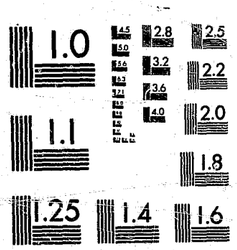

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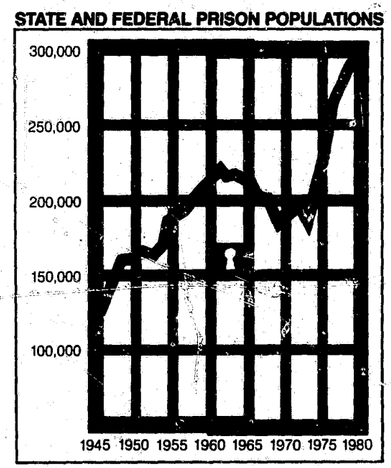
American Prisons and Jails

Volume IV: Supplemental Report – Case Studies of New Legislation Governing Sentencing and Release.



a publication of the **National Institute of Justice**

OVERVIEW OF MATERIALS AVAILABLE FROM THE SURVEY OF AMERICAN PRISONS AND JAILS

On October 15, 1976, the *Crime Control Act of 1976* was enacted into law. The Act included the following mandate:

> "The Institute shall, before September 30, 1977, survey existing and future needs in correctional facilities in the Nation and the adequacy of federal, state and local programs to meet such needs. Such survey shall specifically determine the effect of anticipated sentencing reforms such as mandatory minimum sentences on such needs. In carrying out the provisions of this section, the Director of the Institute shall make maximum use of statistical and other related information of the Department of Labor, Department of Health, Education and Welfare, the General Accounting Office, federal, state and local criminal justice agencies and other appropriate public and private agencies."

The National Institute of Law Enforcement and Criminal Justice, within the Law Enforcement Assistance Administration, was assigned the responsibility for executing the study. In order to respond to the statutory requirement for a report to Congress no later than September 30, 1977, and to address the longer term research issues, a two-phased research project was developed, resulting in the following interim and final reports:

INTERIM REPORTS:

Prison Population and Policy Choices, Volume I: Preliminary Report to Congress and *Volume II: Technical Appendix,* September, 1977. These volumes document the first four months of project activity. The major analyses conducted during that period are also summarized in the final report volumes.

FINAL REPORTS:

American Prisons and Jails, Volume I: Summary Findings and Policy Implications of a National Survey, presents in summary form the major findings of the study and implications for corrections policy. This volume serves both as a self-contained document for the policymaker and a foundation for the more detailed presentation of results in Volumes II, III, IV and V.

American Prisons and Jails, Volume II: Population Trends and Projections, presents a history of the size and composition of inmate populations at the federal, state and local levels of government, defines the models used to project future populations, discusses the significant limitations of those models, and presents state-by-state projection results. The accuracy of these projections is tested for the years for which actual inmate counts have become available.

American Prisons and Jails, Volume III: Conditions and Costs of Confinement, discusses the physical conditions and costs of the institutions surveyed, including an important assessment of institutional capacities based on the application of standards promulgated by the Commission on Accreditation for Corrections, the Department of Justice and other prison and jail standard-setting groups.

American Prisons and Jails, Volume IV: Supplemental Report—Case Studies of New Legislation Governing Sentencing and Release, examines the impact of revisions in sentencing and release policies on inmate population flows. The case studies include investigations of two determinate sentencing statutes, a mandatory sentencing law, parole release guidelines, and a Community Corrections Law.

American Prisons and Jails, Volume V: Supplemental Report—Adult Pre-Release Facilities, discusses the physical conditions, staffing and costs of those institutions that house sentenced prisoners for less than 24 hours a day.

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AMERICAN PRISONS AND JAILS

Volume IV: Supplemental Report
Case Studies of New Legislation Governing Sentencing and Release

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VOLUME IV
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Chapter 1
INTRODUCTION AND SUMMARY

1.1 Mandate for the Case Studies

This volume of American Prisons and Jails presents five case studies of recently amended laws governing sentencing and release practices. As part of the larger study to survey existing and future needs of state correctional facilities, the case studies speak to the stipulation in the 1976 Congressional mandate which reads:[1]

> "Such survey shall specifically determine the effect of anticipated sentencing reforms such as mandatory minimum sentencing on such needs."

This excerpt suggests that the chief concern of the Congress was with legislative proposals intended to limit, or at least formally guide, the discretion available to the judicial and executive branches in making the decision to imprison and setting the term of imprisonment. In the five years preceding the Congressional mandate, state and federal prison populations increased by 33 percent resulting in a rapid deterioration of prison facilities and conditions of confinement.[2] With the enactment of new laws calling for across-the-board changes in sentencing and release principles and in some cases sanction levels, problems stemming from overpopulation, the Congress feared, might become further exacerbated.

The projections discussed in Volume 2 (Population Trends and Projections) have considered only the impact of historical criminal justice policies and processes on future population movements. The three series of numerical projections presented in that volume are essentially statements about the past, each based on different assumptions about which past relationship will remain in force until 1983. As that report has emphasized, these relationships can break down at any time: Any policy decision relating to the criminal justice system that changes the status quo at any of its points, potentially affects correctional populations. If the policy change alters the pace, characteristics or distribution of offenders flowing through the criminal justice system, it can alter the balance between space and people.

In developing our projections, no general rule could be offered for considering the effects of broad, substantive changes in sentencing policy since the characteristics of these statutory changes differ in every state. As a result the case studies were developed to examine the vulnerability of prison populations to the specific changes enacted in five states. Four of the case studies dealt with legislation which altered statutory provisions

governing sentencing or release: one with mandatory sentencing, two with determinate sentencing, and the fourth with state subsidized community corrections. The fifth case study involved legislation that mandated the establishment of parole release guidelines.

As the name implies, mandatory minimum sentencing requires judges to impose a prison sentence upon a guilty finding on certain types of charges (mandatory sentence) and prohibits release from prison until a minimum time has been served. This type of provision is typically aimed at violent crimes, particularly those involving firearms, and at drug dealing. If strictly enforced, these laws supersede the two major means of controlling population: probation and parole. The first case study was a 1975 Florida law mandating a minimum three-year prison term for possession of a firearm during the commission of designated felonies. This law explicitly prohibits parole release prior to three years, as well as any other mechanisms that might result in less than three years time (such as granting of good time or work release).

Determinate sentencing, as interpreted in this report, has as its defining characteristic the absence of a paroling authority to grant release from prison before the court-imposed sentence has been served. Under determinate sentencing thus defined, the time actually served in prison is the sentence less time off for good behavior and, in some states, for participation in prison work programs.[3] This results in release dates that theoretically can be known within the range of allowable good time. It also places a greater emphasis on offense and offender characteristics than on rehabilitative progress. Liberals and conservatives alike are faced with determinate sentencing dilemmas. While favoring the apparent increase in equity, liberals may fear the possibility that future legislators will increase the length of determinate sentences without a parole board that could take "corrective" action. Conservatives may approve of the notion that the full sentence be served (less good time) but generally dislike the prospect of "clearly dangerous" persons being prematurely released. Nonetheless, optimism on the part of both groups has led to broad support for determinate sentencing as defined here. The year 1977 saw California and Indiana follow Maine by adopting penal codes of this nature.

State subsidies for community-based corrections, especially for juveniles, were first tried on a large scale in California in 1963. Lasting until 1978, the Probation Subsidy Program provided state funds for community-based correctional programming, with an emphasis on intensive probation. Counties received subsidies for keeping their rate of commitment to state institutions below a baseline level computed from commitments in a prior period. A more contemporary version of state subsidized community corrections, authorized by Minnesota's Community Corrections Act of 1973, constituted the fourth case study. The Minnesota program is broader in scope than was California's Probation Subsidy Program, calling for participating counties to develop plans that incorporate all forms of community corrections, including jail time. Additionally, Minnesota's Community Corrections Act requires counties to pay a fee to the state for committing those convicted of felonies carrying maximum statutory sentences of five years or less.

The fifth case study dealt with Oregon legislation calling for the Parole Board to establish, among other things, an array of nominal prison term ranges which in most cases would contain actual time spent in prison before parole release. Parole release guidelines, as they are often called, resemble determinate sentencing in that the actual time to be served in prison can be determined within good time provisions once the conviction charge is known. Essentially, this is accomplished by parole boards' use of pre-established prison term "standards," based on offense and offender characteristics. It is argued that this approach shares the benefits found in determinate sentencing but avoids the burdensome task of amending the penal code. Thus, the Oregon approach, like those of California and Indiana, moves the determination of sanctions nearer to the beginning of the prison term, sets forth explicit criteria for the length of those terms, and attempts to reduce the perceived arbitrary component of parole release decisions.

These changes in the structure of sentencing and release decisions emerged in a context of two major ideological shifts in legislative and correctional thinking. The first was an attempt to reduce or eliminate some of the unfair disparity which was said to follow from parole boards' powers of ad hominem release decisions. The second was an explicit desire to increase the real or perceived severity of correctional sanctions. An ever-increasing fraction of public opinion held that courts were "too lenient in dealing with criminals."[4] Opponents of determinate sentencing feared it would increase the prison populations. Proponents (sometimes) hoped it would.

The case studies explored the degree to which the changes in sentencing and release policies may have affected the size of the prison and jail populations. The changes we examined were all comparatively recent innovations. None of them had been in force long enough to accrue the kind of experience which would support confident statistical conclusions about their effects, and some were so new that we could only observe the initial transition period. The limited analyses performed suggest that the dynamics of population flow may have been altered, but that average daily populations have not departed significantly from trends observed prior to the statutory changes. While it is too early to deny categorically that such changes will ever influence the prison population, it seems clear that the dramatic effects some had predicted have failed to materialize, and that the size of prison and jail populations is at most indirectly influenced by the mechanisms studied here. Determinacy emerges as neither a major cause of, nor a major cure for rising prison populations, and at most may serve to increase the severity of some sentences while reducing the severity of others.

Assessing the impact of changes in statutory provisions governing sentencing or release on the number of persons in correctional institutions called for the examination of three major issues: (1) intended or expected effects of the changes; (2) unintended consequences due to adjustments made by criminal justice system components and the re-channeling of discretion among these components; and (3) underlying forces that simultaneously account for both legislative action and population trends. In an overview, the next four sections summarize ways in which the five case studies informed these issues.

1.2 The Primary Relationship: Legislative Intent and Its Implication for Prison Population

Florida's mandatory minimum three-year prison term for certain felony convictions involving firearms sought a greater deterrent effect through stiffer penalties and greater certainty of their imposition. Arguing that too few criminals are imprisoned, proponents of mandatory minimum laws also hoped to reduce crime through incapacitation. The Florida case study in Chapter 3 did not attempt to measure deterrence, but did develop indicators of the incapacitation rate for felonies involving firearms.

The three-year mandatory minimum gun law, which became effective in October 1975, applies to eleven types of felonies, including robbery and burglary. This law would rarely be invoked in burglary cases since they infrequently involve charges of firearm possession. Since robbery frequently involves the use of firearms, admissions to prison for robbery, relative to burglary, were examined for periods before and after the law's effective date. As shown in Section 3.3, no indication of an impact was found in this regard. Statistics were also analyzed for a number of offense categories on time served in prison. This analysis found that a larger percentage of armed robbers served three years or more after the law went into effect than before.[5] This percentage also exceeded the corresponding percentage in all offense categories except homicide. This may result in a long-term gradual increase in the population of Florida's prisons, beginning in mid-1978.

California's determinate sentencing law (effective July 1, 1977), subject of the case study in Chapter 4, reversed that state's highly indeterminate system of sentencing and release. Under indeterminate sentencing in California, the judge would, upon a guilty finding and a decision to imprison, impose sentence as provided by statute (one-to-life for several common crimes). The parole board determined the actual release date, in theory based primarily on rehabilitative progress. Under this system, the nature of the offense and the past record of the inmate were of secondary concern. Determinate sentencing procedures in California are largely set by statute.[6] In addition to life sentences there are four felony classes each carrying three possible terms: 16 months, 2 years, or 3 years; 2, 3, or 4 years; 3, 4, or 5 years; and 5, 6, or 7 years. The middle term must be selected unless there are aggravating or mitigating circumstances. "Enhancements" can also be added to the term if certain elements are present. Except in certain types of cases involving firearms where commitment to a state institution is mandatory, the decision to imprison is based on guidelines established by the State Judicial Council. Judges are afforded a degree of latitude in specifying the sentence in most cases, but in every case, applicable provisions must be indicated on the record.

Because statutory ranges in California had been so broad under the indeterminate system, the specification of determinate terms noted above had to rely on the actual time served by those who had recently been released from prison. Compared to maximum terms of 10, 20, 30 years and life, these time-served statistics (and consequently the determinate terms) seemed quite short, although in fact they simply reflected parole board practices of the

time. Most states that may be contemplating determinate systems will have to deal with this rather significant psychological element. In summary, the intent of the determinate sentencing law in California was to narrow disparity by eliminating the exercise of release discretion, but to maintain the status quo with respect to "typical" prison terms.

Apart from concern by some that the length of sentences would increase with each legislative session, and by others that a substantial number of indeterminately sentenced inmates who had served terms in excess of corresponding determinate sentences would be released at once, no significant short-term impact on prison population was anticipated. Our analysis of data on the first year's determinately sentenced cohort in Section 4.3 suggests that larger proportions of felony convictions result in prison sentences; sentence variation for similar crimes has been narrowed; and median terms may be lower for burglary, marginally higher for robbery, and lower for all felonies combined. In the two years since determinate sentencing went into effect on July 1, 1977, the volume of newly-received felons is the largest in the history of the State, with short-term prison population increases as a result.

Given these findings, it is tempting to conclude that determinate sentencing has produced greater numbers going to prison, but serving less time. There are, however, several confounding factors such as Proposition 13 which stands to reduce expenditures for local corrections; termination of the Probation Subsidy Program which had as one goal, diversion of non-dangerous felons to local correctional programs; and prior trends toward a higher probability of receiving a prison sentence given conviction.[7] The fact remains, however, that pre-law expectations of no change in admission volume and "typical" length of stay have apparently been violated.

The new Indiana criminal code (effective October 1977) is also of the determinate variety in that the state parole board no longer has the authority to release persons from prison. In addition to a 40-year sentence for murder, there are, as in California, four major felony classes carrying presumptive sentences of 2,5, 10, and 30 years within broad maximum and minimum limits.[8] In Indiana judges are free to select any length sentence in the allowable range, but deviations from the "presumptive" term must be explained on the record. For a given type of aggravating or mitigating circumstance, the magnitude of the deviation is left to judicial discretion, making the range of prison sentences for a particular type of offense available in Indiana much greater than that available in California.

A substantial number of mandatory imprisonment provisions appear in the new Indiana law, pertaining to second convictions, career criminals, and firearm involvement. At the same time, a number of safety valves are provided: the Department of Corrections is authorized to establish definitions of custody security levels, noting explicitly that minimum security need not involve incarceration; convictions on charges of attempted felonies are not subject to mandatory minimum provisions covering their non-attempt counterparts; and the maximum available "good time" provided by law halves the length of sentences. Most observers characterized the new Indiana law

as a prosecutor's law, noting the increase in negotiating leverage afforded to prosecutors by the combination of severe sanctions and provisions to circumvent their imposition.

As discussed in Chapter 5 the first ten months' experience under the new Indiana law found no indication of increased prison admission volumes. Comparisons between projected determinate terms and actual terms served by those released in a prior year showed substantially lower determinate terms for robbery, greater determinate terms for burglary, and approximately equal overall terms. The assumption that maximum (day-for-day) good time will be awarded yields the shortest possible determinate terms. We may also be seeing those cases which were readily negotiated to short sentences. Cases susceptible to longer sentences take longer to process and are not fully represented in our sample. Further experience is needed in Indiana to assess its impact on sentencing practices.

Minnesota's Community Corrections Act of 1973, discussed in Chapter 6, sought to improve efficiency and effectiveness in correctional programming through the enhancement of community-based alternatives. The act offered financial incentives to counties for keeping adults convicted of less serious felonies and all juveniles under community custody or supervision in lieu of State commitment. Other factors remaining constant, one would expect to see prison population declines and, in participating counties, possible increases in jail population. Counties first began to receive subsidies under the Act in July 1973.

In a limited study of sentencing practices, detailed in Section 6.3, we found declining trends among participating counties in the probability of incarceration for convicted felons. These decreases began at least one year before the effective date of the Act, and occurred in both counties covered by the Act and counties which were not covered. Thus CCA can have made at most a partial contribution to the observed changes in sentencing.

Our examination of (statewide) prison population trends found mid-1974, the point designated as the Act's implementation date for the first counties to participate, to be the low point of the seven-year trend beginning in 1970. After declining an average of seven percent a year between 1970 and 1974, the mid-year population count rose by an average of 12 percent a year to 1977. Inspection of admission and release statistics indicated that the latter was primarily responsible for the population increase after mid-1974. The instability of release volume clearly violated the ceterus paribus clause which qualified expectations regarding prison population.

The Oregon case study described in Chapter 7 dealt with 1977 legislation mandating the establishment of guidelines to be used by the parole board in determining the length of imprisonment time before parole release. Arrayed in a matrix, suggested prison term ranges are specified as a function of the seriousness of the offense and the characteristics of the offender. For each inmate admitted, "scores" are calculated for offense seriousness and offender characteristics (e.g., number of prior convictions and incarcerations, age at first commitment), and a tentative target date for parole is chosen within the corresponding range; a second

matrix provides broader ranges for cases involving exceptional circumstances of aggravation or mitigation. The legislative intent was to provide standards for making release decisions, which would vary over time in accordance with society's perceptions of "just deserts." Modifications are subject to the approval of an advisory commission consisting of parole board members and judges. With this mandate, clear expectations for the law's impact on prison population were not evident.

Data on prison population movement showed an annual increase in the State's average daily population of 20 percent from 1974 to 1977, due primarily to the combination of larger numbers admitted after 1973 and smaller numbers released in 1973 and 1974.

In 1978 over 90 percent of all releases were by parole (as distinct from discharge after serving sentence), compared to 50 percent eight years earlier. The annual volume of releases increased by an average of nearly 40 percent from 1975 through 1978, while new admissions began to level off during this period, causing average daily population to stabilize in that latter year. Increases in the proportion of the prison population paroled each year also speak to increasing parole activity in recent years. The role of the parole board in Oregon clearly changed during the last decade, and its level of activity during the latter half of the decade kept pace with prison population. As will be discussed further in Section 1.4 and in Chapter 7, the Oregon legislation appears to have formalized parole policies and procedures that were already in force.

1.3 Secondary Effects and Unintended Consequences

The revision of statutory provisions governing sentencing and release may also give rise to a host of side effects, due in large measure to actual and perceived shifts in the discretionary leverage afforded to various system actors. These unintended consequences may or may not violate legislative intent, but they could prove detrimental, at least in the short run, to the administration of justice in several ways.

The elimination of parole as a release mechanism (though perhaps not as a condition of release), for example, significantly enhances the importance of good time provisions in California and Indiana which if awarded could reduce the time actually served by factors of 33 and 50 percent, respectively. In these cases, the discretionary authority to determine length of stay in prison shifts from the parole board to correctional officials--indeed, correctional officers. Leverage over the prison stay of inmates is theoretically augmented by their decision on how to handle violations of institutional rules and other forms of inmate misbehavior.

In another example, the removal of a judge's authority to impose probation sentences under mandatory sentencing schemes would seem to give prosecutors considerably more bargaining leverage than might otherwise be the case. Indiana observers noted this possibility and short-term statistics on admissions and projected terms seem to bear this out. Plea negotiation

strategies were also altered in Florida and in Oregon, in the latter case due to the knowledge of prison terms likely to be served under the matrix ranges.

More generally, flat-time sentencing provisions are often perceived as affording state legislatures greater discretionary authority, at a policy level, in setting sanctions against criminal behavior and in defining seriousness. This was found to be the case in California where the derivation of prison sentences is closely guided by statute, and in Florida, where the legislature wished to ensure that a minimum of three full years would be served for convictions of targeted felonies.

Whether or not the range of possible unintended consequences of legislative reform are considered seriously before the fact, it is clear that some of them may actually conflict with legislative intent. In cases where more severe sanctions are introduced, defense tactics may shift toward greater delay, such as asking for trials in cases that would have been pled before the change. Section 2.4 will describe an enormous build-up of judicial backlog in New York as a result of the mandatory drug law there, which affected the efficiency of the justice system in that state for several years. The evaluation of the Massachusetts mandatory gun law, also discussed in Section 2.4, found greater use of delay tactics by the defense and a significant decrease in conviction likelihood.

The administration of justice involves much more than the direct imposition of punitive sanctions against those who violate the law. The complex network of decisions constituting the criminal justice system, designed to protect individuals against miscarriages of justice and afford them due process, gives rise to a host of possible secondary effects of changes to criminal statutes. The case studies clearly demonstrate how these effects would hamper predictions of the impact of such laws on prison population.

1.4 The Public Context of Statutory Revision

The third issue examined in the case studies dealt with the possibility that common forces were driving both legislative initiatives and institutional populations. Public calls for law and order, for example, might simultaneously drive legislators to pass "tougher" laws, lead to stricter enforcement, cause judges to impose harsher penalties, and reduce the rate of release on parole. It would be difficult to argue in such a case that tougher laws were the cause of harsher sanctions.

The issue of underlying forces is a serious, but unavoidable confounding factor in attempts to predict the impact of new sentencing and release statutes on prison population. Such forces may be in the form of public attitudes, criminal justice system workloads, prevailing policies and practices within and among criminal justice agencies (in turn, a function of the views held by system administrators and managers), or the availability of resources.

Two of the case studies provided indications of underlying forces at work. Our analysis of sentencing practices in the Minnesota case study found similar trends away from prison sentences in the counties which participated in the Community Corrections Act and the counties which declined participation (in the period covered by the analysis), raising the possibility that other forces were responsible for the common trend exhibited by the two samples. In Oregon, the parole board sought legislation which would give it the authority to establish prison term standards with which it had already been experimenting for two years. The increase in paroling activity that began in 1976 may well have reflected the initial guidelines which the parole board began using on an experimental basis in late 1975. In addition to making parole release decisions more explicit and to making it possible to estimate the length of prison terms with some degree of confidence (as under determinate sentencing systems), the Oregon legislation provided an expedient safety valve for prison overcrowding that relied solely on administrative procedure. Similar theories could also be developed for the other case studies.

1.5 Summary

Reform proposals dealing with sentencing and release have found broad popular support among conservatives and liberals alike. That each group has found these proposals consonant with vastly differing political ideologies, suggests that any result may be unlikely to satisfy expectations for reform. The authors of a preliminary analysis of Indiana's new determinate sentencing code have noted the extravagant promises associated with the change in that state:[10]

> "In the eyes of one interest group or another, the new Indiana Penal code is variously expected to increase deterrence, increase humaneness, decrease discretion, 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. Someone is bound to be disappointed."

Similarly, Volume II of this report has noted the conflicting predictions about the consequences of proposed legislative changes:

> "In Illinois, for example, different groups--all supporters of determinate sentencing--variously claimed that it would have no net impact on population, that it would reduce it, and that it would imprison more criminals."

This uncertainty of purpose and effect has generally characterized the changes we have studied here. Even after implementation, it is sometimes difficult to tell what changes in prison and jail populations are consequences of the law. What is clear is that a prediction of consequences based on a literal reading of the law's provisions is unlikely to provide a reliable guide to actual consequences.

While the laws may not change the number of people going to prison, they may substantially alter the distribution of discretion among actors in the criminal justice system, reducing the power of parole boards and/or judges, while enhancing that of law enforcement officials and prosecutors.

1.6 Implications for Prison Population Projections

The issues presented in the previous section give rise to serious questions about the predictability of prison population as a function of statutory provisions governing sentencing and release. We have seen that expectations for what these types of reform are to accomplish vary enormously and are often conflicting. In states where the criminal justice system has well established policies for dealing with those accused or convicted of crimes under existing statute, the passage of new laws is likely to see a number of unintended consequences. Given the large number of variables in addition to statutory provisions that may affect prison population, and the problem of measuring many of them in a meaningful fashion, and shifts in the locus of discretion, reliable long-term impact projections are simply not possible at this time.

In Chapter 8 several areas are outlined that may be ripe for future research. More narrowly focused studies should be undertaken on the effects of changing statutes on policies and practices of specific agencies, in relation to other factors which are believed to affect these agencies' contribution to the criminal justice system workload. One such study might, for example, focus upon sentencing or release statutes as one of many possible factors that shape plea negotiation policies, in an effort to measure the relative contribution of these statutes. Variation in policies governing the denial of good time, particularly in states where release by a paroling authority is no longer possible in most cases, also seems to be a fruitful area of research. At the other extreme, further work on models of the total criminal justice system would be valuable as a means of understanding the many interrelations among its components. While the utility of such models for predictive purposes has been called into question, they provide a framework for the "mini-studies" which are discussed in Chapter 8.

Finally, we note that data quality and flexibility for deriving measures of interest need further enhancement. Further efforts to standardize the definition of key variables (even as basic as "imprisonable crimes") are also necessary if the experience of some jurisdictions is to be of value to others contemplating similar initiatives. While much has been accomplished through the development of statistical systems which use a single unit of count for system transactions (e.g., Offender-Based Transaction Statistics and Prosecutors Management Information System), lack of comparability in classification and counting methods among agencies remains a problem in most jurisdictions.

Chapter 1: NOTES

1. P.L. 94-503, Section 402(e) of the Crime Control Act.

2. The number of adults serving sentences of more than a year in state and federal institutions rose from 198,061 on December 31, 1971 to 263,291 on December 31, 1976. Source: National Prisoner Statistics Bulletins published by the National Criminal Justice Information and Statistics Service.

3. The Harris survey found agreement with this statement rising from 49 percent in 1967 to 74 percent in 1977. Quoted in Nicolette Parisi et al., Sourcebook of Criminal Justice Statistics - 1978. Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, 1979.

4. The specific firearm statute had to be cited in the commitment papers in order for the mandatory minimum three-year term to apply. Thus, a defendant could be convicted of armed robbery and sentenced to prison, but need not fall under the three-year provision.

5. The Community Release Board established under the law will, among other things, continue to make decisions on parole release of lifers.

6. This trend reflected relatively stable numbers sentenced to prison against declining numbers sentenced, suggesting the possibility that those not likely to receive prison sentences had been "diverted" from the system prior to sentencing.

7. Sentence ranges for these four Indiana felony classes are 2 to 4 years, 2 to 8 years, 6 to 20 years, and 20 to 50 years, respectively.

8. As noted already, however, those sentenced during the first ten months of the new law may prove to be atypical over the long run.

9. Todd R. Clear, John D. Hewitt, and Robert M. Regoli, "Discretion and the Determinate Sentence: Its Distribution, Control and Effect on Time Served," Journal of Crime and Delinquency (October 1978).

Chapter 2
BACKGROUND ON SENTENCING AND RELEASE REFORMS

2.1 The Medical Model of Imprisonment

During this century, the debates on sentencing and imprisonment have revolved largely around the issues of retribution and rehabilitation. For most of this century it has been widely held in the United States that the chief aim of criminal sanctioning is the rehabilitation of the individual offender. The notion that prisons might be treatment facilities for offenders goes back to the early nineteenth century. By the close of the nineteenth century, penal reformers were increasingly interested in linking time served to rehabilitative progress and the beginnings of indeterminate sentencing and parole were evident.[1]

Retribution, by the turn of the century, had been disavowed by many legal theorists as both unscientific and uncivilized. Roscoe Pound, writing in 1906, observed:[2]

> "Revenge and the modern expression, punishment, belong to the past of legal history."

The Positivist School of criminology, despite its several divergences in theory, re-emphasized the individualized treatment basis for punishment. This rehabilitative thrust, encouraged by the growth of the social sciences and the professionalization of social work, gave impetus to the movement away from determinate sentencing toward having parole boards determine length of time served in prison with reference to rehabilitative progress. The indeterminate sentence, which by the 1930's characterized virtually every state sentencing code, was testimony to the political force of the rehabilitation ideal.[3] The amount of time served became as much determined by rehabilitative progress as by the severity of the offenses for which prisoners had been convicted. Legislatures often made explicit the rehabilitative purpose of correctional facilities in language similar to that of Missouri:[4]

> "In the correctional treatment applied to each inmate, reformation of the inmate, his society and moral improvement, and his rehabilitation toward useful, productive and law-abiding citizenship should be guiding factors and aims."

Although the rehabilitative purpose of correctional facilities was widely endorsed for much of this century, it was not until the late 1950's that it took on a real vigor at the operational level. While much of what took place in prisons was very far from the medical model, the analogy with the hospital did influence many of the pioneers of correctional treatment. The California Department of Corrections was without question the leader, and

its influence extended across the country and beyond.[5] The prison riots of the early 1950's[6] and the emerging sociology of the prison with its scrutiny of institutional subculture, led to the view that prison should, and perhaps could, be changed from a place of confinement, with many negative and damaging features, to a positive setting for personal growth and change. At its most extreme, this theme was expressed in terms of the prison becoming a therapeutic community,[7] borrowing from the work of Maxwell Jones and others in psychiatric settings.[8] The President's Crime Commission in 1967 recommended that correctional institutions be small, adjacent to urban centers and be based upon a "collaborative regime between staff and prisoners."[9]

2.2 The Movement Toward Determinacy

What has been characterized as the medical model of imprisonment and more generally corrections, is premised on the notion that sanctioning should be tailored to the individual offender. Under this model, the determination of how an offender is to be treated, for how long, and under what circumstances was left to the discretion of judicial and administrative authorities. Beginning in the late 1960's, a move to control this discretion gained momentum, resulting in the present trend towards greater determinacy in sentencing and release decisions. As this section will indicate, this movement has found support among a broad audience concerned with the failure of the nation's prisons to provide an environment conducive to rehabilitation. The perceived ineffectiveness of rehabilitation programs and the ethic of "constructive coercion," the alleged disparities in time served by comparable offenders for comparable crimes, and a renewed emphasis on the purposes of retribution, deterrence and incapacitation--all contributed to the attack on indeterminate sentencing and parole.

Fairness and Uniformity

Skepticism toward the indeterminate sentence began in the late 1960's, in large part, a result of prisoners' protests regarding their conditions of confinement. The new visibility of prisoners' rights was partly an outgrowth of the civil rights and war resistance movements which some observers claimed "had resulted in the imprisonment of more middle-class persons closer to the sources of power, influence, and publicity than was the 'core' population of prisons."[9] Uncertainty about when prisoners would be released--a fundamental consequence of indeterminate sentencing and parole release--began to surface as a major prisoners' rights issue.

Adding further stimulus for reform, the prisoners' rights movement was buttressed by a reversal in the "hands-off" policy of the courts. The 1971 Attica uprising is generally credited with arousing judicial concern for the conditions of confinement. Since that time the courts have intervened with increasing frequency in the day-to-day operations of prisons and jails, often establishing and enforcing minimum standards of institutional adequacy.

Prisoners' rights issues, particularly those relating to the uncertainty associated with the duration of prison terms, were voiced most

prominently in California which at the time had a wholly indeterminate system of sentencing. The California situation prompted the formation of a "working group" of the American Friends Service Committee which in 1971 published the book, Struggle for Justice. Arguing basically on moral grounds, the Friends asserted that "Instead of promoting rehabilitation, the individualized system promotes inhumanity, discrimination, hypocrisy and a sense of injustice."[10] Citing the indeterminate sentence as a control mechanism for most of those involved in the administration of justice, the authors charged that "the rehabilitative system offered prison administrators [control over] the size and flow of the prison population . . . as suits their purposes." In positing their view of the proper role of criminal law, they suggested that only a narrow aspect of the individual--his criminal act or acts--is appropriately considered, and that the relevant sanctions be applied uniformly to the degree possible. The view that indeterminate sentencing be abolished was later shared by Richard H. McGee, former Director of Corrections in California, the same state that had led the movement to embrace the rehabilitation ideal.[11]

The moral objections expressed by the Friends Committee were complemented by the publication of Criminal Sentences: Law Without Order by federal Judge Marvin Frankel in 1972, which focused on "unchecked and sweeping powers we give to judges in the fashioning of sentences."[12] While Frankel did not wholly reject rehabilitation as an ideal, he did affirm the Friends' view that "indeterminate sentencing, as thus far employed and justified, has produced more cruelty and injustice than the benefits its supporters envisage." He concluded with a proposal (for the federal system) calling for the creation of a Commission on Sentencing which would be responsible for studying sentencing, corrections and parole, the formulation of laws and rules suggested by these studies, and the enactment of rules toward the provision of guidance in sentencing decisions.

Frankel's view was supported by a number of assessments of sentencing variations, with indications of disparity emerging from virtually every study, whether based on statistics or courtroom observation.[13] State-by-state statistics on the length of time spent in prison prior to first release, published by the federal Bureau of Prisons in 1971 showed, for example, that 62.5 percent of those released from Minnesota prisons had served more than ten years, while none of those released from Vermont prisons had served more than five years. Similar disparities were found among sentences: only three percent of Washington prisoners released in 1971 had been sentenced to one to five years, while 86 percent in South Dakota had received sentences in that range.

One explanation of wide disparities in measures of time served lies in the variation among states in who receives prison sentences. Thus, in the Minnesota/Vermont comparison, it could be argued that only those convicted of the most serious crimes (carrying lengthy terms) received prison sentences in Minnesota, while in Vermont many of those convicted were sentenced on relatively minor crimes and served short terms. This explanation, however, also transfers the charge of disparity from time served to the imprisonment decision.

Disparities have also been noted when comparing sentences imposed by different judges within the same county. Alan M. Dershowitz reported on a study of sentencing patterns over a two-year period in Montgomery County, Ohio,[14] which found that one judge imposed prison sentences in 77 percent of robbery convictions, while another judge imprisoned only 17 percent of those convicted of robbery. Frequently, differences such as this could be explained only in terms of the proclivities of the sentencing judges.

The U.S. Board of Parole (now the U.S. Parole Commission) was the target of particularly intensive criticism in the early 1970's. "Charges of lack of procedural due process, arbitrariness, capriciousness, defensive self-protectiveness, failure to specify reasons for decisions and working at cross-purposes to rehabilitation were among the complaints."[15] The Board's response to this criticism took the form of a collaborative study with a research team headed by Don M. Gottfredson of Rutgers University and Leslie Wilkins of the State University of New York at Albany. The purpose of the study was to assist the Board in its articulation of general paroling policies, and its main product was a guideline matrix which gives nominal time to be served before parole, as functions of offense severity and offender characteristics.

The Effectiveness of Correctional Treatment

In addition to the issues of fairness and uniformity, disillusionment with the effectiveness of rehabilitation programs was added to the determinacy debate. The hope that with appropriate treatment criminals could be rehabilitated, received a severe blow with the publication of a paper in 1974 by Robert Martinson.[16] After reviewing some 231 research studies completed between 1945 and 1967 on the effectiveness of correctional treatment, Martinson and his colleagues concluded that:

> "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."

In those studies where recidivism was evaluated as a function of time served in prison, there were mixed results. Some of the studies found that when release from prison occurred earlier than the scheduled parole date, recidivism during the parole period was no worse than when release occurred on the scheduled date.[17] Another study found recidivism rates to decrease with time spent in prison, but only up to three years; thereafter, they began to increase.[18] Other studies, which focused on specific offender types, led to mixed findings, largely because they failed to control for type of institution.[19]

It must be realized, as Martinson did, that the apparent ineffectiveness of treatment strategies may stem partly from technical difficulties

inherent in research studies of this nature. The only instances of recidivism that can be measured are those which are detected and reported. Unfortunately, offenses not known to law enforcement officials are also not reliably known by researchers. Even more fundamental is the research problem of conducting true experiments to control for those factors which may also contribute to the recidivism outcome. Regardless of the technical caveats, however, the lack of systematic, replicated positive results clearly served to diminish the position of rehabilitation in the debate on the purposes of criminal sanctions.

Martinson's findings notwithstanding, Morris in The Future of Imprisonment, proposed the retention of the valuable aspects of the rehabilitative ideal largely by eliminating the compulsory nature of participation in rehabilitation programs as a criterion in the decision to grant release on parole.[20] This view suggested that "forced rehabilitation" is rarely achieved and that an unnecessary degree of social control is permitted under the name of rehabilitation. Urging that neither the time nor the conditions of imprisonment be tied to such programs, Morris' proposals called for setting the parole release date within a few weeks of admission to prison. Three guiding principles for the decision to imprison were offered:

- that the least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed;
- that prediction of future criminality not be considered in determining whether imprisonment is appropriate;
- that the sanction imposed not exceed that which is "deserved" by the most recent crime or crimes for which the offender is being sentenced.

Given the decision to imprison, graduated testing of increased increments of freedom (e.g., furloughs, work or education release) would be substituted for predictions of suitability for release. In short, for reasons of both principle and political feasibility, Morris argued against drastic reform such as that suggested in Struggle for Justice.

The Re-Emergence of Retribution

Writing from the perspective of a policy analyst, James Q. Wilson did not deal with the issue of whether the medical model of corrections is viable, but rather with the possible crime reduction effects of incapacitation.[21] Noting the self-evident proposition that those who are incarcerated cannot commit crimes against the society outside, Wilson proposed that sentencing be the primary task of the court system; that uniform sentencing standards be applied and that deprivation of liberty, even if brief, be the penalty extracted for every "non-trivial" offense, with increased penalties upon subsequent convictions. Under these proposals, the potential incapacitative effect on crime of greater certainty of imprisonment takes priority over the rehabilitative purpose of corrections.

The notion that punishment is the rightful primary purpose of imprisonment was explored from a philosophical standpoint in the writings of Ernest van den Haag in Punishing Criminals. Citing Martinson, he argues that:[22]

> ". . . given the evidence we now have we should no longer regard rehabilitation as the major purpose to which punishment is suited. Retribution, deterrence, and incapacitation should have priority."

His viewpoint regarding the criteria for establishing the length of prison terms goes beyond Morris'. Van den Haag justifies "risk of recidivism" as a criterion in noting that priority should be given to "the protection of society" over "the freedom and comfort of offenders."

Von Hirsch concurs with van den Haag on the significance of the "desert" principle in the book Doing Justice: The Choice of Punishments. Beginning with the premise that under "just deserts" the basis for broad sentencing discretion is removed, von Hirsch proceeds in developing a framework for sentencing standards. Here, presumptive sentences, based on the seriousness of the crime, would be the disposition for most offenders convicted of that crime, with limited room for departure for aggravating and mitigating circumstances--these also guided by standards. With the desert principle governing the establishment of standards, von Hirsch addresses the question of future dangerousness by suggesting that for these "special situations, [the authority to extend the term of incarceration beyond that which is deserved] be narrowly defined in the sentencing rules."[23]

2.3 The Role of Community-Based Corrections

In any discussion of the ideal of rehabilitation, the role of community corrections cannot be overlooked. Indeed, the argument that custodial facilities are ineffective settings for rehabilitation has not only intensified the concern for more explicit articulation of sentencing policies; it has also supported the case for developing community-based alternatives to prison.

Probation is the most frequently used alternative to prison. In 1931, when probation was still very undeveloped in many jurisdictions, the Wickersham Committee urged that:[24]

> "No man should be sent to a penal institution unless it is definitely determined that he is not a fit subject for probation. To this end it is urged that every effort be made to broaden probation and provide more and better probation supervision."

Years later the President's Crime Commission advocated this position again, and also argued for the development of community-based programs which are an intermediate sanction between probation and incarceration.[25] It was,

however, the National Advisory Commission on Criminal Justice Standards and Goals, in 1973, which made such alternatives a major policy recommendation. The National Advisory Commission stated: "The Commission considers community-based corrections as the most promising means of accomplishing the changes in offender behavior that the public expects--and in fact now demands--of corrections."[26] The Commission added: "From the standpoint of rehabilitation and reintegration, the major adult institutions operated by the states represent the least promising component of corrections."[27] This report takes the position that "more offenders should be diverted from such adult institutions, that much of their present populations should be transferred to community-based programs, and that the construction of new major institutions should be postponed until such diversions and transfers have been achieved and the need for additional institutions is clearly established." As these words were printed, state prison populations were entering a period of rapid growth that would bring a net increase of 48 percent in the five years from 1973 to 1978. Despite this pressure, in March 1978 state corrections agencies reported that less than five percent of all state sentenced prisoners nationwide were housed in community-based facilities.[28]

2.4 Proposed Reforms

To a large extent, the same forces that shaped the scholarly debates on the purposes of criminal sentencing and imprisonment have led, in turn to a variety of legislative proposals to change sentencing and release practices. Although rejecting the medical model of corrections to varying degrees, proposals based on "justice" and "just deserts" models of sentencing share the general desire to reduce unwarranted disparity and curtail the discretion available in sanctioning. Other proposals have sought to enhance community-based correctional programming through legislative action. Four general types of proposals are discussed in the subsections which follow.

Mandatory Sentencing

Mandatory sentencing laws seek to eliminate the discretion of the judge to suspend prison sentences or grant probation, and they often stipulate that a minimum term of imprisonment be served. These laws typically apply only to specific classes of offenses, such as dealing in narcotics or possessing (or using) a dangerous weapon or firearm in the commission of a felony, or to specific classes of offenders, such as "career criminals" or "repeat offenders." They also frequently accompany sentences whose maximum is life imprisonment.[29]

The intents of mandatory minimum sentencing laws are to deter through the increased threat of imprisonment, and to enhance public safety through the incapacitation of those who would otherwise commit crimes. The combined effects of deterrence and incapacitation on crime levels and the relative importance of each continue to be debated and researched, and the literature, both theoretical and empirical, is extensive.[30] Mandatory sentencing and mandatory minimum sentencing laws generally reflect the belief that law and

order must be preserved, by prohibiting sentences that are viewed as too lenient. This principle is consistent with one which rejects rehabilitation as the primary purpose of corrections; it simply ignores the rehabilitation issue altogether.

A report, recently released by the Rand Corporation, assesses the impact of hypothetical mandatory sentencing laws on crime levels and prison population using a sample of 625 persons convicted from mid-1968 to mid-1970, of burglary, robbery, rape, aggravated assault, homicide, auto theft, selling drugs, and grand larceny, in Denver, Colorado District Court.[31] Data were collected on personal characteristics, prior criminal record, court disposition of the current offense, and recidivism during a two-year follow-up. These data were then applied against a variety of hypothetical sentencing options which differed by length of mandatory term, type of felony, and prior felony record. The researchers estimated that if the most severe option--a five-year prison term for any felony, with or without a prior record--had been imposed following those convictions prior to the "current" conviction (if any), 45 percent of the "current" offenses would have been averted. The estimated impact on prison population in this case was found to be far more dramatic--an increase of 450 percent. At the other extreme, one-year mandatory sentences for second felony convictions, regardless of type, yielded estimates of a three percent decline in crime and a 15 percent increase in prison population.

In contrast to the hypothetical scenarios of the Rand report, the final report of the Joint Committee on New York Drug Law Evaluation[32] provides some empirical results on the nature and extent of that mandatory sentencing law's impact between 1973 and 1976.[33] Briefly, the New York Drug Law mandated that any person, other than a Youthful Offender (ages 16 through 18), or an informant, indicted for selling heroin must, if convicted, be sentenced to a prison term of at least one year and upon release, remain on parole for life.[34] The same law also provided for mandatory prison terms for second or subsequent felony convictions generally and raised penalties for other (non-narcotic) drug convictions. The law was enacted in 1973, and the evaluation covered some three and one-half years under its regime.

The Committee's evaluation found no evidence of sustained reduction in heroin use and no change in the number of crimes committed by known narcotics users. Moreover, for New York City, the recidivist sentencing (predicate felony) provision was determined not to have significantly deterred prior felons from committing additional crimes. The evaluation also found that drug law sentences did not constitute a significantly larger fraction of annual new commitments to prison than in the past, and that the number of inmates who had been convicted of drug felonies, as a proportion of total prison population, was the same in December 1975 as in June 1973. On this latter point, the evaluation noted that the backlog of the most serious cases (i.e., involving the longest minimum prison terms), once disposed, might raise this proportion in the future. Indeed, because the time between indictment and conviction was extended substantially by increased demands for trial and the use of postponement tactics, it was not until 1977 that the force of the law began to be seen in an incarceration level that exceeded

2,100 persons per annum for these offenses. While this only slightly exceeded the previous maximum set in 1972, sentences under the new law were potentially much longer, while charges were less severe than those of the earlier period.[35]

In summary, the New York Drug Law Evaluation found no apparent impact on drug use and consequent criminality and several adverse effects on case processing. More than three years passed before the courts were able to reverse the backlog and impose the mandated sanctions. Yet in the latter years of the law, it began to appear that penalties were especially severe for lesser offenders, without any clear reduction in the activity of major pushers. In 1979 the law was amended to reduce the severity of its sanctions and to restore judicial discretion in dealing with first offenders.

A number of states have mandatory minimum sentencing laws for firearm-related offenses. Florida's felony-firearm law, the subject of the case study in Chapter 3, requires that a term of at least three years be served in prison by those convicted or possessing a firearm while committing certain felonies. Colin Loftin, at the Center for Research on Social Organizations, University of Michigan at Ann Arbor, is currently conducting a study of the Michigan Felony Firearm Law on Detroit's Recorder's Court.[36] This law, implemented in January 1977, stipulates that two years imprisonment be served consecutively with a prison sentence imposed for a conviction on the primary felony, with suspension, probation and early parole prohibited. The prosecutor for this particular jurisdiction has ordered that this statute be charged when a firearm is present and has prohibited subsequent charge reduction, thereby, in theory, further reducing the discretion of the system to circumvent the legislative intent.

Finally, an evaluation of Massachusetts' widely publicized gun law ("And Nobody Can Get You Out"), effective in April 1975, which imposes a one-year mandatory term of imprisonment on those convicted of carrying any firearm without proper authorization (regardless of whether its possession is in connection with a crime), has just been completed under a grant from the National Institute of Justice to Boston University's Center for Criminal Justice. This study examined several areas in which the law was expected to have an impact and arrived at a number of interesting conclusions:[37]

- The introduction of the law did have an impact on firearm assaults (which apparently began prior to the effective date of the law as a result of considerable publicity), but the decline was offset by increases in non-firearm assaults.

- Armed robbery showed decreases for two years following the law's effective date, but began to rise again.

- The probability of conviction on charges of carrying a firearm declined from nearly half in the year prior to the law to about one-quarter in each of the two years following the law.

- Plea bargaining continued to play an important role in the disposition of cases. In some cases, charges were dismissed or reduced so that the defendant could receive a suspended sentence.

- Defendants were more prone to appeal for a trial de novo -- obtaining a second chance for acquittal by a higher level court or delaying the inevitable conviction -- at a much greater rate. There was also a trend toward increased use of trials under the law.

Determinate Sentencing

The term "determinate sentencing" is highly ambiguous. In this volume, a system of penal sanctions is designated as determinate if, barring time off for good behavior (i.e., complying with the rules of the institution) or the loss of such time, there is no administrative discretion as to when most prisoners are to be released from confinement.[38] Such decisions are typically made by parole boards under indeterminate sentencing, based on the prisoner's "readiness" for release. Under determinate sentencing as defined above, the date of release can be known at the time a prison sentence is imposed (again within the range provided by good time allowances). It should also be observed that the decision whether or not to impose a prison sentence need not differ between determinate and indeterminate sentencing; either can stipulate conditions under which prison sentences are mandatory. Thus, mandatory sentences or even mandatory minimum sentences can be part of determinate or indeterminate systems.

Under determinate sentencing thus defined, the length of imprisonment, given a prison sentence, is subject to variation allowed within legislatively prescribed sanctions available to the sentencing judge and good time allowances available to prison administrators. Since under most indeterminate sentencing systems, the awarding of good time advances the parole eligibility date but does not guarantee release on parole, the exercise of good time provisions assumes greater significance under determinate sentencing systems.

Ironically, the first new determinate sentencing code, which became effective on May 1, 1976 in the state of Maine, did not stem from an abandonment of the rehabilitative ideal, but rather from more sweeping changes to the criminal code in bringing common law together under a unified system. Indeed the first purpose listed under Chapter 47, General Sentencing Provisions, indicates that the Maine legislation seemed not to be cognizant of the ongoing debate on whether the purposes of sentencing could be simultaneously achieved:

> "To prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety."

By abolishing the function of the parole board to decide when prisoners should be released, as well as the parole supervision function, and providing judges the exclusive authority to impose fixed sentences not exceeding legislatively-established maxima, determinate sentencing in Maine served to enhance accountability for the exercise of discretion rather than to reduce discretionary authority.[39]

A recently completed study of the impact of the new Maine law on the administration of justice found that in the first year:[40]

- The use of incarceration was less frequent.

- The length of incarceration was shorter for Class B and C offenses (carrying a possible maximum of 10 and 5 years, respectively), but longer for Class A offenses (carrying a possible maximum of 20 years).

- Variation among sentences increased, due mainly to a small number of very long sentences.

- Very little of the variance in the distribution of sentences pre- and post-code can be explained by "justifiable" variables such as offense severity and prior incarceration experience.

The researchers noted that these results were unintended under the new code, and that they were probably due to the "increased authority and visibility of the judiciary (leading to) social psychological pressure towards moderation."

Although the second state to implement a determinate sentencing code, California received considerable attention in the literature even before the new code went into effect. As will be discussed at greater length in Chapter Four, California's Uniform Determinate Sentence Act of 1976 (which became effective on July 1, 1977) represents a complete reversal of views toward the primary purpose of imprisonment. From highly indeterminate sentences under which the state's parole boards were almost exclusively empowered to decide how long prison terms would be, the Act set forth a highly determinate scheme in which the penal code specifies terms of imprisonment as a function of offense and offender characteristics. Under determinate sentencing, judges will continue to have limited formal discretion in setting terms of imprisonment. Except for those receiving life sentences and those already in prison when the new law went into effect (and again excluding good time provisions) prisoners' release dates are known at the time of sentencing. Like Maine, California abolished the parole release decision of its parole board, but unlike Maine, it retained a period for parole supervision following release. A review of research on the anticipated effects of determinate sentencing in California is included in Section 4.3 as part of that case study.

Indiana was the third state to implement a determinate sentence law, which became effective November 1, 1977. As will be discussed in greater detail in Chapter 5, the Indiana law specifies a "presumptive term," given the decision to imprison, for each of five felony categories. Judges

may significantly depart from these terms by prescribed amounts for aggravating and mitigating circumstances, but the law itself gives no guidance as to how much should be added or subtracted for specific types of aggravation or mitigation. As in Maine and California, the term of imprisonment is specified at the time of sentencing, within the range of good time allowances, since the function of the parole board to determine release dates has been abolished. The Indiana law also has mandatory imprisonment provisions for any felony conviction which is not a first conviction and for first convictions on certain types of felonies.

Following the passage of the Indiana law, Illinois and New Mexico also enacted determinate sentencing laws, as we have defined the term, which became effective on February 1, 1978, and July 1, 1979, respectively. Both laws eliminated the release decision by a parole board, but both retained terms of parole supervision following release. In New Mexico, the law required the sentencing judge to specify a total sentence within legislatively-prescribed limits, dividing this total into the part to be served in prison and the part to be served on parole. However, this provision was superseded by another law, subsequently enacted, which effectively reinstituted the function of the parole board to release prisoners.[41]

A unique feature of the Illinois law is the Class X felony category which includes aggravated kidnapping for ransom, rape, deviate sexual assault, aggravated arson, armed violence, armed robbery, treason, battery, certain narcotics transactions, and calculated criminal drug conspiracy. A mandatory minimum term of six years must be served for Class X convictions; a third Class X conviction requires a sentence to life imprisonment. Other mandatory prison terms are also provided by the new Illinois law. The Illinois legislation establishes a Criminal Sentencing Commission which, among other duties, is authorized to monitor the fiscal impact and effect upon prison populations caused by the use of determinate sentences, and to develop standardized sentencing guidelines designed to provide for greater uniformity in the imposition of criminal sentences.

The Illinois Department of Corrections recently released a report[42] that presents statistics for measuring selected trends through the first year in which the new law was in force. Summary observations on these statistics follow:

- In Cook County, the probability of a prison sentence given conviction returned to the 1973 level (46%) after having declined to 36 percent in 1975 and risen again to 43 percent in 1976 and 1977. Other parts of the state exhibited a 35 percent probability, which was not substantially different from the 33-35 percent range in the 1974-1977 period.

- Comparing average time actually served by persons released in the year prior to the new law to time projected (assuming all inmates earn maximum good time) for those sentenced determinately in the new law's first year, little difference was found for armed robbery (4.0 years determinate to 3.9 years indeterminate). For unarmed robbery, burglary and theft, however, determinate terms were substantially lower (1.7 to 4.2 years for robbery, 1.7 to 2.9 years for burglary, and 1.2 to 2.7 years for theft).

- Average daily prison population grew steadily since 1974, from 6,137 in that year to 10,273 in 1977, averaging about 22 percent per year. The average daily population in 1978 was only three percent higher than that in 1977.

Further experience under the new law and additional analysis are clearly required in order to assess the extent to which these trends reflect the new law's impact.

Table 2.1 summarizes some of the main features of the determinate sentencing laws which have been adopted to date. The first row of the table shows the basic structure in each code. All five states use a felony class system; specific offense types can span several classes, depending on the particular elements in the crime. The legislatively-prescribed sentence ranges are ordered in the table from most to least severe. The second row of the table shows specific provisions contained in each statute that can be invoked to increase a "basic" term of imprisonment. These extensions supplement the latitude afforded sentencing judges within each range for aggravating or mitigating circumstances. The third line of the table summarizes normal good time provisions under each law--i.e., the portion of the prison terms still subject to administrative discretion (of the respective correctional authorities). Not shown are the more detailed provisions governing the vesting of good time or additional time off for participation in prison programs or other special circumstances. The fourth row of the table simply indicates the period of parole supervision retained under the new law, while the fifth line indicates the general nature of mandatory imprisonment provisions in the new laws. All five states have such provisions which, as already noted, typically pertain to crimes of violence or use of weapons in crimes of violence.

