsin guidelines are still in experimental use. Eight counties began sentencing under the guideline system in December of 1982. Data kept by the Office of Court Operations indicate that the guideline sentences are imposed in 55 percent of the experimental cases. In 45 percent of the cases, sentences differ from the recommended sentence with approximately half of the differences resulting in higher sentences (than the one recommended) and half resulting in lower sentences.<sup>145</sup> As far as other sentence impacts are concerned, while specific

population projection analyses were not requested during the research, it appears that the guidelines in and of themselves should not add to the existing overcrowding problem. First, the guidelines are not required, and, as evidenced from the agreement analysis done by the office of court operations, are not always followed. Second, although judges may sentence higher than the recommended range up to the statutory maximum, no matrix contains sentence recommendations that include the maximum amount of time. The most severe recommended armed robbery sentence range (bottom right of the matrix), for example, is 132 to 156 months, or 11 to 13 years. While that may seem like a very broad range, it is important to remember that this is the most severe guideline sentence for an offense which carries a maximum of 20 years. Further, some impact analyses were done tangentially to the major research effort, and for four of the matrices at least, the individuals in the research sample were found to receive fewer days of recommended sentence than they actually received of real sentence. These findings were preliminary, however, and additional population projections should be made.

Practitioners who have used the Wisconsin guidelines have, by and large, indicated that they found them useful. The state assembly has drafted legislation directing the court to develop felony sentencing guidelines, and that bill awaits voting pending the outcome of the high court's decision regarding the continuation and expansion of the experimental phase. One aspect of the Wisconsin guidelines that will bear close scrutiny is the effect of the armed robbery matrix on sentences of non-white persons convicted of that crime. During the research phase, analysis of all armed robbery sentences imposed throughout

the state in a four-and-one-half year period indicated that non-white persons convicted of armed robbery were more likely to receive an additional year of sentence regardless of the extent or lack of a prior record and regardless of variations in specific case severity.<sup>146</sup> This race finding is, of course, similar to those found in sentencing research in many other states.

In sum, it is far too early to assess the impact of the Wisconsin felony guidelines. It is possible that despite unanimous

endorsement by most of the Wisconsin criminal justice establishment (the state's Chief Judges, the District Attorney's Association, the State Public Defender's Office, and the heads of the Bureau of Community Corrections and the parole board), the Wisconsin Supreme Court may refuse the advisory committee's recommendations to continue the experiment. It is clear that if implementation and use are not statewide and standardized, the guideline experiment in Wisconsin will end.

WYOMING

Sentencing reform and its context

Wyoming, like many of the previously reviewed states, has made no substantial change in its basic indeterminate sentencing system for many years, except for changes increasing sanctions for habitual offenders and firearm use by certain offenders. Statutory minimums and maximums are provided for each felony offense. Judges, if sentencing an offender to prison, must set both a minimum and maximum term within these limits. A minimum sentence of one year must be given if incarceration is imposed. An example of Wyoming's felony sentencing scheme for some offenses follows:

<u>Offense</u>	<u>Minimum/Maximum Sentence</u>
Manslaughter	0 - 20 years
1st Degree Assault (1st offense)	5 - 50 years
2nd Degree Sexual Assault	1 - 20 years
3rd Degree Sexual Assault	1 - 5 years
Robbery	0 - 14 years
Forgery	0 - 14 years

As illustrated above, Wyoming judges have a great deal of discretion in sentencing persons to incarcerative terms. Non-incarcerative terms are also available for most felony offenses. Wyoming does have the death penalty. Probation is not an option for offenses punishable by life imprisonment or death.

The Wyoming Parole Board sets the actual release date for persons serving penitentiary sentences. Persons are eligible for

parole after reaching the minimum term. Good time credits are authorized by the parole board and are not a matter of course for inmates. Good time may be withheld or given at the discretion of the board.

Habitual offender sentencing. One change that has occurred in recent years was the passage of habitual offender statutes in 1973 providing harsh punishment for repeat offenders.

Every person convicted of a felony in this state who shall previously have been twice convicted of a felony upon charges separately brought and tried which have arisen out of separate occurrences either in this state or elsewhere, shall be adjudged to be a habitual criminal and shall be punished by imprisonment in the state penitentiary for 10 - 50 years. Three or more previous felony convictions result in imprisonment in the state penitentiary for the term of his or her life (Wyoming Statutes Annotated, 6-1-110).

Although no major studies have been done assessing the impact of this law on Wyoming's prison population, the state did experience a substantial increase in the number of persons being incarcerated after 1973. In 1973, the inmate population was 278 persons, and by 1980 it had reached 534 (Gardner, 1981). While this is a very small absolute increase compared to other states, the percent increase is rather high. Whether this jump may be credited to the habitual offender statute or other factors has not been assessed.

Firearm enhancements. In 1979, the legislature passed provisions for increasing the punishment for certain offenders

who use or possess a firearm in the commission of an offense. Persons with previous convictions for certain violent felonies may be charged with a separate offense if they are in possession of or use a firearm in the commission of an offense. Imprisonment for this offense could be up to an additional five years.

#### SUMMARY AND TYPOLOGY OF SENTENCING REFORM

We have spent the past several hundred pages discussing the wide variety of types of sentencing reforms, total and partial, enacted in many states during the past 10 years. We have described sentencing trends--determinate, guidelines, mandatory minimums--but our discussion has been replete with examples of differences. There are many types and sub-types of reform. There have been modifications to initial modifications of sentencing statutes, alterations to the original underlying intent of new laws, divided opinions regarding the effects of the new laws, and sometimes, misunderstandings as to what the reforms actually were and what they actually did. These reforms and modifications have resulted in enough confusion so that even practitioners occasionally mistake all reforms as determinate. In fact, it would be a mistake to assume that all states with determinate sentencing have essentially similar sentencing laws, or perhaps more surprising, that all states that have maintained an indeterminate sentencing structure have maintained laws that continue to effect criminal justice practices in the same way that they did previously. The foregoing chapters are, then, documentation of the variability related to sentencing reform.

It is when we endeavor to present a discussion of central tendency, the subject of this summary chapter, that difficulties arise. Essentially, there is one common measure of central tendency--during the past 10 years, all 50 states and the District of Columbia have at some time considered or drafted legislation to alter extant indeterminate sentencing structures to some other sentencing plan. This apparently trivial piece of information represents a wholesale shift

in thinking about criminal sanctions, and the first time in many decades that the indeterminate rationale for sanctioning was doubted. It was in 1870, at the first meeting of what was then called the National Prison Association that members drafted a resolution calling for the adoption of indeterminate sentencing to counteract the perceived ills of the universally used determinate base to sentencing.

Now that situation is apparently reversed, for in 15 states sweeping new sentencing legislation has passed, creating an entirely new philosophical basis for sentencing. In addition, a large majority of the remaining states has altered a portion of their sentencing laws, some implementing a blend of sentencing changes, occasionally creating philosophical sentencing contradictions within the new law. Regardless of the number of changes, however, a significant majority of states retained indeterminate sentencing as a base to their sentencing laws.

Our analysis of the commonality of the reforms indicates that when sentencing laws were changed, penalties, almost entirely, were increased, mandatory minimum terms enacted, repeater or habitual criminal laws enacted or tightened or eliminated altogether. Also, despite these developments, a very great majority of states have not authorized examination of the effect of these rather critical changes on prison population.<sup>147</sup> An ancillary commonality, then, is that almost every state is facing grave problems with overcrowding, and many states are building new penal institutions.

In this chapter, we illustrate the specific changes in each state by presenting tables related to 10 aspects of sentencing reform that we deemed appropriate to most reliably characterize the current sentencing structure in each state. Each state's sentencing structure is first characterized as either indeterminate or determinate in base, followed by nine additional aspects useful in describing sentencing structure. Table 27 lists the aspects considered.