As observed at the outset, the concept of "determinateness" spans a continuum which reflects statutory provisions governing release from prison. The narrower the period in which release can occur, the more determinate the system, apart from good time provisions which are exercised by correctional administrators. We adopted a definition of determinacy for which good time is the only factor governing the actual release date of most prisoners. Thus while Arizona and North Carolina have also enacted sentencing laws which bear the "determinate" label (with effective dates of October 1, 1978 and July 1, 1980, respectively), both states have retained parole boards which have the authority to release prisoners earlier or later than the time specified by sentence less good time.[43]

We close this brief overview of determinate sentencing with the observation that such systems may vary in ways other than those that have been discussed to this point. Retroactive provisions (application of the new law to individuals in prison or being adjudicated on the effective date); resentencing provisions; pardon and commutation authority; and procedures for

Table 2.1

Summary of Provisions in Five States Adopting Determinate Sentencing as of September 1979

SUBJECT	PROVISION				
	California	Illinois	Indiana	Maine	New Mexico
Statutory Ranges for Felonies*					
Most Serious Class	Life[a] 5, 6, 7 yrs 3, 4, 5 yrs 2, 3, 4 yrs	20-40 yrs or life[i] 6-30 yrs (Class X) 4-15 yrs 3-7 yrs 2-5 yrs	30-60 yrs[o] 20-50 yrs 6-20 yrs 2-8 yrs	25 yrs-life[t] 20 yr max 10 yr max 5 yr max	life[w] 10-25 yrs 7-15 yrs 2-10 yrs
Least Serious Class	16 months, 2, 3 yrs	1-3 yrs	2-4 yrs	1 yr max 6 month max	1-5 yrs
Possible Extensions of Prison Terms	enhancements (each instance): weapon involved-1,2 yrs[b] great loss of property-1,2 yrs[c] great bodily harm-3 yrs[d] prior prison term-1, 2, or 3 yrs[e]	extended terms:[j] 40-80 yrs 30-60 yrs (Class X) 15-30 yrs 7-14 yrs 5-10 yrs 3-6 yrs habitual offender: 3 prior Class X convictions-life[k]	habitual offender (2 or more prior felony convictions): 30 yrs[p]	none	habitual offender:[x] 1 prior felony conviction - 1 yr 2 prior felony convictions - 2 yrs 3 prior felony convictions - 4 yrs
Normal maximum good time	4 months for every 8 served[f]	one day for each day served[l]	one day for each day served[q]	10 days for each month served[u]	up to one year off sentence[y]
Term of parole supervision after release	3 years[g]	3, 2, or 1 years depending on felony class[m]	1 yr[r]	none	remainder of sentence[z]
Mandatory imprisonment	certain crimes involving firearms[h]	habitual offender, murder/attempted murder, drug trafficking, prior serious felony conviction.[n]	prior felony conviction, current violent felony[s]	murder, prior burglary[v]	capital felony and use of a deadly weapon[aa]

*Maine does not distinguish between felonies and misdemeanors

a Cal.P.C. §1170(a)(2)
b Id. §12022, §2022.5
c Id. §13022.6
d Id. §12022.7
e Id. §667.5
f Id. §2931 (a)
g Id. §3000 (a)
h Id. §1203.6
i Ch. 38 Ill. Rev. St. §1005-8-1
j Id. §1005-8-2
k Id. §33B-1
l Id. §3-6-3(a)(2)
m Id. §3-8-1 (d)
n Id. §33B-1, §5-5-3 (e) (2)
o Ind Code §35-50-2-3 through §35-50-2-7
p Id. §35-50-2-8
q Id. §35-50-6-3
r Id. §35-50-6-1 (b)
s Id. §35-50-2-2
t T-17A Maine Rev. Stats. Anno. §1252
u Id. §1253-3
v Id. §1201-1
w N.M. Laws of 1977 §40A-29-28
x Id. §40A-29-30-B through D
y Id. §42-1-55-A
z Id. §41-17-24-C
aa Id. §§40A-29-27.1 and 40A-29-29A and B

appealing sentences all have implications for prison populations and consequently for the needs of correctional facilities. One study currently in progress expects to examine the impacts of determinacy in a number of these areas.[44]

Guidelines

The concept of guidelines, predominantly in sentencing and parole release decisionmaking, has also received considerable attention as an alternative to (or as in Illinois, complementary to) determinate sentencing. Applied to either sentencing or parole release decisions, guidelines are promulgated administratively through the rulemaking of a commission established by enabling legislation and composed of criminal justice system representatives. The heart of a guideline system is a two-way grid, the dimensions of which contain "scores" pertaining respectively to the convicted offense (usually the most serious when there are multiple convictions) and the offender. For each combination of "scores" sentencing guidelines indicate an appropriate sentence or sentence range, and parole release guidelines indicate an appropriate prison term or range of prison terms to be served prior to release on parole. These specifications are not intended to be binding in every case; indeed some percentage of cases is expected to fall outside the guideline range. Rather, guideline systems are designed to structure decisionmaking and to avoid widely disparate sanctioning in "ordinary" cases, which are typically expected to encompass 75-85 percent of the total.

In many respects, sentencing and parole release guidelines have the same characteristics as determinate sentence systems, most notably early determination (or knowledge) of the likely time to be served, given a prison sentence. In this respect they avert the problem of uncertainty that characterizes indeterminate sentences. While the decision to impose a prison sentence is not mandatory, sentencing guidelines do provide a clearer indication about the nature of the sentence sanction (incarcerative or not) than is typically the case under either determinate or indeterminate systems. The guideline approach, however, provides more flexibility for the modification of sanctions (e.g., to reflect changing societal norms or accommodate increasing prison population) than exists under determinate sentence systems, by virtue of the delegated authority to an administrative agency.

Guideline ranges (either for sentencing or terms of imprisonment prior to parole) can be derived empirically or established by collective experience to reflect sanctioning philosophies (such as "just deserts"). Most of the empirically-based work has been done by Wilkins and Gottfredson, for the U.S. Parole Commission[45] in 1973 and subsequently for the parole boards of a number of states.[46] The "deserts" approach is advocated by von Hirsch in his recent publication, Abolish Parole?[47] Von Hirsch was also instrumental in the development of parole release guidelines in Oregon, the topic of the case study presented in Chapter 7.

Because parole boards operate statewide, ease of administration is often cited as the primary advantage of using the guideline method for parole

release--rather than sentencing--decisions. Nevertheless, sentencing guideline systems have been implemented in a number of localities; were prescribed by the Illinois legislature in concert with determinate sentencing; and, in 1980, will be adopted statewide in Minnesota.[48]

A number of guideline studies are currently in progress: the Institute for Law and Social Research began a study in 1978 to support the formulation of sentencing guidelines for the federal justice system;[49] the National Center for State Courts is conducting a study of the impact of sentencing guidelines on the administration of justice in three sites;[50] and Abt Associates is conducting an evaluation of multi-jurisdictional sentencing guidelines in Maryland and Florida, to be implemented in urban, suburban and rural jurisdictions under test conditions developed by the National Institute of Justice.[51]

Community-Based Correctional Strategies

Legislative efforts to encourage the use of community corrections or to provide state supported local correctional resources, have received relatively little attention in current discussions regarding the use of imprisonment. One of the earliest initiatives, California's Probation Subsidy Program, which began in 1966 and ended in 1977, represented a unique approach to the delivery of local probation services with substantial levels of state resources.[52] Growing out of a 1964 State Board of Corrections study which found probation services "woefully inadequate," the Probation Subsidy Program allocated state funds, which otherwise would have been applied to incarceration and parole supervision, toward the development of county probation services. The amount of resources available from the state was determined by a statutory formula used to calculate a county's "earnings." Participation by counties was voluntary, and "earnings" were based on a county's reduction in the number of adults and juveniles committed to the Department of Corrections and the Youth Authority. The base rate of commitments was designated as the larger of the 1959-63 and 1962-63 average rate of commitment, and it remained unchanged over the life of the program. Funds received from the state were used to establish intensive (probation) supervision units; individual, group and family counseling; to purchase psychiatric, psychological and medical services; to provide job placement services, vocational and training programs, drug education programs, remedial education programs, anti-narcotic testing, and placement programs (foster homes, group homes and community day care).

The objectives of the Probation Subsidy Program were both ambitious and potentially conflicting:

(1) To increase the protection afforded to citizens of California

(2) To permit a more even administration of justice

(3) To rehabilitate offenders

(4) To reduce the necessity for commitment to a state institution.

An evaluation of the program was presented in a 1974 report issued by the California Youth Authority. This evaluation found the program:

(1) to have "been extremely successful in achieving its goal of reducing the use of state correctional institutions," which was not "offset by the need for increased institutionalization at the local level."

(2) resulted in "a greater amount of consistency among participating counties with respect to their use of state institutions."

(3) failed to produce a decrease in the reported crime rate in California.

(4) was, based on a preliminary analysis, not "substantially more effective than regular probation."

A considerable amount of additional evaluative research has been conducted with regard to item (4).[53]

The Probation Subsidy Program in California came to an end on July 1, 1977. It had apparently never received the full support of the state's law enforcement community, which felt that the program resulted in probation sentences for offenders believed to be dangerous. Moreover, subsidies were unable to keep pace with inflation, with a corresponding decline in purchasing power.[54]

In 1973, the Minnesota legislature enacted Chapter 401, the Community Corrections Act. While bearing some resemblance to the Probation Subsidy Program in California, the Act is narrower in its purposes and broader in its scope. More specifically, the purposes set forth in the legislation are two-fold: to protect society more effectively and to promote efficiency and economy in the delivery of correctional services. As in California, the participation of counties is voluntary and the Act's provisions apply to both adults and juveniles. Unlike California, state subsidies granted under the act can be used for the development of local institutions and institutional programs as well as for programs not involving confinement. A second departure in the Minnesota Act is the imposition of a penalty for each offender committed to a state institution from participating counties.

A preliminary evaluation of the impact of the Community Corrections Act on adult commitments to state institutions was reported by the Minnesota Department of Corrections in January 1977.[55] This study, described further in Chapter 6, tentatively concluded that the Act was responsible for reducing the probability of a prison sentence, given conviction, in participating counties.

The state of Oregon recently enacted legislation (1977) to promote the use of community corrections. Fashioned after Minnesota's Community Corrections Act, the legislation authorizes the state Division of Corrections to grant subsidies to participating counties for the development of correctional resources at the local level, and to charge counties for the commitment of certain offenders (those who would not pose a danger to the community) to state institutions.

2.5 Summary

The call for reform that emerged in the 1970's stemmed largely from the perceived inequities in penal sanctioning which had been justified in the name of rehabilitation. Disparity in sentencing and release practices, within and between states, was found to be unwarranted given the reliability of methods to predict future criminality. The discretionary latitude afforded judges as sentencing agents and parole boards as release agents, and the lack of a means for monitoring the way in which this discretion was exercised have prompted a response of stronger legislative controls.

Many of the proposed reforms call for major changes in the manner of setting sentences and determining release, as well as in the severity and duration of terms of imprisonment. While these can be tentatively organized into common groupings as we did in Section 2.4, it is important to bear in mind possibly significant differences within a group prior to embarking on a study of their impact. Expectations of these reforms are varied and often conflicting, indicative of the range of interpretation of their literal provisions. The remaining chapters explore these issues in depth for five states which have enacted reform legislation of this nature.

2.6 A Note on Methodology

Our approach to conducting the case studies was guided by the availability of secondary data that could be analyzed for shifts in prison population that were plausibly attributable to the new law. A number of data sources were common to all five states. Sections of state penal codes were analyzed to determine the precise nature of the revisions brought about by the new laws. Other relevant statutes were examined in order to provide an appropriate context in which to interpret the findings. Published articles pertaining to the legislation were also analyzed in terms of purpose, methodology, assumptions and findings. All five state correctional agencies furnished annual reports, a variety of statistical tabulations, in-house studies, and population projections. Finally, interviews were conducted with selected officials in each state whose operation stood to be affected by the respective new statutes. Interview questions were designed to yield insights into areas where no statistical indicators could be found. Among those interviewed were correctional agency officials,

criminal court judges, prosecutors, defense attorneys, parole officials, and law enforcement officials.

In two states we were able to utilize raw data in our analyses. The Minnesota Department of Corrections provided a computer tape containing court disposition data on selected counties that had previously been used by agency staff in analyzing the effect of the Community Corrections Act on sentencing patterns. They also furnished computer printouts showing quarterly statistics on population movement into and out of state institutions. In Indiana, we were granted permission by the Reception and Diagnostic Center of the State Department of Corrections to code data on those receiving prison sentences under the provisions of the determinate sentencing law. Using admission records, we coded some 705 cases for our analysis of projected prison terms.

For a given state, one could envision a full study to address a new law's impact on:

- arrest practices of law enforcement agencies;
- bail/bond and pre-trial release policies of the lower courts;
- charging and negotiation strategies adopted by the prosecution and defense;
- propensity of judges and juries to convict;
- probation and parole revocation practices of these agencies.

Our goal for the case studies was modest: to perform a limited analysis of the laws' effects on prison population in five states. For each, the material has been organized into the following sections:

- background and intent of the new law, providing a context for understanding the legislature's expectations;
- key statutory provisions, to highlight those aspects of the new law that are believed to be most likely to affect the needs of correctional facilities;
- impact analysis, based on statistical and impressionistic data gathered from documents and site interviews;
- conclusions, returning to the questions of whether expectations have been met or the needs of correctional facilities affected.

We hoped these analyses would provide a point of departure for correctional planners and for those engaged in more general research of this nature.

Chapter 2: NOTES

1. See, e.g., The Principles of Prison Discipline adopted by the National Congress on Penitentiary and Reformatory Discipline in 1870, Sections IV-VI.

2. Roscoe Pound, "The Causes of Popular Dissatisfaction in the Administration of Justice," American Bar Association Reports 29 (1906):395.

3. See Wickersham Committee Report on Penal Institutions, Probation and Parole, 1931, pp. 182-173.

4. Mo. Ann. Stat., 216.090.

5. See, e.g., Norman S. Haynor, "Correctional Systems and National Values," British Journal of Criminology (October 1962).

6. Between 1952-1955 there were riots in federal prisons and in prisons in 15 states. See Robert M. Carter, Richard A. McGee and E. Kim Nelson, Corrections in America (Philadelphia: J. B. Lippencott, 1975), pp. 104-105. For an early review of the sociology of the prison see, R. A. Cloward et al., Theoretical Studies in the Social Organization of the Prison (New York: Social Science Research Council Pamphlet No. 15; see also, Donald R. Cressey, The Prison: Studies in Instrumental Organization Change (New York: Holt, Reinhart and Winston, 1961).

7. Maxwell Jones, Social Psychiatry in Practice (London: Penguin, 1968).

8. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report on Corrections (Washington, D.C.: Government Printing Office, 1967), p. 47.

9. Alan M. Dershowitz, Background Paper for the Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (New York: McGraw Hill, 1976), p. 137.

10. American Friends Service Committee, Struggle for Justice: A Report on Crime and Punishment in America (New York: Hill and Wang, 1971), p. 125.

11. Richard McGee, "A New Look at Sentencing: Part I," Federal Probation, 38 (June 1974):3, and "Part II," 38 (September 1974):3-11.

12. Marvin E. Frankel, Criminal Sentences: Law Without Order (New York: Hill and Wang, 1973), p. 5.

13. See, for example, A. Partridge and W. Elridge, "The Second Circuit Sentencing Study, A Report to the Judges of the Second Circuit," Washington, D.C.: Federal Judicial Center, 1974; Henry Bullock, "Significance of the Racial Factor in the Length of Prison Sentences," Journal of Criminal Law, Criminology and Police Science, 52 (1961):411; Comment, "Discretion in Felony Sentencing--A Study of Influencing Factors," Washington Law Review, 48 (1973):857; Comment, "Texas Sentencing Practices: A Statistical Study," Texas Law Review, 45 (1967):471; Marvin E. Wolfgang and Marc Riedel, "Race, Judicial Discretion, and the Death Penalty," The Annals of the American Academy of Political and Social Science, 407 (1973):119; Lawrence P. Tiffany, Yakov Avichai, and Geoffrey W. Peters, "A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-1968," The Journal of Legal Studies, 4 (1975):369.

14. These statistics were taken from Alan M. Dershowitz, Background Paper for the Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (New York: McGraw-Hill, 1976), pp. 103-104.

15. D.M. Gottfredson, L.T. Wilkins and P.B. Hoffman, Guidelines for Sentencing and Parole (Lexington, MA: Lexington Books, 1978).

16. Robert Martinson, "What Works? Questions and Answers about Penal Reform," The Public Interest, 35 (1974):22-54. This paper was preliminary to the more comprehensive book by Douglas Lipton, Robert Martinson and Judith Wilks, The Effectiveness of Correctional Treatment (New York: Praeger Publishers, 1975).

17. R.P. Narloch, Stuart Adams, and Kendall J. Jenkins, "Characteristics and Parole Performance of California Youth Authority Early Releases," Research Report No. 7, California Youth Authority, June 22, 1959 (mimeographed); Karen Bernstein and Karl O. Christiansen, "A Resocialization Experiment with Short-Term Offenders," Scandinavian Studies in Criminology, I (1965) pp. 35-54; and Walter I. Stone, "Special Intensive Parole Unit, Phase I: Fifteen Man Caseload Study," Division of Adult Paroles, California Adult Authority, November 1956 (mimeographed).

18. Daniel Glaser, The Effectiveness of a Prison and Parole System (New York: Bobbs-Merrill, 1964).

19. W.H. Hammond and E. Chayen, Persistent Criminals: A Home Office Research Unit Report (London: Her Majesty's Stationery Office, 1963); Anonymous, The Sentence of the Court: A Handbook for Courts on the Treatment of Offenders (London: Her Majesty's Stationery Office, 1964); and Cambridge University, Department of Criminal Science, Detention in Remard Homes (London: Macmillan, 1952).

20. Norval Morris, The Future of Imprisonment (Chicago: University of Chicago Press, 1974).

21. James Q. Wilson, Thinking About Crime (New York: Basic Books, Inc., 1975), p. 193.

22. Ernest van den Haag, Punishing Criminals (New York: Basic Books, Inc., 1975), p. 188.

23. Andrew von Hirsch, Doing Justice: The Choice of Punishments (New York: Hill and Wang, 1975), p. 126.

24. Wickersham Committee Report on Penal Institutions, Probation and Parole, 1931, p. 173.

25. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (Washington, D.C.: Government Printing Office, 1967), pp. 165-171.

26. National Advisory Commission on Criminal Justice Standards and Goals, Corrections (Washington, D.C.: Government Printing Office, 1973), p. 223.

27. Ibid, p. 349.

28. According to the NPS Bulletin SD-NPS-PSF-1 (May 1975), there were, on December 31, 1973, 181,534 state prisoners serving sentences in excess of one year. The NPS Bulletin SD-NPS-PSF-6A (May 1979) indicates a rise in this number to 268,189 by the end of 1978. The percentage of state-sentenced prisoners in community-based facilities derives from the PC-3 instruments used in Abt Associates' March 1978 survey (see Volume III, American Prisons and Jails: The Conditions and Cost of Confinement).

29. American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, Approved Draft, 1967, p. 145.

30. A summary of recent research on this topic can be found in Alfred Blumstein, Jacqueline Cohen and Daniel Nagin, eds., Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (Washington, D.C.: National Academy of Sciences, 1978).

31. Joan Petersilia and Peter Greenwood, "Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations," Rand Corporation, Report P-6014 (Santa Monica, CA: October 1977).

32. "The Nation's Toughest Drug Law: Evaluating the New York Experience," Final Report of the Joint Committee on New York Drug Law Evaluation, National Institute of Law Enforcement and Criminal Justice, March 1978.

33. The New York Drug Law was amended significantly in 1976 and repealed in 1979.

34. Certain informants could receive an alternate sentence of lifetime probation, and youthful offenders (16-18) could be excepted in certain instances.

35. "Mandatory Sentencing: The New York State Experience," Policy Briefs, National Institute of Law Enforcement and Criminal Justice, forthcoming.

36. This research is being funded under a grant from the National Institute of Law Enforcement and Criminal Justice.

37. These conclusions were drawn from a synopsis of "The Impact of the Mandatory Gun Law in Massachusetts," David Rossman, Principal Investigator, Boston University School of Law. The full report is forthcoming in March 1980. Similar conclusions, with caveats, were reached by James Beha in "And Nobody Can Get You Out: The Impact of Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston," final report of The Gun Law Project, Center for Criminal Justice, Harvard Law School, July 1976; and by Stuart J. Deutch and Francis B. Alt in "The Effect of Massachusetts' Gun Control Law on Gun-Related Crimes in the City of Boston," Evaluation Quarterly, 1 (November 1977).

38. We refer to "most prisoners" to exclude persons sentenced to life imprisonment with the possibility of parole release after substantial time has been served.

39. The Maine code does allow the Division of Corrections to petition the sentencing judge to reduce sentences of over one year if the prisoner's conduct and rehabilitative progress so warrant.

40. John Kramer et al., "Assessing the Impact of Determinate Sentencing and Parole Abolition in Maine," final report to the Corrections Division, Office of Research Programs, Law Enforcement Assistance Administration under Grant No. 76-NI-99-0142, September 1978.

41. According to a spokesman from the Governor's Council on Criminal Justice Planning, the New Mexico legislature is trying to resolve the issue of determinateness in its current session.

42. "Determinate Sentencing Impact," Report to the Criminal Sentencing Commission by the Illinois Department of Corrections (Draft, April 1979).

43. Arizona's new law is set forth in Arizona Revised Statutes 13-901; North Carolina's "Fair Sentencing Act" was enacted as Senate Bill 560 (Chapter 760).

44. Study entitled "Strategies for Determinate Sentencing," funded under grant No. 78-NI-AX-0081 by the Corrections Division, Office of Research Programs of the National Institute of Law Enforcement and Criminal Justice and led by Sheldon Messinger, Richard Sparks and Andrew von Hirsch.

45. Don M. Gottfredson et al., The Utilization of Experience in Parole Decision-Making: Summary Report (Washington, D.C.: Government Printing Office, 1974), and Supplementary Reports 1-13 listed therein (p. viii).

46. Don M. Gottfredson et al., Classification for Parole Decision Policy (Washington, D.C.: Government Printing Office, 1978).

47. Andrew von Hirsch and Kathleen Hanrahan, Abolish Parole? (Washington, D.C.: Government Printing Office, 1978).

48. Minnesota Laws, 1978, Ch. 723.

49. Research funded by the Office for Improvements in the Administration of Justice, U.S. Department of Justice. Differences between House and Senate versions of SB1437 which among other things would have established a Federal Sentencing Commission, were not resolved during the last legislative session. A new draft was reported to the Senate on January 17, 1980, which includes two significant revisions. One calls for eventual abolition of the U.S. Parole Commission (once all parolable federal prisoners have been released), while the other excises all reference to rehabilitation or rehabilitative progress.

50. Research funded by the Adjudication Division, Office of Research Programs, National Institute of Law Enforcement and Criminal Justice.

51. Research funded by the Office of Program Evaluation, National Institute of Law Enforcement and Criminal Justice.

52. Section 1, Article 7, sections 1826 through 1827 of the Welfare and Institutions Code. The program was replaced by AB 90 in July 1978 (see Chapter 4, Section 4.3).

53. See, for example, the following studies by Stuart Adams:

"Effectiveness of the Youth Authority Special Treatment Program: First Interim Report." Research Report No. 5. California Youth Authority, March 16, 1959

"Assessment of the Psychiatric Treatment Program: Second Interim Report." Research Report No. 15. California Youth Authority, December 13, 1959.

"Effectiveness of Interview Therapy with Older Youth Authority Wards: An Interim Evaluation of the PICO Project." Research Report No. 20. California Youth Authority, January 20, 1961.
"Development of a Program Research Service in Probation." Research Report No. 27. (Final Report, National Institute of Mental Health Project MH00718.) Los Angeles County Probation Department, January 1966.

"Assessment of the Psychiatric Treatment Program, Phase I: Third Interim Report." Research Report No. 21. California Youth Authority, January 13, 1961.

"An Experimental Assessment of Group Counseling with Juvenile Probationers." Paper presented at the 18th Convention of the California State Psychological Association, Los Angeles, December 12, 1964.

(with Roger E. Rice and Borden Olive) "A Cost Analysis of the Effectiveness of the Group Guidance Program" Research Memorandum 65-3. Los Angeles County Probation Department, January 1965.

54. These observations were related during a telephone interview with Professor Floyd Feeny of the University of California Law School at Davis.

55. "Impact of the Community Corrections Act on Sentencing Patterns," Report issued by the Minnesota Department of Corrections, January 1977.

Chapter 3
FLORIDA: THE 1975 FIREARM LAW

3.1 Background and Intent

Mandatory sentencing statutes generally require judges to impose prison sentences upon a guilty finding for offenses covered by these laws. Some further require a minimum length of time to be served in prison. The Florida legislature enacted a mandatory minimum sentencing law in 1975, incorporating both mandatory imprisonment and minimum term provisions, which apply to those convicted of possessing a firearm while committing or attempting to commit any of eleven specific offenses. As with the other case studies, our interest lies in the impact of this law on confined correctional populations.

Most states have laws imposing additional penalties or defining a separate crime for the use or possession of a firearm or other weapon during the commission of a felony or crime of violence, but these laws differ in many substantive ways. Some consider the use of the firearm while others the mere possession or even access to a firearm during commission of a crime or during flight from the scene of a crime. Yet others go so far as to penalize the representation of possession of a firearm during the commission of a crime. The principal perpetrator or a member of the group may have the weapon and all may be liable. Other differences between states arise over the nature of the primary conduct. Some laws cover the commission of a felony, or a crime of violence, and some encompass only certain enumerated crimes. Statutes regulate the use of such things as firearms, weapons, deadly and/or dangerous weapons, and some other specific implements. A few states have laws of this nature which relate only to machine guns.

General Felony Sentencing and Release Provisions

Florida statutes divide felonies into five categories, each carrying a specified maximum term. Longer terms are specified for the three least serious categories for those designated "habitual felony offenders." These are individuals who have a prior felony conviction in Florida or two prior convictions on serious misdemeanors within five years. Table 3.1 summarizes the maximum terms for the various categories. Except in the case of a capital felony, which carries a 25-year mandatory minimum, and the 3-year minimum of the firearm law, offenders are technically eligible for release to parole. Since January 1, 1979, however, the Florida Parole and Probation Commission has been utilizing guidelines to set a presumptive parole release date at the first parole hearing. Like Oregon, guideline ranges for prison terms (before release on parole) have been established for combinations of offense severity and "salient factors" (relating to the offender) based on the collective experience of Commission members. Unlike Oregon, there is no

Table 3.1

Summary of Felony Sentencing Provisions in the State of Florida

Felony Class	Maximum Term	Habitual Offender Term
Capital Felony	Life or Death*	
Life Felony	30 Years or Life	
First Degree Felony	30 Years or Life	Life
Second Degree Felony	15 Years	30 Years
Third Degree Felony	5 Years	10 Years

*Florida statutes (§775.082) require that a mandatory minimum 25-year term be served prior to release on parole.

Source: Florida Statutes §775.081 through §775.084.

formal mechanism for the judiciary to provide input; in fact, sentence length is not considered in the determination of guideline ranges.

Again the two mandatory minimum provisions excepted, probation is a possible disposition in all cases. Judges may also sentence offenders to a county jail or impose jail time as a condition of probation. If probation is revoked, the judge may re-sentence an offender to any term applicable at the time the defendant was initially sentenced.

Inmates can also be discharged afer serving the judicially imposed term less gain time granted by the Department of Corrections.[2] A complex new system of gain time[3] went into effect on January 1, 1979, the same time as the parole release guidelines. "Statutory gain time" can be earned at the graduated rates of three days per month (years 1 and 2); six days per month (years 3-5); and nine days per month (year 6 and beyond). Statutory gain time must be granted to all inmates unless they are found to have violated rules of the institution.[4] The statutes also provide for "discretionary gain time" whose award is solely at the discretion of the Department of Corrections.[5] Under these provisions, sentences can be further shortened by as much as the length of time spent working within the institution, engaged in "constructive" activity (if unable to work due to physical handicap, illness, or old age), or academic programs, and by up to 60 days, once applied, for "outstanding" or "meritorious" service.

Familiarity with the Firearm Law

According to Senator James Glisson, co-sponsor of the firearm legislation, the three-year mandatory minimum term was expected to be a deterrent. A necessary condition to the fulfillment of this objective was seen to be awareness of the "certain 3-year penalty" by those who would commit felonies. To inform the public (particularly that segment prone to commit crime) of the new law, a massive public relations campaign was launched, including radio and television spots, billboards, press releases, public speaking engagements, and posters placed on the doors of high-risk establishments. Subsequently, a number of surveys were conducted to measure the public's and the criminal element's familiarity with the firearm law:

- "Surveys, both before and after the public awareness campaign, indicated only 19 percent of the age group which commits most crimes (16 to 25 year olds) were aware of the law before efforts to publicize it, while afterwards 49 percent were aware."[6]

- "According to a study conducted in 1977 by the Governor's Help Stop Crime Committee, only 1 of 7 persons between the ages of 13 and 25 have ever heard about the 3-year mandatory sentence."[7]

- The two senators who sponsored the bill conducted an informal survey of student awareness of the law in two high schools. In a question and answer session, few students

indicated that they knew about the provisions of the law. Some had seen decals on stores, but few knew exactly what the decals meant.[8]

- A statewide survey found that 80 percent of the public was not familiar with the law.[9]

- During a fact finding and information dissemination tour through several counties, the Senator who had sponsored the law questioned students at state supported schools and universities and inmates at state operated penal institutions about the law. He found that less than one of ten of these students and inmates were aware of the law.[10]

- A study conducted by D. E. S. Burr of the Florida Technological University interviewed inmates at five correctional facilities. The study found that among incarcerated offenders, knowledge of the law was common: 83 percent were aware of the law. The study went a bit further and asked if, upon release, the inmates would cease to carry guns. Among first offenders, 69 percent said they would continue to carry guns. Among multiple-felony offenders, 76 percent indicated that they would continue to carry a handgun. Social pressure and perceived need for protection were given as reasons for continuing to carry a gun. The deterrent effect of the law was of little significance in comparison with these factors. The prospect of three years incarceration was viewed as less risky than being without a gun.[11]

Only the survey of known offenders found more people familiar with the firearm law than not. In the other surveys of the youthful population at large, between 80 and 90 percent were not aware of the three-year mandatory minimum sentence. In short, there is no definitive answer to the question of whether the firearm law was well-known to its targets.

3.2 Key Statutory Provisions

The first appearance of a mandatory sentencing law relating to firearms was in §775.087 of the 1974 Florida statutes, and consisted of two parts. One part upgraded first, second and third degree felony convictions to life felony, first and second degree felonies, respectively, whenever the offender displayed, used, threatened, or attempted to use any weapon or firearm, unless it is an element of the crime.[12] The other part of this statute, which is the object of the case study, stipulated a minimum term of three years for felony convictions in which a firearm or destructive device is used or displayed. In its initial form, however, the mandatory three-year term could only be applied if a prior conviction anywhere punishable by a year or more prison sentence were found in the offender's record.

year.[13] This version of the law was amended significantly the following year. In particular:

- A prior "felony" conviction (involving a possible year's imprisonment) was no longer necessary;

- The provision applied to eleven specific types of felonies (enumerated in footnote 1);

- "Use or display" was replaced by "possessed";

- Suspension, deferment or withholding of sentence was prohibited, as was eligibility for parole release before three years.

After the passage of the 1975 amendments further question arose concerning possible avenues of mitigation of the three-year sentence, and an Attorney General's Opinion was requested. The opinion (Op. Atty. Gen. 075-202) noted that while the statute clearly barred intervention on the part of sentencing judges at the probation stage, and therefore required a three-year minimum prison sentence, persons sentenced pursuant to this section would still be eligible for gain time allowances.

During its 1976 session, partly in response to the Attorney General's Opinion, §775.087 was amended again to provide for three full years of imprisonment. Moreover, battery upon a law enforcement officer or firefighter was added to the list of crimes. Senate Bill No. 405 was subsequently enacted, fully clarifying the intent of §775.087:

> AN ACT relating to criminal law; creating §784.07, Florida Statutes, defining "law enforcement officer" and fire fighter; . . . amending §775.087 (2), Florida Statutes, including battery upon a law enforcement officer or fire fighter among those offenses subject to a minimum 3-year sentence if a firearm or destructive device was in the possession of the offender during the commission of the offense; specifying that the minimum 3-year sentences for specified offenses shall be for 3 calendar years; providing an effective date. (emphasis added)

Section 2 of §775.087 was thus amended a third time, and now reads as follows:

> (2) Any person who is convicted of:
>
> (a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit the aforementioned crimes; or

(b) Any battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties and who had in his possession a "firearm" as defined in §790.001 (6), or "destructive device," as defined in §790.001 (4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provisions of §948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred or withheld, nor shall the defendant be eligible for parole or statutory gain time under §944.27 or §944.29 prior to serving such minimum sentence.

In order to be in force in a particular case, the firearm law must survive the entire apprehension and adjudication process. The first step in this process is the arrest and charging of a suspect for possession of a firearm while committing one of the eleven designated felonies. Typically an adult suspect would be brought to the local detention facility and booked, i.e., charged with the violation of specific statutes. For example, an adult suspected of armed robbery would have to be charged by the police with violations of both §812.13 (defining robbery and stipulating its felony degree) and §775.087 (the firearm law) in order for the three-year mandatory minimum to be considered as part of the case. No special bail-bond procedures were established for §775.087, so that pre-trial detention would be decided on usual factors. If the firearm statute is charged by the police, it must remain as a specific charge through the charging, adjudication and sentencing processes in order to be in force when the sentence is executed--specifically, the sentencing judge must stipulate §775.087 in the commitment papers. In sum, despite "evident" involvement of a firearm during the commission of certain types of crime (e.g., when the possession of a firearm by the offender is part of the record), the specific §775.087 charge must also be present, or the mandatory minimum three-year condition need not be met.

3.3 Impact

The sequence of amendments to the mandatory minimum provision made the intent of the legislature clear: there was to be a minimum punitive sanction for those convicted of certain felonies involving firearms which it was hoped would serve as a deterrent to the future commission of such crimes. While the law's deterrent effect was of central concern to its framers, this complex question was not addressed in our case study. Using the available data we focused on two central questions relating to the impact of the mandatory minimum provision:

- Has the mandatory imprisonment aspect of the law affected the number of people receiving prison sentences relative to other dispositional alternatives?
- Is the three-year mandatory minimum term of any consequence, given the decision to incarcerate? That is,

would those convicted under this law and committed to prison have served at least three years anyway?

Since the felony-firearm law was aimed primarily at armed robbery, we limited our analysis of these two questions to this group of offenders.

Admissions

In the absence of adjudication and disposition data, it was necessary to approach the question of the mandatory imprisonment aspect of the felony-firearm law indirectly. One method would simply involve the examination of the volume of prison admissions for armed robbery, to determine whether or not volume has increased since the felony-firearm law became effective. Using this method, increases in volume would presumably indicate use of the mandatory imprisonment provision of the law. The problem with this method is that the results would be subject to a host of confounding factors affecting admission volumes, thereby substantially weakening arguments that observed shifts in volume are due to the felony-firearm law.

While not all confounding factors can be removed, some improvement is possible by taking advantage of the fact that although burglary is designated as a felony-firearm offense, it rarely involves the use of firearms.[14] Therefore, we examined trends in the ratio of admissions for armed robbery and burglary as an indicator of the law's impact on prison admissions for armed robbery. Confounding factors that have affected admission volumes for the two crimes in a like manner are thus removed using this method.

Table 3.2 shows admissions for armed robbery and burglary, and their ratio, for fiscal years 1973 through 1978.

Table 3.2

Admissions to Florida Prisons for Armed Robbery and Burglary
Fiscal Years 1973-1978

	Fiscal Year					
Offense	1973	1974	1975	1976	1977	1978
Armed Robbery	600	565	1340	1348	868	747
Burglary	1037	1202	1521	1794	1902	2128
Ratio	.58	.47	.88	.75	.46	.35

Source: Florida Department of Corrections, Annual Reports, Fiscal Years 1973-1978.

As can readily be seen from the table, the ratio increased dramatically between fiscal year 1974 and fiscal year 1975 and then declined. According to our analytic strategy we would have expected to find an accelerated increase in the ratio of armed robbery to burglary admissions from fiscal year 1976 through fiscal year 1978 reflecting the October 1975 effective date of the felony-firearm law.[15] It is evident from Table 3.2, however, that this did not occur; indeed, a steady downward trend in the armed robbery/burglary admissions ratio can be observed since the high in fiscal year 1975. From these limited data, the law appears not to have had the anticipated impact on admissions to prison.

Time Served

An indirect method was also utilized to assess the impact of the firearm law on time served. The Department of Corrections observed that 793 of the inmates under its custody on December 31, 1977 were bound by the three-year mandatory minimum provision. Since this date occurred before three years from receipt of the first inmate sentenced under §775.087 had elapsed, everyone received by the Department on §775.087 sentences over a period of some two and one-half years should be included. The same study noted the admission during this period of 1398 inmates whose offense descriptions would appear to warrant the three-year mandatory minimum (i.e., firearm possession while committing one of the designated felonies), but for whom that provision was not stipulated in the commitment papers. Thus 57 percent (793/1398) provides a rough estimate of the proportion of persons sentenced for firearm-related offenses who were required by §775.087 to serve a minimum of three years.[16]

Unfortunately time served data were not available on cohorts admitted to prison. However, we can contrast the 57 percent figure with the proportion of release cohorts that served three or more years for various offenses. When, as was the case in Florida, the population in prison is expanding, time served statistics on release cohorts understate time served by admission cohorts, because long-term inmates who have not yet been released are not included in the release cohort statistics. For armed robbery, 39 percent of the 434 released in fiscal 1977 had served three or more years, while for aggravated assault, the figure was only six percent of 323.[17] Percentages serving three or more years for sexual battery, manslaughter, and homicide were 41 percent, 23 percent and 72 percent, respectively. All offense categories but homicide exhibited percentages serving three years or more that were smaller than the estimated 57 percent serving three-year mandatory sentences. Despite the caveat on comparisons of time served by release and admission cohorts, these comparisons suggest that prison terms for those convicted of §775.087 will be longer than they would have been in the absence of that statute.

Interview Findings

Interviews were conducted with justice system practitioners in Dade County to assist in the interpretation of the results described above.[18] Dade County leads the state in volume of index crimes (the next higher county

recording but 59 percent of Dade's 116,303 index crimes in 1977); in number of arrests (at 63,600 in 1977 almost double the next higher county); and as a contributor to the state's prison system (some 14 percent in June 1976).[19] The Miami area, where most of the county's population is located, follows the pattern reputed for most urban centers: that cases are less likely to penetrate intact to subsequent stages of the criminal justice system than in other parts of the state. Thus while Dade County was a reasonable choice for the purpose of illustrating the policies and practices of the case decision-makers in the system, it cannot be viewed as representative of the state as a whole.

A spokesman for the Dade County Public Safety Department indicated that officer discretion in bringing charges is limited and structured. Common practice is to charge every offense for which there is probable cause. Given an arrest, the police saw themselves as having to be satisfied with any conviction rather than risk an all-or-nothing proposition on a particular type of offense. This suggests that §775.087 is charged when there is reason to believe that a defendant charged with one of the eleven designated felonies possessed a firearm when committing the felony. In contrast, smaller municipal police departments in the county were described as typically able to exercise more discretion in charging than in Dade County.

Members of the robbery unit within the Public Safety Department believed that while the incidence of robbery had declined, the firearm law was not responsible. Lack of familiarity with the firearm law on the part of potential offenders was cited as a reason for skepticism. Reductions in unemployment and heroin usage were cited as more likely candidates. Law enforcement officials interviewed generally believed that "serious" cases were likely to draw lengthy prison sentences as before the firearm law, while less serious cases--even though involving firearms--continue to receive a variety of sentences, including probation and jail.

Interviews with members of both the State Attorneys' and Public Defenders' Offices in Dade County revealed that approximately 85-95 percent of all felony cases are settled by plea and that the majority of those pleas are arrived at by negotiation. Members of the Public Defender's Office were unanimous in their opposition to mandatory terms on the arguments that mandatory terms theoretically enhance the power of the prosecutor, and that "clearly inappropriate" cases fall under the language of the statute. While the three-year term was cited as a factor in the negotiations, members of both the defender's and prosecutor's office felt that the law had little actual impact on the result. Both also felt that in cases where the offense was serious, the statute is frequently charged and rarely negotiable. They noted that since these cases had traditionally received lengthy prison sentences, the minimum term of three years was relatively unimportant and that in less serious cases, with few exceptions, the felony-firearm law is rarely at issue because it is not charged. There was general agreement that charges would be reduced in these cases to offenses that yield probation, jail terms, or some combination of jail and probation.

Interviews with two judges supported the statements of prosecution and defense attorneys, with respect to the plea negotiation and sentencing process. Although one of the judges supported the theory of mandatory sentencing, both felt that judicial response to the firearm law was generally negative since the legislation encompasses a broad range of behavior and in some cases would result in a sentence believed to be too severe. One judge noted that on occasion, juries have refused to convict on §775.087, even when there was clear evidence of guilt.

During interviews with members of the Department of Corrections, we learned that at least initially there was some confusion about the law. For a period after the law went into effect it was unclear from the commitment papers sent by the court whether or not an offender had been sentenced to the minimum three years. Members of the court system noted that this was probably a result of the volume of revisions of the sentencing law and the practice of rotating judges within the circuit. It was believed possible that knowledge of the law was uneven during the implementation phase. Moreover, the mechanics of commitment paper preparation more or less preclude discovering errors. The papers are prepared by the court clerk, signed by the judge (in large number at a time) and forwarded to the Department of Corrections. It is extremely unusual for the judge, prosecutor, or defense attorney to read these papers, due to caseload and time pressures.

The observations of those involved in case adjudication were corroborated by a study of cases "which involved the use of a deadly weapon in a violent crime," conducted under the auspices of the Crime Commission of Greater Miami.[20] The study was conducted by Crime Commission Court Aides and included 62 cases on which convictions were obtained from November 1977 through January 1978. Of the 32 firearm cases reviewed in the study, five defendants who possessed firearms during the commission of the crime were not charged with §775.087; 13 had the firearm possession charge dropped during plea negotiation; one was acquitted of the firearm possession charge by a jury; and 13 did receive the three-year mandatory minimum sentence (41%).[21] These results vividly illustrate some of the "branching" possibilities in the processing of felony cases involving firearms under the felony-firearm law.

Dade County Corrections

It was initially hypothesized that the three-year firearm law could have an impact on jail populations through:

- ineligibility for pre-trial release, leading to an increase in the number of persons detained before trial;
- an increase in case processing time; and/or
- a decrease in the number of felons sentenced to jail or jail and probation.

This section briefly speaks to each of these hypotheses, again based on Dade County's experience.

All persons arrested in Dade County are brought to one of the detention facilities and booked. Individuals charged with certain felonies can post bond at the jail, according to a schedule of bond rates. Several of the offenses covered by §775.087 are not covered by the bond schedule. In these cases (or if the individual does not post bond) the person is held in custody until the arraignment, which usually occurs before a magistrate within 24 hours. At arraignment, the magistrate may set bond for cases not bondable at booking. Since the bond schedule did not indicate higher amounts for offenses involving firearms as a result of the firearm law, there is little reason to expect that jail population increased by virtue of these defendants' inability to make bail.

Dade County has had a pre-trial release program since 1971. Program personnel interview defendants before the hearing and make release recommendations to the magistrate. Initially, eligibility for felony offenders was restricted to third degree felony cases. The eligibility requirements have been changed to include any offense that is listed on the bond schedule. For offenses not listed on the schedule, persons become eligible only if the judge sets bond. The program's general policy is not to recommend persons charged with violent crimes for release. Thus, most defendants charged with violation of §775.087 would be ineligible for the pre-trial release program.

With regard to the second hypothesis, both the jail personnel and judges interviewed believed that the statute has not affected case processing time. In fact, time to disposition may have been lowered in §775.087 cases, due to the improved plea bargaining position of prosecutors and consequently fewer trials in these cases.

Finally, when asked if the three-year mandatory minimum law had any impact on jail sentences, representatives of the county correctional system responded with impressions similar to those reported by law enforcement officials: under the statute, serious offenders receive prison time, as always, and less serious offenders receive a variety of sentences, including jail time, as always.[22] In summary, the firearm law seems to have had little impact on the population of Dade County's correctional institutions.

3.4 Conclusions

The case study analysis suggests that admissions to prison have not increased by the provision of §775.087 requiring mandatory imprisonment, while the three-year minimum term for those sentenced under that statute may be substantially longer than would have been the case had the firearm law not been enacted. Interviews with Dade County officials largely corroborated the limited statistical evidence available. Most felt that the felony-firearm law was easily evaded or not necessary for most cases. The consistent theme of the interviews was that justice system officials judged cases on their individual merit and that the specific provisions of §775.087 were of little consequence.

This is not to say that a felony-firearm law like that in Florida would be inconsequential at other times or in other places. The stated provisions of the law offer considerable plea bargaining leverage to prosecutors who could utilize it to a greater extent than is apparent in Dade County. The Florida case study does suggest, however, that a law's actual consequences may differ substantially from what might be anticipated from a literal reading.

Chapter 3: NOTES

1. Murder, sexual battery (rape), robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, and aircraft piracy.

2. Formerly, the Florida Department of Rehabilitation. The name was officially changed in 1978.

3. Most states refer to time off from a sentence as "good time."

4. Florida Statutes §944.27.

5. Florida Statutes §944.29.

6. "Senator and Top Law Officials Issue Stern Holiday Warnings," The Weekly Spokesman of Lynn Haven, December 22, 1977, p. 7.

7. James Glisson, "Holidays Mean Increase in Gun Related Crimes," press release, December 1977.

8. "Students Unaware of Law," Washington County News, Chipley, Florida, February 10, 1977.

9. "Florida's Tough Law Reduces Gun Crimes," Rocky Mountain News, Denver, Colorado, April 14, 1976.

10. James Glisson, press release, March 3, 1977.

11. D.E.S. Burr, "Handgun Regulation," Final Report, Bureau of Criminal Justice Planning and Assistance, December 1977, pp. 23-24.

12. For example, "arming" is an element of armed robbery, so this provision could not be charged in a case involving armed robbery.

13. Since the first part of §775.087 will never supersede the second in terms of mandatory prison time--given the release mechanisms described--we will refer to the second provision alone as the "felony-firearm law."

14. Spokesmen for the Dade County Police Department confirmed this observation.

15. Although the felony-firearm law became effective on May 14, 1975, uncertainty regarding its proper implementation led the Florida Department of Corrections to designate October 1975 as the effective date.

16. These two statistics appeared in Department of Corrections, Research and Statistics Bureau, Mandatory Minimum Sentences, Report No. 78-R-001, March 7, 1978.

17. These statistics were gleaned from Department of Corrections, Research and Statistics Bureau, Frequency Distribution of Time Served by Offense, Report No. 78-R-007, April 18, 1978. As in the Indiana case study, the reader is cautioned that release cohorts (in fiscal 1977) are being compared with an admission cohort.

18. These interviews were conducted during May 1978.

19. Index crime and arrest figures are from Crime in Florida 1977, published by the Florida Department of Law Enforcement. The percentage in prison from Dade County (the Eleventh Judicial Circuit) is from Florida Department of Corrections, Annual Report 1975-1976.

20. "Disposition of Criminal Charges in Cases Involving Violent Crime, Deadly Weapons, and Mandatory Sentence," Report of the Crime Commission of Greater Miami, undated.

21. Thirty additional cases reported in the study involved other types of deadly weapons.

22. It was recalled that at one point, several years ago, the jail was receiving an increasing number of persons initially charged with armed robbery, but who had bargained to have the charge reduced and received a jail term. The Director of the Dade County Corrections Department met with representatives of the Public Defender's Office and circuit judges about these dispositions, which he viewed as inappropriate, and he indicated that the number of these offenders sentenced to jail subsequently declined.

Chapter 4
CALIFORNIA: THE UNIFORM DETERMINATE SENTENCING ACT

4.1 Background and Intent

California was the second state to enact a determinate sentencing law. It became effective on July 1, 1977.[1] Sentencing schemes that bear the designation "determinate" are varied, although they share the general intents of providing a framework for sentencing, increasing the definiteness of prison terms (given a prison sentence), and reducing disparity in sentencing similar offenders for similar crimes. California's determinate sentencing law (DSL) represents an explicit rejection of rehabilitation as the primary purpose of imprisonment. It is noteworthy that California had previously exemplified the rehabilitative model of corrections under its indeterminate sentencing law (ISL) -- a philosophy that state had pioneered more than a half-century earlier.

Prior to July 1, 1977, California operated under an indeterminate sentencing system in which a judge would sentence a person to prison "for the term prescribed by law." These statutory terms were specified as broad ranges: robbery carried five years or one year to life, depending on degree; assault with a deadly weapon carried a six-month-to-life penalty; first-degree burglary, five years to life; forgery, one to 14 years; and so forth. A minimum number of months to parole eligibility was specified under ISL, typically one-third the minimum and the Adult Authority (the paroling authority for men from 1944 to 1977) was charged with the responsibility of determining the length of time that would actually be spent in prison. As will be seen later, the Adult Authority also had considerable influence over total admissions to prison through its policies on parole revocation.

At the foundation of the movement against indeterminate sentencing was the broad range of discretion available to the Adult Authority in determining how long convicted felons would stay in prison. Indeterminate sentencing in California was keyed to the future behavior of inmates after their release from prison. Thus prison terms were individually established on the theory that "rehabilitation" would occur at varying rates.

By 1974 political liberals and conservatives, inmates and law enforcement officers, civil libertarians and strong proponents of social control, all generally found ISL unsatisfactory, albeit for different reasons. As articulated in Chapter One, the scholarly work that was being published during this period acted as a catalyst that produced, by the end of 1974, a clear consensus that some type of reform was necessary.

California's determinate sentencing movement first gained widespread recognition and considerable support with the hearings held by the Senate Select Committee on Penal Institutions, December 4 and 5, 1974. Immediately

upon the completion of these hearings, work on the drafting of SB42 began, and by March 4, 1975 the new bill was introduced in the State Senate. A staff analysis of the bill was sent to superior court judges, district attorneys, public defenders, police chiefs, and sheriffs two weeks later, and SB42 passed the Senate on May 15, 1975.

Cassou and Taugher suggest in their paper[2] that the scene was set in 1972 for the downfall of ISL by two landmark cases: Morrissey v. Brewer[3] and In re Lynch.[4] By requiring that parole be revoked only in accordance with the due process clause, Morrissey broke a long-standing "hands-off" policy with respect to parole release and revocation decisions and opened the floodgates for litigation on every discretionary decision within the prison system.[5] At about the same time In re Lynch led the California Supreme Court to develop a three-part test of cruel and unusual punishment:

- that punishment be determined in relation to the particular offense and offender;
- that the term of incarceration be compared to terms for more serious crimes within the state; and
- that the term be compared to those of other states for similar crimes.

This case paved the way for a deluge of individual appeals and writs which charged that time served in prison was excessive to the point of being cruel and unusual punishment.

Administrative reforms were instituted by the Adult Authority in April 1975, while SB42 was being debated in the Senate. At that time the Chairman (formerly Director of Corrections) issued Directive 75/20, which established parole release standards and fixed parole release dates for almost all inmates. While the provisions of this directive pre-empted the need for determinate sentencing legislation, SB42 proponents held it to be illegal.

The year 1975 dramatically illustrated the effects of policy shifts by the Adult Authority regarding release to parole and re-admission to prison for violating parole conditions. Table 4.1 displays summary statistics for 1974 and 1975 on male felon population movements.[6] Male felon population in institutions climbed by some 2100 in 1974, then declined by nearly 4700 in 1975. New commitments from court and parolees returned with new commitments, over which the Adult Authority had virtually no control, differed by only six percent in the two years. However, for those determinants over which the Adult Authority had virtually exclusive control, the following observations can be made:

- The number of first paroles was 157 percent more in 1975 than 1974.

Table 4.1

Summary of Major Determinants of Male Felon Institution Population in California: 1974-1975*

	Year	
	1974	1975
Population, January 1	19,167	21,283
Population, December 31	21,283	16,598
Increase (decrease)	2,116	(4,685)
New Commitments from Court	5,018	5,443
Parolees Returned with New Commitment	727	732
Parolees Returned without New Commitment	1,533	808
First Paroles	2,694	6,918
Re-paroles	2,023	3,660

Source: California Prisoners 1974-1975, Table 3.

*Other movements include escapes and escapees returned; deaths; court-ordered discharges; transfers to and from court; and to and from local facilities (for diagnostic study); and movement of safekeepers. The net effect of these movements on male felon population is negligible in both years.

- The number of parolees returned without a new commitment (i.e., on violations) was 90 percent less in 1975 than in 1974.
- The number of re-paroles was 81 percent more in 1975 than in 1974.

Overall median time served by those first released to parole increased from 36 months in 1974 to 39 months in 1975, with increases registered in every major offense category. This is suggestive of an explicit policy to release long-term inmates who, while perhaps not "rehabilitated," were not believed to be threats to public safety.

Further case law developments also emerged in 1975, In re Rodriguez being of particular significance to the move toward determinacy.[7] This opinion, filed in June 1975, held that "as the only body with jurisdiction to apply the punishment to the individual offender, the Adult Authority was required to fix promptly a prisoner's term proportionate to his culpability, thereby precluding cruel and unusual punishment with respect to duration."[8]

In response to Rodriguez, the Adult Authority issued Directive 75/30 which updated and refined its predecessor, and the urgency for determinate sentencing legislation diminished.

The opportunity to revive interest in SB42 came in January 1976 with the opinion in In re Stanley.[9] This opinion held that the original directive (75/20) failed to account for post-release rehabilitative conduct adequately in the setting of terms and was consequently illegal. Citing Stanley as evidence that determinacy could only be brought about through legislative change, the authors of SB42 were able to revive interest in the legislation which, after several amendments, passed the Assembly in August 1976, and was signed into law on September 21, 1976.[10]

Because SB42 was so sweeping in scope, and its specific provisions were highly controversial even after its passage, the nine months before the July 1, 1977 implementation date were used to draft an amendment (AB476) that would "clean up" the initial legislation and reflect compromises on specific points. AB476 was signed into law as urgency legislation on June 29, 1977, only two days before DSL (which we use to refer to SB42 as amended by AB476) became a reality.

4.2 Key Statutory Provisions

Section 1170 of Chapter 4.5, Trial Court Sentencing, adds to Title 7 of Part 2 of the California Penal Code the following declaration:

> "The Legislature finds and declares that the purpose of imprisonment for crime is punishment."

This leaves little doubt about the reversal of the state's prior view towards imprisonment. The main provisions of DSL fall into five categories:

- base terms
- enhancements
- good time
- retroactive provisions
- parole

With regard to parole, DSL replaces the Adult Authority with the Community Release Board (CRB). This board will continue to make parole release decisions for life prisoners who are virtually unaffected by DSL; review determinate sentences for disparity; revoke parole; and apply DSL retroactively. The CRB is also charged with reviewing the length and conditions of parole and the denial of good time, both determined initially by, and appealed to, the Department of Corrections.

At the front end, after conviction, the judge must first consider, and subsequently reject probation and diagnostic referral, before specifying a prison term.[11] Section 1203.06 of the Penal Code, as amended by AB476, prohibits probation or sentence suspension for any person

- who personally uses a firearm during the commission or attempted commission of murder, assault with intent to murder, robbery, kidnapping, first degree burglary, rape, assault with intent to rape, and escape.

- who was previously convicted of one of the felonies listed above and is convicted of [any] subsequent felony while armed with a firearm or who unlawfully possessed a firearm when arrested for the second felony.

The California Judicial Council has established, in its Benchguide, factors that make the offender ineligible for probation and lists the criteria for granting probation with respect to a substantial number of additional factors. For example, assault with a likelihood of great bodily injury is non-probationable, according to the rules; numerous mixes of prior felony convictions are also designated ineligible for probation. These, however, are judicial guides and are not mandated directly by the law.

Base Terms

Crimes calling for life sentences, such as first-degree murder, are affected by the DSL only with respect to the parole provisions noted above. Virtually all other crimes fall into one of four penalty groupings:

- 16 months, 2 years, 3 years (e.g., second degree burglary, forgery, theft);

- 2, 3 or 4 years (e.g., robbery, first degree burglary, sale of controlled substance, arson, assault with intent to kill);

- 3, 4 or 5 years (e.g., kidnapping, rape, transportation of controlled substance);

- 5, 6 or 7 years (e.g., crimes punishable by life or death, second degree murder).

Most offenses fall into the first triad. Conviction of an attempt typically draws a base term one triad lower than the offense itself. The middle terms must be chosen by the judge unless aggravating or mitigating circumstances, which the court can raise on its own motion, are found. Examples of mitigating circumstances are: restitution, victim not harmed, victim provocation, and need to obtain family necessities. Aggravating circumstances are typified by weapon use or possession, serious bodily injury, loss of great monetary value, or involving minors in the crime. Given either type of circumstance, the judge may sentence the lower or upper term.

Enhancements

Enhancements provide judges with another means of lengthening the term, but in some cases judges must decide whether to use a particular finding to enhance a base term or to choose a (necessarily unenhanced) upper term in the triad. Enhancements pleaded and proved must normally be imposed, but they can be stricken by the judge.[12] A base term can be enhanced if the court finds:

- arming with, or use of a weapon (1 or 2 years);[13]
- great loss of property (1 or 2 years, depending on amount over $25,000); or
- great bodily harm (3 years if personally and intentionally inflicted).[14]

Another enhancement pertains to prior prison terms. Three years can be added for each prior term served in the ten preceding years on a violent felony or on any felony if the current conviction is on a violent felony. If no violence is involved, the enhancement is only one year. Finally, a sentence can be enhanced through the choice of consecutive or concurrent sentences for multiple crimes.[15] DSL spells out very carefully how to calculate the term in either case, but the choice is left largely to the discretion of the judge.

As a postscript to the discussion on enhancements, we note that DSL's addition of provisions limiting the imposition of enhancements and the possible mixture of determinate and indeterminate sentences stemming from several convictions complicates the situation to the point where the determination of a term (or comparisons of alternative terms) can become quite difficult for judges. Thus it can be seen that DSL sentences still need to be individually tailored, although not to accommodate varying rehabilitation rates, as was theoretically the case under ISL.

Pre-delivery Credits and Good Time

Time incarcerated prior to sentencing (jail time) on a given offense is credited against the term calculated by the court, as described above. Further reducing time in prison is good time earned, which can (and in most cases probably will) be as large as one-third the term less jail time.[16] More specifically, four months of good time can be earned on every eight months of the term served. Three of the four months are earned by refraining from rule violations or violent conduct. The fourth month is earned by participating in, but not necessarily completing programs.[17]

Retroactive Provisions

We close this section with a brief description of DSL's provisions for determining terms of those who have been or will be sentenced indeterminately

because their crimes were committed before July 1, 1977.[18] Roughly, a retroactive term is the longest middle term of the conviction offenses, plus enhancements. Definitions and a formula are provided for determining enhancements and calculating terms, but good time and jail time are not considered in retroactive calculations. Responsibility for establishing determinate release dates in retroactive cases rests with the Community Release Board, which as a result was immediately faced with some 17,000 cases on July 1, 1977. If on that day an inmate's parole release date had already been set to an earlier time than was determined from the retroactive calculations, the earlier date prevailed (barring subsequent institutional infractions by the inmate). In cases where the ISL parole eligibility date preceded the retroactive term, but no release date had been set, the Community Release Board was required to hold annual review hearings. If a release date prior to that calculated retroactively were set, release would occur at that time (again barring subsequent institutional infractions). In sum the retroactive provisions favor the shorter of ISL and DSL "estimates."

4.3 Impact

This section assesses the impact of DSL on California's prison population, based on one year's experience under the new law. We begin with a review of some preliminary assessments of DSL (made before the law went into effect). Next we examine the rate of admissions to prison. Distributions of time actually served in prison by ISL cohorts are then compared with estimates of time to be served by DSL cohorts. These analyses are limited to male felons, newly received from court and first released to parole, respectively. Finally, because of its potentially significant implications for state and local correctional caseloads, a preliminary assessment of the impact of Proposition 13 is given.

An Overview of Preliminary Assessments

A number of papers were written about DSL's anticipated effects before the law became effective. These took advantage of the increased precision that could be gained in projecting prison terms under determinate sentences. Nagin used a retrospective approach in assessing the new law's impact on prison population by applying its provisions to cohorts admitted to California prisons beginning with 1970, a method which assumes that determinate sentences would not alter admissions patterns (size and nature of offenses).[19] The result was a marginally lower hypothetical 1976 end population than was actually counted. The prospective component of Nagin's analysis, which accounted for growth in admissions to prison during the 1970-76 period, however, yielded a 1981-end projection that was more than 60 percent higher than the average year-end population for the 1970-76 period. Nagin concluded his analysis by noting two reasons for expecting admission cohort sizes to increase even further under DSL:

- limited periods of parole supervision (during which return to prison could be accomplished by revoking

parole for new crimes) might lead to increased admissions from the courts following convictions on new crimes,[20]

- restricted use of probation for violent felonies.[21]

Nagin concludes his paper with a discussion of possible offsetting effects due to increased deterrence and adaptive charging and sentencing behavior.

In their paper, Johnson and Messinger[22] hypothesized that both time served by those receiving prison sentences and the proportion convicted that receive prison sentences would increase under determinate sentencing. The potential for lengthening terms through "enhancements" provided in the law was cited as their primary reason for expecting the length of prison terms to increase. Their expectation that proportionately more offenders would receive prison sentences was based on the observation that the availability of relatively short sentences under DSL might cause judges to impose prison sentences in "marginal" cases where, due to uncertainty about the behavior of the Adult Authority, probation would have been granted in these cases under ISL.

Cassou and Taugher[23] concurred with Johnson and Messinger in their prediction that "marginal" offenders are more likely to receive prison sentences under DSL than ISL. However, their paper suggested that the median length of prison terms may drop slightly if most of the good time available is actually granted to most inmates. Cassou and Taugher predicted quite confidently that disparity in the length of prison terms would be substantially reduced.

In the "Comments" section of the San Diego Law Review,[24] Kenneth Zuetel predicted that the length of prison terms under ISL and DSL would be pretty much the same. He further anticipated that the new law would reduce prison unrest caused by anxiety produced by the uncertainty of release dates under ISL and that it would have the same general effects on deterring crime as did ISL.

Mention is made, in virtually all of the papers reviewed, of the illusion created by a direct comparison of the sentencing provisions of ISL and DSL. To the casual observer and indeed the public generally, base terms of 2, 3, or 4 years as an example for assault with intent to murder seem considerably shorter than ISL's six month to life range for that same crime. Thus it was generally predicted that the determinate penalty ranges would eventually be raised by the legislature as a result of public pressure for longer sentences more in line with those previously thought to have been served under ISL. If this were to occur, there would be no release valve such as existed previously in the form of the Adult Authority to relieve overpopulation of prisons that would result from longer determinate terms. This psychological effect was a point of central concern to many of those who examined the provisions of DSL before the fact.

Admissions

This section examines the question of whether judges have a greater propensity to impose prison sentences under DSL than under ISL. Table 4.2 displays superior court dispositions and prison sentences for the (predominantly) ISL period 1970-77.[25] Inspection of this table suggests a trend toward greater proportional use of prison sentences. Since this trend, however, stems more from the decline in dispositions than from the increase in prison sentences, the trend in the probability of prison given conviction is difficult to interpret.[26]

Quarterly statistics published by the California Judicial Council since the inception of DSL in July 1977 provide some indication that judges may be more prone to prison sentences under DSL. While the probability of prison (given conviction) could not be derived separately for DSL and ISL, the majority of those sentenced during the April-June 1978 quarter had been charged with offenses occurring after July 1, 1977 and thus fell under DSL provisions. Of 10,180 felony sentences imposed by the superior court during this quarter, 3,407 (33%) were prison commitments--two-thirds of which were determinate. This compares to 21 percent in 1977 (see Table 4.2), a year in which ISL dispositions predominate, and to 14 percent in 1973, in which a comparable volume of ISL dispositions (42,676) was reached.

Further evidence that judges may be demonstrating a greater propensity to select prison sentences appeared in a report recently submitted to the National Institute of Justice by the Rand Corporation.[27] Samples were drawn from the Alameda County District Attorney's Office on adults convicted of robberies that occurred before and after July 1, 1977. The pre-law sample of 202 cases represented approximately 25 percent of all eligible cases for 1975 and 1976, while the post-law sample consisted of all 174 eligible cases at the time the data were collected. Data were collected on characteristics of the crime and offender, and on the disposition of each sample case.

Rand's analysis of the data led to the following findings:

- The significantly higher proportion of prison sentences found for the post-law sample corresponds to a shift away from the use of jail sentences.

- The seriousness of robberies warranting prison sentences is lower for the post-law group than the pre-law group.

- Plea bargaining provided a greater payoff to offenders, in terms of fewer prison sentences, to the pre-law sample than the post-law sample.

These led the researchers to conclude tentatively that judges in Alameda County were imposing more severe sanctions than previously in sentencing for robbery under determinate sentencing. The extent to which this was due to the mandatory imprisonment provisions of the law (for armed robberies), the

Table 4.2

Proportion of California Superior Court Dispositions Involving Prison Commitments: 1970-1977

Year	Number of Dispositions (Defendants)	Prison Sentences (Defendants)	Percentage Prison
1970	49,950	5,025	10%
1971	56,018	5,408	10
1972	49,024	5,664	12
1973	42,672	5,826	14
1974	38,007	5,637	15
1975*	35,419	5,117	14
1976*	30,563	5,451	18
1977*	28,608	6,003	21

Source: Bureau of Criminal Statistics (as reproduced in a Department of Corrections memorandum dated September 15, 1978).

*Figures shown for these years are offender-based transactions (OBTS) statistics, which replaced the Superior Court's earlier reporting system. While some counties or parts of counties are not participating in California's OBTS program, there is no obvious reason to expect this underreporting to produce a bias in the proportion of prison sentences.

Judicial Council's guidelines for probation sentences, or to a greater propensity of judges to impose prison sentences generally was, for reasons cited earlier, not assessed in the Rand study.

One final observation that is relevant to the impact of DSL on new admissions from court deals with the offense mix of newly admitted offenders. In 1974 and 1975 adults convicted of robbery constituted 23 and 25 percent, respectively, of male felons newly received from court, while burglary admissions accounted for some 17 percent in each of these years. Moreover, the percentage of male felons received on robbery convictions has exceeded that for burglary in every year since 1969. By contrast the April-June 1978 quarter showed only 10 percent of prison sentences were for robbery while 22 percent were for burglary.[28] This again is indicative of a lower threshold of seriousness for prison sentences under DSL.

Time Served

Not enough time has elapsed since the enactment of DSL to permit comparisons of time actually served in prison under ISL and DSL. However, estimates of time to first parole can be made for cohorts newly received from court with DSL sentences, and these can be compared to release rates of cohorts received under ISL sentences in earlier years. The latter have been tabulated as percentages of male felons newly received from court in 1966 through 1974 that were still in prison at the end of 1967 through 1975.[29] We begin with a brief analysis of these (ISL) historical data.

Since 1966, time served by male felons under ISL has generally grown shorter in terms of the proportion still in prison at the end of each year following the year of admission. For example, nearly 55 percent of those admitted in 1966 were still in prison on December 31, 1968, an average of 2.5 years later, while only 44 percent of 1973 admissions were still in prison on December 31, 1975. This trend is shown for all offenses, robbery and burglary in Table 4.3. In this table the columns headed 1966 show the percentage still in prison at the end of 1967, 1968, ..., 1975, corresponding to average terms of 1.5, 2.5, ..., 9.5 years respectively. The columns headed Composite show the percentage of cohorts admitted in 1974, 1973, ..., 1966 that were still in prison on December 31, 1975. These also correspond to average terms of 1.5, 2.5, ..., 9.5 years, but in this case the most recent admission cohort for which data are available is used.

In every case the retention rate for 1966 admissions is higher than the more recent retention rate shown in the composite column. For robbery, this remains true even if the composite column is lagged by a year (e.g., the 86.2 percent of the 1974 cohort still in prison as of December 31, 1975 is smaller than the 97.5 percent of the 1966 cohort still in prison as of December 31, 1968). The trend since 1966 toward shorter prison stays--measured in this fashion--is undeniable.

The length of time that will be served under determinate sentences is a function of three variables: the judicially determined sentence; pre-delivery credit, applied against sentences for time incarcerated on the same charges prior to sentencing (usually in local jails); and good time earned, which can be as large as one-third the sentence net pre-delivery credit. Letting T denote time served, S denote the sentence, C denote pre-delivery credit, and p denote the fraction of maximum good time earned, the relationship is given by the equation:

$$T = (S - C)(1 - p/3).$$

The California Department of Corrections recently released frequency distributions of S and C for the determinately sentenced cohort received in the year beginning July 1, 1977, the effective date of DSL.[30] Unfortunately, the frequency distribution of S - C (sentence net pre-delivery credit) cannot be derived from those of S and C. Values of p (fraction of good time earned) for which T and (2/3)S are equal are plotted against C/S (the proportion of the sentence spent jailed) in Figure 4.1. The curve shows the regions in

Table 4.3

Retention Rates for Male Felons Newly Received from Court
On All Felony, Robbery, and Burglary Convictions

Percentage in Prison After*	Year Newly Received from Court: All Offenses 1966	All Offenses Composite**	Robbery 1966	Robbery Composite**	Burglary 1966	Burglary Composite**
1.5 years	77.4	73.0	97.5	86.2	74.0	59.9
2.5 years	54.9	44.2	88.7	55.1	42.0	20.6
3.5 years	31.8	21.9	55.9	26.4	19.9	6.6
4.5 years	17.5	10.6	28.0	11.6	9.6	3.4
5.5 years	7.8	6.4	11.5	5.6	3.2	1.8
6.5 years	4.8	4.0	5.6	3.1	1.3	0.7
7.5 years	3.9	3.1	4.2	1.2	0.9	0.4
8.5 years	3.2	2.1	2 .9	1.4	0.7	0.2
9.5 years	1.6	1.6	0. 6	0.6	0.4	0.4

Source: California Prisons 1974-1975.

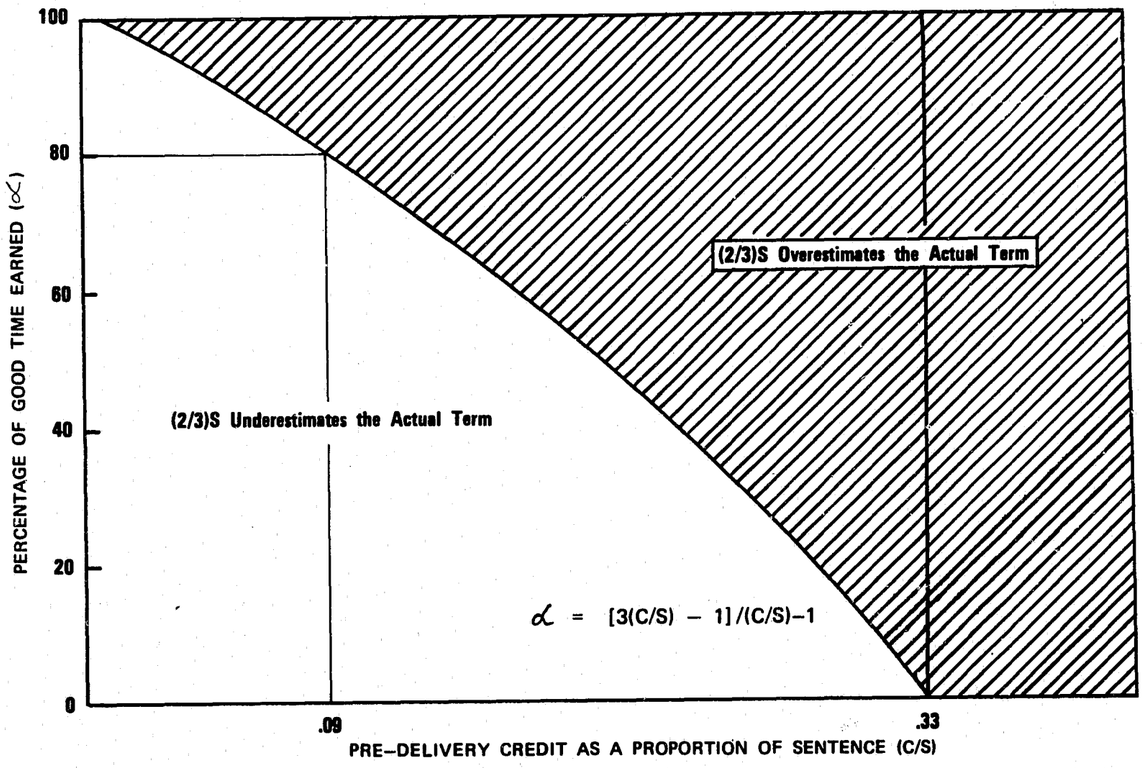
*Average terms are listed; actual terms are average plus or minus a half-year.

*Cohorts admitted in 1974, 1973, ..., 1966.

which (2/3)S under- and over-estimates T. In cases having no pre-delivery credit (C/S = 0), (2/3)S is served if maximum good time is earned (p = 1). At the other end of the curve, (2/3)S is the actual term if the pre-delivery credit-to-sentence ratio is one-third, even if no good time is earned. For the first-year DSL cohort, pre-delivery credits (C) averaged 3.8 months, while sentences (S) averaged 42.3 months, yielding a ratio of averages (C/S) of 0.09. Reading from the curve we find that (2/3)S is an accurate estimate if, on the average, 80 percent of maximum possible good time is earned (p = 0.8). If, in a particular case, p were larger than 0.8, (2/3)S would overestimate the prison term; if p were smaller than 0.8, the prison term would exceed (2/3)S.

Expectations based on legislative provisions governing the granting and denial of good time suggest that the average good time earnings will exceed 80 percent of the possible maximum and that consequently (2/3)S is not unreasonable as an estimate of time that will actually be served by felons sentenced determinately.[31]

Figure 4.1
Estimating DSL Time Served as a Function of Pre-Delivery Credit and Fraction of Maximum Possible Good Time Earned



Using two-thirds the sentence as an estimate of time actually to be served by those sentenced to prison under DSL, it is possible to construct percentage point distributions of time served for male felons newly received from court by determinate sentences for the year beginning July 1, 1977. These are shown in Figure 4.2, together with the percentage point distributions derived from the ISL composite cohort in Table 4.3. In both cases the medians, middle 50 percent and middle 75 percent points were derived from the data, using linear interpolations, on all offenses, robbery, and burglary.

The distributions in Figure 4.2 indicate first that the middle 50 and 75 percent ranges are smaller under DSL in all three offense categories, suggesting that disparity is lower under determinate sentencing. For all offenses the middle 50 percent range spans less than a year-and-a-half under DSL, compared with two-and-a-half years under ISL. Similar differences in the DSL and ISL middle ranges can also be seen for robbery and burglary. The greater symmetry about the median of the middle 50 percent of the DSL distribution, relative to the ISL distribution, is also notable.

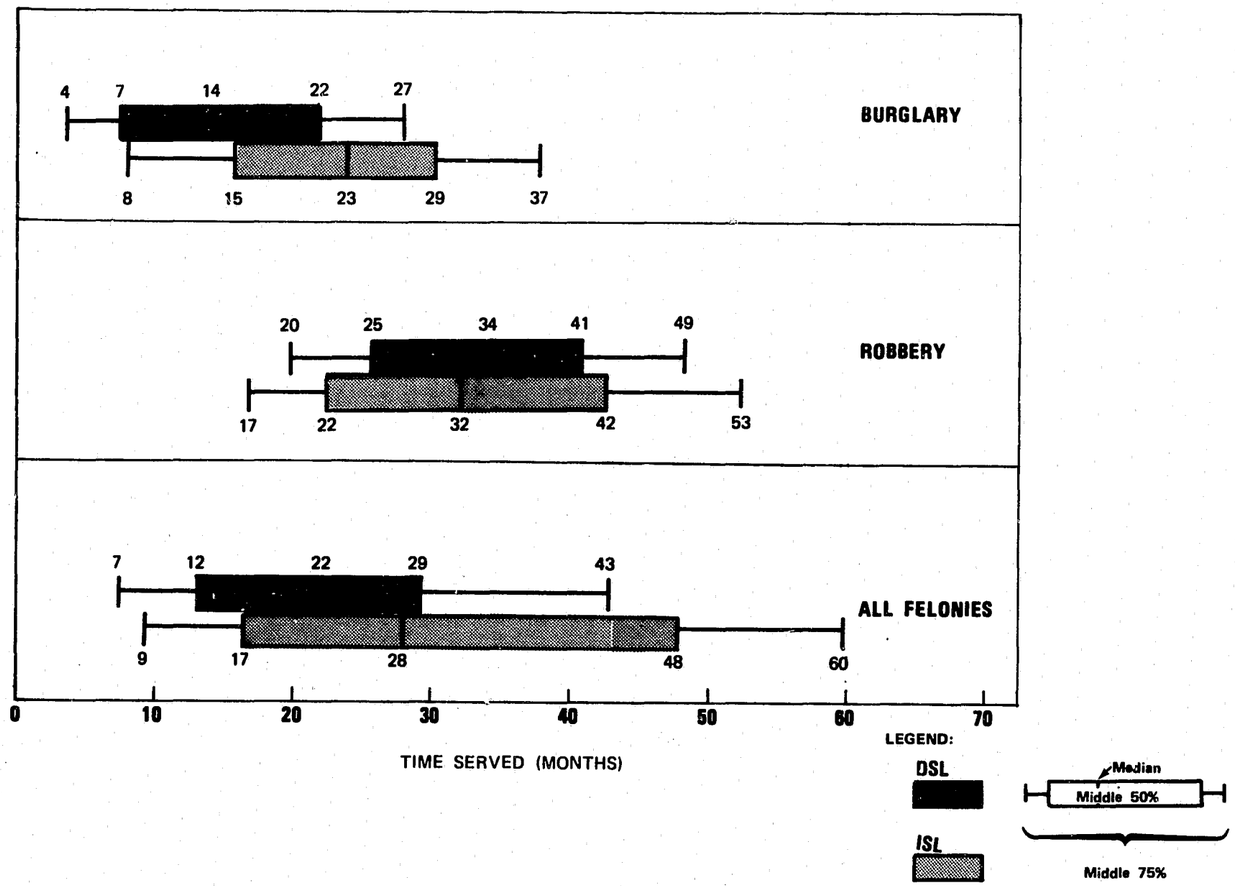
Overall median terms are about six months less for the DSL and ISL cohorts, about 22 months compared to 28 months. The DSL median for robbery is approximately 34 months, compared with 32 months for the ISL cohort.[32] Finally, the DSL burglary median of 14 months is about nine months shorter than that derived for male felons sentenced for burglary under ISL.

Proposition 13 Impact

Exactly one year after determinate sentencing came to California Proposition 13, which severely curtailed local government revenues from property taxes, went into effect. Because of possible consequences for the budgets of local correctional agencies, an assessment of possible implications for the population of local and state correctional facilities and an examination of steps taken to deal with this problem became addenda to the California case study.[33] Interviews were conducted with officials in four counties: Los Angeles, San Francisco, San Joaquin, and Ventura. These counties account for 40 percent of the State's general population and some 44 percent of its local jail population. The total capacity reported for local correctional facilities operated by these counties was 11,691.

Proposition 13 was expected to affect jail populations directly as a result of drastic budget cutbacks in sheriffs' offices that receive some 77 percent of their support from property taxes. Large-scale layoffs, accompanied by the release of substantial numbers of jail inmates, were threatened in several counties. Also, it was believed that the situation would be further aggravated by the closing of community based residential facilities, which would leave judges with fewer sentencing options. If these predictions were to hold true, jail as a condition of probation -- typically constituting about 80 percent of probation sentences -- would be forced also to decline, adding further pressure to increase actual probation caseloads.

Figure 4.2
Estimated Percentage Points of Prison Terms Under DSL and ISL in California



Probation agencies, which are locally funded also, were expected to be heavily hit by budget reductions, layoffs, and resulting increases in caseloads. Given large probation caseloads, the possible loss of jail as a condition of probation as a sentencing option, and short determinate sentences (16 months, 2 years, 3 years) for the majority of probationable offenders, an increase in prison commitments was anticipated as an indirect result of Proposition 13.

The California Probation, Parole, and Correctional Association surveyed 17 of the State's 58 probation agencies in June 1978 to determine the anticipated effects of Proposition 13 on their operations.[34] Most relevant among the findings of this survey was the belief that commitments to the State Department of Corrections and the California Youth Authority could double within the year. Operating budgets and staffs were reported to be cut by an average of 32 percent, with larger counties experiencing larger cuts. Respondents to the survey predicted that ranches and camps that mostly received youthful offenders would be closed in most counties that operated them and that these wards would be transferred to the state institutions. For example, Los Angeles County threatened to close all 12 of its camps and ranches at the time housing some 1400 youths. The survey also found expectations that work furlough, community release, drug programs, group homes, diversion programs, volunteer programs, and victim assistance programs for adults would be terminated. Finally, the report noted that all training and education, planning and evaluation, and CETA positions would be terminated.

Many of the concerns raised about the impact of Proposition 13 were at least temporarily allayed by $5 billion in surplus state revenues, allocated largely to maintain existing levels of fire protection, police, and educational services. In fact, one eligibility condition for the surplus was maintenance of pre-Proposition 13 levels of law enforcement and fire protection resources. While there was initially some ambiguity in which functions are in the law enforcement category, county sheriffs' offices eventually were so designated, but probation was not. Thus, the State bail-out precluded Proposition 13's full impact on local jails in its first year, and created additional time for localities to plan for reductions in state aid, possibly to zero, after fiscal 1979.

Before turning to the results of our survey of the four counties, we make brief mention of two other factors that may be of significance to the population of local jails. The first concerns replacement legislation (AB90) for the State's Probation Subsidy Program that had been operating since 1963. Under AB90, which also went into effect on July 1, 1978, California's 58 counties shared some $55 million in appropriations allocated on a per capita basis, with county boards of supervisors deciding on specific agency allocations. This differs from the former Probation Subsidy Program in which county probation agencies received direct subsidies whose amount was based on the volume of cases "diverted" from prison after a finding of guilty.[35] While only a small portion of the total budget for probation services statewide, the $55 million disbursed on July 1, 1978 helped offset Proposition 13's immediate anticipated effect.

The other factor that may be significant in local corrections is the little-used provision for paroling sentenced inmates from county jails. This statute, enacted in 1909, provided for local parole boards consisting of the sheriff, chief probation officer, and an appointee of the presiding judge of the Superior Court to consider parole application and hold parole hearings. This law was amended as of January 1, 1979, to enhance the use of local parole through the development of standards, guidelines, and procedures. The new law may provide a release valve should local institutions be faced with staff cuts that would reduce the maximum population over which sheriffs' offices could maintain custody.

- Budgets

Based on our post-Proposition 13 survey of Los Angeles, San Francisco, San Joaquin, and Ventura Counties, it seems safe to say that county sheriffs' budgets were largely spared from Proposition 13's impact in fiscal 1979 by the state subsidy.[36] The Los Angeles County budget increased in fiscal year 1979 by some $1.71 million (4%) over fiscal year 1978, while those of Ventura and San Joaquin counties remained essentially unchanged at about $4.5 million and $3.5 million, respectively. San Francisco cut its $11.2 million fiscal 1978 budget of its sheriff's office by ten percent in fiscal 1979. However, this difference is largely due to the one-time $900,000 capital improvement budget in fiscal 1978; only $30,000 was budgeted in this category in fiscal 1979.

For the future, two of the counties surveyed, Los Angeles and San Joaquin, estimate a further increase in their fiscal 1980 budgets. The other counties were unable to provide specific estimates. To a large extent, county budgets will depend on the level of the state surplus. Sizable budget reductions may result when and if a surplus is no longer available. While the fiscal 1978 surplus was $5 billion, surpluses of $4.5 billion and $1.5 billion are estimated for fiscal 1979 and 1980, respectively.

Although the overall surplus expected to be available next year is only ten percent less than that currently available, the Sheriff's Department and Probation Department in San Francisco expect cuts to be proportionately larger next year because they believe that the County received a disproportionate share of the present surplus and that this situation will be equalized in the future. The Mayor's Office forecasts a ten to 15 percent reduction in the fiscal 1980 budget. County departments have been asked to submit budgets at 80 percent of fiscal 1979 levels with two to five percent add-ons should additional monies become available. At best, next year's budgets are expected to match existing levels. However, in stark contrast to the above predictions, the San Francisco County Board of Supervisors foresaw a ten to 15 percent increase in next year's budget.

- Measures Taken to Reduce Operating Costs

As soon as Proposition 13 was implemented, the Ventura County Sheriff's Office sent layoff notices to 40 of its custodial corrections staff with the least seniority, but layoffs never actually occurred because the Sheriff's Office received its share of state surplus. The County Board of Supervisors imposed a hiring freeze resulting in some five unfilled vacancies among custodial staff. Following complaints that the freeze was forcing more overtime by the other custodial staff and interfering with training schedules, the freeze was lifted.

In Los Angeles County, Proposition 13 closed a prison farm and a work camp, and put severe restrictions on overtime. However, the Sheriff's Department noted that it had previously recognized that it was cheaper to buy privately the products that the two programs produced than to continue to absorb the cost of their operations. Further, the farm and the work camp were felt to have little job-related training value as work sites for the inmates. Thus it would seem inappropriate to attribute these closings to Proposition 13, although it might have expedited the decision.

In San Francisco overtime was cut, pay raises were cancelled, and no major capital improvements were planned. However, as noted earlier, the net effect of these measures was that the operating budget for the jails is the same for fiscal 1979 as it was for fiscal 1978. As in Los Angeles, security coverage has become a problem at certain times. To compensate for the reduction in staff and overtime, inmates spend longer periods of time in their cells.

Finally, apart from the elimination of an adult education program, the San Joaquin County Sheriff's Department reported having taken no specific steps to reduce costs as a result of Proposition 13.

- Construction Plans and Jail Population

All four counties expect jail population to increase, and Los Angeles and Ventura counties are confidently planning to build more jail space. Ventura is going to build a 500-bed facility to replace its oldest jail and increase its jail capacity. Los Angeles is planning to build five 480-bed facilities over the next five years. Officials in both counties seem certain that Proposition 13 will not affect their construction plans. Even San Francisco, which seems to face the worst financial problems, is expanding one of its facilities for women. We note that no dramatic population reductions occurred in any of the counties between May and September 1978, the five months surrounding the effective date of Proposition 13.

There are three divergent schools of thought on the future trends of inmate populations. None of the opinions are based on empirical evidence, but tend to reflect the orientation and the office held by the speaker.

The first school of thought, held by the small counties, is most effectively conveyed as a question: "There was no reduction in inmate populations when locally-funded probation and community programs were begun; why should there be an increase when these programs are ended by virtue of Proposition 13?"

The second group has an orientation toward state corrections. Richard A. McGee, former Commissioner of the California Department of Corrections, feels that "With limited jail space and funds, plus reduced probation services, an increasing number of (convicted felons) will be sent to (state) prison in spite of AB90. The state prisons are easily vulnerable to a 100 percent increase in intake as a result of Proposition 13 and recent mandatory sentence statutes."[37]

The third group, consisting of large counties, feels that determinate sentencing already has begun to fill the state prisons; that the state legislature has rejected and will continue to reject the construction of new state prisons in order that better use be made of existing facilities at the county level; and that the counties will be the ones to absorb the increased prison population as probation cuts and a more hard-line attitude toward crime signal a decreased use of alternatives to incarceration.[38]

At this time it is not possible to draw any definitive conclusions about the impact of Proposition 13. It can only be said there has been no visible impact on jail populations thus far and that there is a wide diversity of opinion about what will happen in the future. It would appear that it will take at least another year for trends to emerge.

4.4 Conclusions

The intent of California's determinate sentencing law was to reduce the disparity in prison terms that had been perceived under indeterminate sentencing. Stating the purpose of imprisonment as punishment, the law was designed to produce prison terms of similar length for those convicted of similar crimes. Under DSL, time spent in prison was no longer to be a function of predictions of future criminality based on the degree of rehabilitation.

The empirical evidence drawn from the state's first year's experience with DSL, limited though it may be, indicates that the intent to narrow variation in prison terms was largely met. Comparisons of time served distributions, known for ISL cohorts and estimated for DSL cohorts, found narrower spans for the middle 50 and 75 percent, for all offenses together, for robbery, and for burglary.

As observed earlier, the question of whether prison terms should be longer, shorter or about the same under DSL was posed by a number of researchers before any DSL experience had accumulated. Despite the intensive debate over the terms designated in the four sentencing triads and the time added by enhancements, DSL was not intended to increase or decrease "average"

time relative to ISL experience. The first year's DSL experience suggests moderate success with respect to this implicit objective. For all offenses together, median time projected for DSL was found to be somewhat less than the ISL median. Shifts were also seen within offense categories: the DSL burglary median was about nine months shorter, while that for robbery was found to be higher by about two months.

The possibility that the rate of commitment to prison from the courts would be affected by DSL was raised in the literature before the fact, but received relatively little attention. Ironically, an increase in the probability of a prison commitment (given conviction) appears to be the most immediate consequence of DSL. The extent to which this increase reflects changes in the convicted population, changes in sentencing practices as a direct result of the availability of shorter sentences, or other factors is a concern for further research.

Current projections of the male felon population of institutions, developed by the California Department of Corrections show an increase from 17,747 on June 30, 1978 to 23,550 on June 30, 1982.[39] These projections were developed using a simulation model for the DSL portion, and in input-output model of the ISL portion of institutional population movements.[40] Since the Department's initial projections that incorporated DSL provisions were made, there have been two revisions upward.[41] If the current projections were to prove accurate, the current institutional capacity for males of 22,810 would be inadequate by the end of 1981.

There remain in California a number of known contingencies that might affect prison population, and our case study concludes with a brief discussion of each.

Retroactive Cases

ISL-sentenced prisoners continue to be received from the courts on convictions of crimes committed before July 1, 1977 although in diminishing numbers. Section 4.2 outlined DSL's retroactive provisions which basically attempt to set terms on non-life ISL inmates as close as possible to what they would have been had they been DSL terms.

Parolees Returned

The return to prison of parolees contributed significantly to the total number of prison admissions under ISL. Moreover, the volume of parolees returned fluctuated considerably from year to year. For example, 10,578 parolees were returned on new commitments and technical violations in 1975, compared with 4,717 in 1974. For a number of reasons, it is difficult to forecast the practices of the Community Release Board in this regard:

- Length of time on parole is generally shorter under DSL;

- The criteria used by the Community Release Board for revoking parole may differ from those used by the former Adult Authority;

- Determinate terms may result in the release of individuals who are likely to have their parole revoked. This would occur, for example, if the Adult Authority had been correct in its decisions not to release.

Movements between parole and prison are described as the "heart of the system" in a paper describing the Department's simulation model for projections. Once some experience has been accumulated on parole revocations under DSL, the importance of this form of admissions can be reassessed.

Feedback Effects

The Judicial Council of California was required by SB42 to provide feedback to Superior Court judges in the form of statistical summaries on sentencing practices. When judges discover that they are sending more people to prison and possibly for less serious crimes, some may alter their sentencing criteria. Others, of course, may already be aware of their own shift in sentencing practices which may well have been intentional.

Amendments

Within a year after DSL went into effect in California, it was amended twice, both toward harsher penalties. SB709 placed certain types of offenses (primarily violent) in higher sentence triads, established seven years in prison as a minimum for life sentences, and took other steps toward lengthening terms. Its provisions apply to crimes committed on or after January 1, 1979. SB1057 lengthened the period of parole from one to three years for determinate sentences, and from three to five years for life sentences, and it doubled the six months additional time for technical revocations of parole. Whether future amendments to DSL will tend towards greater harshness can only be a matter of speculation at present. Major amendments that would affect large numbers of prisoners could invalidate all current population projections.

Proposition 13 and AB90

The possible effects of Proposition 13 and AB90 were discussed at length in the previous section. Both measures could affect prison and jail populations in a variety of ways, both directly and indirectly. Again, however, neither the direction nor magnitude of these effects is readily predictable.

Chapter 4: NOTES

1. As observed in Chapter 2, Maine was the first state to adopt determinate sentencing, effective in March 1976. Indiana, Illinois, Arizona and New Mexico followed California with the enactment of legislation bearing the "determinate sentence" designation.

2. April K. Cassou and Brian Taugher, "Determinate Sentencing in California: The New Numbers Game," Pacific Law Journal 9 (January 1978):5-106.

3. 408 U.S. 471 (1972).

4. 8 Cal. 3d 410, 503 P2d 291, 105 Cal. Rptr. (1972).

5. Cassou and Taugher, p. 10. Court interventions in other aspects of corrections, such as prisoner rights and prison conditions, were also beginning to emerge.

6. All the data analyzed as part of the California case studies pertain exclusively to male felons, which constitute some 95 percent of the population in state correctional institutions.

7. 14 Cal. 3d 639, 537 P2d 384, 122 Cal Rptr. 552 (1975).

8. This decision held also that once set by the Adult Authority the term could not be lengthened.

9. 54 Cal. App. 3d 1030, 126 Cal. Rptr. 524 (1976).

10. According to Johnson and Messinger, resistance to the Adult Authority Chairman's directives was also prevalent among some members of long standing. See Philip E. Johnson and Sheldon L. Messinger, "California's Determinate Sentencing Statute: History and Issues," Proceedings of the Special Conference on Determinate Sentencing, Boalt School of Law, University of California, Berkeley, June 2-3, 1977. Cassou and Taugher note that Stanley did not intend to strike down the concept of administrative guidelines and in fact encouraged their use, given a corrected rule.

11. Probation usually involves jail time on felony convictions.

12. The finding, however, remains on the record. This may be significant for reviewing cases believed to be disparate, one of the functions of the Community Release Board.

13. This enhancement cannot be used if the weapon was an element of the crime, such as armed robbery.

14. This enhancement cannot be used if great bodily injury is an element of the crime, such as murder.

15. Consecutive sentences normally result in longer terms than concurrent sentences. However, examples of the opposite result can be constructed, as demonstrated by Cassou and Taugher on pp. 59-60 of their article.

16. Good time is presently not earned on jail time, although amendments to this effect have been proposed.

17. "Participation" in programs could be interpreted to include work detail, so that by sweeping his cell, a well-behaved but unambitious inmate could earn this month.

18. Even as 1978 drew to a close, almost a quarter of male felons received from court were indeterminately sentenced.

19. Nagin asserts that, more than likely, this assumption will be violated. Daniel Nagin, "The Impact of Determinate Sentencing Legislation on Prison Population and Sentence Length," Institute of Policy Sciences and Public Affairs, Duke University, 1977, p. 11.

20. No estimates of the effect of parolees returned by the parole revocation method were made by Nagin.

21. The mandatory imprisonment provisions of AB476 were not noted by Nagin.

22. Johnson and Messinger, supra note 10.

23. Cassou and Taugher, supra note 2.

24. Kenneth R. Zuetel, Jr., "Senate Bill 42 and the Myth of Shortened Sentences for California Offenders: The Effects of the Uniform Determinate Sentencing Act," San Diego Law Review 14 (July 1977), pp. 1176-1204.

25. The 1977 dispositions included a mixture of determinate and indeterminate sentences.

26. The validity of this assertion is only minimally affected by the absence of Santa Clara County (San Jose) from the OBTS data base as indicated in the note to Table 4.2.

27. Rand Corporation, quarterly progress report (October-December 1978), Grant #77-NI-99-0053 from the National Institute of Law Enforcement and Criminal Justice.

28. Sentencing Practices Quarterly, Judicial Council of California, No. 4, Quarter ending June 30, 1978 in Table 1.

29. The ISL data taken from California Prisoners 1974-75, published periodically by the California Department of Corrections.

30. "Some Experience with Uniform Determinate Sentencing Act, July 1, 1977-June 30, 1978," California Department of Corrections, January 3, 1979.

31. Cassou and Taugher note that "good time credits are easily earned, but can be taken away only after a complex procedure has been meticulously followed" (p. 77). Nagin asserts ". . . the most realistic assumption is that prisoners will receive nearly maximum good time credit. . . ." Supra note 19, p. 14.

32. This reverses the declining trend in time served before DSL; the median for the robbery cohort admitted in 1966 was about 44 months.

33. Proposition 13 had been in effect for less than three months when this work began.

34. "Effects of Jarvis-Gann on Local Probation Departments," Report by the Foundation for Continuing Education in Corrections of the California Probation, Parole, and Correctional Association, undated.

35. Even under AB90, counties must keep prison commitments under a certain ceiling, determined by formula, to qualify for funds. However, AB90 appears to provide somewhat less incentive to judges not to sentence adults to prison than did its predecessor. According to one observer, the refusal of some counties to participate in this new program has led to the serious possibility of major amendments.

36. Readers should bear in mind the sizable inflation rates experienced nationally in the past several years. A match in dollar amounts of 1980 and 1979 budgets may be tantamount to a ten to 15 percent reduction when adjusted for inflation.

37. Richard A. McGee, Statement on the Impact of Proposition 13, September 22, 1978.

38. Los Angeles County was negotiating with state officials for a contract to have 500 inmates under state sentence placed in the county jail system.

39. Interview with M. Vida Ryan, Chief, Management Information Section, California Department of Corrections, February 22, 1979.

40. The simulation model takes advantage of the explicit sentencing algorithms for determining a prison term. Projections of new male admissions to prison are based on annual rates admitted per 100,000 males, ages 18-49, and total male population projections made by the Department of Finance.

41. Initial projections incorporating DSL provisions appeared in the August 9, 1977 projections, which showed only 20,700 male felons on June 30, 1982. These were revised in the August 13, 1978 publications, showing 22,225 male felons at the end of fiscal 1982. See Population Projections published periodically by the Management Information Section of the California Department of Corrections.

Chapter 5
INDIANA: PUBLIC LAW 148, REVISING THE CRIMINAL LAW

5.1 Background and Intent

Indiana became the third state to adopt a determinate sentencing system when the P.L. 148, amended by P.L. 340, went into effect on October 1, 1977. These two laws completely revised the piecemeal legislation constituting the criminal laws of the state, which dated back to 1905--the last time a major revision occurred. Several thousand crime "types" were consolidated into some 200 offense types by this legislation. Thus one intent of this reform was to modernize the criminal law of the state.

The first step in the revision of Indiana's criminal law occurred in April 1970, with the appointment of the Criminal Law Study Commission. The major product of that group's work was the Indiana Code of Criminal Procedures, proposed in 1972 and enacted in part by the 1973 General Assembly. The same commission proposed a new Penal Code for the state in 1974, which was reviewed in the 1975 and 1976 sessions of the General Assembly. The result was P.L. 148, signed into law in February 1976, to become effective in July 1977. This interim period of over a year was intended to clean up the initial legislation and to permit further debate on its provisions in the 1976 and 1977 legislative sessions. The effective date was postponed for another three months to allow final changes to be incorporated in P.L. 340, the amending legislation. The recommended amendments were made by an interim study group appointed by the governor. On the whole the amendments in P.L. 340 increased the severity of sentencing criteria and the "presumptive" length of sentences for a substantial number of crimes.

Also in progress during this period was the development of a code for corrections which began in April 1976 with the appointment of the Correctional Code Commission. While the draft legislation of October 1977 was not ratified by the 1978 legislature, the state's intent with respect to correctional reform, which would complement new penal sanctions, is clear. Three general purposes delineated for the corrections code are to (1) provide "clear guidelines for the exercise of the state authority to confine, control, care for, train and reintegrate offenders; (2) establish effective correctional measures to deal with conduct found to be harmful to individual or public interests, . . . ; (3) and prevent arbitrary or oppressive treatment of offenders." If these purposes survive the next legislative session, the set of adult justice reform initiatives taken by the state will be complete.

Sentences under the old Indiana code were largely indeterminate, in that the judge would specify a range such as 1-10 years, and the actual term of imprisonment was established by the state parole board through its parole release decisions. Because of the piecemeal nature of the old code, however, four crimes carried determinate terms, for which the judge would specify a

particular sentence length within the range established by statute.[2] Since these ranges were quite broad (e.g, 2-21 years for rape) and parole release dates were determined by the parole board even for these kinds of sentences, there was little real difference between determinate and indeterminate sentences under the old code.

The Indiana Parole Board had considerable discretion in determining time in prison under the old code. Those sentenced to "indeterminate" terms were eligible for release on parole upon completion of their minimum term (minus good time and jail time), while those sentenced to "determinate" terms could be paroled after one half of the determinate term or 20 years (minus good time and jail time), whichever came first. In neither case was the board required to grant parole at these points.

An examination of time served in different sentencing categories under the old code, shown in Table 5.1, illustrates this point. These

Table 5.1

Mean Time Served by Sentence Range:
Adults Released from Indiana State Prison
January-October 1975

Sentence Range	Time Served (months)		
	Mean	Std. Deviation	Range
1-5 years (n=25)	15.0	4.9	9-31
2-5 years (n=25)	12.4	3.9	7-23
1-10 years (n=25)	18.0	11.95	3-44
2-10 years (n=8)	15.5	5.7	9-25
2-14 years (n=15)	21.1	31.5	3-134
2-21 years (n=22)	61.7	30.8	16-121
Life (n=25)	236.8	99	14-420

Source: Memoranda from Ron Vail, Coordinator, Research and Statistics, Indiana Department of Correction, December 19, 1975 and May 24, 1976.

statistics are based on a 1975 study by the Department of Correction.[3] For example, while the sentence range of 2-5 years may appear more severe than 1-5 years, the mean time served in the latter category was 2.6 months less than that for the former. Inspection of the table reveals other apparent discrepancies.

Since the determinate nature of the new sentencing process in Indiana grew out of a larger effort to revise the entire criminal law, different observers held a variety of views regarding the intent behind the removal of the Parole Board's authority to decide when a prisoner should be released on parole. According to Clear et al., the new code "is variously expected to increase deterrence, increase humaneness, decrease discretion, 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."[4] While each of these impact areas could well be the subject of a given research effort, our case study focused chiefly on the law's impact on prison population and the distribution of time served.

5.2 Key Statutory Provisions

We turn now to a description of those aspects of the new penal code in Indiana that bear upon the population of the state's prisons. Relevant provisions of this code are reproduced in Appendix B. As noted previously, the old code consisted of an enumeration of crimes, each carrying its own sentencing provisions. P.L. 148 as amended by P.L. 340 established five felony categories and three misdemeanor categories and specifies a presumptive term for each. Maximum variations from these presumptive terms are also specified by law, allowing for aggravating and mitigating circumstances. Aggravating factors apply, but are not limited to cases in which there was a recent violation of a probation, parole or pardon; a history of criminal activity is present; rehabilitative treatment can best be given in a penal environment; a shorter or suspended sentence would depreciate the seriousness of the crime; the victim was 65 years of age or more, or was mentally or physically infirm. Mitigating factors apply to cases in which no serious harm to person or property was caused or contemplated; circumstances of the crime are unlikely to recur; the victim induced or facilitated the crime; the crime could be justified or excused, but not to the point of establishing as defense; the offender was strongly provoked; there is no history of criminal activity; positive response to a short or suspended sentence is likely, the character and attitudes of the offender are not indicative of further criminality; restitution has been, or will be made; imprisonment would result in undue hardship for the offender or his dependents. Other aggravating and mitigating factors are also possible. No specific provisions to govern the amount of time to be added to, or subtracted from, the "presumptive" term are given by statute. Thus variation from a base or presumed sentence length is largely in prosecutors' and judges' hands in Indiana, whereas such variation is specified by the legislature in California.

Table 5.2 summarizes the presumptive terms and maximum variations for the five felony categories and the three misdemeanor categories in terms of

Table 5.2

Sentence Ranges Stipulated by the
Indiana Penal Code as of October 1, 1977

Offense Category	Minimum	Presumed	Maximum
Murder	30	40*	60
Class A Felony	20	30	50
Class B Felony	6	10	20
Class C Felony	2	5	8
Class D Felony	2	2	4
Class A Misdemeanor	0	NA	1
Class B Misdemeanor	0	NA	180 days

Source: Indiana Code, 1977 Supplement.

*The death sentence is also possible.

the total possible range. Most common offenses span a number of felony (and misdemeanor) classes. For example, burglary and robbery range over Classes A, B and C felonies, depending on specific elements of the crime, while battery--defined as intentionally touching another in a rude, insolent or angry manner--ranges from a Class B misdemeanor to a Class C felony (if committed with a deadly weapon and resulting in serious bodily injury). The misdemeanor categories have been included in the table because the new code permits the court to enter a judgment of conviction of a Class A misdemeanor and sentence accordingly if the defendant was found guilty of a Class D felony. Three other provisions of the new code would suggest increased prison population:

- an additional fixed term of 30 years must be added to the fixed term set for the sentenced offense when the offender has been convicted on two or more prior unrelated felonies (35-50-2-8, Indiana Statutes);

- sentences cannot be suspended in favor of probation if the offender has a prior felony conviction, or if the sentenced felony involved deadly weapons, serious bodily injury or dealing in narcotics (35-50-22, Indiana Code);

- if convicted of a crime while other criminal charges are pending (e.g., while on pre-trial release, probation or parole), the two sentences must be served consecutively (35-30-1-2, Indiana Code).

Offsetting these are several provisions that provide greater bargaining leverage for prosecutors in the form of non-incarcerative sentence recommendations; that increase the court's sentencing flexibility; and that enable greater control over bedspace needs by the Department of Correction:

- the "attempt" version of an offense which, though in the same felony class, falls outside the scope of the mandatory imprisonment provision (35-41-5-1, Indiana Code);

- the court may within 180 days reduce the sentence or suspend it if not prohibited by mandatory confinement provisions (35-4.1-4-18, Indiana Code);[5]

- more liberal good time laws: good time is vested day for day (in Class I) under the new code, compared to 30 days per month under the old (35-50-6-3, Indiana Code), with similar changes in other classes, and stronger criteria for denying good time (35-50-6-4, Indiana Code);

- designation of inmate and institutions to security levels is left to the Department of Correction, with minimum security not necessarily involving a penal facility (35-4.1-5-3 and -4, Indiana Code).

Those convicted of crimes committed prior to October 1, 1977 are sentenced under the old code regardless of the date of sentencing, and those whose crimes were committed since that date are sentenced under the new code. Thus, as in California, there has been a gradual phase-in of new code commitments beginning in October 1977, reaching about 60 percent of all commitments by July 1978.

The new code provides that "a person imprisoned for a felony shall be released on parole upon completing his sentence of imprisonment, less good time he has earned."[6] The Indiana Parole Board remains under the new code, but its main function shifts from deciding when prisoners are to be released, to making parole revocation/reinstatement decisions.

Unlike California's determinate sentencing law, the new Indiana Penal Code is not retroactive to those sentenced under the old law.[7] These offenders will still be released in accordance with the provisions of the old code. Determinate sentencing in Indiana differs from that in California in a number of other respects. While in both systems, the sentencing judge determines a specific term within a legislatively-established framework, the criteria and limitations governing this selection are far more explicit in

the California law. For example, in California serious bodily injury carries a possible three-year enhancement if not an element of the crime or used as an aggravating factor to select the upper term. By contrast, the new Indiana code permits a judge to "enhance" a ten-year presumptive term for a Class B felony by up to ten years if serious bodily injury is found. Similar differences can be found for prior felony convictions and arming with a deadly weapon.

Another possibly important difference between the California and Indiana penal codes concerns mandatory imprisonment, for which Indiana's provisions are far more severe. In practice, actual use of mandatory imprisonment (if there has been a prior felony conviction) may rest largely with Indiana's prosecutors through charging, while in California, the prosecutor has less certain imprisonment levers.

Time has not permitted systematic measurement of the extent to which the provisions of the Indiana code have been invoked. We therefore conclude this section with a discussion of the possibilities based solely on the law's provisions. This discussion is based largely on interviews with state officials and on an assessment by Clear et al., who are also currently collecting and analyzing case disposition data in selected counties throughout the state.[8]

The study by Clear et al., was based on a sample of felony admissions to the Indiana Department of Correction from January through June 1976. Only first-time felons were included in the analysis because of uncertainties about the volume of cases in which the mandatory imprisonment provision would be imposed. Thus Clear asserts that new code time served estimates are correspondingly understated. Framed in expert opinion, determinations of aggravating and mitigating circumstances were coded and good time was liberally estimated in postulating sentences under the new code. Time served under the old code was estimated from Uniform Parole Report (UPR) statistics on time served by Indiana felons. The eight UPR offense categories were used.

Based on the 234 cases in the data base, Clear estimated that on average for the eight offenses, time served would have been over 47 percent longer under the new code's provisions (61.5 months vs. 41.7 months). More than twice the old code mean term of 47.5 months for burglary and 134.0 months for rape were estimated under the new code, while increases in time served of 70 percent and 33 percent were estimated for willful homicide and armed robbery, respectively. Modest declines were registered in the negligent homicide, theft, and forgery/fraud categories. The paper concluded that there may be some increase in prison population, but recognized the possibility that judges, prosecutors and defense attorneys "might engage in unobtrusive negotiations to control prison populations."[9]

Interview comments from representatives of law enforcement, adjudication (including prosecution and defense), corrections (including parole and probation) and the research community concurred with Clear's conclusion that prison population would rise as a result of the new law. All noted the increased leverage in charge and sentence bargaining afforded prosecutors,

due largely to the absence of parole release decisions under the new code. No strong opinions were voiced on the apparent safety valves provided in the new code, to delimit prison population, such as the minimum security designations or good time provisions available to the Department of Correction. In summary, most observers of Indiana law believed the new penal sanctions to be potentially quite severe, but not beyond the capability of the justice system to adjust to the limitations of its immediate "bottom line"--prison population. Clear notes the irony of this conclusion in light of the law's roots in reducing discretion and disparity of terms.