It is important to mention some caveats concerning these summary tables. "Current" was broadly used to cover the end of a 10-year period beginning roughly around 1971, although if there was sentencing change after 1981, we included it. At some point, however, this became an unending task and we abandoned the effort to stay absolutely "current". For the most part, the tables should be regarded as up-to-date until late 1982. Further, we are aware that there are many ways to characterize sentencing reform. We are responsible for any omissions or inaccuracies in the manner in which we have characterized it. For additional descriptions, the reader is referred to the more substantial discussion of each state in the proceeding state review sections.

Specific findings (see Tables 28 through 37) are the following: In the past 10 years, 15 states have adopted determinate sentencing (for our research purposes, we used the term "states" to describe the 50 states and the District of Columbia); 25 states have undergone major criminal code revisions; 15 states have experienced piecemeal code revisions; and 11 states have not essentially altered their codes. In addition, and sometimes in spite of the changes just mentioned, the following

reforms have also been implemented: 33 states have enacted or increased repeater or habitual offender laws; 49 states have enacted mandatory sentencing laws for some offenses; seven states have either implemented or have drafted judicial sentencing guidelines including the following three unique types of guidelines: Ohio has guidelines developed by the state bar; Rhode Island has Benchmark Sentencing; and Utah is moving toward a matrix containing both sentencing and parole guidelines. Also, 10 states have altered their provisions for sentencing appeal, generally to the appellate court or to a sentencing review panel, while 41 states have not altered provisions for sentencing appeal.

At the same time as these changes were occurring, other aspects of the criminal justice system that were related to sentencing were also being reformed. During the 10 years of our research consideration, 27 states tightened parole eligibility requirements, 14 states did not change parole eligibility requirements, and eight eliminated parole altogether. Four states loosened parole eligibility, but of those four two loosened parole eligibility for some offenses and tightened it for others. Good time has also come under reform focus. Twelve states decreased good time, 11 increased it, and 28 did not change it.

Finally, it is interesting to note that amid a decade of focus on sentencing and sentencing reform, only 11 states have provided for research on their reforms or conducted statewide studies to ascertain the impact of the reforms. Those few studies that have been conducted look primarily at the potential impact of the sentencing reforms on prison populations, although one or two notable studies have

Table 27

Reported Aspects of Each State's Sentencing Reform

1. Current sentencing structure best characterized as indeterminate or determinate at base.
2. Current sentencing structure the result of a major criminal code revision.
3. Current sentencing structure has mandatory minimum terms for certain offenses (excluding drunk driving and murder).
4. Current sentencing structure has altered repeater or habitual offender laws.
5. Current sentencing structure involves use of statewide sentencing guidelines.
6. Current sentencing structure has altered provisions for sentence appeal.
7. Current sentencing structure has altered parole eligibility or parole.
8. Current sentencing structure has modified good time calculations.
9. Current sentencing structure has altered penalties for certain offenses.
10. Probable impact of current sentencing structure on prison populations has been determined.

Table 28

CURRENT SENTENCING STRUCTURE BEST CHARACTERIZED AS

	Indeterminate	Determinate
Alabama	X	
Alaska	X	
Arizona		X
Arkansas	X	
California		X
Colorado		X
Connecticut		X
Delaware	X	
District of Columbia	X	
Florida	X	
Georgia	X	
Hawaii	X	
Idaho	X	
Illinois		X
Indiana		X
Iowa	X	
Kansas	X	
Kentucky	X	
Louisiana	X	
Maine		X
Maryland	X	
Massachusetts	X	
Michigan	X	
Minnesota		X
Mississippi	X	
Missouri	X	
Montana	X	
Nebraska	X	
Nevada	X	
New Hampshire	X	

Table 28

CURRENT SENTENCING STRUCTURE BEST CHARACTERIZED AS  
(continued)

	Indeterminate	Determinate
New Jersey		X
New Mexico		X
New York	X	
North Carolina		X (presumptive)
North Dakota	X	
Ohio		X
Oklahoma	X	
Oregon	X	
Pennsylvania		X
Rhode Island	X	
South Carolina	X	
South Dakota	X	
Tennessee		X
Texas	X	
Utah	X	
Vermont	X	
Virginia	X	
Washington		X
West Virginia	X	
Wisconsin	X	
Wyoming	X	
TOTALS	36	15

Table 29

CURRENT SENTENCING STRUCTURE THE RESULT OF MAJOR CRIMINAL CODE REVISION

	Yes	No (piecemeal change)	No. (no change)
Alabama	X		
Alaska	X		
Arizona	X		
Arkansas	X		
California	X		
Colorado	X		
Connecticut	X		
Delaware			
District of Columbia			X
Florida		X	
Georgia		X	
Hawaii		X	
Idaho		X	
Illinois	X		
Indiana	X		
Iowa	X		
Kansas			X
Kentucky		X	
Louisiana			X
Maine	X		
Maryland		X	
Massachusetts		X	
Michigan		X	
Minnesota	X		
Mississippi			X
Missouri	X		
Montana			X
Nebraska	X		
Nevada			X
New Hampshire	X		

Table 29

CURRENT SENTENCING STRUCTURE THE RESULT OF MAJOR CRIMINAL CODE REVISION  
(continued)

	Yes	No (piecemeal change)	No (no change)
New Jersey	X		
New Mexico	X		
New York		X	
North Carolina	X		
North Dakota	X		
Ohio	X		
Oklahoma			
Oregon		X	
Pennsylvania	X	X	
Rhode Island		X	
South Carolina		X	
South Dakota	X	X	
Tennessee	X		
Texas			
Utah		X	
Vermont		X	
Virginia	X		X
Washington	X		
West Virginia			
Wisconsin			X
Wyoming			X
TOTALS	25	15	11

Table 30

CURRENT SENTENCING STRUCTURE HAS MANDATORY TERMS FOR CERTAIN OFFENSES  
(EXCLUDING FIRST DEGREE MURDER AND DRUNK DRIVING)

	Yes	No
Alabama	X	
Alaska	X	
Arizona	X	
Arkansas	X	
California	X	
Colorado	X	
Connecticut	X	
Delaware	X	
District of Columbia	X	
Florida	X	
Georgia	X	
Hawaii	X	
Idaho	X	
Illinois	X	
Indiana	X	
Iowa	X	
Kansas	X	
Kentucky	X	
Louisiana	X	
Maine	X	
Maryland	X	
Massachusetts	X	
Michigan	X	
Minnesota	X	
Mississippi	X	
Missouri	X	
Montana	X	
Nebraska	X	
Nevada	X	
New Hampshire	X	

Table 30

CURRENT SENTENCING STRUCTURE HAS MANDATORY TERMS FOR CERTAIN OFFENSES  
(EXCLUDING FIRST DEGREE MURDER AND DRUNK DRIVING)  
(continued)

	Yes	No
New Jersey	X	
New Mexico	X	
New York	X	
North Carolina	X	
North Dakota	X	
Ohio	X	
Oklahoma	X	
Oregon	X	
Pennsylvania	X	
Rhode Island	X	
South Carolina	X	
South Dakota	X	
Tennessee	X	
Texas	X	
Utah	X	
Vermont	X	
Virginia	X	
Washington	X	
West Virginia	X	
Wisconsin	X	
Wyoming		X
TOTALS	<u>X</u> 50	<u>X</u> 1

Table 31

CURRENT SENTENCING STRUCTURE HAS ALTERED REPEATER OR HABITUAL OFFENDER LAWS

	Yes increased	No decreased	No change
Alabama	X		
Alaska			X
Arizona	X		
Arkansas	X		
California	X		
Colorado	X		
Connecticut	X		
Delaware			X
District of Columbia			X
Florida			X
Georgia	X		
Hawaii	X		
Idaho	X		
Illinois	X		
Indiana	X		
Iowa	X		
Kansas	X		
Kentucky	X		
Louisiana	X		
Maine			X
Maryland	X		
Massachusetts	X		
Michigan			X
Minnesota			X
Mississippi	X		
Missouri	X		
Montana			X
Nebraska			X
Nevada			X
New Hampshire	X		

Table 31

CURRENT SENTENCING STRUCTURE HAS ALTERED REPEATER OR HABITUAL OFFENDER LAWS  
(continued)