5.3 Impact

This section presents a very preliminary analysis of somewhat less than a year's experience under Indiana's new penal code, covering the period from October 1977 (the new code's effective date) through August 1978. Individual case data were collected on the first 705 determinately-sentenced male felons received (through July 1978) at the Department of Correction's Reception and Diagnostic Center (RDC), and projected distributions of time to be served were derived from the target release dates found. These incorporated credit for jail time and maximum (day-for-day) good time. Distributions of time actually served under the old penal code were derived from unpublished (1974) release statistics furnished by the U.S. Bureau of the Census' National Prisoner Statistics program.[10]

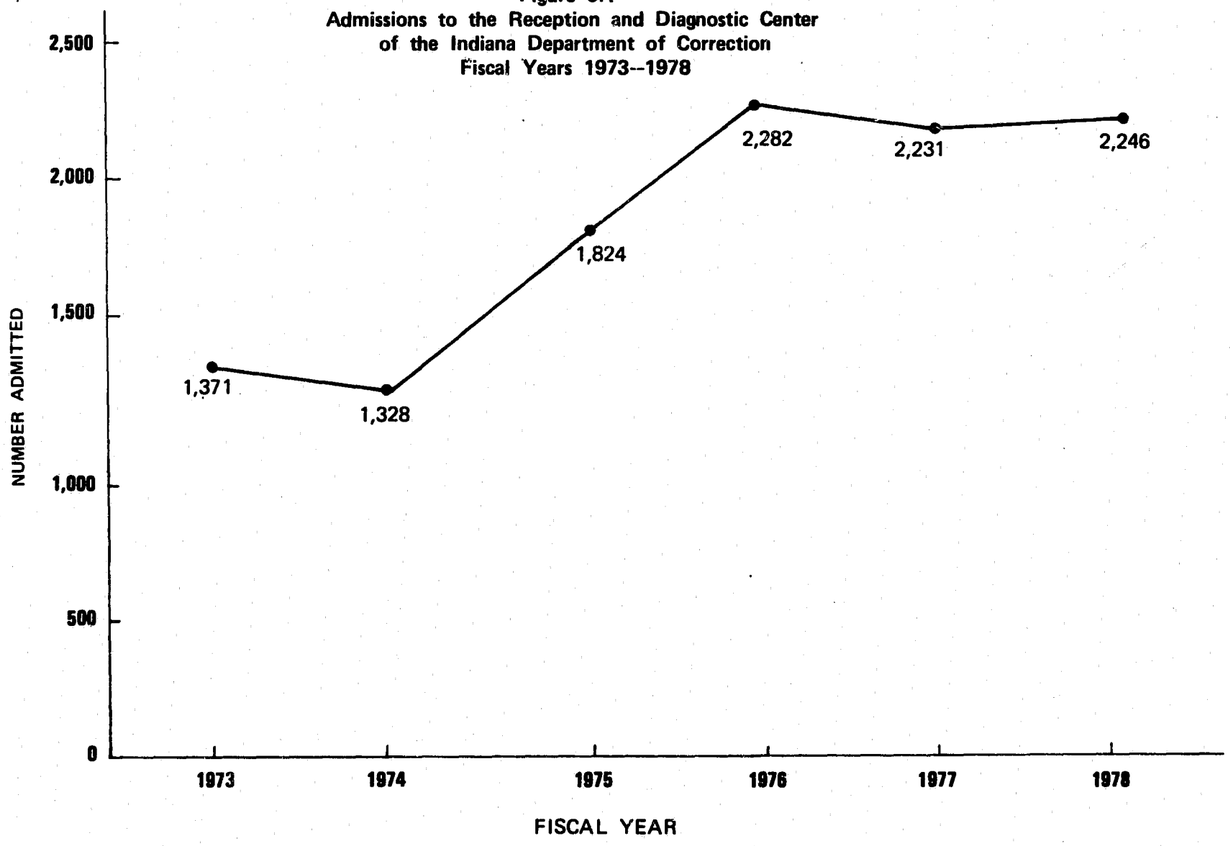
Statistics on admissions to the RDC were gleaned from the Center's monthly reports covering the period from July 1972 through July 1978. Of course, RDC intake since October 1977 consists of both old and new code commitments, the latter having reached 60 percent of the total by July 1978.

Finally, the Marion County prosecutor's office provided selected printouts from its PROMIS (Prosecutor's Management Information System) containing statistics on the relative use of dispositional alternatives in that county. Eleven months experience under the new code are reflected in these data (October 1977 through August 1978).

Admissions

The trend in total admissions to the RDC is shown in Figure 5.1. Admissions leveled off at just over 2250 per year in 1976 after climbing from 1371 in 1974, a 64 percent increase. An examination of monthly counts indicates that the number of admissions in the last ten months of each fiscal year, as a proportion of total fiscal year admissions, has fluctuated between 72 and 79 percent. For fiscal 1978, the last ten months (corresponding to the first ten months under the new code) constituted 77 percent of total fiscal year admissions, well within this range.[11] Thus, the sharp rise in first-year receptions of male felons from court observed under determinate sentencing in California was not in evidence in Indiana after ten months.

Figure 5.1
Admissions to the Reception and Diagnostic Center
of the Indiana Department of Correction
Fiscal Years 1973--1978



Source: Monthly reports of the Reception and Diagnostic Center, Indiana Department of Corrections.

Data from Marion County's Prosecutor's Management Information System (PROMIS) were acquired to determine whether there has been a shift in the relative use of sentencing alternatives under the new law. Proportions receiving prison, jail, probation, and suspended sentences were available for selected crime categories, beginning with January 1976 and ending with August 1978. This is somewhat under eleven quarters, the last four and two-thirds of which include a mixture of individuals sentenced under both new and old laws.

Figure 5.2 compares the use of sentencing alternatives for old code and new code cases (all felony dispositions) during the period covered by the data. Overall, prison and probation sentences occur with slightly greater relative frequency under the new code. Offsetting these are relatively fewer jail and suspended sentences. These shifts are small in relation to the amount of variation that exists from quarter to quarter for both old and new codes. Thus, given the adjudication of guilt on felony charges in Marion County, there appears to be no significant difference in the relative use of alternative sentences.

Time Served

As noted already, our analysis of time served was based on projected release dates for the first 705 males admitted to the Reception and Diagnostic Center with determinate sentences. Target release dates were recorded by the RDC as the earliest possible release dates, incorporating credit for time served in local jails while awaiting disposition and assuming that maximum good time (one day off for each day served) would be granted. Using these data we first estimated median determinate terms for all cases, robbery and burglary.

The median projected time served was 18 months for all cases, while medians for robbery and burglary were 35 and 25 months, respectively. These medians seem to be substantially less than might be expected, given the range of possible terms shown in Table 5.2 for the various felony classes. Robbery and burglary can both be designated as Class B (presumptive 10 years), Class C (presumptive 5 years) and Class D (presumptive 2 years), depending upon the specific elements of the offense. The assumption that maximum good time is awarded in all cases would halve the presumptive terms to 60, 30 and 12 months, respectively. If, in addition, an average hypothetical value of six months' jail credit were deducted, these presumptive terms could be as low as 54, 24 and six months actually served. With these assumptions, medians of 35 and 25 months may not be wholly unreasonable. It should also be noted that as the first cohort of determinate terms, these 705 cases may have been those that were readily negotiated, and thus show shorter projected terms than would be derived from cases taken to trial and consequently not included in this sample.

The 1974 release statistics mentioned previously provide a second comparative reference for the projected determinate terms. Using linear interpolation, we estimated the median and the span of months served by the

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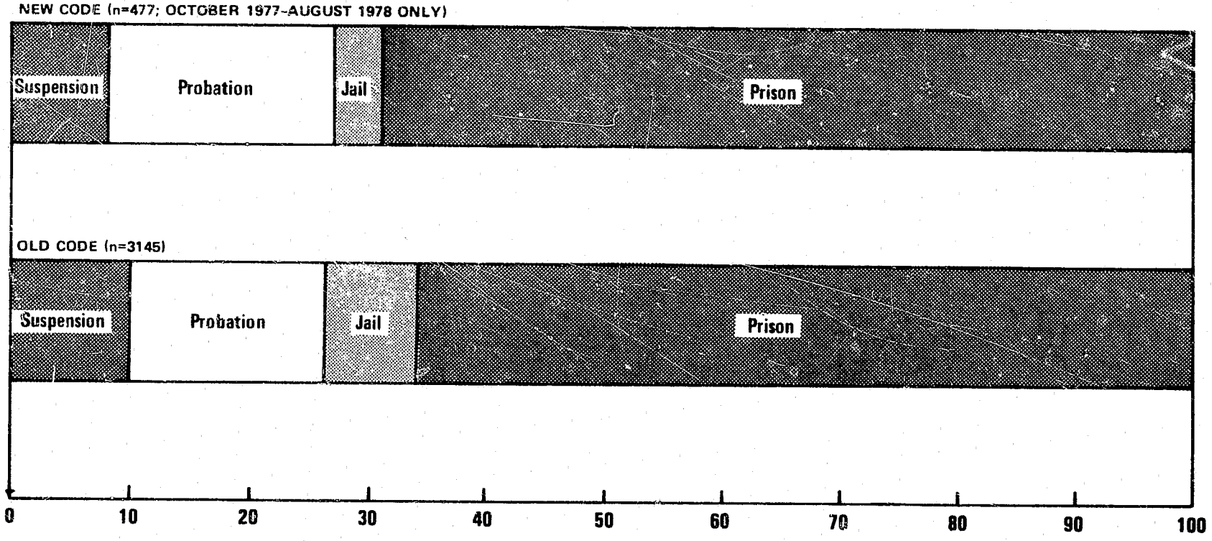
1 OF 3

Figure 5.2
Use of Sentencing Alternatives in Marion County
Under the New and Old Penal Codes
January 1976–August 1978



Source: Tabulations made from the Marion County Prosecutor's Information System.

middle 50 and 75 percent of those released in that year, for all felonies, robbery and burglary. Corresponding spans were also estimated for determinately sentenced cohorts, with the two shown graphically in Figure 5.3. Caution must be exercised in making these comparisons, since the determinate distribution was gleaned from an admission cohort, while the indeterminate distribution pertains to a release cohort. Inspection of these two sets of distributions suggests that minimum projected time served under determinate sentences may be shorter than that under indeterminate sentences for robbery, longer for burglary, and about the same for all felonies combined. These graphs also indicate that variation in the distribution of time served may be narrower under determinate sentencing in all three categories.

The data available to the case study are insufficient for assessing the frequency of mandatory imprisonment for second or subsequent felony convictions, or of the habitual offender penalty of 30 years.[13] Since cases that may be affected by these provisions are likely to result in trials, more time may be necessary to observe the frequency with which they are imposed.

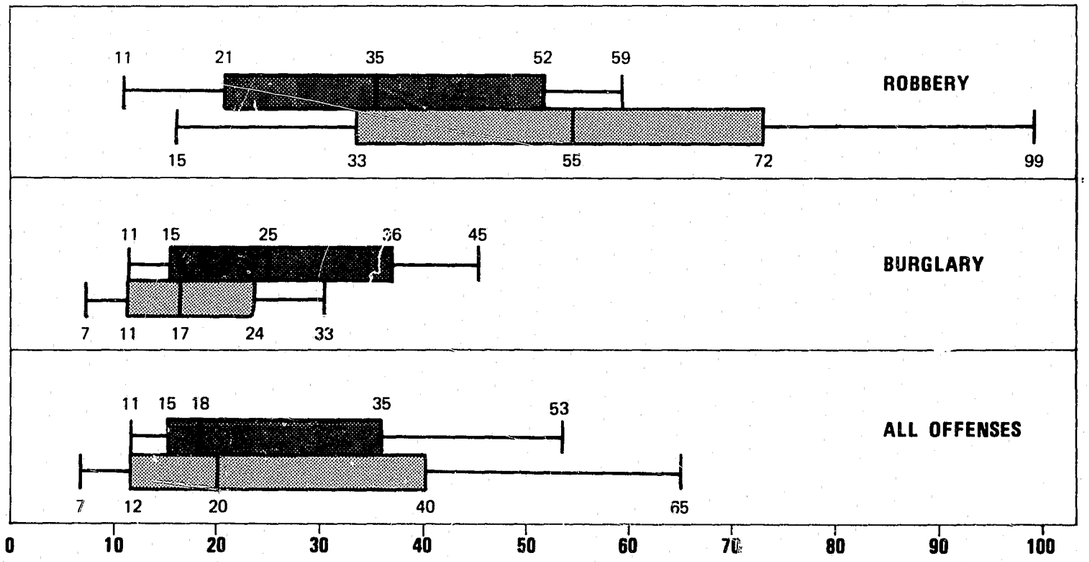
5.4 Conclusions

The previous section provides preliminary indicators of the nature of sentencing practices and time served under the new determinate sentencing law in Indiana. The analysis presented the "best" case for determinate sentences (i.e., the shortest possible sentences) for individuals received by the Department of Correction during the first ten months under the new code--possibly an atypical sample relative to one selected from a longer time frame. Defendants who face possibly very long sentences may have exercised their right to trial and consequently were unable to penetrate the system to the sentencing stage during the ten months. Given broad ranges of choice, sentencing practices are liable to fluctuate for a substantial period of time. More experience must be accumulated before the use of "shock probation" (see Note 5) can be assessed. Experimentation with negotiation strategies under determinate sentencing may still be occurring in prosecutors' and defense counsels' offices.

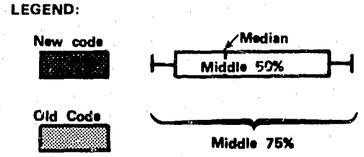
The amount of leverage available to the Department of Correction under the new code is also unknowable at this point. As with California, experience with good time denial has yet to accumulate to a point of statistical utility. Time served can potentially be doubled (or halved, depending on one's perspective) within the allowable range. In Indiana, greater flexibility to adjust to prison population pressures would appear to be available through the new code's security classification provisions. The extent to which persons under the Department's custody are assigned to minimum security outside a penal facility awaits the accumulation of experience.

It would appear safe to assert that Indiana has been spared the apparent increase in the probability of a prison sentence (given conviction) found in California. We postulated earlier that determinate sentencing may

Figure 5.3
Estimated Percentage Points of Prison Terms
Under the New and Old Indiana Penal Codes



Sources: New code--Intake records of the Reception and Diagnostic Center.
Old code--NPS tabulations of time served prior to first release on parole (1974).



have led California judges to impose relatively short prison sentences in borderline cases, rather than sentence to probation. A longer-term and more in-depth analysis is needed to explain adequately the apparent difference between Indiana and California in this regard. Clear's ongoing research on adjudication outcomes under the new code may shed some light on this question.

Chapter 5: NOTES

1. Burglary, robbery, rape, arson, and child molesting were upgraded one felony class by P.L. 340.

2. Determinate sentences were given for armed felony, rape, bank robbery, and dealing in a controlled narcotic substance.

3. Statistics shown in the table were compiled and reported in memoranda from Ron Vail, Coordinator of Research and Statistics at the Indiana Department of Correction.

4. Todd R. Clear, John D. Hewitt, and Robert M. Regoli, "Discretion and the Determinate Sentence: Its Distribution, Control and Effect on Time Served," Journal of Crime and Delinquency 24 (October 1978): 428-445.

5. This type of sentence is often called "shock probation."

6. Indiana Code 35-50-6-1 (1977 Supplements). Emphasis added.

7. Effective October 1, 1977, the good time earnings schedule of the new code applies to everyone.

8. Based on Clear et al., supra note 4, and discussions with representatives from the Indiana Department of Correction, state probation, the judiciary, defense, law enforcement, the state legislature, and the academic community.

9. Ibid., p. 443. We note that the main point of Clear's paper concerned disparity in time served which he believed would not decline under the new code.

10. These data were not published, due to the failure of the data submitted to meet technical criteria established by the Census Bureau. Release data were apparently not submitted in 1973 or 1975, and the 1976 release data are still being reviewed. Despite cautions of the Census Bureau regarding the validity of the 1974 release tabulations for Indiana, these are the only data available for making comparisons of time served between old and new law cohorts.

11. Recall that admissions during this period included both old and new code commitments.

12. As noted earlier, the new code projections assume maximum good time earnings. In principle, loss of good time could double the time served (less jail credit), although (a) lost good time can be restored by the Commission of Corrections and (b) procedural requirements for revoking good time are rigorous.

13. Only one habitual offender case was found among the first 705.

Chapter 6
MINNESOTA'S COMMUNITY CORRECTIONS ACT

6.1 Background and Intent

In 1972 the Minnesota Department of Corrections created a study committee to address the problems of increased cost of state institutions, limited local corrections alternatives, overlapping correctional jurisdictions, and lack of service delivery standards. The study committee was asked to make remedial recommendations in these areas, and the final outcome of this effort was the passage into law of the Community Corrections Act (CCA) in 1973.

The Act has the overriding purposes of "more effectively protecting society" and promoting "efficiency and economy in the delivery of correctional services."[1] The latter goal was to be achieved primarily by providing state subsidies to local communities for the enhancement of local correctional services, programs and facilities for adults and juveniles. Probation, county jails, and community correctional centers are all within the community corrections scope. A disincentive to commitment is provided in the form of a surcharge to counties for the commitment of specific types of offenders to state facilities.

6.2 Key Statutory Provisions[2]

The Act is postulated on the belief that greater efficiency and economy in the delivery of correctional services can be achieved by diverting from state institutions into community-based programs, most juveniles adjudicated delinquent and most adults convicted of felonies carrying a five-year maximum sentence or less (target offenses). A state subsidy for the development of community-based correctional programming is included as a financial incentive for counties to participate. Any single county or multi-county groupings from the same economic development region with a population of at least 30,000 can apply for subsidies, and any county is free to decline participation. Corrections Advisory Boards are created in participating counties, comprised of local representatives from the fields of criminal justice, social welfare, education, county government, and the general public. These boards are responsible to their respective county boards.

The annual subsidy provided by the Act is used to implement a county's Community Corrections Plan, a document produced annually by the Corrections Advisory Board. This document identifies local correctional needs and priorities for the year, and it proposes programs or services to meet those needs. Once approved by the county board (or boards in the case of several counties participating as a unit) and the Commissioner of Corrections, a

subsidy can be awarded. The amount of the subsidy is determined by an equalization formula that incorporates per capita income, per capita taxable value, per capita expenditures for correctional purposes, and percent of county population between the ages of six and 30. In 1978, counties were charged $25 per day per adult inmate by the state for the use of state facilities to incarcerate those committed for target crimes. (No surcharge is levied against participating or non-participating counties for state commitments involving offenses that carry maximum sentences in excess of five years.)

Generally, it is agreed that the major incentive for counties to participate in the Act is economic. Table 6.1 shows the total annual subsidy for which participating counties were, or will be eligible. Counties are included in the fiscal year when they did, or are expected to participate. The first counties entered the Act on June 1, 1974. As of July 1, 1978, a total of 25 counties constituting approximately 60 percent of the overall state population, had chosen to come under the Act. In 1978 the Department of Corrections projected that by June 30, 1981, 38 counties, representing 78 percent of the State's population, would be participating under the CCA.

An overview of how subsidy funds were allocated by participating counties through December 31, 1976 is presented in Table 6.2. The provision of probation and parole services is included in the category labelled Non-residential Programs. Prior to the Act the cost of probation services was divided between the State and counties (except in three counties having populations in excess of 200,000 which have traditionally provided such

Table 6.1

Funding and Participation Under
Minnesota's Community Corrections Act

Fiscal Year	Annual Eligible Amount	Number of Participating Counties
1974	$ 312,264	2
1975	2,399,721	5
1976	2,591,045	9
1977	5,001,831	18
1978	11,516,000*	24
1979	12,773,000*	25*
1980	15,145,000*	32*
1981	16,772,000*	38*

*Estimated by the Minnesota Department of Corrections in November 21, 1978 letter.

Source: Past Efforts 1970-1977, Future Directions 1978-1981, Minnesota Department of Corrections

Table 6.2

Allocation of CCA Subsidy Funds

Function	Percentage of Subsidy
Support Services	15%
Prevention and Diversion	6
Non-residential Programs	25
Residential Programs	18
Local Institution Programs	11
Estimated Use of State Institutions	25
	100%

Source: Past Efforts 1970-1977, Future Directions 1978-1981, Minnesota Department of Corrections, pp. 21-24, p. 253.

services themselves). As of January 1977, a total of 42 probation/parole positions and six support/clerical positions whose cost had previously been shared between the state and local government, were assumed entirely by counties participating in the Act.

The 25 percent designated in the table as the Estimated Use of State Institutions is actually withheld from the subsidy, and adjustment is made after the actual usage can be determined at the end of the year. Thus the amounts shown in Table 6.1 overstate total subsidies actually received by a like amount.

The creation of the local Corrections Advisory Boards is clearly a significant aspect of the Act. These Boards provide a forum in which information can be exchanged, and local corrections policy discussed and formulated in a participative manner. The composition of the Boards also permits the expression of a variety of views on criminal justice system policy. Moreover, the Boards theoretically serve to increase accountability on the part of those functional areas represented. If crime and public response to it are largely community concerns, the CCA does provide an overall framework for the establishment of individually-tailored local policies.

The Community Corrections Act can serve also as a mechanism for the realignment of certain functions within the local criminal justice system, resulting from a provision of the Act calling for centralized administration

of community-based correctional programming. For example, administrative responsibility for county jail operations traditionally rested with the county sheriff, while the responsibility for probation services had been discharged by the local judiciary. Counties participating in the CCA would have to ensure close coordination of functions such as these in the implementation of their Community Corrections Plan.

6.3 Impact

Concern with the increased cost of state institutions and the need to bolster community-based corrections suggest that prison population would decline if a sufficient number of counties chose to participate. In recognition of the multitude of other factors affecting prison population, however, the Act is not primarily viewed by Department spokespeople as a prison population control measure. A study of the Act's impact on sentencing practices was released by the Minnesota Department of Corrections in January 1977.[4] A summary of the Department's analysis and our re-analysis of the data is presented first.

Sentencing Practices

The Minnesota Department of Corrections' impact study examined the first three pilot areas to participate in the Community Corrections Act: a large metropolitan area, an area containing a middle-sized city, and a rural area. Each pilot area was matched with a demographically similar area not participating in the Act. Information on district court dispositions was collected from the criminal registers of ten counties altogether.[5] Six of these formed the three pilot areas, while four were chosen to form three comparison areas. The data collected covered a four-year period, beginning with July 1, 1972. The exact date of participation varied by area, but the third quarter of 1974 was designated as the starting point for the Community Corrections Act in the pilot areas. Thus, the data consisted of two years of disposition data before the "start" of the CCA and two years after.

The Department's study utilized all adult dispositions, except misdemeanor convictions, in the pilot and comparison counties during this four-year period. First, the probability of receiving a prison sentence was estimated from dispositions in the pilot counties for the two years preceding the CCA. This proportion was then applied to quarterly dispositions rendered in pilot counties during the post-CCA two-year period, to obtain estimates of the number of prison sentences that would have been received had there been no CCA. A similar procedure was followed for the comparison counties. In each instance the difference between this estimate and the number of prison sentences actually observed for the two-year post-CCA period was taken as an estimate of the number of "diversions" from state institutions. Diversions estimated in this fashion constituted 12.6 percent of all adult dispositions in the pilot counties, while the figure for comparison counties was 2.9 percent. Implicit in this comparison is a four-fold improvement in the percentage of cases diverted in participating counties.[6]

The Department continued to collect disposition data in these counties and furnished a tape file covering fiscal years 1973 through 1977 for further analysis in the case study. A preliminary examination of offense codes found cases involving crimes which carry sentences in excess of five years and hence are not subject to the county surcharge. Also found were gross misdemeanors, for which adults cannot be sentenced to state prison. Our analysis used only those cases involving target offenses, i.e., those having statutory maximum sentences of five years or less.[7] The distribution of these 8,727 cases across the ten counties is shown in Table 6.3.

Table 6.3

Number of Adults Sentenced for Felonies Carrying Maximum Sentences of Five Years or Less, Ten Minnesota Counties: July 1972 - June 1977

Type of Area	Participating County		Comparison County	
	Name	No. of Cases	Name	No. of Cases
Urban	Ramsey	2,133	Hennepin	4,788
Rural	Crow Wing	252	Itasca	304
	Morrison	92	Pine	159
Suburban	Dodge	43	Anoka	680
Small City*	Fillmore	45		
	Olmsted	231		

*Dodge, Olmsted, and Fillmore Counties formed as a group, but the first two officially began their participation on June 1, 1974, while the third did not officially enter until July 1975. Ramsey County (St. Paul) entered on July 1, 1974, and Crow Wing and Morrison Counties entered together on September 1, 1974.

Source: Computer tape (Impact Study data tape) furnished by the Minnesota Department of Corrections.

We wished to determine whether participation in the Community Corrections Act resulted in measurable changes in the use of prison sentences as sanctions for conviction offenses covered by the Act. If the CCA had been influential in sentencing decisions, one would expect to see a trend in the probability of receiving a prison sentence for participating counties which was not matched by non-participants. If neither group changed, there would be no statistical basis for believing the Act had an effect on sentencing.

If the two groups changed in similar ways, the Act might have been instrumental in participating counties, but one could not exclude the possibility that changes instead reflected statewide shifts in behavior, independent of CCA participation. In other words, our analysis addressed the same central hypothesis as did the Department's study, but utilized a data base extended by a year and consisting only of that subset of cases involving conviction offenses targeted by the Act.

Table 6.4

Probability of a Prison Sentence Given Conviction on a Felony Charge Carrying a Maximum Sentence of Five Years or Less, Ten Minnesota Counties: Fiscal Years 1973-1977 (Base Number of Dispositions Shown in Parentheses)

County	FY73	FY74	FY75	FY76	FY77
Pilot					
Ramsey	.28 (341)	.18 (373)	.16 (430)	.12 (400)	.12 (466)
Crow Wing	.35 (46)	.33 (43)	.24 (59)	.06 (54)	.20 (35)
Morrison	.00 (11)	.30 (10)	.09 (23)	.00 (24)	.05 (20)
Dodge	.00 (12)	.00 (8)	.08 (12)	.00 (6)	.25 (4)
Fillmore	.11 (9)	.00 (3)	.10 (10)	.11 (9)	.00 (6)
Olmsted	.08 (38)	.09 (34)	.02 (45)	.04 (45)	.06 (47)
Comparison					
Hennepin	.23 (886)	.14 (889)	.13 (822)	.16 (849)	.18 (884)
Anoka	.22 (58)	.26 (89)	.25 (135)	.15 (163)	.24 (206)
Itasca	.33 (45)	.20 (56)	.36 (56)	.24 (55)	.22 (64)
Pine	.35 (17)	.77 (30)	.38 (21)	.25 (44)	.31 (35)

Source: Minnesota Department of Corrections, Impact Study data tape.

Table 6.4 presents the basic data for the re-analysis. It shows the number of defendants sentenced in each county in the fiscal years from 1973 through 1977, and the fraction of those sentences which were for state imprisonment. Thus, in fiscal 1973 Ramsey County courts convicted 341 persons of felonies covered by the Act. (A few of these may have been the same defendant convicted twice. The actual unit of analysis is the sentence, rather than the person, but the difference is minor.) Of these 341 sentences, 28 percent were to state prison. In the next year (FY1974), the fraction had fallen to 18 percent of the 373 sentences. In Ramsey County (and in the other two groups of pilot counties) the proportion of prison sentences continued to

fall during the five-year period. This decrease is both too large and too systematic to be explained as a purely random event. Two facts, however, prevent the immediate conclusion that the Community Corrections Act was responsible for the change. First, in Ramsey County, where most of the sentences occurred, the largest single change in the use of prison sentences occurred the year before the Act became effective (FY1973 to FY1974). Second, a decrease in the use of prison sentences can also be seen in the comparison counties, although with less regularity and starting from a lower level.

In order to assess the effects of CCA on the rate of prison sentencing, it is necessary to specify a model of what would have occurred in the absence of CCA and compare the model's prediction to what did happen. The model chosen must be a fairly simple one since there are not enough data to estimate a complicated model. The model has three components: a set of variables which differentiate counties into matched groups (large, medium, and small), a variable distinguishing pilot from comparison counties, and a set of variables which estimate the statewide sentencing practice in each year from 1973 to 1977. The decision to use statewide rather than individual trends by county size was dictated by the small number of usable observations which remained after aggregations were performed. The stochastic model chosen was the logistic,[8] a distribution widely used for studying dichotomous outcomes. The model thus was:

$$\Pr(\text{Sentence:conviction and } x) = e^{xB}/(1+e^{xB})$$

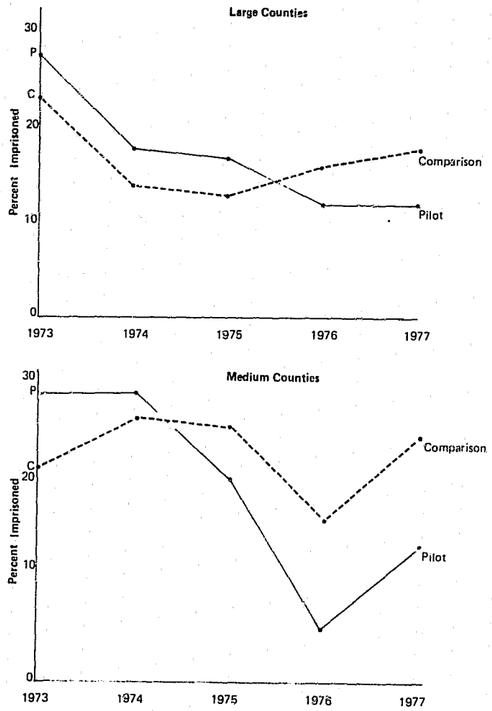
where x is the set of design variables for county and year. This model perfectly predicts the sentencing rate of large, medium, and small counties, and the yearly statewide rates of sentencing. The trends on which this model was based are shown in Figure 6.1.

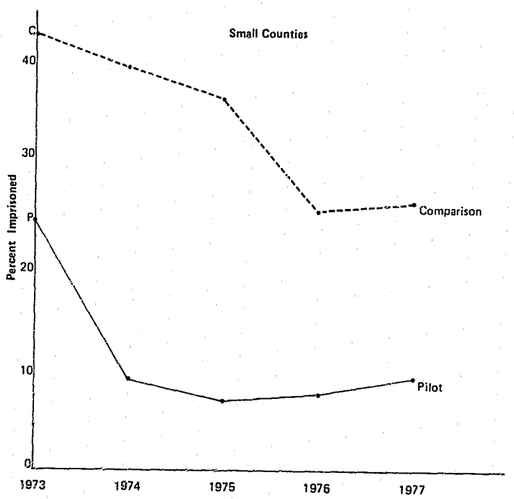
The upper portion of Figure 6.1 compares the two largest counties in the state, Ramsey (pilot) and Hennepin (comparison). The pilot county begins the period with a higher rate of imprisonment than the comparison county. Both decrease prison sentences in the year just prior to the Act. Thereafter, the use of prison sentences in the pilot county continues to decrease, while that in the comparison county actually shows a slight increase. The pattern in the medium-sized counties is similar, with the pilot counties starting above the comparison counties and again ending the period below them. (Small counties are so disparate that comparison is probably inappropriate. They contribute so few cases that the analysis is not affected by their exclusion.)

For each entry in Table 6.4 the original model estimates the probability of prison as:

$$\Pr(\text{Prison:conviction, size, status, year}) = \frac{B_0 B_1(\text{size}) B_2(\text{pilot/comparison}) B_3(\text{year})}{1 + B_0 B_1(\text{size}) B_2(\text{pilot/comparison}) B_3(\text{year})}$$

Figure 6.1
Probability of Prison Sentences in Minnesota Counties
Fiscal Years 1973-1977





For example, in the upper left-hand entry of Table 6.4 we find the probability of prison in 1973 in the large pilot county is .28. The model estimates this cell as:

$$.214 = \frac{.25 \times .77 \times .90 \times 1.59}{1 + .25 \times .77 \times .90 \times 1.59}$$

Similar estimates are constructed for each other entry in the table. The entire model is then reestimated by including a term which reflects the specific fact of participation in the Community Corrections Act. The first model includes terms for average county differences (over all years) and average yearly differences (over all counties), but does not adjust those differences for the specific years when pilot counties were covered by the Act. In the second model, the difference between pilot and comparison counties is estimated separately for years before and during participation. The second model provides a significantly better estimate of the number of prison sentences. (Significance levels are estimated by the likelihood ratio test. Chi square = 15.9 with one degree of freedom. $p < .01$.) This means that the differences in trends between the two groups of counties cannot be attributed to chance alone. The fact that the use of prison sentences began to decrease even before the enactment of the Community Corrections Act serves as a warning that there were clearly other factors at work which affected the use of prison sentences during the years covered by these data. We cannot rule out the possibility that pilot counties elected CCA participation as a means to achieve an already-formulated plan of decreased reliance on state prisons. Whatever the reason, however, it does appear that pilot counties sentenced significantly fewer offenders to state prison under the CCA than did the non-participating counties.

This finding cannot be compared with that of the Department's 1977 study because different data bases and methods of analysis were used. Department analysts chose not to perform tests of statistical significance on the argument that they are inappropriate to the research scenario.[9] Rather, they felt that the difference in the fraction of dispositions "diverted" from state prison should speak for itself. The tests of statistical significance performed in the analysis provide a guidepost for the exercise of our professional judgment.

We were also able to analyze trends in jail sentences in a manner similar to that described previously for prison sentences. Table 6.5 shows the probability of receiving a jail sentence, given conviction and the decision against a state commitment, again only for target offenses. Inspection of this table shows a general trend towards higher probabilities in all counties. However, there is no statistical basis for attributing this phenomenon to the CCA.[10] Our model indicates that trends in the pilot counties are not significantly different from those in the comparison counties.

Table 6.5

Probability of a Jail Sentence Given a Community-Based Sentence on a Felony Carrying a Maximum Sentence of Five Years or Less, Ten Minnesota Counties: Fiscal Years 1973-1977 (Base Number of Dispositions Shown in Parentheses)

County	FY73	FY74	FY75	FY76	FY77
Pilot					
Ramsey	.45 (244)	.32 (307)	.45 (352)	.51 (352)	.43 (409)
Crow Wing	.10 (30)	.06 (31)	.27 (45)	.65 (51)	.54 (28)
Morrison	.00 (11)	.00 (7)	.00 (21)	.13 (24)	.26 (19)
Dodge	.00 (12)	.25 (8)	.45 (11)	.00 (6)	.67 (3)
Fillmore	.00 (8)	.00 (3)	.89 (9)	.63 (8)	.50 (6)
Olmsted	.23 (35)	.32 (31)	.68 (44)	.65 (43)	.66 (44)
Comparison					
Hennepin	.28 (684)	.26 (762)	.41 (713)	.48 (716)	.45 (723)
Anoka	.16 (45)	.17 (66)	.18 (101)	.14 (138)	.24 (156)
Itasca	.07 (30)	.53 (45)	.72 (36)	.90 (42)	.82 (50)
Pine	.00 (11)	.14 (7)	.23 (13)	.09 (33)	.13 (24)

Source: Minnesota Department of Corrections, Impact Study data tape.

A related study conducted by the Department of Corrections and released in June 1977[11] found that, in a large number of cases, individuals sent to a residential community corrections center probably would have been placed on probation in the absence of the center, rather than committed to a state institution. Constituting "supplemental sanctions," these centers' cost effectiveness was called into question. The Departme..t's study of social control issues may be viewed as being essentially heuristic since only two residential centers were examined, albeit in considerable detail. The question of whether or not, or to what extent, these findings might apply to other similar programs, or even to other types of alternative community programs, must be viewed as a suggested area for further inquiry.

Our analysis of trends in sentencing practices should not be viewed as an evaluation of the CCA. The analysis was limited to adult populations; the Act applied also to all juveniles regardless of the type of offense involved. We did not examine the Act's impact on public safety or efficiency in the delivery of correctional services.

Prison Population Trends

The previous analysis dealt with sentencing patterns in ten counties representing some 48 percent of the State's 1970 population of 3.8 million. In order to provide a context for this analysis we next examine population movements into and out of state correctional institutions for the state as a whole, from 1970 through 1977.[12] Figure 6.2 depicts the population count on June 30th of each year, as derived from an initial value of 1605 on December 31, 1969 and subsequent quarterly admission and release volumes. As is evident from the figure, population declined steadily until mid-1974, the date designated as CCA implementation for the impact study described in the previous section, and it rose dramatically during the next three years. A brief analysis of admission and release patterns sheds some light on this unanticipated finding.

Figure 6.3 shows annual admissions (received from court and returned on parole violations) and releases (paroled and discharged) during the July-June periods corresponding to Figure 6.2. Admissions increased slightly from FY 1971 (July 1, 1970-June 30, 1971) through FY 1976, with a sharper increase in both the number received from court and the number of parole violators returned in FY 1977. We did not attempt to determine the extent to which this increase stemmed from changing crime patterns, changes in sentencing practices, or more vigorous arrest and prosecution efforts.

As can be seen from Figure 6.3, release trends were by far the stronger influence on prison population during the 1970-1977 period. Between FY 1971 and FY 1974, the number of releases exceeded the number of admissions, although the difference exhibited a declining trend. However, the total number of releases declined sharply in FY 1975 and continued to lag behind admissions through FY 1977. Inmates can either be paroled or unconditionally discharged at expiration of the sentence (less good time earned). The volume of releases in both categories fluctuated considerably during the period shown in Figure 6.3. The number of paroles granted declined from the 800-900 ranges during FY 1972 through FY 1974 to the 550-600 range during FY 1975-FY 1977, while variation in the number of inmates discharged exhibits no discernable pattern.

A brief diversion into a description of Minnesota's paroling function provides a context for this pattern in releases. Although Minnesota has had a parole board of some sort since 1911, its first full-time adult paroling authority--now known as the Minnesota Corrections Board (MCB)--did not become operational until January 1, 1974. When the MCB was established, there were neither guidelines nor statutory criteria upon which to make release decisions. This led to development of a guideline system for setting actual prison terms, which establishes tentative release dates early after admission to prison. Work on the guidelines system began in October 1974, and the system became fully operational in April 1976. While the MCB's guideline system is structurally similar to that used by Oregon's parole board (see Chapter 7), they differ in the fundamental respects that in addition to "desert" considerations, the Minnesota system includes an assessment of recidivism risk and provisions for early release pending the successful completion of institutional programs. Unlike Oregon, Minnesota judges do not explicitly provide input to the guideline provisions.

Figure 6.2
Trends in Minnesota Prison Populations
June 30, 1970 June 30, 1977

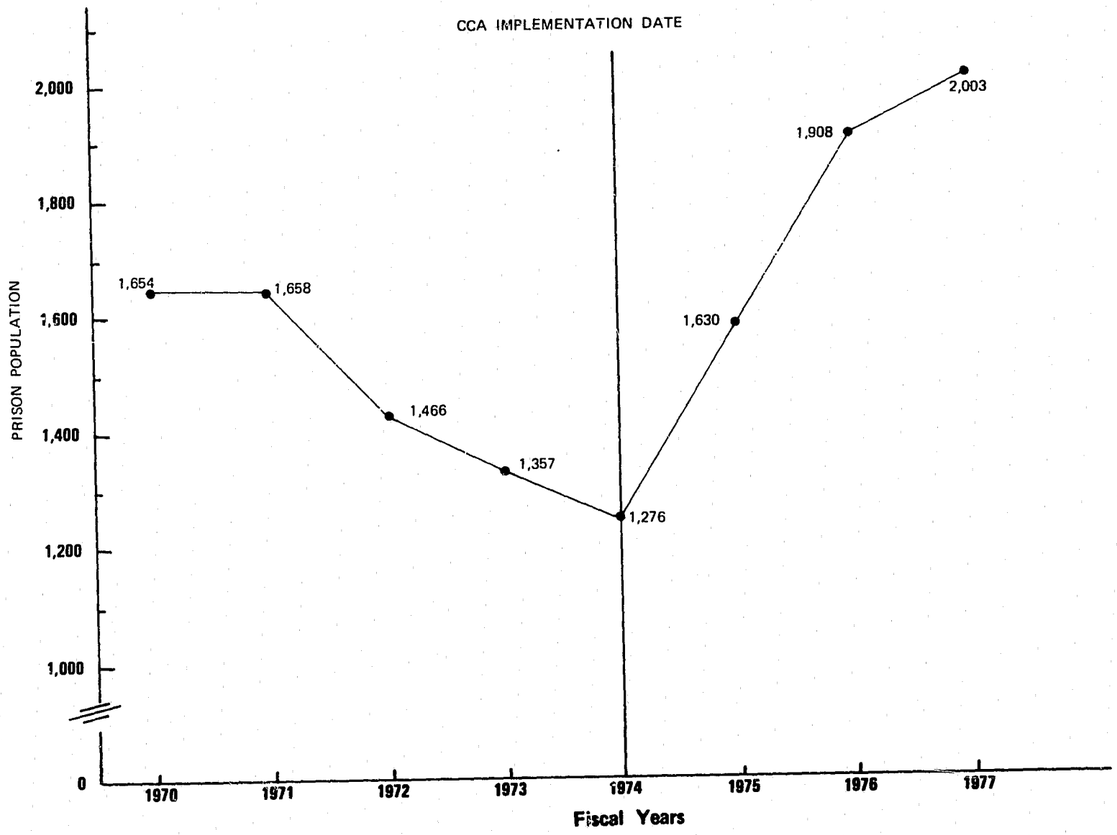
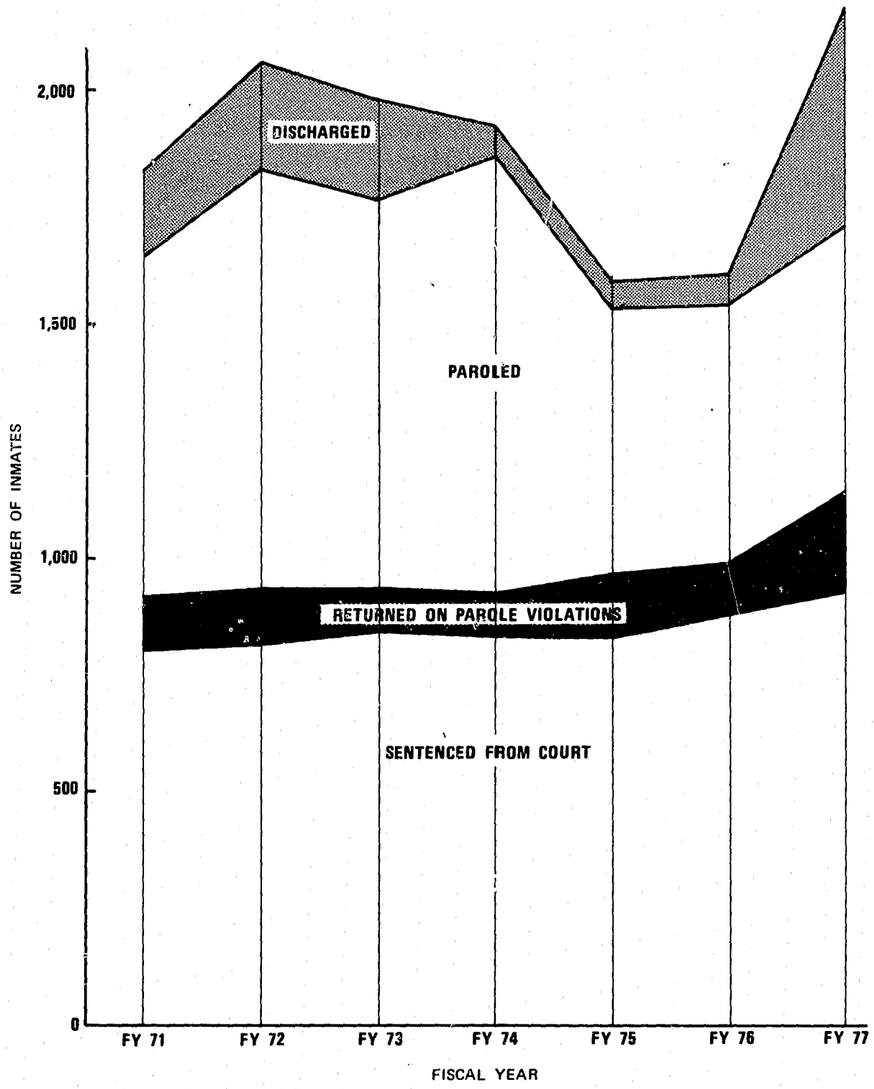


Figure 6.3
Minnesota Prison Population Movements
Fiscal Years 1971–1977



Source: Minnesota Department of Corrections.

We did not attempt to assess the impact of the parole release practices, either with or without guidelines on prison population or sentencing practices in Minnesota. The fluctuations observed in releases, both paroles and unconditional discharges, appear to be related in some fashion to these practices from the time of the agency's establishment in 1974 and subsequent to its adoption of parole release guidelines in 1976.

6.4 Conclusions

The previous analysis of Minnesota's Community Corrections Act examined but one of its possible consequences--namely its impact on prison population in the state--in a limited fashion. The intent of the Act to improve the efficiency and effectiveness (measured from a public safety perspective) through promotion of community-based alternatives was not evaluated in the foregoing analysis; nor was the extent to which counties could be attracted to the Act's provisions. Our analysis of the disposition data furnished by the Department of Corrections indicated that there was a trend away from the use of state commitment as a sentence, some part of which might have been due to the Act. Our examination of prison population movements showed that, at least over the short term, other factors, particularly those governing release decisions, predominated in the determination of prison population.

The impact of parole release guidelines and a contract parole program established in November 1976 are certainly areas ripe for further research. Perhaps more significant for the future of corrections in Minnesota was the recent creation of a Sentencing Guidelines Commission for the state. The law removes the authority of the MCB to establish release dates or grant discharges, although the Board will retain its powers to determine the conditions of supervised release and to revoke parole. The contract parole program is to continue on a voluntary basis, but the length of prison stays will not be shortened as was previously the case. The statute makes no reference to the Community Corrections Act. Perhaps the most significant aspect of the legislation, with respect to our case study, is conveyed in the following passage:

> "In establishing the sentencing guidelines, the Commission shall take into substantial consideration current sentencing and release practices and correctional resources, including but not limited to the capacities of local and state correctional facilities." (emphasis added)

The availability of correctional resources is recognized as a constraint on the specific guidelines to be promulgated. The manner by which the guideline formulation process takes this constraint into account, and the guidelines' net effect on prison population should be carefully examined in future research efforts.

Chapter 6: NOTES

1. Section 401.01, Ch.401, Minnesota Laws.

2. This summary description is drawn largely from Minnesota Department of Corrections, Past Efforts 1970-1977, Future Directions 1978-1981, Report to the 1977 Minnesota Legislature. The Community Corrections Act of 1973 is reproduced in Appendix C.

3. These are called "chargeable" offenses and generally involve non-violent behavior. However, we will use the term "target" crimes to avoid confusion with criminal "charges." The case study deals solely with adult populations.

4. Minnesota Department of Corrections, Impact of the Community Corrections Act on Sentencing Patterns, January 1977.

5. Data for other counties were also collected but were not used in the analysis.

6. Supra note 4, p. 53.

7. Fortunately, offense types were coded in the data. The Department provided a list of statutory maxima, by offense type, thus enabling us to identify target cases.

8. S. E. Fienberg, The Analysis of Cross-Classified Categorical Data, MIT Press, 1977. Computations were performed using program BMDPLR, University of California at Los Angeles, November, 1979.

9. Discussion on this and other issues were held with Department representatives on February 16, 1979.

10. The same design was applied to jail sentences. In this case, Chi square = 7.9 with three degrees of freedom, P>.05.

11. Minnesota Department of Corrections, Research and Information Systems, The Effect of the Availability of Community Residential Alternatives to State Incarceration on Sentencing Practices: The Social Control Issue, June 1977.

12. Quarterly statistics on admissions and releases were furnished by the Minnesota Department of Corrections.

Chapter 7
OREGON: HB2013, PROVIDING FOR PRISON TERM AND PAROLE STANDARDS

7.1 Background and Intent

The 1977 Oregon legislature passed HB2013, a bill which established an Advisory Commission on Prison Terms and Parole Standards. The Commission consists of the five Parole Board members and five circuit court judges who are appointed by the Chief Judge of the State Supreme Court to serve staggered four-year terms. In addition, the legal counsel to the governor, who is authorized to vote only to break ties, serves as an ex officio member, and the Administrator of the Corrections Division serves in an advisory capacity. One of the chief judges and the chairperson of the Parole Board alternate as chairpersons of the Advisory Committee. HB2013 is reproduced in its entirety in Appendix D.

The thrust of the legislation, and the focal point of the case study, is the Commission's mandate to propose guidelines governing the duration of imprisonment in felony cases. These guidelines were not designed to lengthen or shorten time in prison, but simply to structure variation. The bill requires the Parole Board to utilize the Commission's proposals in adopting rules which establish ranges of prison terms to be served prior to release on parole. These ranges are to reflect "punishment which is commensurate with the seriousness of the prisoner's criminal conduct," giving "primary weight to seriousness of the prisoner's present offense and his criminal history."[1]

The law also provides that an initial date of release be set within six months of admission to prison, except in cases where (a) the offense involved is particularly violent or dangerous criminal behavior, (b) the prisoner had previously been convicted two or more times for a Class A or B felony (see below), or (c) the prisoner's record contains a psychiatric or psychological diagnosis of severe emotional disturbance. (In case (c), consideration for parole is not given until the Board receives a report, prepared at least biannually, indicating that the problem is no longer present.) Otherwise, the initial date is honored by the Parole Board if a satisfactory parole plan is developed and the inmate's behavior in the institution is satisfactory.

Under the existing statute, prison sentences are given as maximum terms less than the statutory maxima of 20, 10 and 5 years, respectively, for felony-classes A, B and C.[2] In what was described as a compromise between the state judiciary and the Parole Board, sentencing judges can, under HB2013, set minimum terms of up to half the statutory maximum. A minimum term can be overridden by an affirmative vote of four of the five Parole Board members if it exceeds the maximum allowable under the Board's rules. On its face, HB2013 was an attempt to align judicial and parole policies regarding imprisonment terms, through compromise and the use of explicit standards for determining, within a narrow range, the actual prison

term to be served. This determination can generally be known as early as the prosecutorial investigation stage.

It is notable that despite the "indeterminate" label carried by Oregon's sentencing system and the "determinate" label carried by California's, the sanctioning philosophies underlying the two bear striking similarities. In both cases, punishment is explicitly recognized in the legislation as an objective of imprisonment. The term of imprisonment, given a prison sentence, is generally knowable well in advance of sentencing in both systems. Both systems have some flexibility in allowable terms: California's in the form of a base term which can be varied through aggravating or mitigating factors and Oregon's in the form of a range.[3] Both stipulate satisfactory behavior in prison as a condition of parole release on the designated date, although in California this determination is made by institution authorities rather than the parole board. Finally, the term-setting criteria of both systems look to the past more than the future, in that the nature of the present offense and criminal history are given greater weight than is the probability of recidivism. The two clearly differ in the placement of the authority to establish term-setting criteria. This rests largely with the legislature in California, while in Oregon, the Parole Board sets the terms under policies articulated in the legislation as interpreted by the Advisory Commission.

Parole Board practices that existed prior to the new law were based on 1973 legislation fashioned after the Model Penal Code.[4] It contained a presumption in favor of parole: The Board was to order parole release for eligible inmates "unless the Board [was] of the opinion that . . . release should be deferred or denied because:

(1) There is a reasonable probability that the inmate will not, after parole, remain outside the institution without violating the law and that his release is incompatible with the welfare of society;

(2) There is substantial risk that he will not conform to the conditions of parole;

(3) His release at that time would depreciate the seriousness of his crime or promote disrespect for law;

(4) His release would have a substantially adverse effect on institutional discipline; or

(5) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life when released at a later date."[5]

Also enumerated was a list of factors that could be considered in making the parole release decision. The factors, broken into thirteen categories,

ranged from the prisoner's personality, intelligence and training, to his prior criminal record, parole plan and conduct in the institution.

Partly in response to increasing criticism by judges, legislators, district attorneys, newspaper editors and the public,[6] the Board began experimenting, in November of 1975, with release rules modeled after the federal Parole Commission's guidelines. As in the federal system, the release standards developed by the Oregon Board were based primarily on the seriousness of the offense and the offender's criminal history and risk of recidivism.[7] The provisions of HB2013 were drafted principally by the chairperson of the Board, and constitute a formal, fully developed version of the Board's experimental standards.

The change in Board practices which culminated in the new legislation reflected a concern with disparity, lack of due process protections, and a rejection of rehabilitation as the main criterion for parole release. The new rationale adopted by the Board is basically a "just desert" model of sentencing: that the sentence would be commensurate with the seriousness of the offense and the prior criminal history of the offender. Desert, as used in Oregon, is a limiting principle. The Board may consider deterrence or the offender's probability of recidivism when setting the release date, but the date set may not exceed that which is "commensurate with the seriousness of the offense."

The new practices of the Board, with the reliance on only a few of the factors listed, were somewhat inconsistent with the directives of this existing statute. The Board wanted new legislation that would reflect and support their new procedures. One concern was that the lack of fit between existing statutory provisions for parole and actual parole practices could result in the courts overturning the parole rules, as had been reported in California.[8]

Serious overcrowding in the state's penal institutions and dissatisfaction with sentencing were two factors that created a propitious environment for the passage of HB2013.[9] Parole Board members generally indicated that the Board was not responding to prison population pressure when it began experimenting with standards in late 1975. The latter problem was apparently composed of quite different elements. On the one hand, judges and other members of the criminal justice system were concerned with disparity in prison terms. On the other, there was rising public concern over what was perceived as leniency in sentencing.[10] The legislature was apparently aware of public sentiment, but was unsympathetic to increased terms and reluctant to build new institutions.

In response to the attention directed at sentencing and corrections, the legislature created a committee and the governor created a task force to study the problem. Apparently, legislation of various types was considered. A number of "mandatory minimum" bills were drafted,[11] and there was talk of determinate sentencing.

It was into this environment that the Parole Board introduced its legislation. The legislation was groomed by the House Judiciary Committee and once passed by the House, it passed the Senate easily. There was apparently little or no serious opposition to the bill.

It was reported that the Advisory Commission was especially important to the legislature; it was hoped that the Commission would increase cooperation, communication and coordination between the judiciary and the Parole Board. In fact, it was originally proposed that the Advisory Commission make the rules, rather than recommend them. However, the separation of powers provisions of the Oregon Constitution precluded vesting the joint Commission with that authority. Therefore, the Commission was retained, but its decisions are "recommendations" to the Board of Parole.

7.2 Key Statutory Provisions

As described in the previous section, it is clear that HB 2013 does not per se specify parole release standards; it serves primarily as enabling legislation. The key provisions relating to prison population, discussed below, are established administratively by the Parole Board following the recommendations of the Advisory Commission. The ranges specified by the parole matrix and allowable variations from these ranges were initially based on the collective experience of the Advisory Commission represented by both the Parole Board and the judiciary . Changes to the matrix terms (and, more generally, the rules for applying them) can be made by majority vote at Commission meetings, which must occur at least annually.

The Parole Matrix

The parole matrix, shown in Table 7.1, consists of prison term ranges given as a function of the severity ratings of offenses and the score calculated in the history/risk assessment. As noted earlier, the ranges in the matrix were based initially on the collective opinion of the Board members, rather than on statistical studies of average time served in the recent past.[12] The just deserts principle embodied in the matrix ranges was designed to reflect societal norms. Parole Board rules can be adopted, amended or repealed on the Board's own initiative or by petition. In either case, the proposed change is widely published, and the Board holds a public hearing if requested by at least ten people or an association having more than ten members. The Board may also impose temporary rules which are valid for 120 days. Such rules can be subsequently made permanent through normal filing and hearing procedures.

During the first year, ranges were increased somewhat for those with fair to poor history/risk scores and higher serious categories, while other ranges were lowered. Thus Advisory Commission members' perceptions of society's response to release decisions stemming from their recommendations may be a key element of the length of prison terms in subsequent years.

Table 7.1

Oregon Parole Matrix
(As of July, 1978)

Offense Severity Category	Criminal History/Risk Assessment Score 11-9 Excellent	8-6 Good	5-3 Fair	2-0 Poor
	(All ranges in Categories 1-6 shown in months)			
Category 1	<6 =	<6 =	6-12 (4-8)*	12-22 (8-18)
Category 2	<6 =	6-10 (4-8)	10-18 (8-14)	18-28 (14-24)
Category 3	6-10 (4-8)	10-16 (8-12)	16-24 (12-20)	24-36 (20-32)
Category 4	10-16 (8-12)	16-22 (12-18)	22-30 (16-24)	30-48 (24-42)
Category 5	18-24	24-30 (20-26)	30-48 (26-40)	48-72 (40-62)
Category 6	36-48	48-60	60-86	86-114
Category 7**	10-14 years	14-19 years	19-24 years	24 years-life

Source: Oregon Parole Board Rule 30-032, as amended in July 1978.

*Months in parentheses represent range for youthful offenders (21 or younger at time of conviction).

**The following circumstances will result in a minimum sentence of 30 years: multiple victims, extreme cruelty, contract murder, prior manslaughter or murder conviction, and terrorism.