	Yes increased	No decreased	No change
New Jersey	X		
New Mexico	X		
New York	X		
North Carolina	X		
North Dakota			
Ohio	X		X
Oklahoma	X		
Oregon			
Pennsylvania	X		X
Rhode Island			
South Carolina	X		X
South Dakota			
Tennessee			X
Texas	X		X
Utah	X		
Vermont			
Virginia	X		X
Washington	X		
West Virginia			
Wisconsin			X
Wyoming	X		X
TOTALS	33	0	18

Table 32

CURRENT SENTENCING STRUCTURE INVOLVES USE OF STATEWIDE SENTENCING GUIDELINES

	Yes, developed by judiciary	Yes, developed by legislature or commission	Yes, other	No
Alabama				X
Alaska	X (for some offenses)			
Arizona				X
Arkansas				X
California				X
Colorado				X
Connecticut				X
Delaware				X
District of Columbia				X
Florida	X			
Georgia				X
Hawaii				X
Idaho				X
Illinois				X
Indiana				X
Iowa				X
Kansas				X
Kentucky				X
Louisiana				X
Maine				X
Maryland	X (pending decision)			
Massachusetts				X
Michigan	X (pending decision)			

Table 32

CURRENT SENTENCING STRUCTURE INVOLVES USE OF STATEWIDE SENTENCING GUIDELINES  
(continued)

	Yes, developed by judiciary	Yes, developed by legislature or commission	Yes, other	No
Minnesota		X		
Mississippi				
Missouri				X
Montana				X
Nebraska				X
Nevada				X
New Hampshire				X
New Jersey				X
New Mexico				X
New York				X
North Carolina				X
North Dakota				X
Ohio			X (Developed by Bar Foundation)	
Oklahoma				
Oregon				X
Pennsylvania		X		X
Rhode Island			X (Benchmark)	
South Carolina	X (Under Development)			
South Dakota				
Tennessee				X
Texas				X

Table 32

CURRENT SENTENCING STRUCTURE INVOLVES USE OF STATEWIDE SENTENCING GUIDELINES  
(continued)

	Yes, developed by judiciary	Yes, developed by legislature or commission	Yes, other	No
Utah			X (Sentencing & Parole guide- lines in one matrix)	
Vermont	X			
Virginia				X
Washington		X		
West Virginia				X
Wisconsin	X (pending decision)			
Wyoming				X
<b>TOTALS</b>	<b>7</b>	<b>3</b>	<b>3</b>	<b>38</b>

Table 33

CURRENT SENTENCING STRUCTURE HAS ALTERED PROVISIONS FOR SENTENCE APPEAL

	Yes, petition to appellate courts	Yes, other	No
Alabama			X
Alaska			X
Arizona			X
Arkansas			X
California	X (and sentence review panel)		
Colorado	X		
Connecticut			X
Delaware			X
District of Columbia			X
Florida			X
Georgia		X (sentence review panel)	
Hawaii			X
Idaho			X
Illinois		X	
Indiana			X
Iowa			X
Kansas			X
Kentucky			X
Louisiana			X
Maine		X (Correction's dept. may be petitioned regarding resentencing)	

Table 33

CURRENT SENTENCING STRUCTURE HAS ALTERED PROVISIONS FOR SENTENCE APPEAL  
(continued)

	Yes, petition to appellate courts	Yes, other	No
Massachusetts			X
Michigan			X
Minnesota		X (petition to upper court)	
Mississippi			X
Missouri			X
Montana			X
Nebraska			X
Nevada			X
New Hampshire		X (sentence review panel)	
New Jersey	X		
New Mexico			X
New York			X
North Carolina		X (presumptive term devia- tion now grounds)	
North Dakota			X
Ohio			X
Oklahoma			X
Oregon			X
Pennsylvania	X		
Rhode Island			X

Table 33

CURRENT SENTENCING STRUCTURE HAS ALTERED PROVISIONS FOR SENTENCE APPEAL  
(continued)

	Yes, petition to appellate courts	Yes, other	No
South Carolina			X
South Dakota			X
Tennessee			X
Texas			X
Utah			X
Vermont			X
Virginia			X
Washington			X
West Virginia			X
Wisconsin			X
Wyoming			X
TOTALS	4	6	41

Table 34

CURRENT LAWS HAVE ALTERED PAROLE ELIGIBILITY OR PAROLE

	Yes tightened	Yes loosened	No change	Eliminated parole
Alabama	X	X		
Alaska	X			
Arizona	X			
Arkansas	X	X (for persons with only one prev. conviction)		
California				X
Colorado				X
Connecticut				X
Delaware			X	
District of Columbia			X	
Florida			X (parole guidelines)	
Georgia	X			
Hawaii	X			
Idaho	X			
Illinois				X
Indiana				X
Iowa	X			
Kansas	X			
Kentucky			X	
Louisiana			X	
Maine				X
Maryland	X			
Massachusetts	X			
Michigan	X			

Table 34

CURRENT LAWS HAVE ALTERED PAROLE ELIGIBILITY OR PAROLE  
(continued)

	Yes tightened	Yes loosened	No change	Eliminated parole
Minnesota				X
Mississippi		X		
Missouri	X			
Montana	X			
Nebraska			X	
Nevada	X			
New Hampshire	X			
New Jersey	X			
New Mexico	X			
New York			X	
North Carolina	X			
North Dakota			X	
Ohio			X	
Oklahoma	X			
Oregon	X			
Pennsylvania	X			
Rhode Island			X	
South Carolina		X		
South Dakota		X		
Tennessee	X			
Texas	X			
Utah	X (parole guidelines)			
Vermont			X	

Table 34

CURRENT LAWS HAVE ALTERED PAROLE ELIGIBILITY OR PAROLE  
(continued)

	Yes tightened	Yes loosened	No change	Eliminated parole
Virginia	X			
Washington				X
West Virginia			X	
Wisconsin	X			
Wyoming			X	
<b>TOTALS</b>	<b>27*</b>	<b>4*</b>	<b>14</b>	<b>8</b>

\*May not be mutually exclusive

Table 35

CURRENT LAWS HAVE MODIFIED GOOD TIME CALCULATIONS

	Yes, increased good time	Yes, decreased good time	No
Alabama	X	X	
Alaska			X
Arizona		X	
Arkansas	X		
California	X		
Colorado	X		
Connecticut			
Delaware			X
District of Columbia			X
Florida			X
Georgia			X
Hawaii			X
Idaho			X
Illinois	X		
Indiana	X		
Iowa			
Kansas		X	
Kentucky			X
Louisiana			X
Maine	X		
Maryland			X
Massachusetts	X		
Michigan		X	
Minnesota			X
Mississippi			X
Missouri		X (abolished good time provisions)	
Montana			X

Table 35

CURRENT LAWS HAVE MODIFIED GOOD TIME CALCULATIONS  
(continued)

	Yes, increased good time	Yes, decreased good time	No
Nebraska	X		
Nevada			X
New Hampshire			X
New Jersey	X		
New Mexico		X	
New York			X
North Carolina	X		
North Dakota			X
Ohio			X
Oklahoma		X	
Oregon			X
Pennsylvania		X (abolished good time provisions)	
Rhode Island			X
South Carolina	X		
South Dakota			X
Tennessee		X (abolished good time provisions)	
Texas			X
Utah		X	
Vermont			X
Virginia		X	

Table 35

CURRENT LAWS HAVE MODIFIED GOOD TIME CALCULATIONS  
(continued)

	Yes, increased good time	Yes, decreased good time	No
Washington			X
West Virginia			X
Wisconsin	X	X	
Wyoming			X
TOTALS	13*	12*	28

\*Not mutually exclusive: Some states have decreased good time for certain types of offenders and increased it for other types.

Table 36

CURRENT SENTENCING STRUCTURE HAS ALTERED PENALTIES FOR CERTAIN OFFENSES

	Yes increased	Yes decreased	Yes, both increased & decreased	No
Alabama	X			
Alaska				X
Arizona	X			
Arkansas	X			
California	X			
Colorado	X			
Connecticut	X			
Delaware	X			
District of Columbia	X			
Florida				X
Georgia	X			
Hawaii	X			
Idaho	X			
Illinois	X			
Indiana	X			
Iowa	X			
Kansas	X			
Kentucky	X			
Louisiana	X			
Maine			X	
Maryland	X			
Massachusetts	X			
Michigan	X			
Minnesota			X	
Mississippi				X
Missouri	X			
Montana				X
Nebraska	X			

Table 36

CURRENT SENTENCING STRUCTURE HAS ALTERED PENALTIES FOR CERTAIN OFFENSES  
(continued)

	Yes increased	Yes decreased	Yes, both increased & decreased	No
Nevada	X			
New Hampshire	X			
New Jersey			X	
New Mexico	X			
New York	X			
North Carolina			X	
North Dakota				X
Ohio				X
Oklahoma	X			
Oregon	X			
Pennsylvania	X			
Rhode Island				X
South Carolina			X	
South Dakota	X			
Tennessee			X	
Texas				X
Utah				X
Vermont				X
Virginia	X			
Washington				X
West Virginia				X
Wisconsin				X
Wyoming				X
<b>TOTALS</b>	<b>31</b>	<b>0</b>	<b>6</b>	<b>14</b>

Table 37

PROBABLE IMPACT OF SENTENCING LAWS ON PRISON POPULATIONS HAS BEEN DETERMINED

	Yes	No
Alabama		X
Alaska		X
Arizona		X
Arkansas		X
California	X	
Colorado	X	
Connecticut	X	
Delaware		X
District of Columbia		X
Florida		X
Georgia		X
Hawaii		X
Idaho		X
Illinois		X
Indiana		X
Iowa		X
Kansas		X
Kentucky		X
Louisiana		X
Maine		X
Maryland		X
Massachusetts		X
Michigan		X
Minnesota	X	
Mississippi		X
Missouri		X
Montana		X
Nebraska		X
Nevada		X
New Hampshire		X

Table 37

PROBABLE IMPACT OF SENTENCING LAWS ON PRISON POPULATIONS HAS BEEN DETERMINED  
(continued)

	Yes	No
New Jersey		X
New Mexico		X
New York	X	
North Carolina	X	
North Dakota		X
Ohio		X
Oklahoma	X	
Oregon	X	
Pennsylvania	X	
Rhode Island		X
South Carolina	X	
South Dakota		X
Tennessee		X
Texas		X
Utah		X
Vermont		X
Virginia		X
Washington		X
West Virginia	X	
Wisconsin		X
Wyoming		X
TOTALS	11	40

attempted to assess other measures of impact. In general, there has been much activity concerning sentencing, but not much study of the activity or its consequences.

Tables 38 through 46 reflect the information from the previous summary tables, but are organized in a slightly different way. These latter tables indicate some differences among states that have adopted one sentencing reform as opposed to another. Although it would be a mistake to draw great causal associations from these cross-tabulations, they are illustrative of the commonalities and differences of the various reforms.

Table 38 indicates that of the 36 states that have retained indeterminate sentencing as a base to their sentencing structure, 42 percent (or 15 of them) have not modified their repeater or habitual offender statutes, 58 percent (or 21 of them) have increased penalties for or instituted repeater or habitual offender statutes, and none of these indeterminate states have decreased or eliminated repeater or habitual offender statutes. Of the 15 states that have adopted determinate sentencing, 20 percent (or three states) did not alter their repeater or habitual offender laws and the remaining 80 percent (or 12 states) increased sanctions or instituted new repeater or habitual offender laws. The table suggests that, regardless of basic sentencing structure, there has been a trend toward making sanctions for repeat or habitual offenders more severe. No state decreased or eliminated penalties for individuals in these categories, and the majority of states with indeterminate and with determinate sentencing have implemented or increased penalties in these categories.

The data in Table 39 show a similar trend. Table 39 indicates that 33 percent (or 12) of the states that retained indeterminate sentencing have not altered penalties for most of their statutes, 64 percent (or 23) of the indeterminate states have increased penalties for many of their statutes, and one indeterminate state (amounting to 3 percent of the total) both increased and decreased penalties depending on the specific statute. Comparable data for the determinate states shows that 13 percent (or 2) of the determinate states did not alter penalties for most of their statutes, 53 percent (or 8) of these states increased penalties for many of their statutes, and 33 percent (or 5) of them both increased and decreased penalties depending upon the specific statute. Here again, we see that the direction is toward increasing penalties regardless of the basic sentencing structure.

There is some difference between the indeterminate and the determinate states when we examine whether any modifications have been made in the provisions for sentencing appeal. Table 40 shows that 94 percent (or 34) of the indeterminate states have not altered provisions for sentencing appeal. Of the 15 determinate states, 47 percent (or 7 states) have not altered sentence appeal provisions, but 53 percent (or 8) of the states have. It may be that states which have adopted determinate sentencing have undergone a more thorough rethinking of criminal laws and procedures in general and are more likely to change sentence appeal procedure than those states that have not restructured their criminal code. It may also be, however, that states adopting determinate sentencing have perceived a need to add further guarantees to protect defendants' rights or to develop other institutional

Table 38

CHANGE IN REPEATER AND/OR HABITUAL OFFENDER LAWS BY TYPE OF SENTENCING STRUCTURE

	Altered repeater - Habit offender laws			
	Total	No change	Increased	Decreased
<b>Type of structure</b>				
<b>Total</b>				
No. of states	51	18	33	0
Row percent	100%	35%	65%	0%
Col percent	100%	100%	100%	0%
Tot percent	100%	35%	65%	0%
<b>Indeterminate</b>				
No. of states	36	15	21	0
Row percent	100%	42%	58%	0%
Col percent	71%	83%	64%	0%
Tot percent	71%	29%	41%	0%
<b>Determinate</b>				
No. of states	15	3	12	0
Row percent	100%	20%	80%	0%
Col percent	29%	17%	36%	0%
Tot percent	29%	6%	24%	0%

Table 39

INCREASE OR DECREASE\* IN PENALTIES  
BY TYPE OF SENTENCING STRUCTURE

	Altered penalties for certain offenses			
	Total	No	Yes, increased	No, decreased
<b>Type of structure</b>				
<b>Total</b>				
No. of states	51	14	31	6
Row percent	100%	27%	61%	12%
Col percent	100%	100%	100%	100%
Tot percent	100%	27%	61%	12%
<b>Indeterminate</b>				
No. of states	36	12	23	1
Row percent	100%	33%	64%	3%
Col percent	71%	86%	74%	17%
Tot percent	71%	24%	45%	2%
<b>Determinate</b>				
No. of states	15	2	8	5
Row percent	100%	13%	53%	33%
Col percent	29%	14%	26%	83%
Tot percent	29%	4%	16%	10%

\*"Decreased" means either decreased or both decreased and increased.

Table 40

MODIFICATIONS MADE TO PROVISION FOR SENTENCE  
APPEAL BY TYPE OF SENTENCING STRUCTURE

	Altered provisions for sentence appeal		
	Total	No	Yes appellate courts
<b>Type of structure</b>			
<b>Total</b>			
No. of states	51	41	10
Row percent	100%	80%	20%
Col percent	100%	100%	100%
Tot percent	100%	80%	20%
<b>Indeterminate</b>			
No. of states	36	34	2
Row percent	100%	94%	6%
Col percent	71%	83%	20%
Tot percent	71%	67%	4%
<b>Determinate</b>			
No. of states	15	7	8
Row percent	100%	47%	53%
Col percent	29%	17%	80%
Tot percent	29%	14%	16%

levels of sentencing appeal mechanisms, thereby increasing the steps in a balance of sanctioning powers.

Table 41 presents the breakdown of changes in parole or parole eligibility by type of sentencing structure. Of the 36 indeterminate states, 47 percent (or 17) of the states have not tightened parole eligibility or eliminated parole, while 53 percent (or 19) of these states have. Conversely, of the 15 determinate states, only one state has not altered parole or parole eligibility or eliminated parole altogether. As with the trend toward increasing sanctions for offenses in general and also for repeater or habitual offender laws, this table indicates that, regardless of sentencing structure, parole eligibility requirements have been tightened or eliminated in a majority of the states.