All offenses in the criminal code are classified according to seriousness, the categories ranging from category 1 (least serious) to category 7 (most serious). These seriousness categories generally reflect the severity of maximum sentences in the three felony classes, although there are exceptions. For example, an adult who furnishes a narcotic or dangerous drug to a minor (under 18 years of age) three or more years younger, commits a Class A felony, punishable by up to 20 years imprisonment. However, the subcategory of this statutory offense which involves less than one ounce of marijuana falls into seriousness category 2 of the parole matrix. Similarly, burglary of a dwelling is a Class A felony, but if it occurs while the owners are away and the value of stolen items is small, a seriousness rating of 3 would be most likely.

Only murder, certain types of felony-murder, and treason comprise the most serious category (7). Rape, robbery and assault range over seriousness categories 2 through 6, depending upon specific elements of the crime. As suggested by the previous example, burglary ranges from seriousness category 5 to 2. If an offender is convicted of multiple offenses and concurrent sentences are imposed, the seriousness rating is that of the offense bearing the highest rating.

The other dimension of the parole matrix is an offender's criminal history/risk assessment, scored on the basis of six items:

- number of prior felony or misdemeanor convictions, as an adult or juvenile, scored 0 (four or more) to 3 (none);
- number of prior incarcerations (90 days or more), as an adult or juvenile, scored 0 (three or more) to 2 (none);
- age at first commitment of 90 days or more (scored 0 (18 or younger) to 2 (26 or older);
- escapes or failures on parole or probation, scored 0 (two or more) to 2 (none);
- drug and/or alcohol problem, scored 0 (problem present) to 1 (no problem);
- conviction-free in the community for five years, scored 0 if not or 1 if so.

Total scores for these items range from 0 (worst) to 11 (best).

The range of terms corresponding to a seriousness category and history/risk assessment is located in the matrix at the intersection of the appropriate row and column. Thus, for example, if an offender's crime has a severity rating of 4 (e.g., residential burglary) and his history/risk score is 9, he would normally be released after serving between 10 and 16 months--

unless the circumstances of the offense or sentence permit variations from the ranges or exceptions.

Hearing panels, consisting of at least two full-time voting members of the Board, set terms in most cases. The panel may depart from the matrix ranges if it makes a specific finding that there is, by preponderance of the evidence (a lower standard of proof than that required for conviction), aggravation or mitigation that justifies the departure, and the facts and specific reasons for such variation are stated on the record. Inmates are afforded the opportunity to rebut these elements prior to the initial prison term hearing.

The parole rules also govern the maximum amount of variation from the ranges. Initially for offenses in the least severe category, from two to four months could be added or subtracted from the range boundaries, depending on the criminal history/risk score, while ranges in the most severe category could be extended by ± two years. A June 1978 amendment to the rules further delineated a panel's range of discretion by permitting up to eight months variation in severity category 1 and up to three years variation in category 7. In these cases, the term must be ratified by four of the five Board members.

Possible Effects on Felony Prosecution and Sentencing

The provision of the statute that permits judges to set a minimum term of up to one half the imposed maximum was reportedly a concession to the judiciary. It was designed to permit judges to set terms in excess of the anticipated range specified in the matrix. The Division of Corrections indicated that the imposition of minimum terms has comprised only about four percent of felons received since the law was enacted. Moreover, Division spokesmen believed that in most of these minimum term cases the matrix term would have been at least as long anyway, due to the nature of the offenses. As noted earlier, a minimum term can be overridden by an affirmative vote by four of the five Board members. According to Board rules, however, the issue of override is raised only when the minimum sentence exceeds the upper limit of the matrix range plus the corresponding maximum permissible variation.

The legislation requires that the Corrections Division provide the sentencing court with a presentence report in all cases involving a felony conviction. The report is to contain a sentence recommendation "including incarceration or alternatives to incarceration." Prior to HB2013, presentence investigations were conducted only at the request of the court. This requirement now has important implications because each presentence report contains a case analysis of the matrix--history/risk factors, severity, aggravating and mitigating factors--and eligibility for an initial parole hearing. Thus, at the time of sentencing, the judge has a fairly definite idea of how long the defendant is likely to serve, and can weight this term against other alternatives such as jail, probation, or restitution.

The legislation provides that: "The Court shall state on the record the reasons for the sentence imposed." The importance of the court stating

the reasons now stems from the Board's consideration of the judge's reason for the sentence imposed, particularly in deciding whether aggravating or mitigating circumstances warrant variations outside the matrix ranges.

Advance knowledge of the likely time to be served in prison extends to the prosecutor and defense counsel as well. A memorandum concerning the parole matrix was issued to all Oregon district attorneys from the Multnomah County district attorney's office. In part the memorandum read:

> "The most important change . . . is that we are no longer going to be able to formulate credible sentence recommendations without first considering the parole matrix system.
>
> . . .
>
> "(a) When judges are advised of the expected length of an offender's actual stay in the penitentiary under the matrix system, many will perhaps be more willing to impose the new minimum sentence recommendation in order to increase the actual incarceration period."

The memorandum also noted that the matrix system may have an impact on the charging decision. It indicated that the seriousness category of the offense charged should be considered and suggested the possibility of bringing more than one charge in order to secure consecutive sentences, which would require the total term to be the sum of the appropriate individual matrix terms.

Further possibilities for the matrix's impact on prosecution rest with the Board's previously noted reliance on findings of fact and reasons for the sentence, in setting terms. On this point, the memorandum circulated to district attorneys contained the following advice:

> "(c) Section 12 of HB2013 (ORS 137.120 (2)) now requires that a judge state on the record the reasons for the sentence imposed. Although this law is presently in effect, many judges are not complying with its provisions. DAs must emphasize that unless this is done, the judge's sentence will not be considered an aggravation and indeed will have no effect at all on the period of incarceration an offender will serve (unless a minimum sentence is imposed). We must be certain that these reasons are communicated to the Parole Board in the same way, since this may also be an aggravation and mitigation factor.
>
> "(d) The Parole Board has expressed a desire to have judges do the fact finding relating to the matrix system at the time of sentencing (e.g., offense severity rating, facts in Exhibit B, etc.). This has the obvious advantage of virtually 'locking in' the

Parole Board to the conclusion reached by the judge in assessing the matrix score. . . ."

For the past few years Multnomah County has been trying to eliminate charge bargaining. Initially the effort was limited to three offenses, but the list of offenses has been expanded.[15] Sentence bargaining, on the other hand, is not discouraged. No statistical description of the negotiation process was available, but the importance of analyzing matrix terms in charging and charge/sentence negotiations has clearly been recognized by some prosecutors in the state. Actually,[16] the parole rules clearly stipulate the Board's view toward plea bargaining.

> "Plea Bargained Sentences: If the prisoner has pleaded guilty to the crime or crimes of which he was convicted and more serious or other charges have been dismissed, or other crimes have not been charged, then the Board may deem it an aggravating or mitigating circumstance, allowing a variation from the matrix pursuant to rule 254-30-033(1), if the Court has found, or the Board finds, by a preponderance of the evidence, that the defendant's actual criminal conduct was of a different degree of seriousness than the crime of which he/she was convicted. In determining whether the conduct was of a different degree of seriousness, the Board shall consult the rankings of seriousness of crimes set forth in Exhibit A. In such cases, the Board shall state the actual criminal conduct on the record."

The ability of prosecutors, defense attorneys, judges, and probation officers to assess prison terms before sentencing, adjudication, or even charging, highlights the similarities between criminal sanctioning under Oregon's system and that of determinate sentencing systems.

Parole Decision-Making

The paroling function itself clearly stands to be affected most directly by the legislation. The legislation requires the Board to conduct the parole hearing and establish a release date within six months of an inmate's entry to the penal institution. In practice, the Board interviews inmates between two and four months of entry; the date depends on the statutory maximum for the offense. When the date has been set, the sentencing judge is informed of the release date. A judge who is dissatisfied with the release date can notify the Board. Such a communication is largely for purposes of raising issues to be deliberated by the Advisory Commission.

The parole release dates are subject to change in some instances. The Board's rules permit resetting to an earlier date upon application for review, made to the chairperson of the Board. A recommendation by the institution superintendent, with the concurrence of a majority of the Board, is required for a term reduction, which cannot exceed 20 percent. The date may be reset to a later time upon the recommendation of an institution

superintendent or Board member, with the concurrence of a majority of the Board. The inmate is permitted to appear in his own behalf.

Prior to release on the established date, each inmate is interviewed by at least one member of the Board. Release may be postponed at that time for three reasons:

- There is a psychiatric or psychological diagnosis of present severe emotional disturbance;
- The Board finds the inmate's parole plan inadequate. In this case, release may be postponed for up to three months. All inmates are required to submit a parole plan to the Board and the Corrections Division must provide assistance in the preparation of the plan. The legislation requires the Board to adopt rules defining the elements of an adequate plan.[17]
- The Board finds, after a hearing, that the inmate engaged in serious misconduct during confinement. The legislation requires the Board to define serious misconduct and to specify the periods of postponement, or extension of the term. The rules provide for extension only after the inmate has been found at a disciplinary hearing to have violated a rule and all other disciplinary actions have been considered and deemed inadequate due to the seriousness of the misconduct. In this case, the extension may be varied by 25 percent to account for aggravating or mitigating factors; greater variation requires the affirmative vote of four of the five Board members.

Finally, the legislation directs the Board to adopt rules, consistent with those governing parole release, for the re-release of prisoners whose parole has been revoked.[18] The rules governing the time that must be served prior to re-release of parolees revoked for technical violations are based on the severity of the original offense. For offenses with a severity rating of between one and five, four to six months must be served; offenses ranked six or seven result in re-imprisonment for a period between six and ten months. The ranges may be modified if there were aggravating or mitigating circumstances in the event leading to the revocation. For parolees returned with a conviction for a new crime, a new history/risk score is calculated, and the offense severity is determined by the new offense.

While those parts of HB2013 that deal directly with procedures and rules explicitly address many of the same factors that were regarded implicitly prior to the adoption of standards, the general requirement that reasons for actions or decisions be entered on the record was expected to reduce the number of "abuses" in parole release decisions. Given the passage of the legislation at a time when prison population was climbing (up by some 33 percent from two years earlier), the question can be posed as to whether

"abuses" will be in favor of prisoners, to control institution population. As noted previously, interviews with Board members and others suggest that this will not occur, although formal changes to the rules (or ranges of terms) provide a relatively fast means of achieving this end, should crisis prison population levels be reached.

7.3 Impact

The use of standards by the Oregon Parole Board for setting terms and making parole release decisions could theoretically affect both the length of prison terms and the volume of admissions. Prison population could also be affected by changes in the rate of re-admission to prison for revocation of parole, on either a technical violation or a conviction on new charges, if the revocation criteria reflected in the new rules, or if release decisions are less effective with respect to successful completion of parole.

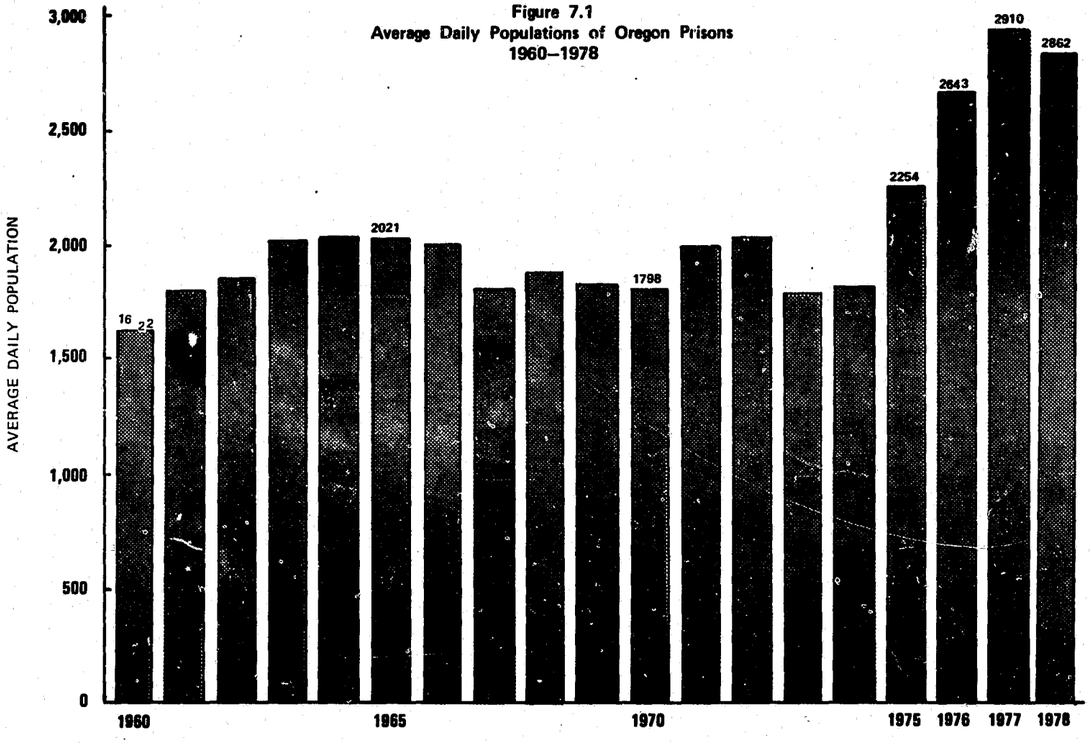
The guidelines stemming from HB2013 could also have an indirect effect on prison population through formal or informal charging, negotiation and sentencing policies, as suggested in the previous section. Such an impact would in turn affect the volume of offenders newly admitted to prison from court, similar to what seems to have occurred under determinate sentencing in California. This section speaks to questions of impact indirectly using the available statistics on prison population, admissions, releases, and time served.

Oregon's prisons have experienced an unprecedented rise in population since 1975.[19] Prior to that year, average daily population fluctuated moderately in the 1600-2000 range. The average daily population increased by over 60 percent in three years after 1974 and subsided somewhat in 1978. This population trend is shown graphically in Figure 7.1.

An examination of population movement shows that the combination of an increase in the rate of new admissions from court beginning in 1974, and a decrease in the number of releases (through both discharge and parole) during the 1973-1975 period was chiefly responsible for the subsequent increase in population. New admissions from court were relatively constant before 1974, but the next four years saw annual admissions rise to unprecedented levels. By contrast, releases declined steadily from 1973 to 1975, then increased dramatically each year from 1976 to 1978, resulting in an abatement of average daily population in 1978. Trends in new admissions and releases are shown graphically in Figure 7.2.

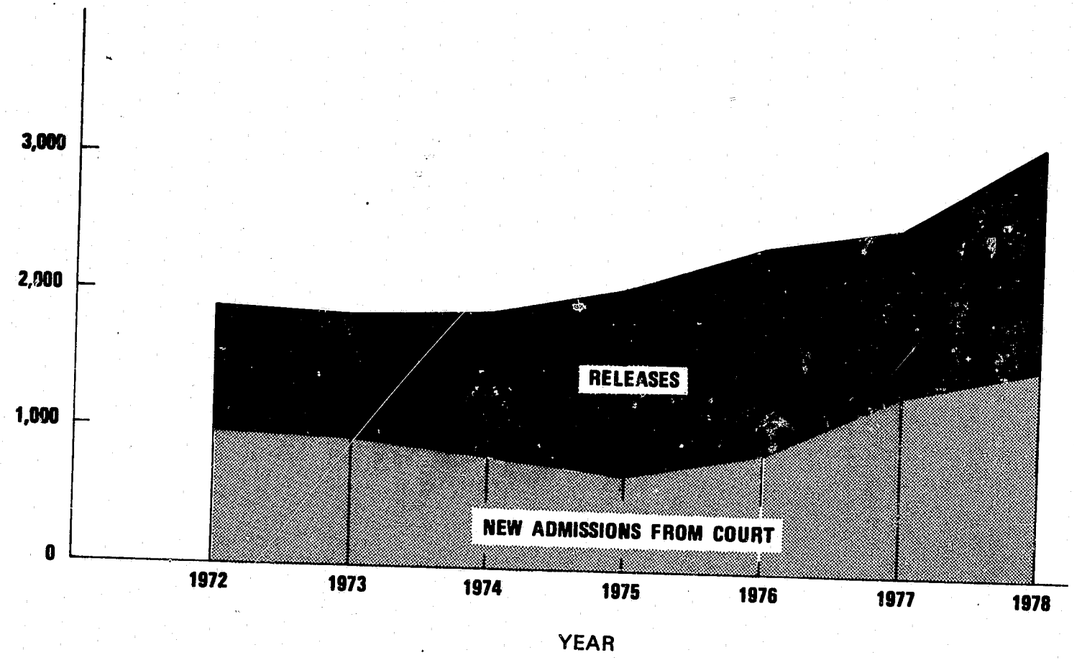
The scope of the paroling function has changed significantly since 1972. Of the 416 inmates released in the second half of 1971, only half (207) were paroled. By the second half of 1978, paroles constituted 91 percent of all releases, having increased steadily over the six-year period. Recognizing the increased share of releases borne by parole, the trend in releases can be viewed from a different perspective. Specifically, the question of how releases behave as a function of prison population can be examined. Table 7.2 shows releases (both discharges and paroled) as a

Figure 7.1
Average Daily Populations of Oregon Prisons
1960–1978



Source: Oregon Division of Corrections.

Figure 7.2
New Admissions From Court and Releases
Oregon Felony Institutions
1972–1978



Source: Oregon Division of Corrections.

Table 7.2

Releases as a Percentage of
Average Daily Population in Oregon:
1972-1978

Year	Releases	ADP	% Released	% Released (lagged)
1972	987	2029	49%	50%
1973	953	1781	54	47
1974	805	1803	45	45
1975	700	2254	31	39
1976	891	2661	34	40
1977	1326	2910	50	50
1978	1519	2862	53	52

Source: Oregon Division of Corrections

percentage of average daily population for the years since 1972. Also shown in the table are annual releases as a percentage of average daily population the previous year. In both cases, releases as a percentage of average daily population declined between 1972 and 1975, and then increased slightly above former levels by 1978.

7.4 Conclusions

From the discussion in the previous section, it is evident that 1975 was a pivotal year with respect to parole activities. Apart from the fact that parole was becoming a more prevalent means of release from prison,

- the Board began experimenting with release standards in late 1975;
- the declining trend in releases as a percentage of ADP began its reversal in 1975; and
- time served shifted downward in 1975, despite increases in the average sentence length.

Together, these findings are highly suggestive of a parole response to the climb in prison population that began in 1975--a response resulting in the abatement of this increase in 1978. In many respects, the response was

system-wide: it emerged from the joint efforts of the state legislature in its enactment of HB2013; the judiciary through participation on the Advisory Commission; and the Parole Board by way of rules formulation and implementation.

Even if this conclusion is correct, projection of population changes through 1982 remains problematic. One reason deals with uncertainties in the volume of re-admission to prison on parole revocations. While the percentage of the parole caseload so re-admitted has shown no trend since 1975, the parole caseload has increased by 53 percent from 1234 on July 1, 1975, to 1890 parolees 30 months later. Thus, even if release decisions did not affect the rate of recidivism, the volume of re-admissions may continue to grow if parole caseload does.

Finally, new commitments to prison, although continuing to increase through 1978, stand to be affected by the participation of counties in the Community Correction Act of 1977, fashioned after 1973 Minnesota legislation bearing the same name (see Chapter 6). Briefly, the Act was designed to encourage counties, through financial incentives, to incarcerate, supervise, or treat certain types of offenders in the local community, using commitment to a state institution only for those who would pose a danger to the community. Counties electing to participate would receive subsidies from the state to develop community-based programs and facilities, but would be charged by the state for the commitment of certain types of offenders to a state institution.

A final reason for uncertainty of projections is built into the nature of the matrix terms and parole rules themselves: they reflect current societal norms, and are thus subject to change. The commission of one particularly heinous or notorious crime by a parolee could cause a shift in what constitutes "just deserts" for a broad range of crimes. In the final analysis, the factors that guide the recommendations of the Advisory Commission, and the subsequent rule-making of the Board, may prove to be the most significant determinant of prison population.

Chapter 7: NOTES

1. HB2013, Section 2, (2)(a) and (3). Emphasis added.

2. The offense "aggravated murder" constitutes a special class which carries a mandatory 20- or 30-year minimum term.

3. Further deviations outside the ranges are also allowable under Parole Board rules, described in Section 7.2.

4. These provisions replaced earlier statutory authority which provided that no inmate was to be paroled unless, in the Board's opinion, there was a reasonable probability that the prisoner would remain outside the institution without violating the law and that the release was not incompatible with the welfare of society. Factors to be considered by the Board were "good conduct and efficient performance of duties" in the institution. [Oregon Laws 515, repealed in 1973.]

5. ORS 144.175 (1975).

6. See footnotes 4-9 in David M. Moule and John K. Hanft, "Parole Decision-making in Oregon," Oregon Law Review 55 (1976):303-304.

7. Unlike the federal parole system, term ranges were based on experiential impressions of "desert" reflecting societal norms, rather than on a statistical analysis of past practices.

8. Prior to California's determinate sentencing legislation, the Chairman of the Adult Authority had issued a directive which established rules and ranges to govern parole release. In In re Stanley, the court held the directive illegal because it failed "to account for one factor that the Adult Authority had argued was already implicit in the rules: namely post-conviction rehabilitative conduct." This decision was widely--but mistakenly--construed as overturning the parole rules as unconstitutional. See April Kestell Cassou and Brian Taugher, "Determinate Sentencing in California: The New Numbers Game," Pacific Law Journal 9 (January 1978):16.

9. According to Division of Correction statistics, institutional population grew from 2,054 to 2,271 in the last half of 1975, the latter figure being the largest ever recorded for the state. Design (single cell) capacity during this period was given as 2,108.

10. This was apparently due in part to widespread press attention devoted to one case involving a parolee.

11. All but one were defeated. The bill that passed created the offense of aggravated murder, and mandates a minimum term of 30 or 20 years, depending on the elements of the crime.

12. A Division of Corrections spokesperson indicated that the matrix ranges are very close to actual time served in the past.

13. A failure on probation is counted only if it stemmed from the commission of a new crime.

14. Rule 254-30-033 as amended July, 1978.

15. This policy was implemented as one element of a project undertaken by the Multnomah County District Attorney as part of Portland's High Impact Anti-Crime Program (1973-1976), funded by LEAA, which focused on burglary and stranger-to-stranger crime.

16. Rule 254-30-033(4).

17. An acceptable plan generally includes employment, school or other situation and suitable residence; it may require treatment programs and prescribed medication. If any portion of the plan is inadequate, the Board shall specify the ways in which the plan is deficient and order deferral of the prisoner's parole release [Rule 254-50-025(d)].

18. Rule 254-90-005 specifies one year on parole for seriousness categories 1 and 2, category 3 (if history/risk score is at least a 3), and category 4 (if history/risk score is at least a 6). For all others, time on parole equals time incarcerated, unless the latter exceeds 10 years; in this case, maximum time on parole is 10 years. The rules also contain provisions for reducing time on parole in suitable circumstances.

19. Statistics reported in this section were obtained from the Oregon Division of Corrections.

Chapter 8
CONCLUSIONS

The central issue in four of the case studies was whether the introduction of new laws seeking to limit or guide discretion in sentencing and release would affect prison population. The main question addressed in our analysis of Minnesota's Community Corrections Act was whether legislation whose provisions are clearly suggestive of a reduction in prison population would indeed result in such a reduction. Our general conclusions on the case studies as a whole are summarized in the following sections.

8.1 Expectations vs. Outcomes

Perhaps the most significant conclusion of the case studies as a group is that analyses based on literal provisions in the law, "other factors remaining constant," are less than likely to be borne out by experience. In support of this conclusion, we briefly recapitulate the findings:

- Determinate sentencing in California appears to have extended the reach of the imprisonment sanction, a result that was not intended by the law's framers. Thus, offenders who probably would have been placed on probation under California's previous highly indeterminate sentencing (likely serving some time in local jails) are now serving relatively short prison terms. The median length of stay of all prisoners serving determinate sentences is about six months less than that served under indeterminate sentences. However, time projected to be served under determinate sentences is less dispersed than time served under indeterminate sentences.

  In Indiana, determinate sentencing seems not to have substantially affected the decision to imprison. Median length of stay in prison is about the same, although shorter robbery terms and slightly longer burglary terms do not seem consistent with the intent of the law. As in California, dispersion of term lengths is substantially lower under determinate sentencing.

- The use of guidelines to set the length of prison terms in Oregon appears generally to have increased the volume and rate of releases from prison. Parole caseloads have grown as a result, and the rate of parole revocations has remained stable, resulting in an increase in admissions to prison due to the larger number of parolees at

risk. Data were not available to assess the effects of guideline usage on the dispersion of time served.

- Fewer adults convicted of armed robbery and aggravated assault have been admitted to prison than would have been expected since the felony-firearm law became effective in Florida. However, the three-year minimum term that must be served is longer than time served by those who had been sentenced to prison for these crimes prior to the act.

- Passage of the Community Corrections Act in Minnesota may have partially contributed to the "diversion" of less serious felony offenders from prison. Declining trends in the proportion sentenced to prison, beginning two years prior to the first counties' participation in the program, were found in both participating and non-participating counties. Ironically, the state's prison population began to rise to unprecedented levels at about this time, largely due to reduction in parole releases.

Granted that these findings are based on limited empirical evidence, they should suggest caution to those who would make policy decisions or take actions on the basis of the literal provisions of sentencing statutes. They should also be viewed in light of the time required for any system to re-establish equilibrium following a change in policy or law. Until the adaptation is complete, it is virtually impossible to evaluate the full impact of the change. If, for example, state legislatures were to increase the penalty for rape to a mandatory minimum of 25 years, it may be possible within three years to assess its impact on arrests, charges, trials vs. reduced pleas, and convictions. But it will be at least seven to ten years before the full impact on prison population even begins to be felt (assuming those first sentenced on the average of 20 years, served about a third of their sentence). At that time the first wave of inmates convicted under the new law, who otherwise would have been released, will remain in prison--joined by a regular flow of new inmates given the mandatory minimum. Such a lagged effect makes it difficult to monitor the impact on prison population or to adjust for consequences that may not be felt for several years. For other kinds of policy change (e.g., sentencing guidelines), there may be no fixed period of adaptation: The impact on prison population in two years may be very different from today's or that in four years. Even legislative changes, for which lagged effects can be anticipated, may be modified before their original outcomes are fully understood. Under these circumstances, any claims to knowledge about the true consequences of legislative acts are highly speculative. Finally, legislative intent with respect to penal sanctions can be inadvertently undermined by other policy changes within general government. We saw this phenomenon, for example, in California where the advent of Proposition 13 may well drive up state commitments for lack of resources to deal with offenders at the local level.

8.2 Shifts in Discretionary Power

The second conclusion that emerges from the case studies pertains to the location of discretionary power in the sanctioning of those accused or convicted of crimes. Judges and parole board members were the primary targets of the reformers' efforts; their application of the discretionary authority to sentence and release was seen as primarily responsible for sanctioning disparity under indeterminate sentencing provisions.

The discretion of law enforcement officers to arrest and of prosecutors to charge and negotiate, while called into question by some, was seldom directly addressed in reform proposals. The Florida, Indiana, and Oregon case studies suggested that prosecutors have gained greater leverage in the adversary process, and that the discretion they maintained under the new provisions of these statutes is of greater importance than under former statutes. In Florida, State's Attorneys, when interviewed, admitted to circumventing the mandatory minimum law by simply not filing that specific charge in cases where they felt the circumstances did not warrant a three-year prison term. In Oregon, District Attorneys devised strategies for dealing with cases for which parole release guideline terms were believed to be inappropriately short. These examples suggest that prosecutors are able to retain the discretion to charge defendants as usual, or to compensate provisions believed to be too lenient by overcharging. It also suggests that as a general rule, when any system is confronted with legislative changes in procedure, capability or sanction, the behavior of key actors probably changes as little as necessary to comply, and as much as possible to mediate the negative impact or disruption of the change.

8.3 Formalization of Policies Already in Force

Presumably, all legislated changes are intended improvements. To a large extent, however, the recent movement to change legislated sanctioning practices reflects a trend toward formalizing the system. Determinate sentencing and parole guidelines as well as other administrative changes (such as explicit restrictions on plea bargaining or "Career Criminal" prosecutorial programs) all reflect a desire to eliminate or to make explicit practices that were implicit, or ad hoc and "extra legal." Supporting this view, Florida and Oregon, and to a lesser extent, Minnesota, and California shared in the fact that the subject law simply formalized penal sanctions already in force, though perhaps for different reasons. Our analysis suggested that the mandatory imprisonment part of Florida's three-year mandatory minimum term was already the practice, at least for armed robbers--the main group affected by the felony-firearm law. In Oregon, the parole board began experimenting with standards to govern release decisions two years prior to the enactment of the law mandating the creation and use of such standards. While the standards evolved over this period, and they continue to evolve, the initiative leading to the enactment of a law mandating standards rested with the parole board.

In our analysis of the effects of Minnesota's Community Corrections Act we found a trend away from state institution commitments two years prior to the Act in both the pilot counties participating and similar counties that were not. For at least one of the counties, this appeared to be the result of local initiative without state funding incentives.[1]

Finally, we saw that a movement against disparity in the length of prison terms, supported by a variety of interest groups, had begun in California well before the passage of the determinate sentencing law. This movement resulted in far-reaching court decisions and actions taken by the Adult Authority.[2] Together these might have produced results that have simply continued under determinate sentencing.

One implication of these observations is that empirical findings in one state cannot be directly applied in another. (For example, even if it had been determined empirically that a ten percent rise in prison population occurred in California after five years, it could not be assumed that the same determinate sentencing law would produce a similar effect in North Carolina.) This is because whatever the effect determined, it cannot be wholly attributable to the law per se. Moreover, since prior law and system practices in the two states are more likely to have been different than not, the effects of changes in the law, as the variable of interest, will not be captured in simple re-applications of the results in one state.

8.4 Areas of Further Research

Realistic assessments of the impact of new legislation affecting criminal sanctioning are difficult to achieve. Statutory provisions operate in a highly complex environment and are subject to often conflicting forces within the system of criminal justice. Meeting the intent of a law and avoiding undesired consequences would require concurrent actions of independent decision makers within all three branches of government. Rather than attempting to capture at once, all of the possible interactions that can occur in response to new legislation of this nature, researchers should focus on specific components and on the sensitivity of outcome variables to a variety of policy options available to individual agencies.

Empirical studies in jurisdictions which have recently altered their formal sanctions for sentencing and release, either directly by the legislature or using a guideline approach (under a legislative mandate), constitute one approach to sharpening the research focus. Descriptive analyses of sentencing patterns under a stable set of statutory provisions, at the state level, are still lacking. An even greater knowledge gap exists for the process of plea and sentence negotiations involving prosecutor, defense counsel and sometimes judges. Disparity in penal sanctioning was traced to the level of discretion under indeterminate sentencing laws by a number of theorists. The extent to which within-state variation persists under determinate sentencing laws should also be carefully examined.

Chapter 8: NOTES

1. Dodge, Olmsted and Fillmore Counties, which joined the Act as a unit, began operating a community corrections center in 1973.

2. Cf. Chapter Two, Section 2.

More research on the granting and denial of good time by correctional authorities is also needed, particularly in states that have sought to limit parole release discretion. Loss of all good time can double the minimum length of time in prison in some states. Variations in good time practices, as a function of difference between the population and capacity of institutions, might prove to be an enlightening study topic.

Parallel research of a more theoretical nature should also be continued. Models of the total criminal justice system which account explicitly for statutory provisions for sanctioning and the sanctioning policies of justice agencies could help to structure our thinking about the way these functions interact with one another and about the significance of feedback and adjustment in policy formulation. With the emergence of offender-based transaction data at the state level, the feasibility of calibrating these models with a reasonable degree of confidence may be greatly enhanced.

In summary, reliable predictions about the implications of proposed new laws for prison populations are not possible given our present knowledge of the criminal justice system's behavior and the deterrent effects of the criminal law. The case studies suggest that it is even difficult to predict the direction, not to mention the magnitude of net consequences of a new set of statutory provisions governing sentencing and release practices. Prediction methods which rely solely on changes in statutory provisions, holding other factors constant, can serve as useful heuristics, and may be "best estimates" by some standard. We would not recommend, however, that such estimates play a significant role in deciding whether to build new institutions or to plan the closing of existing ones. Since the forecasting of prison population relies on sanctioning behavior throughout the criminal justice system, it may be useful to inventory the existing literature on this topic. Research on research could then proceed with the aim of synthesizing existing knowledge on the consequences of different sanction structures and provisions.

Appendices

A. National Overview of Good Time Provisions.

B. P.L. 148 and P.L. 340, Affecting Sentencing and Release in Indiana.

C. Minnesota's Community Corrections Act of 1973.

D. Oregon HB 2013, Providing for Prison Term and Parole Standards.

Appendix A
National Overview of Good Time Provisions

"GOOD TIME" ALLOWANCES

History and Development

Prior to the early 1800's, when a person was imprisoned he or she would remain in custody for a certain period of time regardless of behavior while in prison. The inmate who obeyed all the rules of the institution could not be rewarded through any mechanism existing at that time. In 1817, New York became the first state to design a system to encourage good behavior among inmates and therefore, further prison discipline. Under the New York statute, the sentence imposed by the court would be reduced by a specified amount if the prisoner's behavior was satisfactory. Prior to this law, the only incentive for good behavior was negative, the avoidance of punishment.

By 1900, forty-four states had passed similar legislation. Originally, the intent of these provisions was that good time credits had to be earned by prisoners through daily conformance with institutional regulations. Eventually these credits came to be granted almost automatically in most states and the incentive for good behavior once again was negative, since they could be denied or revoked for violations of prison rules.

Two types of good time allowances eventually developed. Many states utilize both variations. The standard type of good time credit is that which must technically be earned by good behavior but in practice is awarded to all eligible inmates except those who commit serious disciplinary infractions and lose their credits. The second type of allowance is one that is awarded for special activity on the part of the inmate that calls for recognition over and above the standard good time award. Things such as work or educational involvement, blood donations or meritorious conduct trigger these additional reductions from sentences.

The granting or denial of good time credits is almost completely subject to the discretion of correctional officials, either at the state or institutional level. Most states have statutes specifying the maximum amount of good time credits that can be earned while a few leave the schedule of earnings to the discretion of administrators. Even in those states that specify a schedule, however, prison officials often have the flexibility to establish other categories for which credit may be awarded. Other than the statutory generalizations as to what constitutes sufficient good behavior to justify a reduction in a court ordered sentence (and these generalizations are frequently concerned with what behavior is to be avoided rather than what positive traits an offender should exhibit) there are no detailed guidelines indicating policies to be followed in the decision of how much good time to award in any given case. The denial or revocation of credit is equally discretionary and many statutes specify that there is no legal right to good time credits and foreclose inmate access to the courts in this area. As indicated above, however, the considerable discretion available to correctional authorities usually needs not be exercised; the majority of inmates receive most of the good time for which they are eligible.

Litigation concerning the granting or revocation of good time credits deals with the adequacy of the procedures followed in the decision-making process. In 1974, the U.S. Supreme Court established minimum due process requirements for prison disciplinary procedures in Wolff v. McDonnell, 418 U.S. 539. Once the state (in this case Nebraska) statutorily created the privilege of accumulating good time credits and authorized the deprivation of these credits as a sanction for serious misconduct, the Fourteenth Amendment guarantee of "liberty" mandates certain due process procedures.

The procedures to determine whether misconduct has occurred must comply with the conditions set forth by the Court regarding the interests of the prisoners, the needs of the institution and the unique environment of a prison. The following due process conditions must be met:

- Advance written notice of the charges must be given to the inmate who is the subject of the disciplinary hearing at least 24 hours before the hearing;
- There must be a written statement by the factfinders indicating what evidence was relied upon and the reasons for any action;
- The inmate is to be permitted to call witnesses and produce documentary evidence on his behalf unless to do so would jeopardize institutional safety or correctional goals.

Certain procedures that are required in other types of hearings were not mandated in a prison disciplinary process. Prison officials retained discretion to permit or deny the right of confrontation and cross-examination. There is no right to retained or appointed counsel but the Court did specify that if the inmate is illiterate or if the issues are so complex that it is unlikely that he can properly present his side of the case, the inmate may seek aid from a fellow inmate or the staff may designate a competent inmate or provide assistance directly to the inmate.

Correctional authorities retain considerable discretion in the area of good time credits as long as they follow the appropriate procedures in denying credit for disciplinary violations. It is the question of the adequacy of due process protections that spurs most challenges to the administration of the good time laws.

Current Provisions Nationally

The following chart indicates the current statutory provisions for good time reductions of sentences.* Six states (Arizona, Hawaii, Kansas, Missouri, Pennsylvania and Utah) do not have a system of good time allowances. Of

* The chart provided here summarizes the salient features of good-time statutory provisions in all states where these exist. It is intended to provide a comparative overview and not a complete summary of the complexities of the statutory language and its application.

the remaining states, the District of Columbia and the federal system, five jurisdictions have only standard good time allowances whereas all others have both a standard schedule as well as additional allowances for exceptional behavior.*

Generally, most inmates are eligible to earn good time credits. Those sentenced to life imprisonment are the only category of inmate typically excluded. Some jurisdictions allow those under parole supervision to earn good time but this practice is not the general rule.

In approximately half of the states, good time deductions advance an inmate's parole eligibility date through reductions in the minimum and/or maximum term. In all the jurisdictions in which there is no effect on parole eligibility, good time credits are deducted from the maximum term to hasten either conditional release or complete discharge from prison. In many jurisdictions, good time credits impact on both the parole eligibility and discharge dates.

The rate at which good time credits are earned vary widely from state to state. For example, in many states the rate of earned good time after ten years is ten or fifteen days a month (one day off for every two or three days served). In contrast, under Indiana's determinate sentencing law and in Illinois, administrative rules provide for a reduction of one day for every day served lawfully. This has the potential to cut a sentence in half from the first day served assuming there is no revocation of these allowances. The highest ratio of reduction in some other jurisdictions is one to three or one to four and it may take many years to reach this rate of reduction.

As the chart shows, the flat rate is more commonly used for additional good time. For the standard credits, the schedule increases the rate of award as the time served or the length of the sentence increases. Typically, when consecutive sentences are imposed, the good time is commuted on the aggregate of all sentences.

Good time allowances take on far greater significance in states that have abolished release through parole (California, Illinois, Indiana, Maine), as this allowance provides the only means of reducing a sentence in such states. As a result, procedures for estimating good time earnings potential and for taking away good time credits have become quite complex.** This is likely to aggravate systems which already exhibit a surprisingly high error rate, due simply to miscalculation.***

* For a very thorough discussion of this topic, the reader is referred to "A National Survey of Good Time Laws and Administrative Procedures," Texas Department of Corrections, Research Report No. 17, June, 1973.

** See, for example, April Cassou and Brian Taugher, "Determinate Sentencing in California: The New Numbers Game," Pacific Law Journal 9 (January 1978): 77-84.

*** Scott Christianson, "Computing Jail Time Credit," Criminal Law Bulletin 14 (September-October 1978): 437-440.

SUMMARY OF STATUTORY GOOD TIME ALLOWANCES

State	Rate of Good Time Allowances		Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances
Alabama[1]	1-6mo	7 days/mo	Meritorious	1st yr 3 days/mo
	6mo-1yr	8 days/mo	Industrial production	2nd, 3rd, 4th yr 4 days/mo
	1-3yr	10 days/mo	Trusty status	over 5 yr 5 days/mo
	3-5yr	11 days/mo		
	5-10yr	13 days/mo	Blood donation	30 days/yr
	over 10yr	15 days/mo		
Alaska	6mo-1yr	5 days/mo	Work projects,	1st yr 3 days/mo
	1-3yr	7 days/mo	Meritorious conduct	over 1 yr 5 days/mo
	5-10yr	8 days/mo		
	over 10yr	10 days/mo		
Arkansas	Class I	30 days/mo	None	None
	Class II	20 days/mo		
	Class III	9 days/mo		
	Class IV	None		
Arizona	Good time provisions repealed effective 10/1/78			
California	3 mo/8 mo		Participation in work, education, treatment	1 mo/yr
Colorado	1 day/every lawful day served		Earned time	15 days/6 mo
Connecticut	1-5yr	2 mo/yr	Meritorious achievement	5 days/mo
	6 yr and over	3 mo/yr	Employment	1 day/6 days work
			Outstanding meritorious conduct	120 days maximum
			Those not bailed pre-sentencing	10 days/mo in jail pre-sentence
Delaware[2]	1st yr	5 days/mo	Meritorious conduct	5 days/mo
	1-2yr	7 days/mo		
	2-3yr	9 days/mo		
	4yr and over	10 days/mo		

[1]Statutory provisions current through 1975. For all other states, statutes are updated through 1977 or 1978.

[2]Good time is allowed by statute but the schedule is established by the correction department rules.

SUMMARY OF STATUTORY GOOD TIME ALLOWANCES
(Continued)

State	Rate of Good Time Allowances		Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances
District of Columbia	1 yr	5 days/mo	Blood donation[1]	30 days/yr
	1-3 yr	6 days/mo		
	3-5 yr	7 days/mo	Meritorious conduct[1]	Lump sum or
	5-10 yr	8 days/mo		1 yr 3 days/mo
	11 yr and over	10 days/mo		over 1 yr 5 days/mo
Florida	1-2 yr	3 days/mo	Meritorious conduct[2]	Maximum
	3-4 yr	6 days/mo		
	5 yr and over	9 days/mo	Work performance	1 day/each day of work
			Constructive utilization of time[3]	6 days/mo max.
			Academic progress	6 days max.
			Outstanding service	1 time, up to 60 days
	1st yr	1 mo/yr	Exemplary conduct	Set by board of corrections
	2nd yr	2 mo/yr		
	3-10 yr	3 mo/yr		
	11 yr and over	4 mo/yr		
Hawaii	None			
Idaho	6 mo-1 yr	5 days/mo	Meritorious conduct	Up to 5 days/mo, total not to exceed 10 days
	1-3 yr	6 days/mo		
	3-5 yr	7 days/mo		
	5-10 yr	8 days/mo		
	11 yr and over	10 days/mo		
Illinois[4]	1 day/every lawful day served		Meritorious conduct	3 mo/yr
Indiana	Class I	1 day/1 day served	None	
	Class II	1 day/2 days served		
	Class III	0		

[1]Regular good time allowances are provided by statute. The additional good time allowances are taken from "A National Survey of Good Time Laws and Administrative Procedures," Texas Department of Corrections, June, 1973.

[2]Additional good time allowances are provided for by statute but the schedule is established administratively.

[3]This allowance is for inmates unable to perform routine work assignments.

[4]Good time allowances provided for by statute with authority given to the corrections department to establish rules concerning granting and/or revoking such credits.

SUMMARY OF STATUTORY GOOD TIME ALLOWANCES
(Continued)

State	Rate of Good Time Allowances		Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances
Iowa	1 yr	1 mo/yr	Trusty, service outside walls	10 days/mo
	2 yr	2 mo/yr		
	3 yr	3 mo/yr		
	4 yr	4 mo/yr		
	5 yr	5 mo/yr		
	6 yr and over	6 mo/yr		
Kansas	None since approximately 1974-1975			
Kentucky	Max. 10 days/mo		Exceptionally meritorious conduct	Max 5 days/mo
Louisiana	1-2 yr	2 mo/yr	Work under direction of police juries	1/6 off sentence
	3-4 yr	3 mo/yr		
	5 yr and over	4 mo/yr	Public work in Orleans Parish	1 day/each day of work
Maine	Sentence less than 6 mo	3 days/mo	Special assignments	2 days/mo
	Sentence over 6 mo	10 days/mo		
Maryland	5 days/mo flat		Exceptional industry or vocational/educational participation	5 days/mo
			Special projects	5 days/mo
Massachusetts	4 mo-1 yr	2-1/2 days/mo	Blood donation[1]	Sentence 1 mo-1 yr 5 days/pint
	1-2 yr	5 days/mo		
	2-3 yr	7-1/2 days/mo		Sentence over 1 yr 10 days/pint
	3-4 yr	10 days/mo		
	5 yr and over	12-1/2 days/mo	Prison Camp	2-1/2 days/mo
			Work/educational programs	2-1/2 days/mo
Michigan	1-2 yr	5 days/mo	Exemplary conduct	Maximum of 1/2 regular good time allowances
	3-4 yr	6 days/mo		
	5-6 yr	7 days/mo		
	7-9 yr	9 days/mo		
	10-14 yr	10 days/mo	Road work	Amount unspecified
	15-19 yr	12 days/mo		
	20 yr and over	15 days/mo		

[1] Limited to one donation in every eight weeks period.

SUMMARY OF STATUTORY GOOD TIME ALLOWANCES
(Continued)

State	Rate of Good Time Allowances		Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances
Minnesota	1 day/2 days		None	
Mississippi	Class I	30 days/mo	Extra meritorious conduct[2]	Increase allowances
	Class II	20 days/mo		
	Class III	8 days/mo	Overtime or Sunday Work[2]	Equivalent allowances
	Class IV	0	Blood donation[2]	10 days
Missouri	Good time provisions repealed effective 1/1/79.			
Montana	Inside walls	10 days/mo	Blood donation	10 days
	Outside walls	13 days/mo	Educational, rehabilitative programs	13 days/mo
	Outside walls after 1 yr	15 days/mo	Special self-improvement activities	5 days/mo
Nebraska	1 yr	2 mo	Exemplary performance	5 days/mo
	2 yr	2 mo		
	3 yr	3 mo		
	4 yr	4 mo/yr		
Nevada	1-2 yr	2 mo/yr	Blood donation, meritorious conduct	Determined by state board of parole committee
	3-4 yr	4 mo/yr		
	5 yr and over	5 mo/yr		
New Hampshire	90 days/yr		Meritorious conduct	5 days/mo
			Blood donation	5 days/6 mo
New Jersey	1 yr	7 days/mo	Productive occupation	1 day/5 days work
	2-6 yr	8 days/mo		
	7-11 yr	10 days/mo	Honor Camp	1st yr 3 days/mo
	12-16 yr	11 days/mo		2 yr and over 5 days/mo
	17-21 yr	12 days/mo		
	22-24 yr	13 days/mo		
	25-29 yr	15 days/mo		
	30 yr and over	6 days/mo		

[1] As of 7/1/77 if convicted of a crime with a mandatory sentence, no good time reductions are allowed for the first three years.

[2] Regular good time allowances are provided by statute. The additional allowances are taken from the 1973 Texas Department of Corrections report.

SUMMARY OF STATUTORY GOOD TIME ALLOWANCES
(Continued)

State	Rate of Good Time Allowances		Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances
New Mexico	1 yr	1 mo/yr	Meritorious conduct	12 days/mo
	2 yr	2 mo/yr		
	3 yr	3 mo/yr	Exceptional meritorious conduct	Lump sum not to exceed 1 yr
	4 yr	4 mo/yr	Honor Farm[1]	12 days/mo[1]
	5 yr	5 mo/yr	Blood donation[1]	10 days[1]
	6 yr and over	6 mo/yr	Industrial work[1]	10 days/mo[1]
New York	Rate determined administratively, not to exceed 1/3 of the maximum term		Meritorious conduct, extra work[2]	Rate determined by commissioner of corrections[2]
North Carolina	Rate determined by commissioner of corrections		Meritorious conduct	Rate determined by commissioner of corrections
North Dakota	3 mo-1yr	5 days/mo	Meritorious or heroic act	Lump sum of 2 days/mo max. for months already served
	1-3yr	6 days/mo		
	3-5yr	7 days/mo		
	5-10yr	8 days/mo		
	11 yr and over	10 days/mo		
Ohio	1 yr	5 days/mo	None	
	2 yr	6 days/mo		
	3 yr	8 days/mo		
	4 yr	9 days/mo		
	5 yr	10 days/mo		
	6 yr and over	11 days/mo		
Oklahoma	1-2yr	2 mo/yr	Work	2 days/6 days work
	3-4yr	4 mo/yr	Blood donation	20 days/pint
	5 yr and over	5 mo/yr		

[1] These good time allowances are not statutorily specified and are taken from the 1973 Texas Department of Corrections report.

[2] 1973 Texas Department of Corrections Report.

SUMMARY OF STATUTORY GOOD TIME ALLOWANCES
(Continued)

State	Rate of Good Time Allowances		Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances
Utah	Rescinded 1957			
Vermont	5 days/mo		Meritorious work conduct	5 days/mo
			Special services	5 days/mo
Virginia	10 days/20 days served		Vocational or educational training	1-5 days/mo
			Blood donation, extraordinary service	Lump sum to be determined by board of parole
Washington	To be determined by Board of Prison Terms and Paroles not to exceed 1/3 of the sentence		None	
West Virginia	1 yr	5 days/mo	Class I	20 days/mo
	1-3 yr	6 days/mo	Class II	10 days/mo
	3-5 yr	7 days/mo	Overtime or Sunday work	2 hrs/1 hr work
	5-10 yr	8 days/mo		
	11 yr and over	10 days/mo		
Wisconsin	1 yr	1 mo	Diligent labor and/or study	5 days/mo
	2 yr	2 mo		
	3 yr	3 mo		
	4 yr	4 mo		
	5 yr	5 mo		
	6 yr and over	6 mo/yr		
Wyoming	Board of Parole has the power to set rules for regular and special good time allowances.			
Federal	6 mo-1yr	5 days/mo	Meritorious conduct, employment in industry	1st yr 3 days/mo
	1-3 yr	6 days/mo		Over 1 yr 5 days/mo
	3-5 yr	7 days/mo		
	5-10 yr	8 days/mo		
	11 yr and over	10 days/mo		

SUMMARY OF STATUTORY GOOD TIME ALLOWANCES
(Continued)

State	Rate of Good Time Allowances		Types of Additional Good Time Allowances	Rate of Additional Good Time Allowances	
Oregon	6 mo-1yr	1 day/6 days served	Work or education	1 yr	1 day/15 days work
	Over 1 yr	1 day/2 days served		1-5 yr	1 day/7 days work
				6 yr and over	1 day/10 days work
			Agriculture camp	1 yr	1 day/6 days work
				Over 1 yr	1 day/4 days work
Pennsylvania	Repealed 1965		None		
Rhode Island	1 yr	1 day/mo	Institutional industries	2 days/mo	
	2 yr	2 days/mo			
	3 yr	3 days/mo	Blood donation	10 days/pint	
	4 yr	4 days/mo	Heroic Act, meritorious service	3 days/mo	
	5 yr	5 days/mo			
	6 yr	6 days/mo			
	7 yr	7 days/mo			
	8 yr	8 days/mo			
	9 yr	9 days/mo			
	10 yr and over	10 days/mo			
South Carolina	15 days/mo		Extra work	1 day/wk	
			Meritorious service[1]	Lump sum	30 days/6 mo
			Blood donation[1]	12 days/pint	
South Dakota	1-2 yr	2 mo/yr	None		
	3 yr	3 mo/yr			
	4-10 yr	4 mo/yr			
	11 yr and over	6/yr			
Tennessee	1 yr	1 mo/yr	Honor time	2 mo/yr	
	2 yr	2 mo/yr			
	3-10 yr	3 mo/yr			
	11 yr and over	4 mo/yr			
Texas	Class I	20 days/mo	Trusty	10 days/mo	
	Class II	10 days/mo	Blood donation[2]	30 days	
	Class III	0			

[1] Meritorious service and blood donation credits combined cannot exceed 60 days/yr.

[2] Blood donation credits are not statutory. Rate is taken from 1973 Texas Department of Corrections report.

Appendix B
P.L. 148 and P.L. 340, Affecting Sentencing and Release in Indiana

PUBLIC LAW No. 340

[S. 84. Approved April 12, 1977.]

AN ACT to amend IC 35 and IC 11-1 as part of a revision of the criminal law.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 35-41-1-1, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 1. ~~Jurisdiction.~~ (a) A person may be convicted under Indiana law of an offense if:

(1) either the conduct that is an element of the offense, the result that is an element, or both, occur in Indiana;

(2) conduct occurring outside Indiana is sufficient under Indiana law to constitute an attempt to commit an offense in Indiana;

(3) conduct occurring outside Indiana is sufficient under Indiana law to constitute a conspiracy to commit an offense in Indiana, and an overt act in furtherance of the conspiracy occurs in Indiana;

(4) conduct occurring in Indiana establishes complicity in the commission of, or an attempt or conspiracy to com-

mit, an offense in another jurisdiction that also is an offense under Indiana law; or

(5) the offense consists of the omission to perform a ~~legal~~ duty imposed by Indiana law with respect to domicile, residence, or a relationship to a person, thing, or transaction in Indiana.

(b) When the offense is homicide, either the death of the victim or bodily impact causing death constitutes a "result" ~~within the meaning of clause~~ under subdivision (a) (1) of this section. If the body of a homicide victim is found in Indiana, it is presumed that the result occurred in Indiana.

SECTION 2. IC 35-41-1-2, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 2. ~~Definitions.~~ As used in this title:

"Bodily injury" means any impairment of physical condition, including physical pain.

"Credit institution" means a bank, insurance company, credit union, building and loan association, investment trust, industrial loan and investment company, or other organization held out to the public as a place of deposit of funds or a medium of savings or collective investment.

"Crime" means a felony or a misdemeanor.

"Deadly force" means force that creates a substantial risk of ~~death, serious permanent disfigurement, or permanent or protracted loss or impairment of the function of a bodily member or organ~~ serious bodily injury.

"Deadly weapon" means:

(1) a loaded or unloaded firearm; or

(2) a weapon, device, equipment, chemical substance, or other material that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury.

"Deviate sexual conduct" means an act of sexual gratification involving a sex organ of one person and the mouth or anus of another person.

"Dwelling" means a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging.

"Forcible felony" means a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being.

"Governmental entity" means:

~~(i)~~ (1) the United States or any state, county, township, city, town, separate municipal corporation, special taxing district, or public school corporation, ~~or~~;

~~(ii)~~ (2) any authority, board, bureau, commission, committee, department, division, hospital, military body, or other instrumentality of any of ~~these~~ those entities; ~~and includes~~ or

(3) a state-supported ~~colleges and~~ college or state-supported ~~universities~~ university.

"Harm" means loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to any other person in whose welfare he is interested.

"Human being" means ~~a person~~ an individual who has been born and is alive.

"Imprison" means to confine in a penal facility or to commit to the department of correction.

"Included offense" means an offense that:

(1) is established by proof of the same ~~facts~~ material elements or less than all the ~~facts~~ material elements required to establish the commission of the offense charged;

(2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or

(3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

"Law enforcement officer" means:

(1) a police officer, sheriff, constable, marshal, or prosecuting attorney, ~~or~~ ;

(2) a deputy of any of ~~these.~~ those persons; or

(3) an investigator for a prosecuting attorney.

"Offense" means a felony, a misdemeanor, ~~or~~ an infraction, or a violation of a penal ordinance.

"Official proceeding" means a proceeding held or that may be held before a legislative, judicial, administrative, or other agency or before an official authorized to take evidence under oath, including a referee, hearing examiner, commissioner, notary, or other person taking evidence in connection with a proceeding.

"Penal facility" means state prison, reformatory, county jail, penitentiary, house of correction, state farm, or any other facility for confinement of persons under sentence, or awaiting trial or sentence, for offenses.

"Person" means a human being, corporation, partnership, unincorporated association, or governmental entity.

"Property" means anything of value; and includes a gain or advantage or anything that might reasonably be regarded as such by the beneficiary; real property, personal property, money, labor, and services; intangibles; commercial instruments; written instruments concerning labor, services, or property; written instruments otherwise of value to the owner, such as a public record, deed, will, credit card, or letter of credit; a signature to a written instrument; extension of credit; trade secrets; contract rights, choses-in-action, and other interests in or claims to wealth; electricity, gas, oil, and water; captured or domestic animals, birds, and fish; food and drink; and human remains ~~as defined in IC 23-14-1-1~~.

Property is that "of another person" if the other person has a possessory or proprietary interest in it, even if an accused person also has an interest in that property.

"Public servant" means a person who:

(1) is authorized to perform an official function on behalf of, and is paid by, a governmental entity; or

(2) is elected or appointed to office to discharge a public duty for a governmental entity~~; or (3) performs a function for a governmental entity~~.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ.

"Sexual intercourse" means an act that includes any penetration of the female sex organ by the male sex organ.

"Utter" means to issue, authenticate, transfer, publish, deliver, sell, transmit, present, or use.

"Vehicle" means a device for transportation by land, water, or air, ~~including~~; and includes mobile equipment with provision for transport of an operator.

SECTION 3. IC 35-41-2-1, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 1. ~~Voluntary Conduct.~~ (a) A person commits an offense only if he voluntarily engages in conduct in violation of the ~~provision of law~~ statute defining the offense. However, a person who omits to perform an act commits an offense only if the ~~provision of law~~ statute defining the offense ~~provides that he has~~ imposes a duty on him to perform the act.

(b) If possession of property constitutes any part of the prohibited conduct, it is a defense that the person who possessed the property was unaware of his possession for a time sufficient for him to have terminated his possession.

SECTION 4. IC 35-41-2-2, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 2. ~~Culpability.~~ (a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective ~~to do so, whether or not there is a further objective toward which the conduct is directed~~.

(b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

(c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable

disregard of a ~~substantial likelihood of the existence of the relevant facts or risks~~ harm that might result and the disregard involves a ~~gross~~ substantial deviation from acceptable standards of conduct.

(d) Unless the ~~provision of law~~ statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct ~~and its attendant circumstances~~.

SECTION 5. IC 35-41-2-3, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 3. ~~Liability of a Corporation or Unincorporated Association.~~ (a) A corporation, partnership, or unincorporated association may be prosecuted for an any offense; it may be convicted of an offense only if it is proved that the offense was committed by its agent acting within the scope of his authority.

(b) Recovery of a fine, costs, or forfeiture from a corporation, partnership, or unincorporated association is limited to the property of the corporation, partnership, or unincorporated association.

SECTION 6. IC 35-41-2-4, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 4. ~~Aiding, Inducing, or Causing an Offense.~~ A person who knowingly or intentionally aids, induces, or ~~otherwise~~ causes another person to commit an offense commits that offense, even if the other person:

(1) has not been prosecuted for the offense;

(2) has not been convicted of the offense; or

(3) has been acquitted of the offense.

SECTION 7. IC 35-41-3-1, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 1. ~~Legal Authority.~~ A person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so.

SECTION 8. IC 35-41-3-2, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 2. ~~Use of Force to Protect Person or Property.~~ (a) A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonably

believes to be the imminent use of unlawful force. However, a person is justified in using deadly force only if he reasonably believes that that force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony.

(b) A person is justified in using reasonable force, including deadly force ~~that creates a substantial risk of serious bodily injury~~, against another person if he reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on his dwelling or curtilage.

(c) With respect to property other than a dwelling or curtilage, a person is justified in using force against another person if he reasonably believes that the force is necessary to immediately prevent or terminate the other person's trespass on or criminal interference with property lawfully in his possession, ~~or~~ lawfully in possession of a member of his immediate family, or belonging to a person whose property he has authority to protect. However, a person is not justified in using deadly force unless that force is justified under subsection (a) of this section.

(d) Notwithstanding subsections (a), (b), and (c) of this section, a person is not justified in using force if:

(1) he is committing, or is escaping after the commission of, a crime;

(2) he provokes unlawful action by another person, with intent to cause bodily injury to the other person; or

(3) he has entered into combat with another person or is the initial aggressor, unless he withdraws from the encounter and communicates to the other person his intent to do so and the other person nevertheless continues or threatens to continue unlawful action.

SECTION 9. IC 35-41-3-3, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 3. ~~Use of Force Relating to Arrest or Escape.~~ (a) A person other than a law enforcement officer is justified in using reasonable force against another person to effect his arrest or prevent his escape if:

(1) a felony has been committed; and

(2) there is probable cause to believe the other person ~~has~~ committed ~~a~~ **that** felony.

However, such a person is not justified in using deadly force unless that force is justified under section 2 of this chapter.

(b) A law enforcement officer is justified in using force if he reasonably believes that the force is necessary to effect a lawful arrest. However, an officer is justified in using deadly force ~~that creates a substantial risk of serious bodily injury~~ only if he reasonably believes that that force is necessary:

~~(i)~~ **(1)** to prevent serious bodily injury to himself or a third person or the commission of a forcible felony; or

~~(ii)~~ **(2)** to effect an arrest of a person who has committed or attempted to commit a felony.

(c) A law enforcement officer making an arrest under an invalid warrant is justified in using force as if the warrant ~~were~~ was valid, unless he knows that the warrant is invalid.

(d) A law enforcement officer who has an arrested person in his custody is justified in using the same force to prevent the escape of the arrested person from his custody that he would be justified in using if he ~~were~~ was arresting that person.

(e) A guard or other official in a penal facility or a law enforcement officer is justified in using force if he reasonably believes that the force is necessary to prevent the escape of a person who is detained in a the penal facility.

~~(f) A person is justified in using force to resist an arrest only if the arrest is clearly unlawful. A person is justified in using reasonable force to resist excessive force used by another person effecting his arrest.~~

Sec. 4. Avoidance of Greater Harm. A person is justified in engaging in conduct otherwise prohibited if:

(1) the person reasonably believes that the conduct is necessary to prevent harm, except for social or moral harm, greater than the harm that might result from the conduct; and

(2) the person is not at fault in bringing about the situation that makes the conduct necessary.

SECTION 10. IC 35-41-3-5, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 5. ~~Intoxication.~~ (a) It is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated,

if the intoxication resulted from the introduction of a substance into his body:

(1) without his consent; or

(2) when he did not know that the substance might cause intoxication.

(b) Voluntary intoxication is a defense only to the extent that it negates specific intent.

SECTION 11. IC 35-41-3-6, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 6. ~~Mental Disease or Defect. It is a defense that the person who engaged in the prohibited conduct lacked culpability as a result of mental disease or defect.~~ (a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law.

(b) "Mental disease or defect" does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

SECTION 12. IC 35-41-3-7, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 7. ~~Mistake of Fact.~~ It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense.

SECTION 13. IC 35-41-3-8, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 8. ~~Duress.~~ (a) ~~With respect to an offense other than an offense against the person, it~~ It is a defense that the person who engaged in the prohibited conduct was compelled to do so by threat of imminent serious bodily injury to himself or another person. With respect to ~~a misdemeanor or infraction~~ offenses other than ~~an offense against the person~~ felonies, it is a defense that the person who engaged in the prohibited conduct was compelled to do so by force or threat of force. Compulsion under this section exists only if the force, threat, or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.

(b) ~~The defense of duress is not available~~ **This section does not apply** to a person who:

(1) recklessly, knowingly, or intentionally placed **himself** in a situation in which it was foreseeable that he would be subjected to duress.**; or**

(2) committed an offense against the person as defined in IC 35-42.

SECTION 14. IC 35-41-3-9, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 9. ~~Entrapment.~~ (a) It is a defense that:

(1) the prohibited conduct of the person was the product of a ~~public servant~~ **law enforcement officer, or his agent,** using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

SECTION 15. IC 35-41-3-10, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 10. ~~Abandonment. (a)~~ With respect to an ~~offense~~ **charge** under IC 35-41-2-4, ~~or under~~ IC 35-41-5-1, **or** IC 35-41-5-2, it is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the **underlying** crime or **and** voluntarily prevented its commission.

~~(b) With respect to an offense under IC 35-41-5-2, it is a defense that the person who engaged in the prohibited conduct voluntarily prevented the commission of the crime he intended to commit.~~

SECTION 16. IC 35-41-4-1, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 1. ~~Standard of Proof.~~ A person may ~~not~~ be convicted of an offense ~~unless~~ only if his guilt is proved beyond a reasonable doubt.

SECTION 17. IC 35-41-4-2, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 2. ~~Periods of Limitation.~~ (a) Except as otherwise provided in this section, a prosecution for an offense is barred unless it is commenced:

~~(1) at any time for a capital felony or a Class A felony;~~

~~(2)~~ (1) within five (5) years after the commission of ~~any other~~ a Class B, Class C, or Class D felony;

~~(3)~~ (2) within two (2) years after the commission of a misdemeanor; or

~~(4)~~ (3) within one (1) year after the commission of an infraction or violation of a penal ordinance.

A prosecution for murder or a Class A felony may be commenced at any time.

(b) A prosecution for forgery of an instrument for payment of money, or for the uttering of a forged instrument, under IC 35-43-5-2, is barred unless it is commenced within five (5) years after the maturity of the instrument.

(c) If a complaint, indictment, or information is dismissed because of an error, defect, insufficiency, or irregularity, a new prosecution may be commenced within ninety (90) days after the dismissal even if the period of limitation has expired at the time of dismissal, or will expire within ninety (90) days after the dismissal.

(d) The period within which a prosecution must be commenced does not include any period in which:

(1) the accused person is not usually and publicly resident in Indiana or so conceals himself that process cannot be served on him;

(2) the accused person conceals evidence of the offense, and evidence sufficient to charge him with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence; or

(3) the accused person is a person elected or appointed to office under statute or constitution, if the offense charged is theft or conversion of public funds while in public office.

(e) For purposes of tolling the period of limitation only, a prosecution is considered commenced on the earliest of these dates:

(1) The date of filing of an indictment, information, or complaint before a court ~~of competent~~ having jurisdiction.

(2) The date of issuance of a valid arrest warrant.

(3) The date of arrest of the accused person by a law enforcement officer without a warrant, if the officer ~~is legally competent~~ has authority to make the arrest.

(f) A prosecution is considered timely commenced for any offense to which the defendant enters a plea of guilty, notwithstanding that the period of limitation has expired.

SECTION 18. IC 35-41-4-3, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 3. ~~When Prosecution Barred for Same Offense.~~ (a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if:

(1) the former prosecution resulted in an acquittal or a conviction of the defendant (A conviction of an included offense ~~is~~ constitutes an acquittal of the greater offense, even if the conviction is subsequently set aside.); or

(2) the former prosecution was terminated after the jury was impaneled and sworn or, in a trial by the court without a jury, after the first witness was sworn, unless~~:~~ (i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination~~;~~, (ii) it was physically impossible to proceed with the trial in conformity with law~~;~~, (iii) there was a legal defect in the proceedings ~~which~~ that would make any judgment entered upon a verdict reversible as a matter of law~~;~~, (iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state~~;~~, (v) the jury was unable to agree on a verdict~~;~~, or (vi) false statements of a juror on voir dire prevented a fair trial.

(b) If the prosecuting authority brought about any of the circumstances in ~~clauses~~ subdivisions (a) (2) (i) through (a) (2) (vi) of this section, with intent to cause termination of the trial, another prosecution is barred.

SECTION 19. IC 35-41-4-4, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 4. ~~When Prosecution Barred for Different Offense.~~ (a) A prosecution is barred if all of the following exist:

(1) ~~if there~~ There was a former prosecution of the defendant for a different offense or for the same offense based on different facts~~;~~.

(2) ~~if the~~ The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter~~; and~~.

(3) ~~if the~~ The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.

(b) A prosecution is not barred under this section if the offense on which it is based was not consummated when the trial under the former prosecution began.

SECTION 20. IC 35-41-4-5, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 5. ~~Former Prosecution in Another Jurisdiction, a Bar. When~~ In a case in which the alleged conduct constitutes an offense within the concurrent jurisdiction of Indiana and another jurisdiction, a former prosecution in any other jurisdiction is a bar to a subsequent prosecution for the same conduct in Indiana, if the former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter.

SECTION 21. IC 35-41-4-6, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 6. ~~Invalid or Fraudulently Procured Prosecution, Not a Bar.~~ A former prosecution is not a bar under ~~sections~~ section 3, 4, ~~and~~ or 5 of this chapter if:

(1) it was before a court that lacked jurisdiction over the defendant or the offense;

(2) it was procured by the defendant without the knowledge of the prosecuting authority and with ~~the~~ intent to avoid a ~~higher~~ more severe sentence that might otherwise ~~be~~ have been imposed; or

(3) it resulted in a conviction that was set aside, reversed, vacated, or held invalid in a subsequent proceeding, unless the defendant was adjudged not guilty or ordered discharged.

SECTION 22. IC 35-41-5-1, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 1. ~~Attempt.~~ (a) A person attempts to commit a crime ~~if~~ when, acting with the culpability required for ~~the~~ commission of the crime~~:~~, ~~(1)~~ he engages in conduct that constitutes a substantial step toward ~~the~~ commission of the crime. ~~and the crime would have been consummated but for the intervention of, or discovery by, another person; or (2) he engages in conduct that would constitute the crime if the attendant circumstances were as he believed them to be.~~ ~~(b)~~ An attempt to commit a crime is ~~the same class~~ a felony or misdemeanor of the same class as the crime attempted. However, an attempt to commit ~~a capital felony~~ murder is a Class A felony.

(b) It is no defense that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted.

SECTION 23. IC 35-41-5-2, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 2. ~~Conspiracy.~~ (a) A person ~~who~~ conspires to commit a felony when, with intent to commit a the felony, he agrees with another person to commit ~~that~~ the felony ~~commits~~. A conspiracy to commit a felony is a felony of the same class as the underlying felony ~~he intended to commit~~. However, a conspiracy to commit a ~~capital felon~~ murder is a Class A felony.

(b) The state must allege and prove that either the person or the person with whom he agreed performed an overt act in furtherance of the agreement.

(c) It is no defense that the person with whom the accused person is alleged to have conspired:

(1) has not been prosecuted;

(2) has not been convicted;

(3) has been acquitted;

(4) has been convicted of a different crime;

(5) cannot be prosecuted for any reason; or

(6) lacked the capacity to commit the crime.

SECTION 24. IC 35-41-5-3, as added by Acts 1976, P.L. 148, SECTION 1, is amended to read as follows: Sec. 3. ~~Multiple Convictions.~~ (a) A person may not be convicted of both a conspiracy and an attempt with respect to the same underlying crime.

(b) A person may not be convicted of both a crime and an attempt to commit the same crime.

SECTION 25. IC 35-42-1-1, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 1. ~~Murder. (a)~~ A person who:

(1) knowingly or intentionally kills another human being; or

(2) kills another human being while committing or attempting to commit ~~kidnapping,~~ arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery~~, or unlawful deviate conduct~~;

commits murder, a ~~Class A~~ felony.

~~(b) A person who:~~

~~(1) intentionally kills a judge, law enforcement officer, corrections employee, or firefighter acting in the line of duty;~~

~~(2) kills another human being by the unlawful detonation of an explosive with intent to injure person or damage property; or~~

~~(3) kills another human being while committing or attempting to commit kidnapping;~~

~~commits a capital felony.~~

~~(c) A person lying in wait or a person hired to kill who intentionally kills another human being commits a capital felony.~~

~~(d) A person having a prior unrelated conviction of murder or serving a term of life imprisonment who violates this section commits a capital felony.~~

~~(c) Murder as a capital felony must be specifically stated in the charge against the accused person. Notwithstanding any other law, a charge of murder as a capital felony includes no other offense.~~

SECTION 26. IC 35-42-1-2, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 2. ~~Causing Suicide.~~ A person who intentionally causes another ~~person~~ human being, by force, duress, or deception, to commit suicide commits causing suicide, a Class B felony.

SECTION 27. IC 35-42-1-3, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 3. ~~Voluntary Manslaughter.~~ (a) A person who knowingly or intentionally kills another human being while acting under ~~an intense passion resulting from grave and~~ sudden ~~provocation~~ heat commits voluntary manslaughter, a Class B felony. ~~A provocation is grave if it is sufficient to excite an intense passion in a reasonable man. The state is not required to prove intense passion resulting from grave and sudden provocation. Intense passion resulting from grave and~~

(b) The existence of sudden ~~provocation~~ heat is a mitigating factor that reduces what otherwise would be murder under section 1 (1) of this chapter to voluntary manslaughter.

SECTION 28. IC 35-42-1-4, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 4. ~~Involuntary Manslaughter.~~ A person who kills another human being while committing ~~an offense~~ or attempting to commit:

(1) a Class C or Class D felony that inherently poses a risk of serious bodily injury;

(2) a Class A misdemeanor that inherently poses a risk of serious bodily injury; or

(3) battery;

commits involuntary manslaughter, a Class C felony. However, if the killing results from the operation of a vehicle, the offense is a Class D felony.

SECTION 29. IC 35-42-1-5, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 5.

~~Reckless Homicide.~~ A person who recklessly kills another human being commits reckless homicide, a Class C felony. However, if the killing results from the operation of a vehicle, the offense is a Class D felony.

SECTION 30. IC 35-42-2-1, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 1. ~~Battery.~~ A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1) a Class A misdemeanor if ~~the offense~~ it results in bodily injury to any other person, or if it is committed against a law enforcement officer or against a person summoned and directed by the officer while the officer is engaged in the execution of his official duty;;

(2) a Class D felony if ~~the offense~~ it results in bodily injury to such an officer or person summoned and directed;; and

(3) a Class C felony if ~~the offense~~ it results in serious bodily injury to ~~another~~ any other person or if ~~the offense~~ it is committed by means of a deadly weapon.

SECTION 31. IC 35-42-2-2, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 2. ~~Recklessness.~~ (a) A person who recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person commits criminal recklessness, a Class B misdemeanor. However, the offense is a Class A misdemeanor if the conduct includes the use of a vehicle or deadly weapon.

(b) A person who recklessly, knowingly, or intentionally inflicts serious bodily injury on another person commits criminal recklessness, a Class D felony.

SECTION 32. IC 35-42-2-3, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 3. ~~Provocation.~~ A person who recklessly, knowingly, or intentionally engages in conduct that is likely to provoke a reasonable man to commit battery commits provocation, a Class ~~A~~ C infraction.

SECTION 33. IC 35-42-3-1, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 1.

~~Definition.~~ As used in this chapter, ~~"confines"~~ "confine" means to substantially interfere with the liberty of a person.

SECTION 34. IC 35-42-3-2, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 2.

(a) A person who knowingly or intentionally confines another person:

(1) with intent to obtain ransom;

(2) while hijacking a vehicle;

(3) with intent to obtain the release, or intent to aid in the escape, of any person from official custody; or

(4) with intent to use the person confined as a shield or hostage;

commits kidnapping, a Class A felony.

~~Kidnapping.~~ (b) A person who knowingly or intentionally removes another person, by fraud, enticement, force, or threat of force, from one place to another:

(1) with intent to obtain ransom;

(2) while hijacking a vehicle;

(3) with intent to obtain the release, or intent to aid in the escape, of any person from official custody; or

(4) with intent to use the person removed as a shield or hostage;

commits kidnapping, a Class A felony.

SECTION 35. IC 35-42-3-3, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 3. ~~Confinement.~~ A person who knowingly or intentionally:

~~(i)~~ (1) confines another person without his consent; or

~~(ii)~~ (2) removes another person, by fraud, enticement, force, or threat of force, from one place to another;

commits criminal confinement, a Class D felony. However, the offense is: ~~(1)~~ a Class C felony if the other person is ~~a child~~ under ~~the~~ age ~~of~~ fourteen (14) years, of age and is not his child~~,~~, and ~~(2)~~ a Class B felony if it is committed ~~by means of~~ while armed with a deadly weapon.

SECTION 36. IC 35-42-4-1, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 1. ~~Rape.~~ (a) A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex, ~~not his spouse,~~ when:

(1) the other person is compelled by force or imminent threat of force;

(2) the other person is unaware that the sexual intercourse is occurring; or

(3) the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given;

commits rape, a Class ~~C~~ B felony. However, the offense is a Class ~~B~~ A felony if it is committed by using or threatening the use of deadly force ~~that creates a substantial risk of serious bodily injury to the other person,~~ or while armed with a deadly weapon.

~~(b) Sexual intercourse occurs when there is any penetration of the female sex organ by the male sex organ.~~

~~(c) The exclusion for spouses provided in subsection (a) of this~~

(b) This section does not apply ~~if~~ to sexual intercourse between spouses, unless a petition for dissolution of the marriage is pending and the spouses are living apart.

SECTION 37. IC 35-42-4-2, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 2. ~~Unlawful Deviate Conduct.~~ (a) A person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when:

(1) the other person is compelled by force or imminent threat of force;

(2) the other person is unaware that the conduct is occurring; or

(3) the other person is so mentally disabled or deficient that consent to the conduct cannot be given;

commits criminal deviate conduct, a Class ~~C~~ B felony. However, the offense is a Class ~~B~~ A felony if it is committed by using or threatening the use of deadly force ~~that creates a sub-~~

~~stantial~~ risk ~~of serious bodily injury to the other person,~~ or while armed with a deadly weapon.

(b) A person who, ~~under circumstances not covered by section 1 of this chapter or subsection (a) of this section,~~ knowingly or intentionally causes penetration, by an object or any other means, of a the sex organ or anus of another person when:

(1) the other person is compelled by force or imminent threat of force;

(2) the other person is unaware that the conduct is occurring; or

(3) the other person is so mentally disabled or deficient that consent to the conduct cannot be given;

commits criminal deviate conduct, a Class ~~C~~ B felony. However, the offense is a Class ~~B~~ A felony if it is committed by using or threatening the use of deadly force ~~that~~ creates a ~~substantial risk of serious bodily injury to the other person,~~ or while armed with a deadly weapon.

SECTION 38. IC 35-42-4-3, as added by Acts 1976, P.L. 148, SECTION 2, is amended to read as follows: Sec. 3. ~~Child Molesting.~~ (a) A person who, with a child under ~~the age of~~ twelve (12) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if it is committed by using or threatening the use of deadly force ~~that creates a substantial risk of serious bodily injury to the child,~~ or while armed with a deadly weapon.

(b) A person who, with a child under ~~the age of~~ twelve (12) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony. However, the offense is a Class A felony if it is committed by using or threatening the use of deadly force ~~that creates a substantial risk of serious bodily injury to the child,~~ or while armed with a deadly weapon.

(c) A person sixteen (16) years ~~old~~ of age or older who, with a child twelve (12) years ~~old~~ of age or older but under

~~the age of~~ sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class C felony. However, the offense is a Class ~~B~~ A felony if it is committed by using or threatening the use of deadly force ~~that creates a substantial risk of serious bodily injury to the child,~~ or while armed with a deadly weapon.

(d) A person sixteen (16) years ~~old~~ of age, or older who, with a child twelve (12) years ~~old~~ of age or older but under ~~the age of~~ sixteen (16) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class D felony. However, the offense is a Class B felony if it is committed by using or threatening the use of deadly force ~~that creates a substantial risk of serious bodily injury to the child,~~ or while armed with a deadly weapon.

(e) It is a defense that the ~~older~~ accused person reasonably believed that the child was sixteen (16) years ~~old~~ of age or older at the time of the conduct.

(f) It is a defense that the child is or has ever been married.

SECTION 39. IC 35-42, as added by Acts 1976, P.L. 148, SECTION 2, is amended by adding a NEW chapter 5 to read as follows:

Chapter 5. Robbery.

Sec. 1. A person who knowingly or intentionally takes property from another person or from the presence of another person:

(1) by using or threatening the use of force on any person; or

(2) by putting any person in fear;

commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon, and a Class A felony if it results in either bodily injury or serious bodily injury to any other person.

SECTION 40. IC 35-43-1-1, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 1. ~~Ar-~~

~~son.~~ (a) A person who, by means of fire or explosive, knowingly or intentionally damages:

(1) a dwelling of another person without his consent;

(2) property of any person under circumstances that endanger human life; or

(3) property of another person if the pecuniary loss is at least twenty thousand dollars ($20,000);

commits arson, a Class ~~C~~ B felony. However, the offense is a Class ~~B~~ A felony if it results in either bodily injury ~~to another person and a Class B felony if it results in~~ or serious bodily injury to ~~another~~ any other person.

(b) A person who, with intent to injure person or damage property, unlawfully ~~detonates~~ places an explosive commits arson, a Class ~~C~~ B felony. However, the offense is a Class ~~B~~ A felony if it results in either bodily injury to ~~another person and a Class B felony if it results in~~ or serious bodily injury to ~~another~~ any other person.

(c) A person who, commits arson for hire, ~~violates subsection (a) or (b) of this section~~ commits a Class B felony. However, the offense is a Class A felony if it results in bodily injury to ~~another~~ any other person.

SECTION 41. IC 35-43-1-2, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 2. ~~Mischief.~~ A person who:

(1) recklessly, knowingly, or intentionally damages property of another person without his consent; or

(2) knowingly or intentionally causes another to suffer pecuniary loss by deception or by an expression of intention to injure another person or to damage the property or to impair the rights of another person, ~~under circumstances not amounting to theft~~;

commits criminal mischief, a Class B misdemeanor. However, the offense is a Class A misdemeanor if the pecuniary loss is at least two hundred fifty dollars ($250) but less than two thousand five hundred dollars ($2,500), and a Class D felony if (i) the pecuniary loss is at least two thousand five hundred dollars ($2,500), (ii) the damage causes a substantial

interruption or impairment of utility service rendered to the public, or (iii) the damage is to a public record.

SECTION 42. IC 35-43-2-1, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 1. ~~Burglary.~~ A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class ~~D~~ C felony. However, the offense is a Class ~~C~~ B felony if it is committed while armed with a deadly weapon, or if the building or structure is a dwelling, and a Class ~~B~~ A felony if it results in either bodily injury ~~to any other person, and a Class B felony if it results in~~ or serious bodily injury to any other person.

SECTION 43. IC 35-43-2-2, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 2. ~~Trespass.~~ (a) A person who:

(1) not having a contractual interest in the property, knowingly or intentionally enters the real property of another person after having been denied entry by the other person or his agent;

(2) not having a contractual interest in the property, knowingly or intentionally refuses to leave the real property of another person after having been asked to leave by the other person or his agent;

(3) accompanies another person in a vehicle, with knowledge that the other person knowingly or intentionally is exerting unauthorized control over the vehicle; ~~or~~

(4) ~~otherwise~~ knowingly or intentionally interferes with the possession or use of the property of another person without his consent ~~and under circumstances not amounting to theft~~; or

(5) not having a contractual interest in the property, knowingly or intentionally enters the dwelling of another person without his consent;

commits criminal trespass, a Class A misdemeanor.

(b) A person has been denied entry ~~within the meaning~~ under subdivision (a)(1) of this section when he has been denied entry by means of:

(1) personal communication, oral or written; or

(2) posting or exhibiting a notice at the main entrance ~~and~~ in a manner that is either prescribed by law or likely to come to the attention of the public.

SECTION 44. IC 35-43-4-1, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 1. ~~Definition.~~ (a) As used in this chapter, "exert control over property" means to obtain, take, carry, drive, lead away, conceal, abandon, sell, convey, encumber, or possess property, or to secure, transfer, or extend a right to property.

(b) Under this chapter, a person's control over property of another person is "unauthorized" if it is exerted:

(1) without the other person's consent;

(2) in a manner or to an extent other than that to which the other person has consented;

(3) by transferring or encumbering other property while failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of that other property;

(4) by creating or confirming a false impression in the other person;

(5) by failing to correct a false impression that the person knows is influencing the other person, if the person stands in a relationship of special trust to the other person;

(6) by promising performance that the person knows will not be performed;

(7) by expressing an intention to damage the property or impair the rights of any other person; or

(8) by transferring or reproducing recorded sounds, without consent of the owner of the master recording, with intent to distribute the reproductions for a profit.

SECTION 45. IC 35-43-4-2, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 2. ~~Theft.~~ A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent ~~either (i) to accept, use, or withhold property of another~~ to deprive the other person ~~so as to appropriate any portion~~ of any part of its value or use, ~~or benefit or (ii) to return~~

~~property of another person only after payment of a reward or other consideration, knowingly or intentionally exerts control over that property either: (1) in a manner or to an extent other than that to which the other person has consented; (2) by creating or confirming a false impression in the other person; (3) by transferring or encumbering other property while failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of that other property; (4) by failing to correct a false impression that he knows is influencing the other person if he stands in a relationship of special trust to that person; (5) by promising performance that he knows will not be performed; or (6) by expressing an intention to injure any other person or to damage the property or impair the rights of any other person;~~ commits theft, a Class D felony.

SECTION 46. IC 35-43-4-3, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 3. ~~Conversion.~~ A person who~~, under circumstances not amounting to theft,~~ knowingly or intentionally exerts unauthorized control over property of another person ~~either: (1) in a manner or to an extent other than that to which the other person has consented, (2) by creating or confirming a false impression in the other person; (3) by transferring or encumbering other property while failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of that other property; (4) by failing to correct a false impression that he knows is influencing the other person if he stands in a relationship of special trust to that person; (5) by promising performance that he knows will not be performed; or (6) by expressing an intention to injure any other person or to damage the property or impair the rights of any other person;~~ commits criminal conversion, a Class A misdemeanor.

SECTION 47. IC 35-43-4-4, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 4. ~~Evidence.~~ (a) The price tag or price marking on property displayed or offered for sale constitutes prima facie evidence of the value and ownership of the property.

(b) Evidence that a person:

(1) altered, substituted, or transferred a label, price tag, or price marking on property displayed or offered for sale or hire; or

(2) transferred property displayed or offered for sale or hire from the package, bag, or container in or on which the property was displayed or offered to another package, bag, or container;

constitutes prima facie evidence of intent to ~~withhold the property so as to appropriate a portion~~ deprive the owner of the property of a part of its value.

(c) Evidence that a person:

(1) concealed property displayed or offered for sale or hire; and

(2) removed the property from any place within the business premises at which it was displayed or offered to a point beyond that at which payment should be made;

constitutes prima facie evidence of intent to ~~withhold the property so as to appropriate a portion~~ deprive the owner of the property of a part of its value.

(d) Except as provided in subsection (e) of this section, evidence of failure to perform as promised, by itself, does not constitute evidence that the promisor knew that the promise would not be performed.

(e) Except as provided in section 5(b) of this chapter, a person who has insufficient funds in or no account with a drawee credit institution and who makes, draws, or utters a check, draft, or order for payment on the credit institution may be inferred:

(1) to have known that the credit institution would refuse payment upon presentment in the usual course of business; and

(2) to have intended to ~~accept so as to appropriate a portion of its value~~ deprive the owner of any property acquired by making, drawing, or uttering the check, draft, or order for payment of a part of the value of that property.

(f) Evidence that a person, after renting or leasing a any property ~~motor vehicle~~ under a written agreement providing for the return of the ~~vehicle~~ property to a particular place at a particular time, failed to return the ~~vehicle~~ property to the place within seventy-two (72) hours after the agreed time constitutes prima facie evidence that he exerted unauthorized control over the ~~vehicle~~ property ~~to an extent other than that to which the lessor had consented~~.

SECTION 48. IC 35-43-4-5, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 5. ~~Defenses.~~ (a) An owner in possession of encumbered property does not commit a crime under this chapter, as against a person having only a security interest, by removing or otherwise dealing with the property contrary to the terms of the security agreement, even if title is in the credit institution under a mortgage, conditional sales contract, or bailment lease.

(b) A maker or drawer:

(1) who has an account in a credit institution but does not have sufficient funds in that account; and

(2) who makes, draws, or utters a check, draft, or order for payment on the credit institution;

does not commit a crime under this chapter if he pays the credit institution the amount due, together with protest fees, within ten (10) days after receiving notice that the check, draft, or order has not been paid by the credit institution. Notice sent to either (i) the address printed or written on the check, draft, or order or (ii) the address given in writing to the recipient at the time the check, draft, or order was issued or delivered constitutes notice that the check, draft, or order has not been paid by the credit institution.

(c) A person who transfers or reproduces recorded sounds in connection with a broadcast or telecast, or for archival purposes, does not commit a crime under this chapter, even if he does not have the consent of the owner of the master recording.

SECTION 49. IC 35-43-5-1, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 1. ~~Definitions.~~ As used in this chapter:

"Coin machine" means a coin box, vending machine, or other mechanical or electronic device or receptacle designed:

~~(i)~~ (1) to receive a coin, bill, or token made for that purpose; and

~~(ii)~~ (2) in return for the insertion or deposit thereof, automatically to offer, provide, or assist in providing or to permit the acquisition of some property.

"Credit card" means an instrument or device~~,~~ (whether known as a credit card~~,~~ or charge plate, or by any other name~~,~~) issued by an issuer for ~~the~~ use by or on behalf of the credit card holder in obtaining property.

"Credit card holder" means the person to whom or for whose benefit the credit card is issued by an issuer.

"Entrusted ~~property~~" means ~~property~~ held in a fiduciary capacity or ~~property~~ placed in charge of a person engaged in the business of transporting, storing, lending on, or otherwise holding property of others.

~~"Makes"~~ "Make" means to draw, prepare, complete, or alter any ~~writing~~ written instrument in whole or in part.

"Public relief or assistance" means any payment made, service rendered, hospitalization provided, or other benefit extended to a person by a governmental entity from public funds~~, including~~; and includes poor relief, direct relief, unemployment compensation, and any other form of support or aid.

"Slug" means an article or object that is capable of being deposited in a coin machine as an improper substitute for a genuine coin, bill, or token.

~~"With intent to defraud" means with intent to cause, by some form of deception, another person to assume, create, confer, transfer, lose, or terminate a right, obligation, or power with respect to any person or property.~~

~~"Writing"~~ "Written instrument" means a paper, document, or other instrument containing written matter~~,~~; and includes money, coins, tokens, stamps, seals, credit cards, badges, trade marks, medals, or other objects or symbols of value, right, privilege, or identification.

SECTION 50. IC 35-43-5-2, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 2. ~~Forgery.~~ A person who, with intent to defraud, makes or utters a ~~writing~~ written instrument in such a manner that ~~the writing~~ it purports to have been made:

(1) by another person;

(2) at another time;

(3) with different provisions; or

(4) by authority of one who did not give authority;

commits forgery, a Class C felony.

SECTION 51. IC 35-43-5-3, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 3. ~~Deception.~~ (a) A person who:

~~(1) with intent to defraud another person, damages property; or~~

~~(2) with intent to defraud his creditor of purchaser, conceals,~~ encumbers~~, or transfers property;~~

~~commits a Class D felony.~~

~~(b) A person who:~~

(1) being an officer, manager, or other person participating in the direction of a credit institution, knowingly or intentionally receives or permits the receipt of a deposit or other investment, knowing that the institution is insolvent;

(2) knowingly or intentionally issues or delivers a check, draft, or other order on a credit institution or person for the payment of money or other property, knowing that it will not be paid or honored by the drawee;

(3) knowingly or intentionally makes a false or misleading written statement with intent to obtain any public relief or assistance or other property; or

(4) knowingly or intentionally fails to report a material change in his family or financial condition or ability to pay after having properly obtained any public relief or assistance;

~~(4)~~ (5) misapplies entrusted property, property of a governmental entity, or property of a credit institution, ~~under circumstances not amounting to theft,~~ in a manner that he knows is unlawful or that he knows involves substantial risk of loss or detriment to either the owner of the property or to a person for whose benefit the property was entrusted;

~~(5)~~ (6) knowingly or intentionally, in the regular course of business~~:~~, either (i) uses or possesses for use a false weight or measure or other device for falsely determining or recording the quality or quantity of any commodity~~;~~ or (ii) sells, offers, or displays for sale or delivers less than the represented quality or quantity of any commodity;

~~(6)~~ (7) with intent to defraud another person furnishing electricity, gas, water, telecommunication or cable TV service, or any other utility service, avoids a lawful charge for that service by scheme or device or by tampering with facilities or equipment of the person furnishing the service;

~~(7)~~ (8) with intent to defraud, misrepresents the identity of himself or another person or the identity or quality of property;

~~(8)~~ (9) with intent to defraud an owner of a coin machine, deposits a slug in that machine; ~~or~~

(10) with intent to enable himself or another person to deposit a slug in a coin machine, makes, possesses, or disposes of a slug; or

~~(9) knowingly or intentionally~~ (11) disseminates to the public an advertisement that he knows is false, misleading, or deceptive ~~to the public~~, with intent to promote the purchase or sale of property ~~or services~~ or the acceptance of employment;

commits deception, a Class A misdemeanor.

~~(c)~~ (b) With respect to ~~clause (b)(2)~~ subdivision (a)(2) of this section, evidence that a person has insufficient funds in or no account with a drawee credit institution constitutes prima facie evidence that he knew that the check, draft, or order would not be paid or honored. However, if the person has an account in a drawee credit institution but does not

have sufficient funds in that account, he does not commit a crime under this chapter if he pays the credit institution the amount due, together with protest fees, within ten (10) days after receiving notice that the check, draft, or order has not been paid by the credit institution. Notice sent to either (i) the address printed or written on the check, draft, or order or (ii) the address given in writing to the recipient at the time the check, draft, or order was issued or delivered constitutes notice that the check, draft, or order has not been paid by the credit institution.

~~(d)~~ (c) In determining whether an advertisement is false, misleading, or deceptive under ~~clause (b)(9)~~ subdivision (a)(11) of this section, there shall be considered, among other things, not only representations contained or suggested in the advertisement, by whatever means, including device or sound, but also the extent to which the advertisement fails to reveal material facts in the light of the representations.

SECTION 52. IC 35-43-5-4, as added by Acts 1976, P.L. 148, SECTION 3, is amended to read as follows: Sec. 4. ~~Credit Card Deception.~~ A person who:

(1) with intent to defraud, obtains property by~~:~~ (i) using a credit card, knowing that the credit card was unlawfully obtained or retained~~;~~, (ii) using a credit card, knowing that the credit card is forged, revoked, or expired~~;~~, (iii) using, without consent, a credit card that was issued to another person~~;~~ ~~or~~, (iv) representing, without the consent of the credit card holder, that he is the authorized holder of the credit card~~;~~, or ~~(iv)~~ (v) representing that he is the authorized holder of a credit card when the card has not in fact been issued;

(2) being authorized by an issuer to furnish property upon presentation of a credit card, fails to furnish the property and, with intent to defraud the issuer or the credit card holder, represents in writing to the issuer that he has furnished the property;

(3) being authorized by an issuer to furnish property upon presentation of a credit card, furnishes, with intent to defraud the issuer or the credit card holder, property upon presentation of a credit card, knowing that the credit card was unlawfully obtained or retained or that the credit card is forged, revoked, or expired;

(4) not being the issuer, knowingly or intentionally sells a credit card;

(5) not being the issuer, receives a credit card, knowing that the credit card was unlawfully obtained or retained or that the credit card is forged, revoked, or expired;

(6) with intent to defraud, receives a credit card as security for debt; ~~or~~

(7) receives property, knowing that the property was obtained in violation of ~~clause~~ subdivision (1) of this section;

(8) with intent to defraud his credit or purchaser, conceals, encumbers, or transfers property; or

(9) with intent to defraud, damages property;

commits fraud, a Class D felony.

SECTION 53. IC 35-44-1-1, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 1. ~~Bribery.~~ (a) A person who:

(1) confers, offers, or agrees to confer on a public servant, either before or after the public servant becomes appointed, elected, or qualified, any property except property the public servant is authorized by law to accept, with intent to control the performance of an act related to the employment or function of the public servant;

(2) being a public servant, solicits, accepts, or agrees to accept, either before or after he becomes appointed, elected, or qualified, any property, except property he is authorized by law to accept, with intent to control the performance of an act related to his employment or function as a public servant;

(3) confers, offers, or agrees to confer on a person any property, except property the person is authorized by law to accept, with intent to cause that person to control the performance of an act related to the employment or function of a public servant;

(4) solicits, accepts, or agrees to accept any property, except property he is authorized by law to accept, with intent to control the performance of an act related to the employment or function of a public servant;

(5) confers, offers, or agrees to confer any property on a person participating or officiating in, or connected with, an athletic contest, sporting event, or exhibition, with intent that the person ~~shall~~ will fail to use his best efforts in connection with that contest, event, or exhibition;

(6) being a person participating or officiating in, or connected with, an athletic contest, sporting event, or exhibition, solicits, accepts, or agrees to accept any property with intent that he ~~shall~~ will fail to use his best efforts in connection with that contest, event, or exhibition;

(7) being a witness or informant in an official proceeding or investigation, solicits, accepts, or agrees to accept any property, with intent to~~:~~ (i) withhold any testimony, information, document, or thing~~,~~, (ii) avoid legal process summoning him to testify or supply evidence~~,~~, or (iii) absent himself from the proceeding or investigation to which he has been legally summoned; or

(8) confers, offers, or agrees to confer any property on a witness or informant in an official proceeding or investigation, with intent that the witness or informant~~:~~ (i) withhold any testimony, information, document, or thing~~,~~, (ii) avoid legal process summoning the witness or informant to testify or supply evidence~~,~~, or (iii) absent himself from any proceeding or investigation to which the witness or informant has been legally summoned;

commits bribery, a Class C felony.

(b) It is ~~not a~~ no defense that the person whom the accused person sought to control was not qualified to act in the desired way.

SECTION 54. IC 35-44-1-2, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 2. ~~Official Misconduct.~~ A public servant who:

(1) knowingly or intentionally performs an act that he is forbidden by law to perform;

(2) performs an act **~~in excess of his lawful authority~~ he is not authorized by law to perform,** with intent to obtain any property for himself;

(3) knowingly or intentionally solicits, accepts, or agrees to accept from his appointee or employee any property other than what he is authorized by law to accept as a condition of continued employment; or

(4) knowingly or intentionally ~~speculates,~~ ~~wagers,~~ acquires, or divests himself of, a pecuniary interest in any property, transaction, or enterprise, or aids another person to do so, based on information obtained by virtue of his office that official action that has not been made public is contemplated;

commits official misconduct, a Class A misdemeanor.

SECTION 55. IC 35-44-2-1, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 1. ~~Perjury.~~ A person who makes a false, material statement under oath or affirmation, ~~before a person authorized by law to administer oath,~~ knowing the statement to be false or not believing it to be true, commits **perjury**, a Class D felony.

SECTION 56. IC 35-44-2-2, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 2. ~~False Reporting.~~ (a) A person who reports, by telephone, telegraph, mail, or other written or oral communication, that he or another person has placed or intends to place an explosive or other destructive substance in a building or transportation facility, knowing the report to be false, commits **false reporting**, a Class D felony.

(b) A person who:

(1) gives a false report of the commission of a crime or gives false information in the official investigation of the commission of a crime, knowing the report or information to be false; or

(2) gives a false alarm of fire to the fire department of a governmental entity, knowing the alarm to be false;

commits **false reporting**, a Class B misdemeanor. However, the offense is a Class A misdemeanor if it substantially hinders any law enforcement process or if it results in harm to an innocent person.

SECTION 57. IC 35-44-2-3, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 3.

~~Impersonation~~ of a ~~Public Servant.~~ A person who falsely represents himself as a public servant, with intent to mislead and induce another person to submit to false official authority or otherwise to act to his detriment in reliance on the false representation, commits **impersonation of a public servant**, a Class A misdemeanor.

SECTION 58. IC 35-44-2, as added by Acts 1976, P.L. 148, SECTION 4, is amended by adding a NEW section 4 to read as follows: Sec. 4. (a) A public servant who knowingly or intentionally:

(1) hires an employee for the governmental entity that he serves; and

(2) fails to assign to the employee any duties, or assigns to the employee any duties not related to the operation of the governmental entity;

commits ghost employment, a Class D felony.

(b) A public servant who knowingly or intentionally assigns to an employee under his supervision any duties not related to the operation of the governmental entity that he serves commits ghost employment, a Class D felony.

(c) A person employed by a governmental entity who, knowing that he has not been assigned any duties to perform for the entity, accepts property from the entity commits ghost employment, a Class D felony.

(d) A person employed by a governmental entity who knowingly or intentionally accepts property from the entity for the performance of duties not related to the operation of the entity commits ghost employment, a Class D felony.

(e) Any person who accepts property from a governmental entity in violation of this section and any public servant who permits the payment of property in violation of this section are jointly and severally liable to the governmental entity for that property. The attorney general may bring a civil action to recover that property in the county where the governmental entity is located or the person or public servant resides.

SECTION 59. IC 35-44-3-1, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 1.

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~~Definition.~~ As used in this chapter, "lawful detention" means arrest, custody following surrender in lieu of arrest, detention in any facility for custody of persons under charge or conviction of a ~~crime~~ an offense or alleged or found to be delinquent, detention under a law authorizing civil commitment in lieu of criminal proceedings or authorizing such detention while criminal proceedings are held in abeyance, detention for extradition or deportation, or custody for purposes incident to the foregoing including transportation, medical diagnosis or treatment, court appearances, work and recreation, or any other detention for law enforcement purposes; but it does not include supervision of a person on probation or parole or constraint incidental to release with or without bail.

SECTION 60. IC 35-44-3-2, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 2. ~~Assisting a Criminal.~~ A person not standing in the relation of parent, child, or spouse to another person who has committed a crime or is a fugitive from justice who, with intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the person commits assisting a criminal, a Class A misdemeanor. However, the offense is:

(1) a Class D felony if the person assisted has committed a Class B, Class C, or Class D felony~~.~~; and

(2) a Class C felony if the person assisted has committed murder or a Class A felony, or if the assistance was providing a deadly weapon.

SECTION 61. IC 35-44-3-3, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 3. ~~Resisting Law Enforcement.~~ A person who knowingly or intentionally:

(1) ~~knowingly or intentionally,~~ and forcibly~~,~~ resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an officer;

(2) ~~knowingly or intentionally,~~ and forcibly, resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or

(3) ~~knowingly or intentionally~~ flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop;

commits resisting law enforcement, a Class A misdemeanor.

However, the offense is a Class D felony if, while committing it, the person draws or uses a deadly weapon or inflicts bodily injury on another person.

SECTION 62. IC 35-44-3-4, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 4. ~~Tampering.~~ (a) A person who knowingly or intentionally induces, by threat, coercion, or false statement, a witness or informant in an official proceeding or investigation to:

(1) withhold any testimony, information, document, or thing;

(2) avoid legal process summoning him to testify or supply evidence; or

(3) absent himself from a proceeding or investigation to which he has been legally summoned;

commits tampering, a Class D felony.

(b) A person who:

(1) alters, ~~destroys~~ damages, or removes any record, document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation;

(2) makes, presents, or uses a false record, document, or thing with intent that the record, document, or thing, material to the point in question, appear in evidence in an official proceeding or investigation to mislead a public servant; or

(3) communicates, directly or indirectly, with a juror otherwise than as authorized by law, with intent to influence the juror regarding any matter that is or may be brought before the juror;

commits tampering, a Class A misdemeanor.

SECTION 63. IC 35-44-3-5, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 5.

~~Escape.~~ A person who intentionally flees from lawful detention or intentionally fails to return to lawful detention following temporary leave granted for a specified purpose or limited period commits **escape**, a Class D felony. However, the offense is a Class C felony if, while committing it, the person draws or uses a deadly weapon or inflicts bodily injury on another person.

SECTION 64. IC 35-44-3-6, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 6. ~~Failure to appear.~~ (a) A person who, having been released from lawful detention on condition that he appear at a specified time and place in connection with a ~~felony~~ charge **of a crime, ~~intentionally fails to appear at that time and place commits a Class D felony even if he is not convicted of the felony with which he was originally charged.~~**

~~(b) A person who, having been released from lawful detention on condition that he appear at a specified time and place in connection with a misdemeanor charge,~~ intentionally fails to appear at that time and place commits **failure to appear**, a Class A misdemeanor ~~even if he is not convicted of the misdemeanor with which he was originally charged~~. However, **the offense is a Class D felony if the charge was a felony charge.**

(b) It is no defense that the accused person was not convicted of the crime with which he was originally charged.

(c) This section does not apply to obligations to appear incident to release under suspended sentence or on probation or parole.

SECTION 65. IC 35-44-3-7, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 7. ~~Refusal to aid an Officer.~~ A person who, when ordered by a law enforcement officer to assist the officer in the execution of the officer's duties, knowingly or intentionally, and without a reasonable cause, refuses to assist commits **refusal to aid an officer**, a Class B misdemeanor.

SECTION 66. IC 35-44-3-8, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 8. ~~Obstructing a Firefighter.~~ A person who knowingly or intentionally ~~impedes~~ **obstructs** or interferes with a ~~fire-~~

~~fighter~~ **fireman** performing or attempting to perform his emergency functions or duties as a ~~firefighter~~ **fireman** commits **obstructing a fireman**, a Class A misdemeanor.

SECTION 67. IC 35-44-3-9, as added by Acts 1976, P.L. 148, SECTION 4, is amended to read as follows: Sec. 9. ~~Trafficking with an Inmate.~~ A person who, without the prior authorization of the person in charge of a penal facility, knowingly or intentionally:

(1) delivers, or carries into the penal facility with intent to deliver, an article to an inmate of the facility; or

(2) carries, or receives with intent to carry out of the penal facility, an article from an inmate of the facility;

commits **trafficking with an inmate**, a Class A misdemeanor. However, the offense is a Class D felony if the article is a controlled substance ~~as defined in IC 35-48~~ or a deadly weapon.

SECTION 68. IC 35-45-1-1, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 1. ~~Definitions.~~ As used in this chapter:

"Tumultuous ~~and violent~~ conduct" means conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property.

"Unlawful assembly" means an assembly of five (5) or more persons whose common object is to commit an unlawful act, or a lawful act by unlawful means. Prior concert is not necessary to form an unlawful assembly.

SECTION 69. IC 35-45-1-2, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 2. ~~Rioting.~~ A person who, being a member of an unlawful assembly, recklessly, knowingly, or intentionally engages in tumultuous ~~and violent~~ conduct commits **rioting**, a Class A misdemeanor. However, the offense is a Class D felony if it is committed while armed with a deadly weapon.

SECTION 70. IC 35-45-1-3, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 3. ~~Disorderly Conduct.~~ A person who recklessly, knowingly, or intentionally:

(1) engages in fighting or in tumultuous ~~and violent~~ conduct;

(2) makes unreasonable noise and continues to do so after being asked to stop;

(3) disrupts a lawful assembly of persons; or

(4) obstructs vehicular or pedestrian traffic;

commits disorderly conduct, a Class B misdemeanor.

SECTION 71. IC 35-45-2-1, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 1. ~~Intimidation.~~ (a) A person who communicates a threat to another person, with the intent that the other person engage in conduct against his will, commits intimidation, a Class A misdemeanor. However, the offense is a Class D felony if the threat is to commit a forcible felony.

(b) "Threat" means an expression of intention to:

(1) unlawfully injure the person threatened or another person or damage property;

(2) unlawfully subject a person to physical confinement or restraint;

(3) commit a crime;

(4) unlawfully withhold official action, or cause such withholding;

(5) unlawfully withhold testimony or information with respect to another person's legal claim or defense, except for a reasonable claim for witness fees or expenses;

(6) ~~falsely~~ expose the person threatened to hatred, contempt, disgrace, or ridicule; or

(7) falsely harm the credit or business reputation of the person threatened.

SECTION 72. IC 35-45-2-2, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 2. ~~Harassing Communications.~~ A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication:

(1) makes a telephone call, whether or not a conversation ensues, ~~with no intention of legitimate communication~~; or

(2) communicates with a person, anonymously or otherwise, by telegraph, mail, or other form of written communication, ~~with no intention of legitimate communication~~;

commits harassment, a Class B misdemeanor.

SECTION 73. IC 35-45-2-3, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 3. ~~Unlawful Use of a Party Line.~~ (a) A person who knowingly or intentionally:

(1) refuses to yield a party line upon request by another person who states that he wishes to place an emergency call from a telephone on that party line; or

(2) obtains the use of a party line by falsely stating that he wishes to place an emergency call;

commits unlawful use of a party line, a Class B misdemeanor.

(b) "Party line" means a common telephone line for two (2) or more subscribers.

(c) "Emergency call" means a call in which the caller reasonably believes that a human being or property is in jeopardy and that prompt summoning of aid is essential.

SECTION 74. IC 35-45-3-1, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 1. ~~Poisoning Public Water.~~ A person who recklessly, knowingly, or intentionally poisons a public water supply commits poisoning, a Class D felony.

SECTION 75. IC 35-45-3-2, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 2. ~~Littering.~~ (a) A person who recklessly, knowingly, or intentionally places or leaves refuse on property of another person, except in ~~the containers~~ a container provided for refuse, commits littering, a Class B misdemeanor.

(b) "Refuse" ~~means all~~ includes solid and semi-solid wastes ~~and includes~~, dead animals, and offal.

(c) Evidence that littering was committed from a moving vehicle other than a public conveyance ~~is~~ constitutes prima

facie evidence that it was committed by the operator of that vehicle.

SECTION 76. IC 35-45-4-1, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 1. ~~Public Indecency.~~ (a) A person who knowingly or intentionally ~~and~~, in a public place:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct;

(3) appears in a state of nudity; or

(4) fondles the genitals of himself or another person;

commits **public indecency**, a Class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any ~~portion~~ part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

SECTION 77. IC 35-45-4-2, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 2. ~~Prostitution.~~ A person who knowingly or intentionally performs, or offers or agrees to perform, sexual intercourse or deviate sexual conduct for money or other property commits **prostitution**, a Class A misdemeanor.

SECTION 78. IC 35-45-4-3, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 3. ~~Patronizing a Prostitute.~~ A person who knowingly or intentionally pays, or offers or agrees to pay, money or other property to another person for having engaged in, or on the understanding that the other person will engage in, sexual intercourse or deviate sexual conduct with the person or with any other person commits **patronizing a prostitute**, a Class A misdemeanor.

SECTION 79. IC 35-45-4-4, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 4. ~~Promoting Prostitution.~~ A person who:

(1) knowingly or intentionally entices or compels another person to become a prostitute;

(2) knowingly or intentionally procures, or offers or agrees to procure, a person for another person for the purpose of prostitution;

(3) having control over the use of a place, knowingly or intentionally permits another person to use the place for prostitution;

(4) receives money or other property from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution; or

(5) knowingly or intentionally conducts or directs another person to a place for the purpose of prostitution;

commits **promoting prostitution**, a Class C felony.

SECTION 80. IC 35-45-5-1, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 1. ~~Definitions.~~ As used in this chapter:

"Gain" means the direct realization of winnings.

"Gambling" means risking money or other property for gain, contingent in whole or in part upon lot, chance, or the operation of a gambling device~~,~~; but it does not include participating in:

(1) bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries; or ~~in~~

(2) bona fide business transactions that are valid under the law of contracts.

"Gambling device" means:

~~(i)~~ (1) a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance~~,~~;

~~(ii)~~ (2) a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation~~,~~;

~~(iii)~~ (3) a mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with professional gambling~~,~~;

~~(iv)~~(4) a policy ticket or wheel; ~~and~~ or

(5) a subassembly or essential part designed or intended for use in connection with such a device, mechanism, furniture, fixture, construction, or installation.

In the application of this definition, an immediate and unrecorded right to replay mechanically conferred on players of pinball machines and similar amusement devices is presumed to be without value.

"Gambling information" means:

~~(i)~~(1) a communication with respect to a wager made in the course of professional gambling; or

~~(ii)~~(2) information intended to be used for professional gambling.