Differences along the lines of type of sentencing structure appear more clear-cut when we examine the data relating to changes in good time calculations. Table 42 shows that 67 percent (or 24) of the 36 indeterminate states have not modified their good time provisions, 11 percent (or 4) have increased good time calculations, and 22 percent (or 8) have decreased good time calculations. Of the 15 determinate states, 27 percent (or 4) have not altered good time provisions, 46 percent (or 7) have increased good time calculations, and 27 percent (or 4) have decreased good time calculations. In terms of changes to the way good time is counted or accrued, it is clear that the majority of indeterminate states have maintained previously determined good time formulas. If there was a modification to that formula in the indeterminate states, however, slightly more of those states decreased good time provisions than increased them. Consider-

ably more of the determinate states kept the same good time provisions or increased the provisions than decreased them. It may be that, as frequently mentioned by practitioners and social scientists alike, good time provisions add a safety valve for reducing prison overcrowding. Determinate sentencing states, somewhat more likely to have increased sanctions and tightened or eliminated parole, may be more likely than indeterminate states to see a need to expand good time calculations.

Table 43 shows the number of states with a prison increase of 12 or more percent (tabulations from 1982-1983)<sup>148</sup> by type of sentencing structure. Of the 36 indeterminate states, 47 percent (or 17 states) experienced prison population increases of 12 percent or more. Of the 15 determinate states, 60 percent (9 states) experienced prison population increases of 12 percent or more. A slight majority of indeterminate states, then, experienced what we defined as low population increases whereas a great majority of determinate states experienced high population increases. It should be noted that these data, while interesting, are only for one year. It will be far more illustrative to collect these figures and trace prison growth for a greater number of years, comparing determinate states with indeterminate states. Further, additional variables such as degree of urbanization, population density, crime rates, or absolute population figures should be considered or controlled for.

Finally, 81 percent (or 29) of the 36 indeterminate states give additional good time credits for prison program participation. Fifty-three percent (or 8) of the 15 determinate states do the same (see Table 44). Eight percent (or 3) of

Table 41

PAROLE ELIGIBILITY TIGHTENED OR ELIMINATED  
BY TYPE OF SENTENCING STRUCTURE

	Altered parole eligibility or parole		
	Total	Not more severe	More severe
Type of structure			
Total			
No. of states	51	18	33
Row percent	100%	35%	65%
Col percent	100%	100%	100%
Tot percent	100%	35%	65%
Indeterminate			
No. of states	36	17	19
Row percent	100%	47%	53%
Col percent	71%	94%	58%
Tot percent	71%	33%	37%
Determinate			
No. of states	15	1	14
Row percent	100%	7%	93%
Col percent	29%	6%	42%
Tot percent	29%	2%	27%

Table 42

ALTERED CALCULATION OF GOOD TIME  
BY TYPE OF SENTENCING STRUCTURE

	Altered calculation of good time			
	Total	No	Yes, increased	Yes, decreased
<b>Type of structure</b>				
<b>Total</b>				
No. of states	51	28	11	12
Row percent	100%	55%	22%	24%
Col percent	100%	100%	100%	100%
Tot percent	100%	55%	22%	24%
<b>Indeterminate</b>				
No. of states	36	24	4	4
Row percent	100%	67%	14%	27%
Col percent	71%	86%	36%	33%
Tot percent	71%	47%	8%	8%
<b>Determinate</b>				
No. of states	15	4	8	4
Row percent	100%	27%	47%	27%
Col percent	29%	14%	64%	33%
Tot percent	29%	8%	14%	8%

Table 43

INCREASE IN PRISON POPULATION  
BY TYPE OF SENTENCING STRUCTURE

	Increase in prison population		
	Total	Low	High
<b>Type of structure</b>			
<b>Total</b>			
No. of states	51	25	26
Row percent	100%	49%	51%
Col percent	100%	100%	100%
Tot percent	100%	49%	51%
<b>Indeterminate</b>			
No. of states	36	19	17
Row percent	100%	53%	47%
Col percent	71%	76%	65%
Tot percent	71%	37%	33%
<b>Determinate</b>			
No. of states	15	6	9
Row percent	100%	40%	60%
Col percent	29%	24%	35%
Tot percent	29%	12%	18%

Notes:

High increase is 12% and over (1982-1983 data).

Table 44  
**CREDIT GIVEN FOR PROGRAM PARTICIPATION  
 BY TYPE OF SENTENCING STRUCTURE**

	Time served reduction for participation		
	Total	No	Yes
<b>Type of structure</b>			
<b>Total</b>			
No. of states	51	14	37
Row percent	100%	27%	73%
Col percent	100%	100%	100%
Tot percent	100%	27%	73%
<b>Indeterminate</b>			
No. of states	36	7	29
Row percent	100%	19%	81%
Col percent	71%	50%	78%
Tot percent	71%	14%	57%
<b>Determinate</b>			
No. of states	15	7	8
Row percent	100%	47%	53%
Col percent	29%	50%	22%
Tot percent	29%	14%	16%

the indeterminate states have conducted studies to determine the impact of the state's sentencing structure on its prison population. Fifty-three percent (or 8) of the 15 determinate states have conducted similar studies (see Table 45). And the last table, Table 46, shows that 11 states have not undergone any major criminal code revision in the past 10 years, 15 states have undergone piecemeal revisions, and 17 have undergone major revisions. Very few states have attempted to study the effect of these revisions on their prison populations.

In sum, our research on the sentencing reforms enacted in the 50 states and the District of Columbia during the 10 years between 1971 and 1981 indicated that when altered, penalties have been increased, repeater or habitual offender and mandatory minimum laws instituted or increased, parole eligibility tightened or eliminated, and unfortunately, little if no research attention paid to the effect of these changes. Also, regardless of the statutory modifications to sentencing structure, all states experienced prison overcrowding during the 10-year period of our research focus. It appears then, that there have been many changes and reforms,

but not necessarily a lessening of problems.

Indeed, the focus on the perceived ills of the criminal justice system, particularly sentencing, which began with the war on crime on the one hand and the concern for equity and fairness on the other resulted in a universal increase in sanctions and in prison populations. This despite consistent reports from victimization studies indicating that victimization, in general, has not increased since 1973.

It may be fitting to close this concluding chapter with the quote with which we began the book.

...Indeed the changes have made it more important to understand the criminal justice system, its strengths and limitations, and to confront more directly than we have in the past the important administrative policy decisions which must be made...

Robert O. Dawson, 1969  
Sentencing: The Decision  
 as to Type, Length, and  
 Conditions of Sentence.

Table 45

IMPACT OF SENTENCING STRUCTURE ON PRISON POPULATION  
DETERMINED BY TYPE OF SENTENCING STRUCTURE

	Impact on prison population determined		
	Total	No	Yes
<b>Type of structure</b>			
<b>Total</b>			
No. of states	51	40	11
Row percent	100%	78%	22%
Col percent	100%	100%	100%
Tot percent	100%	78%	22%
<b>Indeterminate</b>			
No. of states	36	33	3
Row percent	100%	92%	8%
Col percent	71%	83%	27%
Tot percent	71%	65%	6%
<b>Determinate</b>			
No. of states	15	7	8
Row percent	100%	47%	53%
Col percent	29%	18%	73%
Tot percent	29%	14%	16%

Table 46

MAJOR CODE REVISION  
BY DETERMINATION OF ITS IMPACT ON PRISON POPULATIONS

	Impact on prison populations determined		
	Total	No	Yes
<b>Major code revision</b>			
<b>Total</b>			
No. of states	51	40	11
Row percent	100%	78%	22%
Col percent	100%	100%	100%
Tot percent	100%	78%	22%
<b>No Change</b>			
No. of states	11	11	0
Row percent	100%	100%	0%
Col percent	22%	28%	0%
Tot percent	22%	22%	0%
<b>Piecemeal Change</b>			
No. of states	15	12	3
Row percent	100%	80%	20%
Col percent	29%	30%	27%
Tot percent	29%	24%	6%
<b>Yes, Change</b>			
No. of states	25	17	8
Row percent	100%	68%	32%
Col percent	49%	43%	73%
Tot percent	49%	33%	16%

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FOOTNOTES

1. See for example, Fogel, 1975; Von Hirsch, 1976; Dershowitz, 1976; Feeley, 1980; McCarthy, Sheflin, & Barraco, 1979; Hogarth, 1971; Shane-DuBow, et al., 1979; Clark & Koch, 1977).
2. The extensive and thorough assistance of Thomas Biladeau in developing this section is gratefully acknowledged.
3. One noted instance, and one that would effect the course of American criminology, was that of Pennsylvania. The Quaker William Penn, in receiving his charter for what would eventually become the colony, instituted a system of justice which not only provided for more rights of process to accused persons, but also based its actions upon a defined code that, among other things, limited use of the death penalty to only deliberate murder. The unusual experiment in the new world ended, however, when Queen Anne succeeded Charles II and annulled the colony's code.
4. The California indeterminate sentencing system was indeterminate in the extreme. Rather than sentence to a set term within an indeterminate range (i.e., 5 or 10 years for an offense which carried a maximum penalty of 20 years), the California system required sentences of an indeterminate range. Defendants were sentenced, for example, to up to ten years, or up to 5 years, etc.
5. Ralph Gardner, Jr., "Prison Population Jumps to 369,725," Corrections Magazine, June, 1982.
6. Ibid.
7. Ralph Gardner, Jr., "Prison Population Jumps to 369,725," Corrections Magazine, June, 1982.
8. Based on interviews conducted by the Alaska Judicial Council, Sentencing in Alaska, by Beverly Cutler, March, 1975.
9. For example, in 1973 no one was prosecuted as an habitual offender (Cutler, 1975).
10. The prison population in Alaska for 1981, including those serving time in jails, was only 1,010 (Gardner, 1982). For the two year period 1975-1976, only 2,283 defendants were charged with felonies (Rubenstein, et al., 1980). Other reasons why Alaska may not be a typical state include: the ban on plea negotiations was uniformly ordered and organized throughout the state by the Attorney General's Office; and the Supreme Court further ruled against judges dealing with defense counsel which would prohibit sentence recommendation discussions. Additionally, all judges are required to inquire about negotiated pleas between counsel and the prosecutor-- because all pre-sentence hearings must be recorded, any plea negotiations could easily be detected.

11. Personal communication with Peter Anderson, Criminal Court Administrator's Office, Maricopa County, March 18, 1981.
12. Arizona looked at the feasibility of adopting the guidelines developed for Maricopa County for use under the revised criminal code. Some of the original Albany researchers were retained as consultants and attempted to update the original guidelines by restructuring the guidelines to conform to the new code. The guidelines developed as a result of this effort were to be used in Maricopa County for six months, but plans were ultimately abandoned when it became apparent that the guidelines could not be incorporated into the new, more restrictive system.
13. Effective March of 1982, there were 85 inmates serving such sentences in Arkansas' prisons (Arkansas Department of Corrections).
14. However, probation could be restricted in some cases and denied entirely in others; for example, those cases where there was great bodily harm, or persons had extensive prior violent felonies.
15. Certain capital crimes were not covered by SB 42 and remain indeterminate. These were not included in this report. Also, misdemeanors were not affected by the Bill.
16. A "wash-out" provision was provided in that prior incarcerations were not counted if there was a 5-year period between release from prison and the date of the instant offense

for non-violent offenses, and a 10-year period between release from prison and the date of offense for violent felonies. Note that prior incarcerations were counted, not convictions.

17. Inmates severely criticized the "violent hearing provision" because those scheduled for these hearings were first notified of the mechanically recalculated date, and then later notified whether or not they were required to attend a hearing before their release could be determined.
18. Commitments per 100,000 persons in 1977 were 32.4 persons; in 1978, 39.2 per 100,000; and in 1979, projected to be over 40 per 100,000 (Lipson and Peterson, 1980).
19. California Department of Corrections, "Two Years Experience Uniform Determinate Sentencing Act, July 1977-June 1979", December 14, 1979.
20. Colorado Revised Statutes, 1973 and 1980 Cumulative Supplement, Volume 8.
21. Meyer, Kathryn, Proposed Revision of the Colorado Criminal Code, Advisory Commission on Crime Classification and Sentencing, November, 1981.
22. Personal communication with Tom Siconolfi, Connecticut Justice Commission, March 20, 1981.
23. Final Report of the Legislative Sentencing Commission, March 12, 1980, p. 2.

24. "Revising Connecticut's Sentencing Laws: An Impact Assessment." by Gregory P. Falkin, Gail S. Funke, and Billy L. Wayson.
25. "Revising Connecticut's Sentencing Law: An Impact Assessment." By Gregory P. Falkin, Gail S. Funke, and Billy L. Wayson.
26. In fact, Public Act 81-437 was passed in order to allow for inmate release from the institutions to alleviate the overcrowding problem.
27. Falkin, et. al., 1981.
28. These specified offenses include arson (1st degree), burglary (1st and 2nd degree), murder (1st and 2nd degree), manslaughter, kidnapping (1st and 2nd degree), assault, rape (1st and 2nd degree), sodomy, and robbery.
29. Telephone conversation with Ron Turner from the Delaware Council on Criminal Justice, 1981.
30. Correspondence with Samuel F. Harahan, Executive Director, The Council for Court Excellence, Feb., 1983.
31. Florida Supreme Court, Office of State Courts Administration. "Multi-jurisdictional Sentencing Guidelines Project-Guidelines Manual." Tallahassee, Florida, April, 1981.

32. "Multi-jurisdictional Sentencing Guidelines Project--Guidelines Manual" Office of State Court Administrator, Florida Supreme Court, Tallahassee, Florida. April, 1981, p. 1.
33. The latest legislative initiative in this area was a bill which would have given judges the option of imposing either a determinate (i.e., "fixed") or indeterminate sentence. This bill was defeated in the 1982 session.
34. For 1980, this number was 770; in 1981 it was 1,729 (Gardner, 1982).
35. Under the act, a dangerous offender is defined as anyone imprisoned for any of the following offenses: murder, voluntary manslaughter, kidnapping, armed robbery, rape, aircraft hijacking, aggravated sodomy, aggravated battery, aggravated assault, incest, child molestation, child abuse, enticing a child for indecent purposes, trafficking in cocaine, marijuana, or other illegal drugs; and any inmate incarcerated for a second and subsequent time for commission of a crime for which the inmate could have been sentenced to life imprisonment.
36. For the trafficking of cocaine and marijuana, the schedule of mandatory minimum sentences goes from 5 years and a \$50,000 fine to 15 years and a \$250,000 fine, with an intermediate sentence of 7 years and \$100,000. For the trafficking of morphine and opiates, the schedule is the same except for the most severe sentence, which is 25 years and a \$500,000 fine. For all of these groups of

offenses, the schedule corresponds to various amounts of the contraband.