"Profit" means a realized or unrealized benefit (other than ~~direct realization of winnings~~ a gain) ~~including~~ and includes benefits from proprietorship or management and unequal advantage in a series of transactions.

SECTION 81. IC 35-45-5-2, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 2. ~~Unlawful Gambling.~~ A person who knowingly or intentionally engages in gambling commits unlawful gambling, a Class B misdemeanor.

SECTION 82. IC 35-45-5-3, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 3. ~~Professional Gambling.~~ ~~(a)~~ A person who knowingly or intentionally ~~accepts or offers to accept for profit money or other property risked in gambling or engages in~~:

(1) engages in pool-selling;

(2) engages in bookmaking;

(3) ~~maintaining~~ maintains, in a place accessible to the public, slot machines, one-ball machines or variants thereof, pinball machines that award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars, or spindles;

(4) ~~conducting~~ conducts lotteries, gift enterprises, or policy or numbers games, or ~~selling~~ sells chances therein; ~~or~~

(5) ~~conducting~~ conducts any banking or percentage games played with cards, dice, or counters, or ~~accepting~~ accepts any fixed share of the stakes therein; or

(6) accepts, or offers to accept, for profit, money or other property risked in gambling;

commits ~~a Class A misdemeanor, except as provided in subsection (b). (b) A person having a prior conviction of professional gambling or promoting~~ professional gambling, ~~who violates this section commits~~ a Class D felony.

SECTION 83. IC 35-45-5-4, as added by Acts 1976, P.L. 148, SECTION 5, is amended to read as follows: Sec. 4. ~~Promoting Professional Gambling.~~ (a) A person who:

(1) knowingly or intentionally owns, manufactures, possesses, buys, sells, rents, leases, repairs, or transports a gambling device, or offers or solicits an interest in a gambling device; ~~or~~

(2) before a race, game, contest, or event on which gambling may be conducted, knowingly or intentionally transmits or receives gambling information by any means, or knowingly or intentionally installs or maintains equipment for the transmission or receipt of gambling information; or

~~commits a Class A misdemeanor, except as provided in subsection (c). (b) A person who,~~

(3) having control over the use of a place, knowingly or intentionally permits another person to use the place for professional gambling; ~~commits a Class B misdemeanor, except as provided in subsection (c).~~

~~(c) A person having a prior conviction of professional gambling or promoting professional gambling who violates this section~~

commits promoting professional gambling, a Class D felony.

~~(d)~~(b) When a public utility is notified by a law enforcement agency acting within its jurisdiction that any service,

facility, or equipment furnished by it is being used or will be used to violate this section, it shall discontinue or refuse to furnish that service, facility, or equipment, and no damages, penalty, or forfeiture, civil or criminal, ~~shall~~ may be found against a public utility for an act done in compliance with such a notice. This subsection does not prejudice the right of a person affected by it to secure an appropriate determination, as otherwise provided by law, that the service, facility, or equipment should not be discontinued or refused, or should be restored.

SECTION 84. IC 35-46-1-1, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 1. ~~Definitions.~~ As used in this chapter:

"Dependent" means:

(1) an unemancipated person who ~~has not reached the age of~~ is under eighteen (18) years of age; or

(2) a person of any age who is mentally or physically disabled.

"Support" means food, clothing, shelter, or medical care.

SECTION 85. IC 35-46-1-2, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 2. ~~Bigamy.~~ (a) A person who, being married and knowing that his spouse is alive, marries again commits bigamy, a Class D felony.

(b) It is a defense that the accused person reasonably believed that he was eligible to remarry.

SECTION 86. IC 35-46-1-3, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 3. ~~Incest.~~ (a) A person eighteen (18) years ~~old~~ of age or older who engages in sexual intercourse or deviate sexual conduct with another person, ~~who~~ when he knows that the other person is his parent, stepparent, child, stepchild, grandparent, grandchild, sibling, aunt, ~~or~~ uncle, ~~or~~ niece, or nephew, commits incest, a Class D felony.

(b) It is a defense that the accused person's otherwise incestuous relation with ~~another~~ the other person ~~is~~ was based on their marriage, ~~that~~ if it was valid where entered into.

SECTION 87. IC 35-46-1-4, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 4. ~~Neglect of a Dependent.~~ (a) A person having the care, custody, or control of a dependent who knowingly or intentionally:

(1) places the dependent in a situation that may endanger his life or health;

(2) abandons or cruelly confines the dependent;

(3) deprives the dependent of necessary support; or

(4) deprives the dependent of education as required by law;

commits neglect of a dependent, a Class D felony.

(b) This section does not apply to a person who, in the legitimate practice of his religious belief, has provided treatment by spiritual means through prayer, in lieu of medical care, to a dependent in his care, custody, or control.

SECTION 88. IC 35-46-1-5, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 5. ~~Nonsupport of a Dependent Child.~~ (a) A person who, being able, intentionally fails to provide support to his dependent child commits nonsupport of a child, a Class D felony. ~~However, a child shall not be considered a neglected child or a child lacking proper support because a parent or guardian, in the legitimate practice of his religious belief, provides treatment by spiritual means through prayer in lieu of the specified medical treatment.~~

(b) It is a defense that the child had abandoned the home of his family without the consent of his parent or on the order of a court.

(c) It is not a defense that the child has abandoned the home of his family if the cause of the child's leaving is the fault of his parent or parents.

(d) This section does not apply to a person who, in the legitimate practice of his religious belief, has provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent child.

SECTION 89. IC 35-46-1-6, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 6. ~~Nonsupport of a Spouse.~~ A person who, being able, intentionally fails to provide support to his spouse, ~~who~~ when the spouse needs support, commits **nonsupport of a spouse**, a Class D felony.

SECTION 90. IC 35-46-1-7, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 7. ~~Nonsupport of a Parent.~~ (a) A person who, being financially able, intentionally fails to provide support to his parent, ~~who~~ when the parent is unable to support himself, commits **nonsupport of a parent**, a Class A misdemeanor.

(b) It is a defense that the accused person had not been supported by the parent during the time he was a dependent child under eighteen (18) years of age, unless the parent was unable to provide support.

SECTION 91. IC 35-46-1-8, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 8. ~~Contributing to the Delinquency of a Minor.~~ A person eighteen (18) years ~~old~~ of age or older who knowingly or intentionally aids, induces, or causes a person under ~~the age of~~ eighteen (18) years of age to commit an act of delinquency as defined by IC 31-5-7-4.1 commits **contributing to delinquency**, a Class A misdemeanor.

SECTION 92. IC 35-46-2-1, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 1. ~~Violation of Civil Rights. (a)~~ A person who knowingly or intentionally denies to another person, because of color, creed, handicap, national origin, race, religion, or sex, the full and equal ~~employment or~~ use of the services, facilities, or goods in: ~~a place of public accommodation, resort, or amusement by reason of sex, race, religion, color, creed, handicap, or national origin commits a Class B misdemeanor.~~

~~(b) "Place of public accommodation, resort, or amusement" means either~~

(1) an establishment that caters or offers its services, facilities, or goods to the general public; or

(2) a ~~public or government~~ housing project owned or subsidized by a governmental entity;

commits a civil rights violation, a Class B misdemeanor.

SECTION 93. IC 35-46-2, as added by Acts 1976, P.L. 148, SECTION 6, is amended by adding a NEW section 2 to read as follows: Sec. 2. A public servant having the duty to select or summon persons for grand jury or trial jury service who knowingly or intentionally fails to select or summon a person, because of color, creed, handicap, national origin, race, religion, or sex, commits discrimination in jury selection, a Class A misdemeanor.

SECTION 94. IC 35-46-3-1, as added by Acts 1976, P.L. 148, SECTION 6, is amended to read as follows: Sec. 1. ~~Harboring a Non-immunized Dog.~~ A person who knowingly or intentionally harbors a dog that is over the age of six (6) months and not immunized against rabies commits **harboring a non-immunized dog**, a Class ~~A~~ C infraction. However, the offense is a Class B misdemeanor if the dog causes bodily injury by biting a person.

SECTION 95. IC 35-48-1-1, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 1. ~~Definitions.~~ As used in this article:

"Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(1) a practitioner or by his authorized agent; or

(2) the patient or research subject at the direction and in the presence of the practitioner.

"Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser; but it does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman.

"Board" ~~means~~ refers to the Indiana state board of pharmacy.

"Controlled substance" means a drug, substance, or immediate precursor listed in ~~schedules I through~~ schedule I, II, III, IV, or V of IC 35-48-2.

"Counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trade mark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.

"Delivery" means ~~the~~ an actual, ~~or~~ constructive, ~~or attempted~~ transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

"Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, ~~including~~; and includes the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

"Dispenser" means a practitioner who dispenses.

"Distribute" means to deliver other than by administering or dispensing a controlled substance.

"Distributor" means a person who distributes.

"Drug" means ~~(i) substances~~ a substance:
(1) recognized as ~~drugs~~ a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

~~(ii) substances~~

(2) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals;

~~(iii) substances (other than food)~~

(3) intended to affect the structure or any function of the body of ~~man~~ human beings or animals; ~~and (iv) substances or~~

(4) intended for use as a component of any ~~article~~ substance specified in ~~clause (i), (ii), (iii)~~ subdivision (1), (2), or (3) of this definition.

It does not include devices or their components, parts, or accessories, nor does it include food.

"Immediate precursor" means a substance which the board has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

"Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, ~~or~~ independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, ~~except that this term~~. It does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:

(1) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or

(2) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

"Marijuana" means ~~all parts~~ any part of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant, ~~e.g.,~~ including hashish; ~~and every~~ any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant,; fiber produced from the stalks,; oil or cake made from the seeds of the plant,; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom),; fiber, oil, or cake; or the sterilized seed of the plant which is incapable of germination.

"Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, ~~or~~ independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical ~~with~~ to any of the substances referred to in ~~clause~~ subdivision (1) of this definition, but not including the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical ~~with~~ to any of these substances, but not including decocainized coca leaves or extraction of coca leaves which do not contain cocaine or ecgonine.

"Opiate" means a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under ~~chapter 2, section 1 of this article~~ IC 35-48-2, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

"Opium poppy" means the plant of the species Papaver somniferum L., except its seeds.

"Poppy straw" means ~~all parts~~ any part, except the seeds, of the opium poppy, after mowing.

"Practitioner" means~~: (1)~~ a physician, dentist, veterinarian, scientific investigator, ~~or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state; or (2)~~ a pharmacy, hospital, or other institution or individual licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or ~~to~~ administer a controlled substance in the course of professional practice or research in ~~this state~~ Indiana.

"Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

"Ultimate user" means a person who lawfully possesses a controlled substance for his own use, ~~or~~ for the use of a member of his household, or for administering to an animal owned by him or by a member of his household.

Chapter 2. Classification of Drugs.

Sec. 1. Authority to Control. (a) The Indiana state board of pharmacy shall administer this article and may recommend to the general assembly the addition, deletion, or rescheduling of all substances listed in the schedules in sections 4, 6, 8, 10, and 12 of this chapter by submitting a report of such recommendations to the legislative council. In making a determination regarding a substance, the board shall consider the following:

(1) the actual or relative potential for abuse;

(2) the scientific evidence of its pharmacological effect, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration, and significance of abuse;

(6) the risk to public health;

(7) the potential of the substance to produce psychic or physiological dependence liability; and

(8) whether the substance is an immediate precursor of a substance already controlled under this article.

(b) After considering the factors enumerated in subsection (a) of this section the board shall make findings with respect thereto and make recommendations concerning the control of the substance if it finds the substance has a potential for abuse.

(c) If the board finds that a substance is an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor.

(d) If any substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the board, the board shall recommend similar control of the substance under this article in the board's report to the general assembly, unless the board objects to inclusion, rescheduling, or deletion. In that case, the board shall publish the reasons for objection and afford all interested parties an opportunity to be heard. At the conclusion of the hearing, the board shall publish its findings.

(e) There is established a fourteen (14) member controlled substances advisory committee (hereinafter referred to as "advisory committee") to serve as a consultative and advising body to the board in all matters relating to the classification, reclassification, addition to or deletion from, of all substances presently classified as controlled substances in schedules I to IV, or substances not presently controlled or yet to come into being. In addition, the advisory committee shall conduct hearings and make recommendations to the board regarding revocations, suspensions and restrictions of registrations as provided in IC 35-48-3-4. All hearings shall be conducted in accordance with IC 4-22-1. The advisory committee shall be made up of two (2) physicians from the state board of medical registration; two (2) pharmacists from the state board of pharmacy; two (2) dentists from the state board of dental examiners; the state toxicologist; two (2) veterinarians from the state board of veterinary medical examiners; one (1) podiatrist from the state board of podiatry examiners and the superintendent of the state police or his designee. In addition, the governor, upon the recommendation of the state drug abuse advisory committee, shall appoint a pharmacologist, a chemist, and a research psychopharmacologist to the advisory committee. All appointments shall be for four (4) year terms. The board shall acquire the recommendations of the advisory committee pursuant to administration over the controlled substances to be or not to be included in schedules I to V, especially in the implementation of scheduled substances changes as provided in subsection (d).

(f) Authority to control under this section does not extend to distilled spirits, wine, or malt beverages, as those terms are defined or used in IC Title 7.1, or to tobacco.

(g) The board shall exclude any non-narcotic substance from a schedule if that substance may, under the Federal Food, Drug, and Cosmetic Act or state law, be sold over the counter without a prescription.

Sec. 2. Nomenclature. The controlled substances listed in the schedules in sections 4, 6, 8, 10 and 12 of this chapter are included by whatever official, common, usual, chemical, or trade name designated.

Sec. 3. Schedule I Tests. The board shall recommend placement of a substance in schedule I if it finds that the substance:

(1) has high potential for abuse; and

(2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

Sec. 4. Schedule I. (a) The controlled substance listed in this section are included in schedule I.

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Acetylmethadol.

(2) Allylprodine.

(3) Alphacetylmethadol.

(4) Alphameprodine.

(5) Alphamethadol.

(6) Benzethidine.

(7) Betacetylmethadol.

(8) Betameprodine.

(9) Betamethadol.

(10) Betaprodine.

(11) Clonitazene.

(12) Dextromoramide.

(13) Dextrorphan.

(14) Diampromide.

(15) Diethylthiambutene.

(16) Difenoxin.

(17) Dimenoxadol.

(18) Dimepheptanol.

(19) Dimethylthiambutene.

(20) Dioxaphetyl butyrate.

(21) Dipipanone.

(22) Ethylmethylthiambutene.

(23) Etonitazene.

(24) Etoxeridine.

(25) Furethidine.

(26) Hydroxypethidine.

(27) Ketobemidone.

(28) Levomoramide.

(29) Levophenacylmorphan.

(30) Mecloqualene.

(31) Morpheridine.

(32) Noracymethadol.

(33) Norlevorphanol.

(34) Normethadone.

(35) Norpipanone.

(36) Phenadoxone.

(37) Phenampromide.

(38) Phenomorphan.

(39) Phenoperidine.

(40) Piritramide.

(41) Proheptazine.

(42) Properidine.

(43) Propiram.

(44) Racemoramide.

(45) Trimeperidine.

(c) Any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.

(2) Acetyldihydrocodeine.

(3) Benzylmorphine.

(4) Codeine methylbromide.

(5) Codeine-N-Oxide.

(6) Cyprenorphine.

(7) Desomorphine.

(8) Dihydromorphine.

(9) Drotebanol.

(10) Etrophine (except hydrochloride salt).

(11) Heroin.

(12) Hydromorphinol.

(13) Methyldesorphine.

(14) Methyldihydromorphine.

(15) Morphine methylbromide.

(16) Morphine methylsulfonate.

(17) Morphine-N-Oxide.

(18) Myrophine.

(19) Nicocodeine.

(20) Nicomorphine.

(21) Normorphine.

(22) Pholcodine.

(23) Thebacon.

(d) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic, psychedelic or psychogenic substances, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3, 4-methylenedioxy amphetamine, MDA.

(2) 5-methoxy-3, 4-methylenedioxy amphetamine, MMDA.

(3) 3, 4, 5-trimethoxy amphetamine, TMA.

(4) Bufotenine. Some trade or other names:
3-(beta-dimethylaminoethyl)-5-hydroxindole;
3-(2-dimethylaminoethyl)-5-indolol;
N, N-dimenthyl-serotonin;
5-hydroxy-N-dimethyltryptamine; mappine.

(5) Diethyltryptamine. Some trade or other names:
N, N-diethyltryptamine; DET.

(6) Dimethyltryptamine. Some trade or other names:
DET.

(7) 4-methyl-2, 5-dimethoxyamphetamine. Some trade or other names:
4-methyl-2, 5-dimethoxy-alpha-methylphenethylamine;
DOM; and STP.

(8) Ibogaine. Some trade or other names: 7-ethyl-6, 6 alpha, 7, 8, 9, 10, 12, 13-octahydro-2-methoxy-6, 9-methano-5H-pyrido (1', 2': 1, 2, azepino 4, 5-b) indole; tabernanthe iboga.

(9) Lysergic acid diethylamide, LSD.

(10) Marijuana.

(11) Mescaline.

(12) Peyote.

(13) N-ethyl-3-piperidyl benzilate, DMZ.

(14) N-methyl-3-piperidyl benzilate, LBJ.

(15) Psilocybin.

(16) Psilocyn.

(17) Tetrahydrocannabinols, THC, including synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, sp. and synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:

(i) Δ^1 cis or trans tetrahydrocannabinol, and their optical isomers.

(ii) Δ^6 cis or trans tetrahydrocannabinol, and their optical isomers.

(iii) $\Delta^{3,4}$ cis or trans tetrahydrocannabinol and their optical isomers.

(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions, are covered.)

(18) 2, 5-Dimethoxyamphetamine (Some trade or other names: 2, 5-Dimethoxy-alpha-methylphenethylamine; 2, 5-DMA).

(19) 4-Bromo-2, 5-Dimethoxyamphetamine (Some trade or other names: 4-Bromo-2, 5-Dimethoxy-alpha-methylphenethylamine; 4-Bromo-2, 5-DMA).

(20) 4-Methoxyamphetamine (Some trade or other names: 4-Methoxy-alpha-methylphenethylamine; Paramethoxyamphetamine; PMA).

(21) Thiophene Analog of Phencyclidine (Some trade or other names: 1-[1-(2-thienyl) cyclohexyl] piperidine); 2-Thienyl Analog of Phencyclidine; TPCP).

Sec. 5. Schedule II Tests. The board shall recommend placement of a substance in schedule II if it finds that:

(1) the substance has high potential for abuse;

(2) the substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and

(3) the abuse of the substance may lead to severe psychic or physical dependence.

Sec. 6. Schedule II. (a) The controlled substances listed in this section are included in schedule II.

(b) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate; excluding naloxone hydrochloride and its salts but including:

(i) raw opium;

(ii) opium extracts;

(iii) opium fluid extracts;

(iv) powdered opium;

(v) granulated opium;

(vi) tincture of opium;

(vii) apomorphine;

(viii) codeine;

(ix) ethylmorphine;

(x) etorphine hydrochloride;

(xi) hydrocodone;

(xii) hydromorphone;

(xiii) metopon;

(xiv) morphine;

(xv) oxycodone;

(xvi) oxymorphone; and

(xvii) thebaine.

(2) Any sale, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subdivision (b) (1) of this section, but not including the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves, and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

(5) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid, or powder form which contains the phenanthrine alkaloids of the opium poppy).

(c) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existance of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.

(2) Anileridine.

(3) Bezitramide.

(4) Dihydrocodeine.

(5) Diphenoxylate.

(6) Fentanyl.

(7) Isomethadone.

(8) Levomethorphan.

(9) Levorphanol.

(10) Metazocine.

(11) Methadone.

(12) Methadone - Intermediate, 4 - cyano - 2 - dimethyl - amino - 4, 4 - diphenyl butane.

(13) Moramide - Intermediate, 2 - methyl - 3 - morpholino - 1, 1-diphenylpropane-carboxylic acid.

(14) Pethidine.

(15) Pethidine - Intermediate - A, 4 - cyano - 1 - methyl - 4 - phenylpiperidine.

(16) Pethidine - Intermediate - B, ethyl - 4 - phenylpiperidine - 4 - carboxylate.

(17) Pethidine - Intermediate - C, 1 - methyl - 4 - phenylpiperidine - 4 - carboxylic acid.

(18) Phenazocine.

(19) Piminodine.

(20) Racemethorphan.

(21) Racemorphan.

(d) Any material compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Methamphetamine, including its salts, isomers, and salts of its isomers.

(3) Phenmetrazine and its salts.

(4) Methylphenidate.

(e) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Methaqualone.

(2) Amobarbital.

(3) Secobarbital.

(4) Pentobarbital.

Sec. 7. Schedule III Tests. The board shall recommend placement of a substance in schedule III if it finds that:

(1) the substance has a potential for abuse less than the substances listed in schedule I and II;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to modrate or low physical dependence or high psychological dependence.

Sec. 8. Schedule III. (a) The controlled substances listed in this section are included in schedule III.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Those compounds, mixtures or preparations in dosage unit form containing any stimulant substances listed in schedule II which compounds, mixtures or preparations were listed on August 25, 1971, as excepted compounds under U.S.C. 21 CFR 308.32, and any other drug of the quantitive composition shown in that list for those drugs or that is the same except that it contains a lesser quantity of controlled substances.

(2) Benzphetamine.

(3) Chlorphentermine.

(4) Clortermine.

(5) Mazindol.

(6) Phendimetrazine.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital or any salt thereof and one (1) or more other active medicinal ingredients which are not listed in any schedule.

(2) Any suppository dosage form containing amobarbital, secobarbital, pentobarbital, or any salt of any of these drugs and approved by the Food and Drug Administration for marketing only as a suppository.

(3) Any substance which contains any quantity of a derivative of barbituric acid, or any salt thereof.

(4) Chlorhexadol.

(5) Glutethimide.

(6) Lysergic acid.

(7) Lysergic acid amide.

(8) Methyprylon.

(9) Phencyclidine.

(10) Sulfondiethylmethane.

(11) Sulfonethylmethane.

(12) Sulfonmethane.

(d) Nalorphine (a narcotic drug).

(e) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine, per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine, per 100 milliliters or not more than 90 milligrams per dosage unit, with one (1) or more active, non-narcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone, per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinaline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone, per 100 milliliters or not more than 15 milligrams per dosage unit, with one (1) or more active non-narcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine, per 100 milliliters or not more than 90 milligrams per dosage unit, with one (1) or more active, non-narcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine, per 100 milliliters or not more than 15 milligrams per dosage unit, with one (1) or more active, non-narcotic ingredients in recogized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams or not more than 25 milligrams per dosage unit, with one (1) or more active, non-narcotic ingredients recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine, per 100 milliliters or per 100 grams with one (1) or more active non-narcotic ingredients in recognized therapeutic amounts.

(f) The board shall except any compound, mixture, or preparation containing any stimulant or depressant substance listed in subsections (b), (c), and (d) from the application of any part of this article if the compound, mixture, or preparation contains one (1) or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

Sec. 9. Schedule IV Tests. The board shall recommend placement of a substance in schedule IV if it finds that:

(1) the substance has a low potential for abuse relative to substances in schedule III;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances in schedule III.

Sec. 10. Schedule IV. (a) The controlled substance listed in this section are included in schedule IV.

(b) Unless specifically excepted or rules listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Barbital.

(2) Chloral betaine; Somilan; Beta-Chlur.

(3) Chloral hydrate; Noctec.

(4) Chlordiazepoxide; Llorium.

(5) Clonazepam; Clonopin.

(6) Clorazepate; Tranxene.

(7) Diazepam; Valium.

(8) Ethchlorvynol; Placidyl.

(9) Ethinamate; Valamin; Valmid.

(10) Flurazepam; Dalmane.

(11) Mebutamate.

(12) Meprobamate; Miltown or Equinal.

(13) Methohexital; Brevital.

(14) Methylphenobarbital; Mebaral; Mephobarbital.

(15) Oxazepam; Serax.

(16) Paraldehyde; Paral.

(17) Petrichloral.

(18) Phenobarbital.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances,

including its salts, isomers (whether optical, position, or geometric), and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible.

(1) Fenfluramine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substance having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Diethylpropion.

(2) Phentermine.

(3) Pemoline (including organometallic and chelates thereof).

(e) The board may except by rule any compound, mixture, or preparation containing any depressant substance listed in subsection (b), (c), or (d) of this section from the application of any part of this article if the compound, mixture, or preparation contains one (1) or more active medicinal ingredients not having a depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substance which have a depressant effect on the central nervous system.

Sec. 11. Schedule V Tests. The board shall recommend placement of a substance in schedule V if it finds that:

(1) the substance has low potential for abuse relative to the controlled substances listed in schedule IV;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) the substance has limited physical dependence or psychological dependence liability relative to the controlled substances listed in schedule IV.

Sec. 12. Schedule V. (a) The controlled substances listed in this section are included in schedule V.

(b) Any compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, which also contains one or more non-narcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine, or any of its salts, per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine, or any of its salts, per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

Sec. 13. Republishing of Schedules. The board shall publish the schedules at least annually or more often if deemed necessary by the board.

Chapter 3. Registration and Control.

Sec. 1. Rules. The board may promulgate rules and charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this state.

Sec. 2. Humane Societies. (a) Any humane society is entitled to receive a limited permit only for the purpose of buying, possessing, and using sodium pentobarbital to euthanize injured, sick, homeless, or unwanted domestic pets and animals if it:

(1) makes appropriate application to the board according to rules established by the board; and

(2) pays to the board annually a fee for the limited permit.

(b) All fees collected by the board under this section shall be credited to the state board of pharmacy account.

(c) Storage, handling, and use of sodium pentobarbital obtained according to this section is subject to rules and regulations of the board.

Sec. 3. Registration Requirements. (a) Every person who manufactures, distributes, or dispenses any controlled substance within this state or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance within this state, must obtain annually a registration issued by the board in accordance with its rules.

(b) Persons registered by the board under this article to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture, distribute, dispense, or conduct research with those substances to the extent authorized by their registration and in conformity with the other provisions of this chapter.

(c) The following persons need not register and may lawfully possess controlled substances under this article:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance if he is acting in the usual course of his business or employment.

(2) A common or contract carrier or warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of business or employment.

(3) An ultimate user or a person in possession of any controlled substance under a lawful order of a practitioner or in lawful possession of a schedule V substance.

(d) The board may waive by rule the requirement for registration of certain manufactures, distributors, or dispensers if it finds it consistent with the public health and safety.

(e) A separate registration is required at each principal place of business or professional practice where the applicant manufactures, distributes, dispenses or possesses controlled substances.

(f) The board may inspect the establishment of a registrant or applicant for registration in accordance with the board's rules.

Sec. 4. Registration. (a) The board shall register an applicant to manufacture or distribute controlled substances unless it determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the board shall consider:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, or industrial channels;

(2) compliance with applicable state and local law;

(3) any convictions of the applicant under any federal and state laws relating to any controlled substance;

(4) past experience in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material in any application filed under this article;

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute, or dispense controlled substances as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety.

(b) Registration under subsection (a) of this section does not entitle a registrant to manufacture and distribute controlled substances in schedules I or II other than those specified in the registration.

(c) Practitioners must be registered to dispense any controlled substances or to conduct research with controlled substances in schedules II through V if they are authorized to dispense or conduct research under the law of this state. The board need not require separate registration under this chapter for practitioners engaging in research with nonnarcotic controlled substances in schedules II through V where the registrant is already registered under this chapter in another capacity. Practitioners registered under federal

law to conduct research with schedule I substances may conduct research with schedule I substances within this state upon furnishing the board evidence of that federal registration.

(d) Compliance by manufactures and distributors with the provisions of the federal law respecting registration (excluding fees) entitles them to be registered under this article.

Sec. 5. Denial, Revocation, and Suspension of Registration. (a) An application for registration or re-registration submitted pursuant to and a registration issued under section 3 of this chapter to manufacture, distribute, or dispense a controlled substance may be denied, suspended or revoked by the board upon a finding by the advisory committee that the applicant or registrant:

(1) has furnished false or fraudulent material information in any application filed under this article;

(2) has violated any state or federal law relating to any controlled substance;

(3) has had his federal registration suspended or revoked to manufacture, distribute, or dispense controlled substances; or

(4) has failed to maintain reasonable controls against diversion of controlled substances into other than legitimate medical, scientific, or industrial channels.

(b) The board may limit revocation or suspension of a registration or the denial of an application for registration or re-registration to the particular controlled substance with respect to which grounds for revocation, suspension or denial exist.

(c) If the board suspends or revokes a registration or denies an application for re-registration, all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation or denial order may be placed under seal. The board may require the removal of such substances from the premises. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders

the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation or denial order becoming final, all controlled substances may be forfeited to the state.

(d) The board shall promptly notify the bureau of all orders suspending or revoking registration, all orders denying any application for registration or re-registration, and all forfeitures of controlled substances.

Sec. 6. Order to Show Cause. (a) Before recommending a denial, suspension or revocation of a registration, or before refusing a renewal of registration, the advisory committee shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended, or why the renewal should not be denied. The order to show cause shall contain a statement of the basis therefor and shall call upon the applicant or registrant to appear before the advisory committee at a time and place not less than thirty (30) days after the date of service of the order, but in the case of a denial or renewal of registration the show cause order shall be served not later than thirty (30) days before the expiration of the registration. These proceedings shall be conducted in accordance with IC 4-22-1 without regard to any criminal prosecution or other proceeding. Proceedings to refuse renewal of registration shall not abate the existing registration which shall remain in effect pending the outcome of the administrative hearing.

(b) The advisory committee may recommend suspension, and the board may suspend, without an order to show cause, any registration simultaneously with the institution of proceedings under section 4 of this chapter, or where renewal of registration is refused, if it finds that there is an imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect the conclusion of the proceedings, including judicial review thereof, unless sooner withdrawn by the board or dissolved by a court of competent jurisdiction.

(c) If an applicant for re-registration (who is doing business under a registration previously granted and not revoked nor suspended) has applied for re-registration at least forty-five (45) days before the date on which the existing registration is due to expire, the existing registration of the applicant shall automatically be extended and continue in effect until the date on which the board so issues its order. The board may extend any other existing registration under the circumstances contemplated in this section even though the registrant failed to apply for re-registration at least forty-five (45) days before expiration of the existing registration, with or without request by the registrant, if the board finds that such extension is not inconsistent with the public health and safety.

Sec. 7. Records of Registrants. Persons registered to manufacture, distribute, or dispense controlled substances under this article shall keep records and maintain inventories in conformance with the record-keeping and inventory requirements of federal law and with any additional rules the board issues.

Sec. 8. Order Forms. Controlled substances in schedules I and II shall be distributed by a registrant to another registrant only pursuant to an order form. Compliance with the provisions of federal law respecting order forms is deemed compliance with this section.

Sec. 9. Prescriptions. (a) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, no controlled substance in schedule II may be dispensed without the written prescription of a practitioner.

(b) In emergency situations, as defined by rule of the board, schedule II drugs may be dispensed upon oral prescription of a practitioner, reduced promptly to writing and filed by the pharmacy. Prescriptions shall be retained in conformity with the requirements of section 7 of this chapter. No prescription for a schedule II substance may be refilled.

(c) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a controlled substance included in schedule III or IV, which is a prescription drug as determined under IC 16-6-8, shall not be dispensed without a written or oral prescription of a practitioner. The prescription shall not be filled or refilled more than six (6) months after the date thereof or be refilled more than five (5) times, unless renewed by the practitioner.

(d) A controlled substance included in schedule V shall not be distributed or dispensed other than for a medical purpose.

SECTION 96. IC 35-48-4-1, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 1. ~~Dealing in a Narcotic Drug.~~ A person who:

(1) knowingly or intentionally manufactures or delivers a narcotic drug, pure or adulterated, classified in schedule I or II; or

(2) possesses, with intent to manufacture or deliver, a narcotic drug, pure or adulterated, classified in schedule I or II;

commits dealing in a narcotic drug, a Class B felony. However, the offense is a Class A felony if the amount of the drug involved has an aggregate weight of ten (10) grams or more, or if the person delivered the drug to a person under eighteen (18) years of age at least three (3) years his junior.

SECTION 97. IC 35-48-4-2, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 2. ~~Dealing in a Schedule I, II, or III Controlled Substance.~~ A person who:

(1) knowingly or intentionally manufactures or delivers a controlled substance, pure or adulterated, classified in schedule I, II, or III, except marijuana or hashish; or

(2) possesses, with intent to manufacture or deliver, a controlled substance, pure or adulterated, classified in schedule I, II, or III, except marijuana or hashish;

commits dealing in a schedule I, II, or III controlled substance, a Class ~~C~~ B felony. However, the offense is a Class A felony if the person delivered the substance to a person under eighteen (18) years of age at least three (3) years his junior.

SECTION 98. IC 35-48-4-3, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 3. ~~Dealing in a Schedule IV Controlled Substance.~~ A person who:

(1) knowingly or intentionally ~~manufacturers~~ manufactures or delivers a controlled substance, pure or adulterated, classified in schedule IV; or

(2) possesses, with intent to manufacture or deliver, a controlled substance, pure or adulterated, classified in schedule IV;

commits dealing in a schedule IV controlled substance, a Class ~~D~~ C felony. However, the offense is a Class B felony if the person delivered the substance to a person under eighteen (18) years of age at least three (3) years his junior.

SECTION 99. IC 35-48-4-4, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 4. ~~Dealing in a Schedule V Controlled Substance.~~ A person who:

(1) knowingly or intentionally manufactures or delivers a controlled substance, pure or adulterated, classified in schedule V; or

(2) possesses, with intent to manufacture or deliver, a controlled substance, pure or adulterated, classified in schedule ~~IV~~ V;

commits dealing in a schedule V controlled substance, a Class D felony. However, the offense is a Class B felony if the person delivered the substance to a person under eighteen (18) years of age at least three (3) years his junior.

SECTION 100. IC 35-48-4-5, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 5. ~~Dealing in a Counterfeit Substance.~~ A person who:

(1) knowingly or intentionally creates or delivers a counterfeit substance; or

(2) possesses, with intent to deliver, a counterfeit substance;

commits dealing in a counterfeit substance, a Class D felony.

SECTION 101. IC 35-48-4-6, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 6. ~~Possession of a Narcotic Drug.~~ A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses

a narcotic drug classified in schedule I or II commits possession of a narcotic drug, a Class D felony. However, the offense is a Class C felony if the amount of the drug involved has an aggregate weight of ten (10) grams or more.

SECTION 102. IC 35-48-4-7, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 7. ~~Possession of a Controlled Substance.~~ A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses a controlled substance classified in schedule I, II, III, IV, or V, except marijuana or hashish, commits possession of a controlled substance, a Class D felony.

SECTION 103. IC 35-48-4-8, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 8. ~~Possession of Paraphernalia.~~ (a) A person who possesses, with intent to violate this article, an instrument designed for smoking or injecting a controlled substance commits possession of paraphernalia, a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior conviction of an offense involving paraphernalia.

SECTION 104. IC 35-48-4-9, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 9. ~~Dealing in Paraphernalia.~~ (a) A person who:

(1) knowingly or intentionally ~~manufacturers~~ manufactures or delivers paraphernalia;

(2) possesses, with intent to manufacture or deliver, paraphernalia;

commits dealing in paraphernalia, a Class D felony.

(b) ~~As used in this section, "paraphernalia"~~ "Paraphernalia" means an instrument used, designed for use, or intended for use in ingesting, smoking, administering, or preparing marijuana, hashish, hashish oil, or cocaine,; and includes:

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic marijuana or hashish pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes designed for use or intended for use with marijuana, hashish, hashish oil, or cocaine;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips;

(6) separation gins designed for use or intended for use in cleaning marijuana;

(7) cocaine spoons and vials;

(8) chamber pipes;

(9) carburetor pipes;

(10) electric pipes;

(11) air driven pipes;

(12) chilams;

(13) bongs; and

(14) ice pipes or chillers.

SECTION 105. IC 35-48-4-10, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 10. ~~Dealing in Marijuana or Hashish.~~ A person who:

(1) knowingly or intentionally manufactures or delivers marijuana or ~~dry~~ hashish, pure or adulterated; or

(2) possesses, with intent to manufacture or deliver, marijuana or hashish, pure or adulterated;

commits dealing in marijuana or hashish, a Class A misdemeanor. However, the offense is a Class D felony (i) if the recipient or intended recipient is under eighteen (18) years of age, (ii) if the amount involved is more than thirty (30) grams of marijuana or two (2) grams of hashish, or (iii) if the person has a prior conviction of an offense involving marijuana or hashish.

SECTION 106. IC 35-48-4-11, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 11. ~~Possession of Marijuana or Hashish.~~ A person who:

(1) knowingly or intentionally possesses marijuana or hashish; or

(2) knowingly or intentionally grows or cultivates marijuana or hashish; or

(3) knowing that marijuana is growing on his premises, fails to destroy the marijuana plants;

commits **possession of marijuana or hashish,** a Class A misdemeanor. However, the offense is a Class D felony (i) if the amount involved is more than thirty (30) grams of marijuana or two (2) grams of hashish, or (ii) if the person has a prior conviction of an offense involving marijuana or hashish.

SECTION 107. IC 35-48-4-12, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 12. ~~Conditional Discharge for Possession as First Offense.~~ If a person who has no prior conviction of an offense under this article or under a law of another jurisdiction relating to controlled substances pleads guilty to possession of marijuana or hashish ~~in an amount of less than thirty (30) grams of marijuana or two (2) grams of hashish~~ as a Class A misdemeanor, the court, without entering a judgment of conviction and with the consent of the person, may defer further proceedings and place him in the custody of the court under such conditions as the court determines. Upon violation of a condition of the custody, the court may enter a judgment of conviction. However, if the person fulfills the conditions of the custody, the court shall dismiss the charges against him. There may be only one (1) dismissal under this section with respect to a person.

SECTION 108. IC 35-48-4-13, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 13. ~~Common Nuisance.~~ (a) A person who knowingly or intentionally visits or ~~maintains~~ a building, structure, vehicle, or other place that is used by any person to unlawfully use a controlled substance commits **visiting a common nuisance,** a Class B misdemeanor.

(b) A person who knowingly or intentionally **maintains** a building, structure, vehicle, or other place that is used:

(1) by persons to unlawfully use controlled substances; **or**

(2) for unlawfully keeping or selling controlled substances;

commits **maintaining a common nuisance,** a Class D felony.

SECTION 109. IC 35-48-4-14, as added by Acts 1976, P.L. 148, SECTION 7, is amended to read as follows: Sec. 14. ~~Offenses Relating to Registration.~~ (a) A person who:

(1) is subject to IC 35-48-3 and who recklessly, knowingly, or intentionally distributes or dispenses a controlled substance in violation of IC 35-48-3;

(2) is a registrant and who recklessly, knowingly, or intentionally manufactures a controlled substance not authorized by his registration or distributes, or dispenses a controlled substance not authorized by his registration to another registrant or other authorized person;

(3) recklessly, knowingly, or intentionally fails to make, keep, or furnish a record, notification, order form, statement, invoice or information required under this article; or

(4) recklessly, knowingly, or intentionally refuses entry into any premises for an inspection authorized by this article;

commits a Class D felony.

(b) A person who knowingly or intentionally:

(1) distributes as a registrant a controlled substance classified in ~~schedules~~ **schedule** I or II, except under an order form as required by IC 35-48-3;

(2) uses in the course of the manufacture or distribution of a controlled substance a federal or state registration number that is fictitious, revoked, suspended, or issued to another person;

(3) furnishes false or fraudulent material information in, or omits any material information from, an application, report, or other document required to be kept or filed under this article; or

(4) makes, distributes, or possesses a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or a likeness of any of the foregoing on a drug or container or labeling thereof so as to render the drug a counterfeit substance;

commits a Class D felony.

(c) A person who knowingly or intentionally acquires possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge commits a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior conviction of an offense under this subsection.

SECTION 110. IC 35-50-1-1, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 1. ~~Authority to Sentence.~~ The court shall fix the penalty of and sentence a person convicted of an offense.

SECTION 111. IC 35-50-1-2, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 2. ~~Consecutive and Concurrent Terms.~~ (a) Except as provided in ~~subsections~~ subsection (b) ~~and (c)~~ of this section, ~~a term~~ the court shall determine whether terms of imprisonment ~~begins the date the sentence is imposed~~ shall be served concurrently or consecutively.

(b) ~~A~~ If a person ~~who~~ commits a crime: ~~while he is released from lawful detention pending trial on another charge does not begin serving a term of imprisonment imposed for that crime until he completes any term imposed for a conviction arising out of the other charge.~~

(1) after having been arrested for another crime; and

(2) before the date he is discharged from probation, parole, or a term of imprisonment imposed for that other crime;

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

~~(c) A term of imprisonment imposed on a person for:~~

~~(1) escape (IC 35-44-3-6);~~

~~(2) a crime committed while he is an escapee from lawful detention;~~

~~(3) failure to appear (IC 35-44-3-7); or~~

~~(4) a crime committed while he is imprisoned in a penal facility;~~

~~begins upon his completing the term of imprisonment under which he was imprisoned at the time of his escape, or upon his completing any term of imprisonment imposed for commission of the crime in connection with which he failed to appear.~~

SECTION 112. IC 35-50-1-3, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 3. ~~Costs.~~ (a) A person who is convicted of an offense is liable for costs, ~~unless the court finds otherwise.~~ Costs are not a part of the sentence and may not be suspended.

(b) If a person is acquitted or an indictment or information is dismissed by order of the court, he is not liable for costs.

SECTION 113. IC 35-50-1-4, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 4. ~~Disfranchisement.~~ A person imprisoned for a crime ~~shall be is~~ disfranchised during his imprisonment.

SECTION 114. IC 35-50-2-1, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 1. ~~Definition.~~ As used in this chapter, "felony conviction" means a conviction, in any jurisdiction at any time, with respect to which the convicted person ~~could~~ might have been imprisoned for more than one (1) year~~;~~; but it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under section 7(b) of this chapter.

SECTION 115. IC 35-50-2-2, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 2. ~~Suspension; Probation.~~ (a) The court may suspend any part of a sentence for a felony unless:

(1) the person has a prior unrelated felony conviction; or

(2) the felony committed was murder (IC 35-42-1-1); battery (IC 35-42-2-1) with a deadly weapon; kidnapping (IC 35-42-3-2); confinement (IC 35-42-3-3) with a deadly weapon; rape (IC 35-42-4-1) ~~by force creating a substantial risk of serious bodily injury~~ with a deadly weapon; ~~unlawful~~ criminal deviate conduct (IC 35-42-4-2) ~~by force creating a substantial risk of serious bodily injury~~ with a deadly

weapon; child molesting (IC 35-42-4-3) as a Class A or Class B felony; robbery (IC 35-42-5-1) resulting in serious bodily injury or with a deadly weapon; arson (IC 35-43-1-1) for hire or ~~arson~~ resulting in serious bodily injury; burglary (IC 35-43-2-1) resulting in serious bodily injury or ~~burglary~~ with a deadly weapon; ~~robbery (IC 35-43-3-1) resulting in serious bodily injury or robbery with a deadly weapon;~~ resisting law enforcement (IC 35-44-3-3) with a deadly weapon; escape (IC 35-44-3-5) with a deadly weapon; rioting (IC 35-45-1-2) with a deadly weapon; or dealing in a narcotic drug (IC 35-48-4-1) as a Class A felony.

(b) ~~When~~ Whenever the court suspends a sentence for a felony, it shall place the person on probation under IC 35-7 for a fixed period to end not later than the date the suspended sentence expires.

SECTION 116. IC 35-50-2-3, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 3. ~~Capital Felony. A~~ person ~~who commits a capital felony shall be put to death.~~ (a) A person who commits murder shall be imprisoned for a fixed term of forty (40) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000).

(b) Notwithstanding subsection (a) of this section, a person who commits murder may be sentenced to death under section 9 of this chapter.

SECTION 117. IC 35-50-2-4, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 4. ~~Class A Felony.~~ A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not ~~less~~ more than twenty (20) years ~~nor more than fifty (50) years~~ added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000). ~~However, if he has a prior unrelated conviction of a Class A felony, he shall be imprisoned for life, or if he has two (2) or more prior unrelated felony convictions, he shall be imprisoned for a fixed term of not less than twenty (20) years nor more than eighty (80) years.~~

SECTION 118. IC 35-50-2-5, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 5. ~~Class B Felony.~~ A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000). ~~However, if he has two (2) or more prior unrelated felony convictions, he shall be imprisoned for a fixed term of not less than ten (10) years nor more than fifty (50) years.~~

SECTION 119. IC 35-50-2-6, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 6. ~~Class C Felony.~~ A person who commits a Class C felony shall be imprisoned for a fixed term of five (5) years, with not more than three (3) years added for aggravating circumstances or not more than three (3) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000). ~~However, if he has two (2) or more prior unrelated felony convictions, he shall be imprisoned for a fixed term of not less than five (5) years nor more than thirty-eight (38) years.~~

SECTION 120. IC 35-50-2-7, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 7. ~~Class D Felony.~~ (a) A person who commits a Class D felony shall be imprisoned for a fixed term of two (2) years, with not more than two (2) years added for aggravating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000). ~~However, if he has two (2) or more prior unrelated felony convictions, he shall be imprisoned for a fixed term of not less than two (2) years nor more than thirty-four (34) years.~~

(b) Notwithstanding subsection (a) of this section, if a person has committed a Class D felony, the court may enter judgment of conviction of a Class A misdemeanor and ~~impose~~ sentence accordingly. The court shall enter in the record, in detail, the reason for its action ~~when~~ whenever it exercises the power granted in this subsection.

SECTION 121. IC 35-50-2-8, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 8.

~~Doubling of Term Authorized. If a person eighteen (18) years old or older violates sections 1, 2, 3, or 4 of IC 35-48-4 by distributing a controlled substance to a person under eighteen (18) years of age and at least three (3) years of age his junior, he may be imprisoned for a fixed term of up to twice that otherwise authorized by this chapter.~~ **(a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions. A person who is found to be an habitual offender shall be imprisoned for an additional fixed term of thirty (30) years, to be added to the fixed term of imprisonment imposed under section 3, 4, 5, 6, or 7 of this chapter.**

(b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:

(1) it has been set aside; or

(2) it is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-4.1-4-3.

(d) The jury (if the hearing is by jury), or the court (if the hearing is to the court alone), may find that the person is an habitual offender only if the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

SECTION 122. IC 35-50-2, as added by Acts 1976, P.L. 148, SECTION 8, is amended by adding a NEW section 9 to read as follows: Sec. 9. (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond

a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review.

SECTION 123. IC 35-50-3-1, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 1. ~~Suspension;~~ ~~Probation.~~ (a) The court may suspend any part of a sentence for a misdemeanor.

(b) ~~When~~ **Whenever** the court suspends a sentence for a misdemeanor, it may place the person on probation under IC 35-7 for a fixed period of not more than one (1) year.

SECTION 124. IC 35-50-3-2, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 2. ~~Class A Misdemeanor.~~ A person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year; in addition, he may be fined not more than five thousand dollars ($5,000).

SECTION 125. IC 35-50-3-3, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 3. ~~Class B Misdemeanor.~~ A person who commits a Class B misdemeanor shall be imprisoned for a fixed term of not more than one hundred eighty (180) days; in addition, he may be fined not more than one thousand dollars ($1,000).

SECTION 126. IC 35-50-4-1, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 1. ~~Suspension.~~ The court may suspend the fine ~~and costs~~ for an infraction and release the person on the condition that he not repeat the offense for a fixed period of not more than one (1) year from the date of sentencing.

SECTION 127. IC 35-50-4-2, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 2. ~~Class A Infraction.~~ A person who commits a Class A infraction shall be fined not more than ~~five~~ **hundred ten thousand** dollars ~~($500)~~ **($10,000)**.

SECTION 128. IC 35-50-4, as added by Acts 1976, P.L. 148, SECTION 8, is amended by adding a NEW section 3 to read as follows: Sec. 3. A person who commits a Class B infraction shall be fined not more than one thousand dollars ($1,000).

SECTION 129. IC 35-50-4, as added by Acts 1976, P.L. 148, SECTION 8, is amended by adding a NEW section 4 to read as follows: Sec. 4. A person who commits a Class C infraction shall be fined not more than five hundred dollars ($500).

SECTION 130. IC 35-50-5-1, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 1. ~~Penalty for Bribery or Official Misconduct. When a public servant~~ **Whenever a person** is convicted of bribery ~~under~~ (IC 35-44-1-1) or official misconduct ~~under~~ (IC 35-44-1-2), the court may include in the sentence an order rendering the ~~public servant~~ **person** incapable of holding a public office of trust or profit for a ~~determinate~~ **fixed** period of not more than ten (10) years.

SECTION 131. IC 35-50-5-2, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 2. ~~Alternative Fine.~~ In the alternative to the provisions concerning fines in ~~chapters~~ 2 ~~and~~ 3 ~~of~~ this article, a person may be fined a sum equal to twice his pecuniary gain, or twice the pecuniary loss sustained by victims of the ~~crime~~ **offense** he committed.

SECTION 132. IC 35-50-6-1, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 1. ~~Parole.~~ (a) A person imprisoned for a felony shall be released on parole ~~upon completing~~ **when he completes his** ~~sentence~~ **fixed term** of imprisonment, less ~~good~~ **the credit** time he has earned **with respect to that term.**

(b) A person ~~is~~ **remains on parole from the date of his** release until his ~~sentence~~ **fixed term** expires, unless **his parole**

is revoked or he is discharged ~~earlier~~ from that term by the Indiana parole board. ~~However~~ In any event, if his parole is not revoked, ~~he~~ the parole board shall ~~be discharged~~ discharge him not more than one (1) year after the date of his release.

(c) A person whose parole is revoked shall be imprisoned for the remainder of his ~~sentence~~ **fixed term.** However, he shall again be released ~~upon completing~~ **on parole when he completes** that remainder, less ~~good~~ **the credit** time he has earned since the revocation ~~of parole. Notwithstanding the above, the Indiana~~ **.The** parole board may reinstate ~~a person~~ **him** on parole at any time ~~subsequent to said~~ **after the revocation. For purposes of this subsection, the time the person spent on parole before the revocation does not diminish the remainder of his fixed term.**

SECTION 133. IC 35-50-6-2, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 2. ~~Release from Imprisonment for a Misdemeanor.~~ A person imprisoned for a misdemeanor shall be ~~released upon completing~~ discharged **when he completes his** ~~sentence~~ **fixed term** of imprisonment, less ~~good~~ **the credit** time he has earned **with respect to that term.**

SECTION 134. IC 35-50-6-3, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 3. ~~Good Time Classes.~~ (a) A person assigned to Class I earns one (1) day of ~~good~~ credit time for each day ~~of imprisonment~~ **he is imprisoned for a crime or confined awaiting trial or sentencing.**

(b) A person assigned to Class II earns one (1) day of ~~good~~ credit time for every two (2) days ~~of imprisonment~~ **he is imprisoned for a crime or confined awaiting trial or sentencing.**

(c) A person assigned to Class III earns no ~~good~~ **credit** time.

SECTION 135. IC 35-50-6-4, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 4. ~~Good Time Assignments.~~ (a) A person ~~who is~~ imprisoned ~~shall~~ **for a crime or confined awaiting trial or sentencing is** initially ~~be~~ assigned to Class I.

(b) A person may be reassigned to Class II or Class III if he violates a rule or regulation of the department of correction. However, he must be granted a hearing before a hearing committee appointed by the ~~director of the division of classification and treatment of the department~~ commissioner of correction or his designee, and the committee must find that reassignment is an appropriate disciplinary action for the violation.

(c) In connection with the hearing granted under subsection (b) of this section, the person is entitled:

(1) to receive written notice of the fact that reassignment is contemplated;

(2) to appear and speak in his behalf at the hearing;

(3) to request to have witnesses testify in his behalf; and

(4) to confront and cross-examine witnesses supporting the reassignment, unless the hearing committee specifically finds good cause for not allowing confrontation or cross-examination of a particular witness.

(d) The commissioner of correction, or, ~~subject to the commissioner's approval, the person in charge of the penal facility or program or the director of the division of classification and treatment~~ his designee, may reassign a person from Class III to Class I or II or from Class II to Class I.

SECTION 136. IC 35-50-6-5, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 5. ~~Deprivation of Good Time.~~ (a) A person may be deprived of any ~~portion~~ part of the ~~good~~ credit time he has earned if he violates a rule or regulation of the department of correction. However, he must be granted a hearing before a hearing committee appointed by the ~~director of the division of classification and treatment of the department~~ commissioner of correction or his designee, and the committee must find that deprivation of ~~good~~ credit time is ~~the only~~ an appropriate disciplinary action for the violation. ~~when~~ Whenever a person is deprived of ~~good~~ credit time, he ~~shall~~ may also be reassigned to Class II or III.

(b) In connection with the hearing granted under subsection (a) of this section, the person has the four (4) rights listed in section 4(c) of this chapter and also is entitled to:

(1) the assistance of a lay advocate of his choice (institutional staff member or another inmate ~~presently~~ confined in the same facility, who is not then in segregation);

(2) a written statement of the committee's findings; and

(3) an administrative review of the committee's decision by the commissioner of correction.

(c) The commissioner of correction, or, ~~subject to the commissioner's approval, the person in charge of the penal facility or program or the director of the division of classification and treatment~~ his designee, may restore any ~~portion~~ part of ~~good~~ the credit time ~~that is taken away~~ of which a person is deprived under this section.

SECTION 137. IC 35-50-6-6, as added by Acts 1976, P.L. 148, SECTION 8, is amended to read as follows: Sec. 6. ~~Degree of Security Not a Factor.~~ A person imprisoned for a crime earns ~~good~~ credit time irrespective of the degree of security to which he is assigned by the department of correction. However, a person does not earn credit time while on parole or probation.

SECTION 9. IC 16-6 is amended by adding a new chapter 8.5 to read as follows:

Chapter 8.5. Enforcement of Pharmacy Regulations.

Sec. 1. Powers of Enforcement Officers. (a) Each member of the state board of pharmacy and its designated employees and all law enforcement officers of Indiana are primarily responsible for the enforcement of all laws and regulations of Indiana relating to controlled substances, except that the board is primarily responsible for making accountability audits of the supply and inventory of controlled substances.

(b) Any officer or employee of the state board of pharmacy designated by the board may:

(1) carry firearms in the performance of his official duties;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoeans, and summonses issued under the authority of this state;

(3) make arrests without warrant for any offense relating to controlled substances committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a felony relating to controlled substances;

(4) make seizures of property under this chapter; or

(5) perform other law enforcement duties as the board designates.

Sec. 2. Administrative Inspections and Warrants. (a) Issuance and execution of administrative inspection warrants must be as follows:

(1) A judge of any court of record within his jurisdiction, and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections authorized by this chapter, and seizures of property appropriate to the inspections. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of this chapter, sufficient to justify administrative inspection of the area, premises, building, or conveyance in the circumstances specified in the application for the warrant.

(2) A warrant shall be issued only upon an affidavit of a designated officer or employee having knowledge of the facts alleged, sworn to before the judge, and establishing the grounds for issuing the warrant. If the judge is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of the inspection and if appropriate, the type of property to be inspected. The warrant must:

(i) state the grounds for its issuance and the name of each person whose affidavit has been taken in support thereof;

(ii) be directed to a person authorized by section 1 of this chapter to execute it;

(iii) command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(iv) identify the item or types of property to be seized, if any; and

(v) direct that it may be served during normal business hours and designate the judge to whom it shall be returned.