37. Data for the study were taken from the population of convicted felons sentenced in Georgia's Superior Courts from 1974 to June, 1980.
38. For a discussion of the Hawaii Correctional Master Plan, see Serrill, Michael, S., "Building Prisons in Paradise," Corrections Magazine, Dec., 1978.
39. On the other hand, statistics on the rate of sentenced prisoners per 100,000 civilian population indicate that there was not a significant increase in the prison population until the latter part of the seventies. Between 1972 and 1977, the rate of sentenced prisoners per 100,000 civilian population stayed between 38.8 and 44, giving Hawaii one of the lowest rates in the country. By the end of 1978, however, the rate had gone up to 57 and by the end of 1979, it was at 93. (Sourcebook, 1982).
40. In this regard, it is also worth noting that pre-sentence investigations are very important in Idaho. Unlike most states, judges are required to state their reasons in the record for not ordering a pre-sentence investigation for any felony case.
41. The relevant cases are State v. Rawson, 100 Idaho 308, 597 P. 2d 31 (1979); and State v. Avery, 100 Idaho 409, 559 P. 2d 300 (1979).
42. Art. 5, 13.
43. These offenses include rape, the "crime against nature," and lewd and lascivious conduct with a person under 16.
44. Criminal Courts Technical Assistance Project, 1980.
45. Fogel's concern for equity extended to victims as well. Under his proposal, victim restitution programs would have been vastly expanded by allowing victims to contract with criminals.
46. Weisman, Washington Post, 1975.
47. With rhetoric like this, the debate began to focus on which bill would be the tougher measure. For their part, the Democrats supporting the H.J. II proposal emphasized the determinacy of their entire sentencing structure, the severity of the extended terms, and the fact that Thompson's Class X offenses were subject to the same six-year mandatory minimum term under this proposal. In addition, before the House passed the Judiciary II proposal (as HB 1500), both the severity and the range of sentences for Class 1 offenses were increased (to 6 to 25 years from 4 to 12 years).
48. As originally passed, these convictions had to be within Illinois, but this has since been changed to apply to any equivalent convictions in the United States (See Illinois Code, 1982 Supplement).
49. These rules and regulations include 71 different offenses, some of which

are very ambiguous and minor. One such offense is disturbing the peace and quiet.

50. Information from personal correspondence with Mr. Fischer.
51. It should be pointed out that additional research on the question of racial disparity in sentencing is currently underway. Significantly, attempts are being made to employ a variety of statistical measures of variance, including standard and stepwise regression as well as configural analysis. Unfortunately, analysis will be limited to the type of sentence rather than an examination of both the type and length. Moreover, the number of independent control variables is somewhat limited.
52. The survey response rate was a relatively high 65 percent.
53. Sentence examples from selection provided by legal section, Louisiana Department of Corrections, September, 1982.
54. Sourcebook of Criminal Justice Statistics, 1982.
55. David Fogel, "...We Are the Living Proof..." , Cincinnati, W.A. Anderson, 1975; Alan Dershowitz, Fair and Certain Punishment, Report of the Twentieth Century Fund Task Force on Criminal Sentencing, New York, McGraw-Hill, 1976; Andrew Von Hirsch, Doing Justice-The Choice of Punishments, New York, Hill and Wang, 1976.
56. We are indebted to Dr. David Fogel of the University of Illinois at Chicago for making available background information relating to criminal justice issues in Maine.
57. In fact, Maine was not isolated from the tumult of the sixties, either. In this regard, it is interesting to note that some of the impetus for reform appears to have come from an organization comprised primarily of offenders and ex-offenders. The Statewide Correctional Alliance for Reform (S.C.A.R.) successfully challenged prison regulations on literature, the right of prisoners to assemble, and the right of ex-prisoners to organize inmates. Several SCAR members also served on Governor Curtis's Task Force on Corrections. However, the recommendations of the Task Force were considered too radical and were never acted upon by the legislature (Kramer, Hussey, et. al., 1978).
58. The others had not been published by the time the Commission had completed the bulk of its work.
59. The Commission's arguments against the parole board were based on somewhat spurious grounds. Responding to critics who claimed that its decisions were capricious and counter to due process, the board had adopted a policy whereby it released virtually all prisoners (over 95 percent) when they first became eligible for parole. This policy was well known among judges and other participants in the system (Kramer, Hussey, et al., 1978).

60. The code also establishes and clarifies several rules of law. For example, it specifies the conditions under which one person may be held accountable for the criminal behavior of another.
61. *State v. O'Brikis* (1981) Me., 426 A. 2nd 893.
62. This information was obtained in a phone conversation with Mr. Dyer.
63. Unless noted otherwise, information on the Maryland Sentencing Guidelines was obtained from Ms. Pat Nelson, Director of the Project, and Charles Clemons, Research Analyst.
64. Crimes of violence include abduction, arson, kidnapping, manslaughter, mayhem, murder, rape, robbery, sexual offense in the first or second degree, use of a handgun in the commission of a felony, assault with intent to murder, assault with intent to rape, and attempts to commit any of the felonies. In 1981, robbery with a deadly weapon was added and, in 1982, burglary (nighttime) was added.
65. In addition, the maximum for the offense of manslaughter by automobile or motorboat was raised in 1982 from three to five years.
66. In a forthcoming National Institute of Justice publication, Professors Bowers and Pierce of the Center for Applied Social Research at Northeastern University will address the question of whether the "gun law" has had a deterrent effect. However, the law is continuing, accord-

ing to Professor Bowers' preliminary indications, to have a deterrent effect. Initially, it had been speculated that this effect was due to the amount of publicity that the law received when it first went into effect.

67. Unless specifically cited, information on sentencing guidelines in Massachusetts was obtained from the following sources: "Superior Court Judges Test Proposed Sentencing Guidelines", a press release from the Chief Justice of the Superior Court; Thomas Jakob Marx, "The Question of Racial Disparity in Massachusetts Superior Court Sentences", unpublished report to the Massachusetts Superior Court, May 16, 1980; and the sentencing guidelines manual developed by the Massachusetts Sentencing Guidelines Project and the Committee on Probation and Parole of the Massachusetts Superior Court Department. More recent information was obtained from Mike McEnney.
68. Thomas Jakob Marx, "The Question of Racial Disparity in Massachusetts Superior Court Sentences," p. 7, Report to Massachusetts Superior Court, May 16, 1980.
69. Naturally, the guidelines did not override the provisions of the Bartley-Fox amendment.
70. For a discussion of the most important of these determinate sentencing proposals, see Zalman (1978) and Zalman et al., (1979).
71. We are grateful to Kevin Bowling, former Director of the MFSP, and

Garrett Peaslee, current Acting Director, for providing us with information about the history and current status of the project.

72. In addition to the resignation of two of the state's Supreme Court Justices (including the Chief Justice), the guidelines effort was set back by the sudden death of Justice Blair Moody, who was also the Chairman of the Sentencing Guidelines Advisory Committee.
73. Some recent work (Blumstein, 1982) argues that simply ignoring the coefficients for race and other inappropriate variables, without recalculating the equation, simply distributes the effect of the inappropriate variables on the appropriate, weighted ones used to form the prior record and severity dimensions.
74. The N for the after sample of felonious assault cases was 39, for other assaults it was 53, and for armed robbery, it was 136.
75. Both of the studies discussed in this section are reviewed and analyzed in greater detail by Cohen and Tony in a forthcoming publication entitled Research on Sentencing: The Search for Reform (Blumstein et al., eds., expected 1983). The discussion here has benefited from access to the final draft of this report.
76. See Blumstein (1982), "An Approach to the Allocation of Scarce Imprisonment Resources" for an interesting alternative discussion

of how prison populations might be kept at pre-determined levels.

77. Based on 1963 legislation.
78. See Shane-DuBow, et al., 1979, p. 36-39 for a discussion of Minnesota's parole guidelines.
79. For more detail of the politics involved in Minnesota's sentencing reform effort, see Susan Martin's excellent review "The Politics of Sentencing Reform: A Comparative Case Study of the Development of Sentencing Guidelines in Pennsylvania and Minnesota," forthcoming.
80. Commission members include a Supreme Court Justice, two trial judges appointed by the Chief Justice, a prosecutor, a defender, two citizens appointed by the Governor, the Commissioner of Corrections, and the Chairman of the MCB. A research staff was also appointed consisting of a director, administrative assistant, secretary, and four researchers.
81. The average sentence was found to be 19.5 months, property crimes were 13.8 months, and person offenses 28.5 months.
82. See the Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines, 1982, for a discussion of the alternate dispositional lines developed by the Commission.
83. Some critics contend that a true just deserts model should not

include prior criminal history information in determining sentences.

84. See Blumstein, "The Impact of Changes in Sentencing Policy on Prison Populations," forthcoming.
85. Initially, the Commission attempted to modify this law by simply allowing a reduction in the severity level of one or two points, depending on the offense. In doing so, the Commission hoped to take into account the variety of offenses and the different meanings attempt and conspiracy may have when attached to different offenses. This modification, however, would have resulted in significant population increases in institutions, and the Commission adopted the old law of halving sentences for attempts and conspiracies.
86. The MCB, however, still had jurisdiction for those inmates sentenced before the sentencing guidelines legislation and could also make discretionary decisions of when to release inmates to work release programs. Inmates were eligible for work release only after serving half of their sentences.
87. The director of research for the Commission and others concerned about the impact of the guidelines have contributed articles to the June 1982, issue of the Hamline Law Review which we highly recommend to those wishing more details on post-implementation effects of the Minnesota sentencing reform.

88. There is almost no evaluation literature on the effect of the Minnesota guidelines that has been done by researchers who were not a part of the initial guideline development effort. Although the research integrity and skills of the original Minnesota research team are hardly in question, it would be an addition to see work done on the Minnesota experiment by qualified individuals who were not part of the reform project.
89. Mississippi does not have a separate statute for armed robbery.
90. Correspondence with John Hopkins, General Counsel.
91. From May 1, 1979 to April 30, 1980, over 40 percent of all felony convictions in Nebraska were for Class IV offenses (Sutton, 1981).
92. Most offenders in Nebraska are released at this time.
93. Memo from Donald A. Rhodes, of the Legislative Counsel Bureau, August 31, 1982.
94. We are indebted to Thomas Barry, Coordinator of Judicial Education in New Hampshire, for forwarding a copy of the special court rules relating to the Sentence Review Division.
95. It appeared that prosecutors were somewhat unwilling to charge and judges somewhat unwilling to sentence all persons as severely as the law required. See Feeley (1980).
96. Personal communication with Mike McEnney, Administrative Office of

the Courts; and John Poklemba, New York State Court Administration Office, 1981.

97. Unless otherwise noted, information about the act is drawn from Clarke, Steven H., and Rubinsky, Elizabeth W., North Carolina's Fair Sentencing Act, Institute of Government, University of North Carolina at Chapel Hill, 1981.
98. It should be pointed out that North Carolina is one of only three states (the other two being Illinois and Vermont) which authorize judicial participation in the plea-bargaining process. Moreover, unlike Illinois and Vermont, North Carolina's law provides few guidelines for this participation, other than to delegate ultimate authority for a "plea arrangement as to sentence" to the trial judge and to require judges to notify the relevant parties of their decision regarding a proposed sentence. According to Lefstein, "The statute indicates neither when nor in what manner the trial judge may participate. The crucial question respecting the degree of pressure, if any, that a judge may use in seeking to convince a defendant to plead guilty is not addressed."
99. Shane-DuBow, Brown, and Olsen (1982), also found that unmarried Wisconsin felons received shorter sentences (controlling for similar other variables).
100. There is only one reformatory for women in Ohio. However, a distinction is made between penitentiary

or reformatory commitment for parole purposes.

101. Swisher, 1978.
102. Letter from Thomas R. Swisher of the Ohio State Bar Foundation to Judge Guy Goulard, Director of the Sentencing Project, Ottawa, Canada, March 10, 1981.
103. From January to August, 1981, the Governor rejected only six percent of the parole releases (Department of Corrections, 1982).
104. This bill also allows inmates a deduction of 20 days for every pint of blood donated to the Red Cross or other agency, up to four donations or 120 days per year. This credit cannot be revoked under any circumstances.
105. However, current legislation is attempting to seek a reversal of this order.
106. Taylor, Elizabeth, "In Search of Equity: The Oregon Parole Matrix" Federal Probation, March 1979, V. 43, N. 1, p. 54.
107. Personal communication with Linda Zuckerman, Legal Counsel, House Judiciary Committee.
108. The Commission consisted of four legislators, four judges, a prosecutor, a public defender, and a criminologist.
109. Data Collection Report, Pennsylvania Commission on Sentencing, 1980.

110. Weighting prior record according to seriousness was a relatively unique development in guideline research.
111. For a fuller description of the politics of sentencing reform in Pennsylvania see Martin, 1983.
112. Martin (1983) discusses the basis for strong regional sentencing differences in Pennsylvania.
113. Previously only in 20 percent of the cases, they are now required for all felony convictions.
114. Partridge and Eldridge, 1974.
115. There are no good-time provisions in Rhode Island.
116. "A Study and Review of Prison Overcrowding in South Carolina," South Carolina General Assembly Legislative Audit Council, 1983.
117. Legislative Audit Council, p. 150.
118. *Ibid.*, p. 11.
119. Legislative Audit Council, Personal communication with Frank Sanders.
120. Cathcart, et al., 1981.
121. Sanders, personal communication.
122. LAC report.
123. It should be cautioned, however, that prior record variables were not included in the new admission evaluations.
124. The Act did not change the statutory designation for any offense.
125. Vance, 1974.
126. 1978 Handbook on Parole, Texas Board of Pardons and Paroles.
127. However, this was only a 5.4 percent increase from 1980 (Gardner, 1982).
128. Personal communication, Oldroyd, 1982.
129. "Sentencing Data Project: Six Month Evaluation--February-July, 1982" by the Supreme Court of Vermont, Office of Court Administrator, September 1982.
130. "Procedure for Use of Sentencing Data", January 25, 1982.
131. Personal communication with Kenneth Montero, Director of Legal Research, Supreme Court of Virginia.
132. The studies include the following: State Crime Commission Sentencing Study, 1977; Legislative Committee Study, House Document No. 26, 1980; Virginia Department of Corrections, Sentencing Disparity in Virginia by Court Setting, 1980; and "Sentencing in Criminal Cases: How Great the Need for Reform?", University of Richmond Law Review, 1979.
133. 61 Virginia Law Review, p. 1705.6 (1975).
134. In Virginia jury trials, the jury determines a non-suspendable sentence which may be, but seldom is, reduced by the judge.
135. 66 Virginia Law Review, p. 257 (1980).

136. See Code of Virginia 53.1-196 1982 p. 218.
137. Code of Virginia 53.1-201 1982, p. 220.
138. The Parole Decisions Project was also concerned about any change that might occur in the prison population as a result of the implementation of the parole guidelines. A computerized model was developed to make projections of the prison population. The project also developed an information system that stored information gathered on the offender, the offense, prior record, other data used in predicting parole performance, and the decisions of the parole board.
139. The Commission consists of 15 voting members appointed by the Governor. Members include four Superior Court judges, two defense attorneys, two prosecutors, three citizens, the directors of three state agencies, and the chief of a local law enforcement agency. Four legislators serve as non-voting members.
140. Currently, there are mandatory minimum provisions for offenses committed with a firearm, for repeat or habitual offenders, and for first degree rape.
141. Correspondence with Paul Crabtree, Administrative Director of the Courts, Supreme Court of Appeals, West Virginia, September, 1982.
142. The site of the new prison was the focus of an extended debate as well as legal action by parties who attempted to block the location of a

prison in Milwaukee, preferring rural, less populated counties as potential sites. To the credit of the Department of Health and Social Services which was attempting to locate the new facility near the home of many of the state's inmates to encourage family visits (44 percent of the felony caseload is from Milwaukee), as well as to increase the possibilities of hiring non-white guards for the institution (county locations of most of the existing facilities have minimal or non-existent minority populations), Milwaukee remained the site.

143. The parole board is also part of the Department of Health and Social Services.
144. Well over a third of the felony caseload is disposed by probation sentences. Personal communication with the Director of the Bureau of Community Corrections, 1983.
145. Class A offenses include first degree murder and treason. Class B offenses include first degree sexual assault and armed robbery. Class C offenses include burglary, unarmed robbery, and second degree sexual assault. Class D offenses include certain kinds of theft and third degree sexual assault. Class E offenses include car theft and false imprisonment.
146. Personal communication with Ed McClain, Deputy Director of State Courts.
147. See Shane-DuBow et al., 1981, for a full discussion of the effect of

extra-legal and "quasi-legal" variables on sentences for armed robbery.

148. Or, indeed, addressed their relationship to crime commission or conviction, public safety perceptions, or other criminal justice system problems.
149. Statistics on prison population increases were compiled from documents published by the Bureau of Justice Statistics, U.S. Department of Justice, Washington, D.C.

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