(3) A warrant issued under this section must be executed and returned within ten (10) days of its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized under a warrant, a copy shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible person other than the person executing the warrant. A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(4) The judge who has issued a warrant shall attach thereto a copy of the return and all papers returnable in connection therewith and file them with the clerk of the circuit or superior court for the judicial circuit in which the inspection was made.

(b) The board may make administrative inspections of controlled premises in accordance with the following provisions:

(1) As used in this section, "controlled premises" means:

(i) places where persons registered or exempted from registration requirements under IC 35-48-3 are required to keep records; and

(ii) places including factories, warehouses, establishments, and conveyances in which persons registered or exempted from registration requirements under IC 35-48-3 are permitted to possess, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled substance.

(2) When authorized by an administrative inspection warrant issued pursuant to subsection (a) of this section an

officer or employee designated by the board, upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection.

(3) When authorized by an administrative inspection warrant, an officer or employee designated by the board may:

(i) inspect and copy records required by IC 35-48-3 to be kept;

(ii) inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in paragraph (5) of this subsection, all other things therein, including records, files, papers, processes, controls, and facilities bearing on violation of laws relating to controlled substances; and

(iii) inventory any stock of any controlled substance therein and obtain samples thereof.

(4) This section does not prevent the inspection without a warrant of books and records under an administrative subpoena issued in accordance with IC 4-22-1, nor does it prevent entries and administrative inspections, including seizures of property, without a warrant:

(i) if the owner, operator, or agent in charge of the controlled premises consents;

(ii) in situations presenting imminent danger to health or safety;

(iii) in situations involving inspection of conveyances if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

(iv) in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or

(v) in all other situations in which a warrant is not constitutionally required.

(5) An inspection authorized by this section may not extend to financial data, sales data (other than shipment

data), or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.

Sec. 3. Injunctions. Any court of record has jurisdiction to restrain or enjoin violations of laws relating to controlled substances.

Sec. 4. Cooperative Arrangements and Confidentiality. (a) The state board of pharmacy shall cooperate with federal and other state agencies in discharging its responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, it may:

(1) arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(2) coordinate and cooperate in training programs concerning controlled substance law enforcement at local, state, and federal levels;

(3) cooperate with the United States Drug Enforcement Administration by establishing a centralized unit to accept, catalogue, file, and collect statistics, including records of drug dependent persons and other controlled substance law offenders within the state, and make the information available for federal, state and local law enforcement purposes (It may not furnish the name or identity of a patient or research subject whose identity cannot be obtained under subsection (c) of this section.); and

(4) conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

(b) Results, information, and evidence received from the Drug Enforcement Administration relating to the regulatory functions of this chapter, including results of inspections conducted by it, may be relied and acted upon by the board in the exercise of its regulatory functions.

(c) A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the board, nor may he be compelled in any state or local civil, criminal, administrative,

legislative, or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

Sec. 5. Forfeitures. (a) The following are subject to forfeiture:

(1) All controlled substances that are or have been unlawfully manufactured, distributed, dispensed, acquired, or possessed, or with respect to which there has been any act by any person in violation of laws relating to controlled substances.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in unlawfully manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance.

(3) All property that is used, or intended for use, as a container for property described in paragraph (1) or (2) of this subsection.

(4) All conveyances, including vehicles, that are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale, receipt, possession, or concealment of property described in paragraph (1) or (2) of this subsection, but:

(i) a conveyance used by any person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture under this section, unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of a law relating to controlled substances;

(ii) a conveyance is not subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent;

(iii) a conveyance is not subject to forfeiture for a violation of sections 4, 6, 7, 8, 10, or 14 of IC 35-48-4; and

(iv) a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he had no knowledge of the act or omission.

(5) All books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of a law relating to controlled substances.

(b) Property subject to forfeiture under this chapter may be seized by any enforcement officer upon process issued by any state court of record having jurisdiction over the property. Seizure without process may be made if:

(1) the seizure is incident to an arrest, to a search under a search warrant, or to an inspection under an administrative inspection warrant;

(2) the property subect to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding;

(3) the state board of pharmacy has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the board has probable cause to believe that the property was used or is intended to be used in violation of a law relating to controlled substances.

(c) In the event of a seizure under subsection (b) of this section, proceedings under subsection (d) shall be instituted promptly.

(d) Property taken or detained under this section is not subject to replevin, but is deemed to be in the custody of the board subject only to the orders and decrees of the court having jurisdiction over the forfeiture proceedings. When property is seized under this chapter, the board may:

(1) place the property under seal;

(2) remove the property to a place designated by it; or

(3) take custody of the property and remove it to an appropriate location for disposition in accordance with law.

All property seized under this chapter shall be retained by the board until all proceedings in which the property may be involved have concluded.

(e) When property is forfeited under this chapter, the board shall:

(1) sell any property which by law is not required to be destroyed, which has a monetary value, and which is not harmful to the public (The proceeds shall be used for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, and advertising and court costs. All proceeds in excess of expenses shall be paid into the common school fund of the state.);

(2) take custody of any property which has no monetary value or which cannot lawfully be sold and remove it for disposition in accordance with administrative rule; or

(3) forward it to the Drug Enforcement Administration for disposition.

(f) Controlled substances listed in schedule I that are unlawfully possessed, transferred, sold, or offered for sale are contraband and shall be seized and summarily forfeited to the state. Controlled substances listed in schedule I, which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

(g) Species of plants from which controlled substances in schedules I and II may be derived which have been unlawfully planted or cultivated, of which the owners or cultivators are unknown, or which are wild growths may be seized and summarily forfeited to the state.

(h) The failure, upon demand by the board or its authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, constitutes authority for the seizure and forfeiture of the plants.

Sec. 6. Burden of Proof; Liabilities. (a) It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under

this chapter. The burden of proof of any exemption or exception is on the person claiming it.

(b) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under IC 35-48-3, he is presumed not to be the holder of the registration or form.

Sec. 7. Judicial Review. All final determinations, findings, and conclusions of the board of pharmacy under this chapter are conclusive decisions of the matters involved. Any person aggrieved by the decision may obtain review of the decision in the circuit or superior court in the county in which such person resides. Findings of fact by the board, if supported by substantial evidence, are conclusive.

Sec. 8. Education and Research. (a) The drug abuse division of the state department of mental health shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs it may:

(1) promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(2) assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

(3) consult with interested groups and organizations to aid them in solving administrative and organizational problems;

(4) evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;

(5) disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them; and

(6) assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(b) The drug abuse division of the state department of mental health shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of laws relating to controlled substances, it may:

(1) establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(2) make studies and undertake programs of research to:

(i) develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of laws relating to controlled substances;

(ii) determine patterns of misuse and abuse of controlled substances and the social effects thereof; and

(iii) improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and

(3) enter into contracts with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

(c) The drug abuse division of the state department of mental health may enter into contracts for educational and research activities without performance bonds.

(d) The state board of pharmacy may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are the subject of the research. Persons who obtain this authorization may not be compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(e) The board may authorize the possession and distribution of controlled substances by persons engaged in research. Persons who obtain this authorization are exempt from state

prosecution for possession and distribution of controlled substances to the extent of the authorization.

SECTION 10. IC 33-12-2-3 is amended to read as follows: Sec. 3. (a) The juvenile courts created by the ~~act~~ chapter shall have original exclusive jurisdiction, except after jurisdiction of the child is waived, in all cases in which a child is alleged to be delinquent, dependent or neglected, including the alleged delinquency, dependency or neglect of a child of divorced parents. The juvenile court shall also have exclusive original jurisdiction to determine the paternity of any child born out of wedlock, and to provide for the support and disposition of such a child ~~and in all other cases that may hereafter be conferred by law~~.

(b) The juvenile courts created by this chapter shall have original concurrent jurisdiction in cases in which a person is charged with contributing to the delinquency of a minor (IC 35-46-1-8).

SECTION 11. IC 35-1-32.5-1 is amended to read as follows: Sec. 1. In a prosecution for ~~the~~ a sex crime as defined in IC 35-42-4 ~~of rape (IC 1971, 35-13-4-3), sodomy (IC 1971, 35-1-89-1), assault or assault and battery with intent to commit a felony (IC 1971, 35-1-54-3, where the felony involved is rape, sodomy, or incest), incest (IC 1971, 35-1-82-1), or assault and battery (IC 1971, 35-1-54-4, where the offense involves removing, tearing, unbuttoning or attempting to remove, tear, unbutton or unfasten any clothing of any child who has not attained his or her seventeenth birthday, or fondling or caressing the body or any part thereof of such child with the intent to gratify the sexual desires or appetites of the offending person or, under circumstances which threaten, excite, or tend to frighten or excite such child)~~, evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct, and reputation evidence of the victim's past sexual conduct may not be admitted, nor may reference be made thereto in the presence of the jury, except as provided in this chapter.

SECTION 138. IC 35-1-44-8, as amended by Acts 1976, P.L. 148, SECTION 12, is amended to read as follows: Sec. 8. (a) ~~When~~ Whenever the court imposes a fine, ~~or~~ costs, or both, it shall conduct a hearing to determine whether the convicted person is indigent. If he is not indigent, the court shall direct:

(1) that the person pay the entire amount at the time sentence is pronounced;

(2) that the person pay the entire amount at some later date; or

(3) that the person pay specified ~~portions~~ parts at designated intervals.

(b) Upon any default in the payment of a fine, ~~or~~ costs, both, or any installment thereof, then either:

(1) execution may be levied and such other measures may be taken for the collection of the ~~fine, costs,~~ entire amount or the unpaid balance as are authorized for the collection of an unpaid civil judgment entered against the person in an action on a debt brought by the county attorney.; or

(2) the court may direct that the person, if he is not indigent, be committed to the county jail and credited toward payment at the rate of five dollars ($5.00) for each twenty-four (24) hour period he is confined, until the amount paid plus the amount credited equals the entire amount due.

SECTION 13. IC 35-3 is amended by adding a new chapter 2.1 to read as follows:

Chapter 2.1. Shoplifting Detention.

Sec. 1. Definitions. As used in this chapter:

"Adult employee" means an employee who is eighteen (18) years old or older.

"Store" means a place of business where property, or service with respect to property, is displayed, rented, sold, or offered for sale.

"Security agent" means a person who has been employed by a store to prevent the loss of property due to theft.

Sec. 2. An owner, operator, manager, adult employee, or security agent of a store who has probable cause to believe that a theft has occurred or is occurring on or about the store and who has probable cause to believe that a specific person has committed or is committing the theft may detain that person to require the person to identify himself, to verify the identification, to determine whether the person has in his possession unpurchased merchandise taken from the store, to inform the appropriate law enforcement officers, and to inform the parents or other persons interested in the welfare of the person detained. Such a detention must be reasonable and may last only for a reasonable time, not to extend beyond the arrival of a law enforcement officer or one (1) hour, whichever first occurs.

Sec. 3. An owner, operator, manager, adult employee, or security agent of a store who informs a law enforcement officer of the circumstantial basis for detention and any additional relevant facts shall be presumed to be placing information before the law enforcement officer. It shall be presumed that such placing of information does not constitute a charge of crime.

Sec. 4. A civil or criminal action against an owner, operator, manager, adult employee, or security agent of a store or a law enforcement officer may not be based on a detention lawful under section 2 of this chapter. However, the defendant in such an action has the burden of proof that he acted with probable cause under section 2 of this chapter.

Sec. 5. An owner, operator, manager, adult employee, or security agent of a store may act in the manner permitted by section 2 of this chapter on information received from any employee of the store, if that employee has probable cause to believe that a theft has occurred or is occurring on or about the store and has probable cause to believe that a specific person has committed or is committing the theft.

Sec. 6. This chapter does not limit any right of detention or arrest of any person that is otherwise lawful.

SECTION 14. IC 35-4.1-4 is amended by adding a new section 3 to read as follows: Sec. 3. Sentencing Hearing. Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:

(1) a transcript of the hearing;

(2) a copy of the presentence report; and

(3) a statement of the court's reasons for selecting the sentence that it imposes.

SECTION 139. IC 35-4.1-4-7, as added by Acts 1976, P.L. 148, SECTION 15, is amended to read as follows: Sec. 7. ~~Criteria for Sentencing.~~ (a) In determining what sentence to impose for a crime, the court shall consider the risk that the person will commit another crime, the nature and circumstances of the crime committed, and the prior criminal record, character, and condition of the person.

(b) The court may consider these factors as mitigating circumstances or as favoring suspending the sentence and imposing probation:

(1) The crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so.

(2) The crime was the result of circumstances unlikely to recur.

(3) The victim of the crime induced or facilitated the offense.

(4) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense.

(5) The person acted under strong provocation.

(6) The person has no history of delinquency or criminal activity, or he has led a law-abiding life for a substantial period before commission of the crime.

(7) The person is likely to respond affirmatively to probation or short-term imprisonment.

(8) The character and attitudes of the person indicate that he is unlikely to commit another crime.

(9) The person has made or will make restitution to the victim of his crime for the injury, damage, or loss sustained.

(10) Imprisonment of the person will result in undue hardship to himself or his dependents.

(c) The court may consider these factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment:

(1) The person has recently violated the conditions of any probation, parole, or pardon granted him.

(2) The person has a history of criminal activity.

(3) The person is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility.

(4) Imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime.

(5) The victim of the crime was sixty-five (65) years of age or older.

(6) The victim of the crime was mentally or physically infirm.

(d) The criteria listed in subsections (b) and (c) of this section do not limit the matters that the court may consider in determining the sentence.

SECTION 140. IC 35-4.1-4-18, as added by Acts 1976, P.L. 148, SECTION 16, is amended to read as follows: Sec. 18. ~~Modification of Sentence.~~ The court, within one hundred eighty (180) days after it imposes a sentence, and after a hearing at which the convicted person is present and of which the prosecuting attorney has been notified, may reduce or suspend the sentence, incorporating its reasons in the record. The court may suspend a sentence for a felony under this section only if suspension is permitted under IC 35-50-2-2.

SECTION 141. IC 35-4.1-5-1, as amended by Acts 1976, P.L. 148, SECTION 17, is amended to read as follows: Sec.

1. (a) When a convicted person is sentenced to imprisonment, the court shall, without delay, certify, under the seal of the court, copies of the judgment of conviction and sentence to the sheriff and to the department of correction.

(b) The judgment ~~shall~~ **must** include~~, but not necessarily be limited to,~~ the ~~following~~ ~~information~~:

(1) the crime for which the convicted person is adjudged guilty;

(2) the period, **if any,** for which the person is ~~to be disfranchised or~~ rendered incapable of holding any office of trust or profit; ~~if any fines or costs are assessed,~~

(3) the amount of the fines or costs assessed, **if any,** whether or not the convicted person is indigent, and the method by which the fines or costs are to be satisfied;

(4) the amount of credit, including ~~good~~ **credit** time earned, for time spent in confinement ~~prior to~~ **before** sentencing; and

(5) the amount to be credited toward payment of the fines or costs for time spent in confinement ~~pending~~ **before** sentencing.

The judgment may specify the degree of security recommended by the court.

(c) A term of imprisonment begins on the date sentence is imposed, unless execution of the sentence is stayed according to law.

SECTION 18. 35-4.1-5-2 **is amended to read as follows:** Sec. 2. ~~Sheriff to deliver the convicted person.~~ The sheriff shall, within five (5) days of the day of sentencing, unless otherwise ordered by the court, convey the convicted person to a ~~place of incarceration~~ **penal facility or program** designated by the ~~Department of Corrections~~ **department** and deliver him to the custodian thereof, ~~and~~ with a copy of the judgment of conviction and sentence, **and take from** such custodian a receipt for the convicted person.

~~The Department of Corrections may, notwithstanding any other law, designate the place of incarceration without regard to whether the convicted person is convicted of or sentenced for a felony or misdemeanor, the age of the convicted person, or previous felony convictions. The designation shall, instead, be based on the offender's needs and the department's resources.~~

SECTION 142. IC 35-4.1-5-3, as added by Acts 1976, P.L. 148, SECTION 19, is amended to read as follows: Sec. 3. (a) In order to provide maximum flexibility in institutional use and treatment of convicted persons consistent with public safety, the department after diagnosis and classification shall determine the degree of security, maximum, medium, or minimum, to which a convicted person will be assigned, and shall notify the trial court and prosecuting attorney if the degree of security assigned differs from the court's recommendations.

(b) The department may change the degree of security to which the person is assigned. However, if the person is changed to a lesser degree security during the first two (2) years of the commitment, the department shall notify the trial court and the prosecuting attorney not less than thirty (30) days before the effective date of the changed security assignment.

(c) Notwithstanding subsections (a) and (b) of this section, a person convicted of murder or a Class A felony shall be assigned to maximum security for the first two (2) years of his commitment. After those first two (2) years, the department may change the degree of security to which the person is assigned.

SECTION 143. IC 35-4.1-5-4, as added by Acts 1976, P.L. 148, SECTION 20, is amended to read as follows: Sec. 4. (a) The department shall classify all Indiana penal facilities and programs to which those convicted of crimes may be assigned for supervision or custodial care according to maximum, medium, or minimum security, function, and treatment program available and shall furnish the classifications to all Indiana judges with general criminal jurisdiction.

(b) ~~(1)~~ A maximum security assignment constitutes an assignment of a convicted person to a penal facility and correctional program that are designed to insure that the person remains within a walled or fenced facility where entry and exit of any person occurs only through department supervised gates and where periodic inmate population accounting and supervision by the department occurs each day.

~~(2)~~ **(c)** A medium security assignment constitutes an assignment of a convicted person to a penal facility and correctional program that are designed to insure that if the person is permitted outside the supervised gates of a walled or fenced facility, the department will provide continuous staff supervision and the person will be accounted for throughout the day.

~~(3)~~ (d) A minimum security assignment constitutes an assignment of a convicted person to a work release center or program, to intermittent service of a sentence, or to a program ~~involving only periodic~~ requiring weekly reporting to a designated official. Assignment to minimum security need not involve a penal facility.

SECTION 144. IC 35-7-1-1, as amended by Acts 1976, P.L. 148, SECTION 21, is amended to read as follows: Sec.

1. ~~Placing on Probation. When~~ Whenever it places a person ~~is placed~~ on probation, the court shall specify in the record the conditions of the probation. The court may modify the conditions or terminate the probation at any time. If the person commits an additional crime, the court ~~shall~~ may revoke the probation.

SECTION 145. IC 35-7-2-1, as amended by Acts 1976, P.L. 148, SECTION 22, is amended to read as follows: Sec. 1. ~~Conditions of Probation.~~ (a) ~~When imposing~~ As conditions of probation, the court may require that the person:

(1) work faithfully at a suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment;

(2) undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose;

(3) attend or reside in a facility established for the instruction, recreation, or residence of persons on probation;

(4) support his dependents and meet other family responsibilities;

(5) make restitution or reparation to the victim of his crime for the damage or injury that was sustained (When a restitution or reparation is a condition of the sentence, the court shall fix the amount thereof, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.);

(6) pay a fine authorized by IC 35-50;

(7) refrain from possessing a firearm, ~~destructive device,~~ or other ~~dangerous~~ deadly weapon unless granted written permission by the court or his probation officer;

(8) report to a probation officer at reasonable times as directed by the court or the probation officer;

(9) permit his probation officer to visit him at reasonable times at his home or elsewhere;

(10) remain within the jurisdiction of the court, unless granted permission to leave by the court or by his probation officer;

(11) answer all reasonable inquiries by the court or his probation officer and promptly notify the court or probation officer of any change in ~~addres~~ address or employment; and

(12) satisfy any other conditions reasonably related to his rehabilitation.

(b) When a person is placed on probation, he shall be given a written statement of the conditions of his probation.

(c) ~~When imposing~~ As a condition of probation, the court may also require that the person ~~submit to~~ serve a ~~period~~ term of imprisonment in an appropriate facility at whatever time or intervals (consecutive or intermittent) within the period of probation the court determines. ~~Intermittent service of sentence of imprisonment is service on certain days or during certain periods of days specified by the court as part of the sentence.~~ Intermittent service may be ~~ordered~~ required only for a term of not more than sixty (60) days and must be served in the county or local penal facility. The term ~~of the sentence shall be calculated~~ is computed on the basis of the actual days spent in confinement and shall be completed within one (1) year. The person does not earn credit time while serving a term of imprisonment under this subsection. When the court orders intermittent service ~~of a sentence of imprisonment~~, it shall state:

(1) the term of ~~the sentence~~ imprisonment;

(2) the days or parts of days during which the person is to be confined; and

(3) the conditions.

(d) Supervision of the person may be transferred from the court that ~~imposed~~ **placed** the **person on** probation to a court of another jurisdiction, with the concurrence of both courts. Retransfers of supervision may occur in the same manner. This subsection does not apply to transfers under the provisions of an Interstate Compact on Probation made under IC 35-8-6 or IC 35-8-6.1.

SECTION 146. IC 35-7-2-2, as amended by Acts 1976, P.L. 148, SECTION 23, is amended to read as follows: Sec. 2. ~~Violation of Conditions of Probation.~~ (a) When a petition is filed charging a violation of a condition of probation, the court may:

(1) order a summons to be issued to the person to appear; or

(2) order a warrant for the person's arrest ~~where~~ **if there** is ~~danger~~ **a risk** of his fleeing the jurisdiction or causing harm to others.

(b) The issuance of a summons or warrant tolls the period of probation until the final determination of the charge.

(c) The court shall conduct a hearing ~~of~~ **concerning the** alleged violation. The court may admit the person to bail pending the hearing.

(d) The state ~~has the burden of proving~~ **must prove** the violation by a preponderance of the evidence. The evidence shall be presented in open court. The person ~~has the right of~~ **is entitled to** confrontation, cross-examination, and representation by counsel.

(e) Probation ~~shall~~ **may not** be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally ~~refused~~ **fails** to pay.

(f) If the court finds that the person has violated a condition at any time before termination of the period, it may continue him on the ~~existing~~ sentence **probation**, with or without modifying or enlarging the conditions, or may ~~impose any other~~ **order execution of the** sentence that ~~could have been imposed~~ **was suspended at the time of initial sentencing.**

(g) A judgment revoking probation is a final appealable order.

(e) Neither this act nor Acts 1976, P.L. 148 affects the amount of good time a person has earned under diminution of sentence statutes in effect before October 1, 1977. After September 30, 1977, a person imprisoned under statutes in effect before October 1, 1977, is entitled to diminution of his sentence according to the credit time class to which he is assigned by this SECTION, or to which he may be reassigned under IC 35-50-6.

SECTION 150. (a) Neither this act nor Acts 1976, P.L. 148 affects:

(1) rights or liabilities accrued;

(2) penalties incurred; or

(3) proceedings begun;

before October 1, 1977. Those rights, liabilities, and proceedings are continued, and penalties shall be imposed and enforced as if this act and Acts 1976, P.L. 148 had not been enacted.

(b) An offense committed before October 1, 1977, under a law repealed by Acts 1976, P.L. 148 shall be prosecuted and remains punishable under the repealed law.

(c) Notwithstanding subsections (a) and (b) of this SECTION, a defense available under IC 35-41-3 is available to any defendant tried or retried after September 30, 1977.

SECTION 151. Acts 1976, P.L. 148, SECTION 28 is amended to read as follows: SECTION 28. This act takes effect ~~July~~ **October** 1, 1977.

SECTION 152. (a) This act, except for SECTIONS 151 and 152 takes effect October 1, 1977.

(b) Because an emergency exists, SECTIONS 151 and 152 of this act take effect July 1, 1977.

SECTION 147. IC 11-1-1-9.1 is amended to read as follows: Sec. 9.1. (a) Every prisoner sentenced upon conviction of a felony to an indeterminate term of imprisonment in a correctional institution shall be eligible for release on parole upon completion of his minimum term. Every prisoner sentenced upon conviction of a felony to a determinate term of imprisonment in a correctional institution shall be eligible for release on parole upon completion of one-half (1/2) of his determinate term or at the expiration of twenty (20) years, whichever comes first. **This subsection does not apply to a person who is sentenced under IC 35-50.**

(b) Notwithstanding any other provision of this chapter, a person imprisoned for a felony under IC 35-50 shall be released on parole in accord with IC 35-50.

SECTION 148. The following are repealed:

IC 35-4.1-4-16

IC 35-41-3-4

IC 35-43-3

Acts 1976, P.L. 148, SECTION 25

Acts 1976, P.L. 148, SECTION 27

SECTION 149. (a) A person imprisoned for a felony and assigned to time earning class one (1) or two (2) under IC 11-7-6.1 on September 30, 1977, is assigned to credit time Class I under IC 35-50-6 on October 1, 1977.

(b) A person imprisoned for a felony and assigned to time earning class three (3) under IC 11-7-6.1 on September 30, 1977, is assigned to credit time Class II under IC 35-50-6 on October 1, 1977.

(c) A person imprisoned for a felony and assigned to time earning class four (4) under IC 11-7-6.1 on September 30, 1977, is assigned to credit time Class III under IC 35-50-6 on October 1, 1977.

(d) A person imprisoned for a misdemeanor or confined awaiting trial or sentencing on September 30, 1977, is assigned to credit time Class I under IC 35-50-6 on October 1, 1977.

SECTION 24. The following laws and parts of laws, as amended, are repealed:

IC 11-5-4-7
IC 11-7-2
IC 11-7-3-1
IC 11-7-3-2
IC 11-7-5
IC 11-7-6.1
IC 31-5-4
IC 35-1-1
IC 35-1-2
IC 35-1-3
IC 35-1-14
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Appendix C
Minnesota's Community Corrections Act of 1973

CHAPTER 401

COMMUNITY CORRECTIONS ACT

June 1977

The underlined paragraphs indicate amendments that were passed by the 1977 Legislature

CHAPTER 401

COMMUNITY CORRECTIONS

Section

401.01 PURPOSE AND DEFINITION: ASSISTANCE GRANTS

Subdivision 1

For the purpose of more effectively protecting society and to promote efficiency and economy in the delivery of correctional services, the commissioner is hereby authorized to make grants to assist counties in the development, implementation, and operation of community based corrections programs including, but not limited to preventive or diversionary correctional programs, probation, parole, community corrections centers, and facilities for the detention or confinement, care and treatment of persons convicted of crime or adjudicated delinquent.

Subdivision 2

For the purposes of sections 401.01 to 401.16, "commissioner" means the commissioner of corrections or his designee.

401.02 COUNTIES OR REGIONS: SERVICES INCLUDIBLE

Subdivision 1

One or more contiguous counties, having an aggregate population of 30,000 or more persons or comprising all the counties within a region designated pursuant to sections 462.381 to 462.396 or chapter 473B, situated within the same region designated pursuant to sections 462.381 to 462.396, or chapter 473B, may qualify for a grant as provided in section 401.01 by the enactment of appropriate resolutions creating and establishing a corrections advisory board and providing for the preparation of a comprehensive plan for the development, implementation and operation of the correctional services described in section 401.01, including the assumption of those correctional services other than the operation of state institutions presently provided in such counties by the department of corrections, and providing for centralized administration and control of those correctional services described in section 401.01.

Where counties combine as authorized in this section, they shall comply with the provisions of section 471.59.

Subdivision 2 PLANNING COUNTIES: HOW DESIGNATED: TRAVEL EXPENSES OF CORRECTIONS ADVISORY BOARD MEMBERS

To assist counties which have complied with the provisions of subdivision 1 and require financial aid to defray all or a part of the expenses incurred by corrections advisory board members in discharging their official duties pursuant to section 401.08, the commissioner may designate counties as "planning counties", and, upon receipt of resolutions by the governing boards of the counties certifying the need for and inability to pay the expenses described in this subdivision, advance to the counties an amount not to exceed five percent of the maximum quarterly subsidy for which the counties are eligible. The expenses described in this subdivision shall be paid in the same manner and amount as for state employees.

Subdivision 3

Any county or group of counties which have qualified for participation in the community corrections subsidy program provided by this chapter may reorganize its administrative structure, including but not limited to court services and probation, to conform with the requirements of subdivision 1 notwithstanding any inconsistent special law.

Subdivision 4

Probation officers serving the district courts of counties participating in the subsidy program established by this chapter may, without order or warrant, when it appears necessary to prevent escape or enforce discipline, take and detain a probationer or parolee and bring him before the court or the Minnesota Corrections board respectively, for appropriate action by the court or the board. No probationer or parolee shall be detained more than 72 hours, exclusive of legal holidays, Saturdays and Sundays, pursuant to this subdivision without being provided with the opportunity for a hearing before the court or the board.

401.03 PROMULGATION OF RULES; TECHNICAL ASSISTANCE

The commissioner shall, as provided in sections 15.0411 to 15.0422, promulgate rules for the implementation of sections 401.01 to 401.16, and shall provide consultation and technical assistance to counties to aid them in the development of comprehensive plans.

401.04 ACQUISITION OF PROPERTY; SELECTION OF ADMINISTRATIVE STRUCTURE; EMPLOYEES

Any county or group of counties electing to come within the provisions of sections 401.01 to 401.16 may (a) acquire by any lawful means, including purchase, lease or transfer of custodial control, the lands, buildings and equipment necessary and incident to the accomplishment of the purposes of sections 401.01 to 401.16, (b) determine and establish the administrative structure best suited to the efficient administration and delivery of the correctional services described in section 401.01, and (c) employ a director and other officers, employees and agents as deemed necessary to carry out the provisions of sections 401.01 to 401.16. To the extent that participating counties shall assume and take over state correctional services presently provided in counties, employment shall be given to those state officers, employees and agents thus displaced; if hired by a county, employment shall, to the extent possible and notwithstanding the provisions of any other law or ordinance to the contrary, be deemed a transfer in grade with all of the benefits enjoyed by such officer, employee or agent while in the service of the state.

State employees displaced by county participation in the subsidy program provided by this chapter are on layoff status and, if not hired by a participating county as provided herein, may exercise their rights under layoff procedures established by law or union agreement whichever is applicable.

401.05 FISCAL POWERS

Any county or group of counties electing to come within the provisions of sections 401.01 to 401.16, may, through their governing bodies, use unexpended funds, accept gifts, grants and subsidies from any lawful source, and apply for and accept federal funds.

401.06 COMPREHENSIVE PLAN; STANDARDS OF ELIGIBILITY; COMPLIANCE

No county or group of counties electing to provide correctional services pursuant to sections 401.01 to 401.16 shall be eligible for the subsidy herein provided unless and until its comprehensive plan shall have been approved by the commissioner. The commissioner shall, pursuant to the administrative procedures act, promulgate rules establishing standards of eligibility for counties to receive funds under sections 401.01 to 401.16. To remain eligible for subsidy the county or group of counties shall substantially comply with the operating standards established by the commissioner. The commissioner shall review annually the comprehensive plans submitted by participating counties, including the facilities and programs operated under the plans. He is hereby authorized to enter upon any facility operated under the plan, and inspect books and records, for purposes of recommending needed changes or improvements.

When the commissioner shall determine that there are reasonable grounds to believe that a county or group of counties is not in substantial compliance with minimum standards, at least 30 days notice shall be given the county or counties and a hearing held to ascertain whether there is substantial compliance or satisfactory progress being made toward compliance. The commissioner may suspend all or a portion of any subsidy until the required standard of operation has been met.

401.07 EXISTING SINGLE JURISDICTION COUNTIES OR GROUPS

In any county or group of counties where correctional services are currently being provided by a single jurisdiction within that county, nothing in sections 401.01 to 401.16 shall be interpreted as requiring a change of authority.

401.08 CORRECTIONS ADVISORY BOARD; MEMBERS; DUTIES

Subdivision 1

The corrections advisory board provided in section 401.02, subdivision 1 shall consist of at least 18 but not more than 20 members, who shall be representative of law enforcement, prosecution, the judiciary, education, corrections, ethnic minorities, the social services, and the lay citizen, and shall be appointed as follows:

(1) the prosecution representative shall be either the county attorney or his designee;

(2) the judiciary representatives shall be designated by the chief judge of each district and county court district, and shall include judges representative of courts having felony, misdemeanor and juvenile jurisdiction respectively;

(3) education shall be represented by an academic administrator appointed by the chairman of the board of county commissioners with the advice and consent of the members of the board;

(4) the director of a county welfare board or his designee;

(5) the public defender or his designee;

(6) with the advice and consent of the other members of the county board, the chairman shall appoint the following additional members of the corrections advisory board:

(a) two representatives of law enforcement agencies or their designees, at least one of whom shall be from an agency headed by an elected official;
(b) one parole or probation officer;
(c) one correctional administrator;
(d) a representative from a social service agency, public or private;
(e) an ex-offender;
(f) a licensed medical doctor or other representative of the health care professions;
(g) at least four, but no more than six citizens, provided, however, that if the ethnic minorities resident in the county exceed the percentage of ethnic minorities in the state population, at least two of the citizen members shall be members of an ethnic minority group.

If two or more counties have combined to participate in the subsidy authorized by this chapter, the commissioner of corrections may increase the size of the community corrections advisory board to include one county board member from each participating county.

Subdivision 2

Members of the corrections advisory board appointed by the chairman of the board of county commissioners shall serve for terms of two years from and after the date of their appointment, and shall, subject to the approval of the county board or county boards of commissioners of the participating counties, remain in office until their successors are duly appointed. The other members of the corrections advisory board shall hold office at the pleasure of the appointing authority. The board may elect its own officers.

Subdivision 3

Where two or more counties combine to come within the provisions of sections 401.01 to 401.16 the joint corrections advisory board shall contain representatives as provided in subdivision 1, but the members comprising the board

may come from each of the participating counties as may be determined by agreement of the counties.

Subdivision 4

The corrections advisory board provided in sections 401.01 to 401.16 shall actively participate in the formulation of the comprehensive plan for the development, implementation and operation of the correctional program and services described in section 401.01, and shall make a formal recommendation to the county board or joint board at least annually concerning the comprehensive plan and its implementation during the ensuing year.

Subdivision 5

If a corrections advisory board carries out its duties through the implementation of a committee structure, the composition of each committee or subgroup shall generally reflect the membership of the entire board. All proceedings of the corrections advisory board and any committee or other subgroup of the board shall be open to the public; and all votes taken of members of the board shall be recorded and shall become matters of public record.

Subdivision 6

The corrections advisory board shall promulgate and implement rules concerning attendance of members at board meetings.

401.09 OTHER SUBSIDY PROGRAMS; PURCHASE OF STATE SERVICES

Failure of a county or group of counties to elect to come within the provisions of sections 401.01 to 401.16 shall not affect their eligibility for any other state subsidy for correctional purposes otherwise provided by law. Any comprehensive plan submitted pursuant to sections 401.01 to 401.16 may include the purchase of selected correctional services from the state by contract, including the temporary detention and confinement of persons convicted of crime or adjudicated delinquent; confinement to be in an appropriate state institution as otherwise provided by law. The commissioner shall annually determine the costs of the purchase of services under this section and deduct them from the subsidy due and payable to the county or counties concerned; provided that no contract shall exceed in cost the amount of subsidy to which the participating county or counties are eligible.

401.10 CORRECTIONS EQUALIZATION FORMULA

To determine the amount to be paid participating counties the commissioner of corrections will apply the following formula:

(1) All 87 counties will be scored in accordance with a formula involving four factors:

(a) per capita income;
(b) per capita taxable value;
(c) per capita expenditure per 1,000 population for correctional purposes, and;
(d) percent of county population aged six through 30 years of age according to the most recent federal census, and, in the intervening years between the taking of the federal census, according to the state demographer.

"Per capita expenditure per 1,000 population" for each county is to be determined by multiplying the number of persons convicted of a felony under supervision in each county at the end of the current year by $350. To the product thus obtained will be added:

(i) the number of presentence investigations completed in that county for the current year multiplied by $50;
(ii) the annual cost to the county for county probation officers' salaries for the current year; and
(iii) 33 1/3 percent of such annual cost for probation officers' salaries.

The total figure obtained by adding the foregoing items is then divided by the total county population according to the most recent federal census, or during the intervening years between federal censuses, according to the state demographer.

(2) The percent of county population aged six through 30 years shall be determined according to the most recent federal census, or, during the intervening years between federal censuses, according to the state demographer.

(3) Each county is then scored as follows:

(a) each county's per capita income is divided into the 87 county average;
(b) each county's per capita taxable value is divided into the 87 county average;
(c) each county's per capita expenditure for correctional purposes is divided by the 87 county average;
(d) each county's percent of county population aged six through 30 is divided by the 87 county average.

(4) The scores given each county on each of the foregoing four factors are then totaled and divided by four.

(5) The quotient thus obtained then becomes the computation factor for the county. This computation factor is then multiplied by a "dollar value", as fixed by the appropriation pursuant to sections 401.01 to 401.16, times the total county population. The resulting product is the amount of subsidy to which the county is eligible under sections 401.01 to 401.16. Notwithstanding any law to the contrary, the commissioner of corrections, after notifying the committees on finance of the senate and appropriations of the

house of representatives, may, at the end of any fiscal year, transfer any unobligated funds in any appropriation to the department of corrections to the appropriations under sections 401.01 to 401.16, which appropriation shall not cancel but is reappropriated for the purposes of sections 401.01 to 401.16.

401.11 ITEMS INCLUDED IN PLAN PURSUANT TO REGULATION

The comprehensive plan submitted to the commissioner for his approval shall include those items prescribed by regulation of the commissioner, which may require the inclusion of the following: (a) the manner in which presentence and postsentence investigations and reports for the district courts and social history reports for the juvenile courts will be made; (b) the manner in which probation and parole services to the courts and persons under jurisdiction of the commissioner of corrections and the corrections board will be provided; (c) a program for the detention, supervision and treatment of persons under pre-trial detention or under commitment; (d) delivery of other correctional services defined in section 401.01; (e) proposals for new programs, which proposals must demonstrate a need for the program, its purpose, objective, administrative structure, staffing pattern, staff training, financing, evaluation process, degree of community involvement, client participation and duration of program.

In addition to the foregoing requirements made by this section, each participating county or group of counties shall be required to develop and implement a procedure for the review of grant applications made to the corrections advisory board and for the manner in which corrections advisory board action shall be taken thereon. A description of this procedure shall be made available to members of the public upon request.

401.12 CONTINUATION OF CURRENT SPENDING LEVEL BY COUNTIES

Participating counties shall not diminish their current level of spending for correctional expenses as defined in section 401.01, to the extent of any subsidy received pursuant to sections 401.01 to 401.16; rather the subsidy herein provided is for the expenditure for correctional purposes in excess of those funds currently being expended. Should a participating county be unable to expend the full amount of the subsidy to which it would be entitled in any one year under the provisions of sections 401.01 to 401.16, the commissioner shall retain the surplus, subject to disbursement in the following year wherein such county can demonstrate a need for and ability to expend same for the purposes provided in section 401.01.

401.13 CHARGES MADE TO COUNTIES

Each participating county will be charged a sum equal to the per diem cost of confinement of those persons committed to the commissioner after August 1, 1973, and confined in a state institution. Provided, however, that no charge

shall be made for those persons convicted of offenses for which the penalty provided by law exceeds five years, nor shall the amount charged a participating county for the costs of confinement exceed the amount of subsidy to which the county is eligible. The commissioner shall annually determine costs and deduct them from the subsidy due and payable to the respective participating counties; making necessary adjustments to reflect the actual costs of confinement. However, in no case shall the percentage increase in the amount charged to the counties exceed the percentage by which the appropriation for the purposes of sections 401.01 to 401.16 was increased over the preceding biennium. All charges shall be a charge upon the county of commitment.

401.14 PAYMENT OF SUBSIDY

Subdivision 1

Upon compliance by a county or group of counties with the prerequisites for participation in the subsidy prescribed by sections 401.01 to 401.16, and approval of the comprehensive plan by the commissioner, the commissioner shall determine whether funds exist for the payment of the subsidy and proceed to pay same in accordance with applicable rules and regulations.

Subdivision 2

Based upon the comprehensive plan as approved, the commissioner may estimate the amount to be expended in furnishing the required correctional services during each calendar quarter and cause the estimated amount to be remitted to the counties entitled thereto in the manner provided in section 401.15, subdivision 1.

401.15 PROCEDURE FOR DETERMINATION AND PAYMENT OF AMOUNT; BIENNIAL REVIEW

Subdivision 1

On or before the end of each calendar quarter, participating counties which have received the payments authorized by section 401.14 shall submit to the commissioner certified statements detailing the amounts expended and costs incurred in furnishing the correctional services provided in sections 401.01 to 401.16. Upon receipt of certified statements, the commissioner shall, in the manner provided in sections 401.10 and 401.12, determine the amount each participating county is entitled to receive, making any adjustments necessary to rectify any disparity between the amounts received pursuant to the estimate provided in section 401.14 and the amounts actually expended. If the amount received pursuant to the estimate is greater than the amount actually expended during the quarter, the commissioner may withhold the difference from any subsequent quarterly payments made pursuant to section 401.14. Upon certification by the commissioner of the amount a participating county is entitled to receive under the provisions of section 401.14 or of this subdivision the commissioner of finance shall thereupon issue a State warrant to the chief fiscal officer of each participating county for the amount due together with a copy of the certificate prepared by the commissioner.

Subdivision 2

The commissioner shall biennially review the ranking accorded each county by the equalization formula provided in section 401.10 and compute the subsidy rate accordingly.

401.16 WITHDRAWAL FROM PROGRAM

Any participating county may, at the beginning of any calendar quarter, by resolution of its board of commissioners, notify the commissioner of its intention to withdraw from the subsidy program established by sections 401.01 to 401.16, and the withdrawal shall be effective the last day of the last month of the quarter in which the notice was given. Upon withdrawal, the unexpended balance of monies allocated to the county, or that amount necessary to reinstate state correctional services displaced by that county's participation, including complement positions, may, upon approval of the legislative advisory commission, be transferred to the commissioner for the reinstatement of the displaced services and the payment of any other correctional subsidies for which the withdrawing county had previously been eligible.

Appendix D
Oregon HB 2013, Providing for Prison Term and Parole Standards

Enrolled

House Bill 2013

By order of the Speaker

CHAPTER .....

AN ACT

Relating to sentences; creating new provisions; amending ORS 137.079, 137.120, 138.040, 138.050, 144.035 and 144.345; and repealing ORS 144.175, 144.180 and 144.221.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) There is hereby established an Advisory Commission on Prison Terms and Parole Standards consisting of 11 members. Five members of the commission shall be the voting members of the State Board of Parole. Five members of the commission shall be circuit court judges appointed by the Chief Justice of the Supreme Court. The legal counsel to the Governor shall serve as an ex officio member of the commission and shall not vote unless necessary to break a voting deadlock. The Administrator of the Corrections Division shall act as an advisor to the commission.

(2) The term of office of each of the members appointed by the Chief Justice is four years. Before the expiration of the term of any of those members, the Chief Justice shall appoint a successor whose term begins on July 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause, the Chief Justice shall make an appointment to become immediately effective for the unexpired term.

(3) Notwithstanding the term of office specified by subsection (2) of this section, of the members first appointed by the Chief Justice:

(a) One shall serve for a term ending June 30, 1978.

(b) One shall serve for a term ending June 30, 1979.

(c) One shall serve for a term ending June 30, 1980.

(d) Two shall serve for a term ending June 30, 1981.

(4) A member of the commission shall receive no compensation for his services as a member. However, all members may receive actual and necessary travel and other expenses incurred in the performance of their official duties under ORS 292.495.

(5) The chairman of the State Board of Parole and a judge elected by the judicial members shall serve in alternate years as chairman of the commission. The chairman and a vice chairman shall be elected prior to July 1 of each year to serve for the year following. The commission shall adopt its own bylaws and rules of procedure. Six members shall constitute a quorum for the transaction of business. An affirmative vote of six members shall be required to make proposals to the board under this Act.

(6) The commission shall meet at least annually at a place and time determined by the chairman and at such other times and places as may be specified by the chairman or five members of the commission.

(7) The State Board of Parole shall provide the commission with the necessary clerical and secretarial staff support and shall keep the members of the commission fully informed of the experience of the board in applying the standards derived from those proposed by the commission.

(8) The commission shall propose to the State Board of Parole and the board shall adopt rules establishing ranges of duration of imprisonment and variations from the ranges. In establishing the ranges and variations, factors provided in sections 2 and 3 of this Act shall be considered. The rules adopted and any amendments thereto which may be adopted shall be submitted to the Sixtieth Legislative Assembly. The Sixtieth Legislative Assembly may amend, repeal or supplement any of the rules.

SECTION 2. (1) The commission shall propose to the board and the board shall adopt rules establishing ranges of duration of imprisonment to be served for felony offenses prior to release on parole. The range for any offense shall be within the maximum sentence provided for that offense.

(2) The ranges shall be designed to achieve the following objectives:

(a) Punishment which is commensurate with the seriousness of the prisoner's criminal conduct; and

(b) To the extent not inconsistent with paragraph (a) of this subsection:

(A) The deterrence of criminal conduct; and

(B) The protection of the public from further crimes by the defendant.

(3) The ranges, in achieving the purposes set forth in subsection (2) of this section, shall give primary weight to the seriousness of the prisoner's present offense and his criminal history.

SECTION 3. (1) The commission shall propose to the board and the board shall adopt rules regulating variations from the ranges, to be applied when aggravating or mitigating circumstances exist. The rules shall define types of circumstances as aggravating or mitigating and shall set the maximum variation permitted.

(2) When a prisoner is sentenced to two or more consecutive terms of imprisonment, the duration of the term of imprisonment shall be the sum of the terms set by the board pursuant to the ranges established for the offenses, subject to variations established pursuant to subsection (1) of this section.

(3) In no event shall the duration of the actual imprisonment under the ranges or variations from the ranges exceed the maximum term of imprisonment fixed for an offense, except in the case of a prisoner who has been sentenced under ORS 161.725 as a dangerous offender, in which case the maximum term shall not exceed 30 years.

SECTION 4. (1) In any felony case, the court may impose a minimum term of imprisonment of up to one-half of the sentence it imposes.

(2) Notwithstanding the provisions of sections 2 and 5 of this Act:

(a) The board shall not release a prisoner on parole who has been sentenced under subsection (1) of this section until the minimum term has been served, except upon affirmative vote of at least four members of the board.

(b) The board shall not release a prisoner on parole who has been convicted of murder defined as aggravated murder under the provisions of section 1, chapter _____, Oregon Laws 1977 (Enrolled House Bill 2011), except as provided in section 2, chapter _____, Oregon Laws 1977 (Enrolled House Bill 2011).

(c) The board shall not release a prisoner on parole who has been sentenced under the provisions of chapter _____, Oregon Laws 1977 (Enrolled House Bill 3041), before the expiration of the minimum term of imprisonment imposed under chapter ___, Oregon Laws 1977 (Enrolled House Bill 3041).

SECTION 5. (1) Within six months of the admission of a prisoner to any state penal or correctional institution, the board shall conduct a parole hearing to interview the prisoner and set the initial date of his release on parole pursuant to subsection (2) of this section. Release shall be contingent upon satisfaction of the requirements of section 6 of this Act.

(2) In setting the initial parole release date for a prisoner pursuant to subsection (1) of this section, the board shall apply the appropriate range established pursuant to section 2 of this Act. Variations from the range shall be in accordance with section 3 of this Act.

(3) In setting the initial parole release date for a prisoner pursuant to subsection (1) of this section, the board shall consider reports, statements and information received under ORS 144.210 from the sentencing judge, the district attorney and the sheriff or arresting agency.

(4) Notwithstanding subsection (1) of this section, in the case of a prisoner whose offense included particularly violent or otherwise dangerous criminal conduct or whose offense was preceded by two or more convictions for a Class A or Class B felony or whose record includes a psychiatric or psychological diagnosis of severe emotional disturbance, the board may choose not to set a parole date.

(5) After the expiration of six months after the admission of the prisoner to any state penal or correctional institution, the board may defer setting the initial parole release date for the prisoner for a period not to exceed 30 additional days pending receipt of psychiatric or psychological reports, criminal records or other information essential to formulating the release decision.

(6) When the board has set the initial parole release date for a prisoner, it shall inform the sentencing court of the date.

SECTION 6. (1) Prior to the scheduled release on parole of any prisoner and prior to release rescheduled under this section, the board shall interview each prisoner to review his parole plan, his psychiatric or psychological report, if any, and the record of his conduct during confinement.

(2) The board shall postpone a prisoner's scheduled release date if it finds, after hearing, that the prisoner engaged in serious misconduct during his confinement. The board shall adopt rules defining serious misconduct and specifying periods of postponement for such misconduct.

(3) If a psychiatric or psychological diagnosis of present severe emotional disturbance has been made with respect to the prisoner, the board may order the postponement of the scheduled parole release until a specified future date.

(4) Each prisoner shall furnish the board with a parole plan prior to his scheduled release on parole. The board shall adopt rules specifying the elements of an adequate parole plan and may defer release of the prisoner for not more than three months if it finds that the parole plan is inadequate. The Corrections Division shall assist prisoners in preparing parole plans.

SECTION 7. The board shall adopt rules consistent with the criteria in section 2 of this Act relating to the rerelease of persons whose parole has been revoked.

SECTION 8. (1) Notwithstanding the provisions of ORS 179.495, prior to a parole hearing or other personal interview, each prisoner shall have access to the written materials which the board shall consider with respect to his release on parole, with the exception of materials exempt from disclosure under paragraph (d) of subsection (2) of ORS 192.500.

(2) The board and the Administrator of the Corrections Division shall jointly adopt procedures for a prisoner's access to written materials pursuant to this section.

SECTION 9. The board shall state in writing the detailed bases of its decisions under sections 4 to 6 of this Act.

SECTION 10. (1) Whenever any person is convicted of a felony, the Corrections Division shall furnish a presentence report to the sentencing court. If a presentence report has previously been prepared by the Corrections Division with respect to the defendant, the division shall furnish a copy of that report, and a supplement bringing it up to date, to the sentencing court. The reports shall contain recommendations with respect to the sentencing of the defendant, including incarceration or alternatives to incarceration whenever the Corrections Division officer preparing the report believes such an alternative to be appropriate. All recommendations shall be for the information of the court and shall not limit the sentencing authority of the court.

(2) The commission shall propose to the board and the board shall adopt rules establishing a uniform presentence report form for use pursuant to subsection (1) of this section.

Section 11. ORS 137.079 is amended to read:

137.079. (1) A copy of the presentence report **and all other written information concerning the defendant that the court considers in the imposition of sentence** shall be made available to the district attorney, the defendant or his counsel a reasonable time before the sentencing of the defendant. **All other written information, when received by the court outside the presence of counsel, shall either be summarized by the court in a memorandum available for inspection or summarized by the court on the record before sentence is imposed.**

(2) The court may except from disclosure parts of the presentence report **or other written information described in subsection (1) of this section** which are not relevant to a proper sentence, diagnostic opinions which might seriously disrupt a program of rehabilitation if known by the defendant, or sources of information which were obtainable [*only on a promise*] **with an expectation** of confidentiality.

(3) If parts of the presentence report **or other written information described in subsection (1) of this section** are not disclosed under subsection (2) of this section, the court shall inform the parties that information has not been disclosed and shall state for the record the reasons for the court's action. The action of the court in excepting information shall be reviewable on appeal.

Section 12. ORS 137.120 is amended to read:

137.120. (1) Each [*minumum*] **minimum** period of imprisonment in the penitentiary which prior to June 14, 1939, was provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished.

(2) Whenever any person is convicted of a felony, the court shall, unless it imposes other than a sentence to serve a term of imprisonment in the custody of the Corrections Division, sentence such person to imprisonment for an indeterminate period of time, but stating and fixing in the judgment and sentence a maximum term for the crime, which shall not exceed the maximum term of imprisonment provided by law therefor; and judgment shall be given accordingly. Such a sentence shall be known as an indeterminate sentence. **The court shall state on the record the reasons for the sentence imposed.**

(3) This section does not affect the indictment, prosecution, trial, verdict, judgment or punishment of any felony committed before June 14, 1939, and all laws now and before that date in effect relating to such a felony are continued in full force and effect as to such a felony.

Section 13. ORS 138.040 is amended to read:

138.040. The defendant may appeal to the Court of Appeals from a judgment on a conviction in a district or circuit court[*; and*] **, including a judgment where the court imposes a sentence which is cruel, unusual or excessive in light of the nature and background of the offender or the facts and circumstances of the offense.** Upon an appeal, any decision of the court in an intermediate order or

proceeding may be reviewed. A judgment suspending imposition or execution of sentence or placing a defendant on probation shall be deemed a judgment on a conviction and shall not be subject to appeal after expiration of the time specified in ORS 138.071 except as may be provided in ORS 138.050 and 138.510 to 138.680. **If in the judgment of the appellate court the punishment imposed by the sentence appealed from is cruel, unusual or excessive, the appellate court shall direct the court from which the appeal is taken to impose the punishment that should be administered.**

Section 14. ORS 138.050 is amended to read:

138.050. A defendant who has [*plead*] pleaded guilty or no contest may take an appeal from a judgment on conviction where it imposes [*an excessive fine or excessive, cruel or unusual punishment*] **a sentence that is cruel, unusual or excessive in light of the nature and background of the offender or the facts and circumstances of the offense.** If the judgment of conviction is in the circuit court or the district court, the appeal shall be taken to the Court of Appeals; if it is in the justice of the peace court or municipal court or city recorder's court, the appeal shall be taken to the circuit court of the county in which such court is located. On such appeal, the appellate court shall only consider the question whether an [*excessive fine or*] excessive, cruel or unusual punishment [*not proportionate to the offense*] has been imposed. If in the judgment of the appellate court the [*fine imposed is excessive or the*] punishment imposed is excessive, unusual or cruel [*and not proportionate to the offense*], it shall direct the court from which the appeal is taken to impose the punishment which should be administered.

Section 15. ORS 144.035 is amended to read:

144.035. (1) In hearings conducted by the State Board of Parole, the board may sit together or in panels.

(2) Each panel shall consist of at least two members. The chairman of the board from time to time shall make assignments of members to the panels. The chairman of the board may participate on any panel and when doing so shall act as chairman of the panel. The chairman of the board may designate the chairman for any other panel.

(3) The chairman shall apportion matters for decision to the panels. Each panel shall have the authority to hear and determine all questions before it. However, if there is a division in the panel so that a decision is not unanimous, the chairman of the board shall reassign the matter and no issue so reassigned shall be decided by fewer than three affirmative votes.

(4) The provisions of subsections (1) to (3) of this section shall not apply to a decision to release a prisoner sentenced under subsection (1) of section 4 of this 1977 Act. In such cases, the board shall release the prisoner only upon affirmative vote of at least four members of the board.

Section 16. ORS 144.345 is amended to read:

144.345. Whenever the State Board of Parole considers an alleged parole violator and finds such person has violated one or more conditions of parole and the evidence offered in mitigation does not excuse or justify the violation, the board may revoke parole. [*and defer or deny further consideration for parole when it finds:*]

[*(1) There is a reasonable probability the parole violator will not, if reinstated, remain outside of the institution without violating the law and that his release is incompatible with the welfare of society;*]

[*(2) There is substantial risk that he will not conform to the conditions of parole;*]

[*(3) Reinstatement at that time would depreciate the seriousness of the parole violation or promote disrespect for law;*]

[*(4) Reinstatement at that time would have a substantially adverse effect on other persons upon parole status with regard to their attitude toward supervision on parole; or*]

[*(5) The parole violator's commitment and continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life when released at a later date.*]

SECTION 17. The board shall comply with the rulemaking provisions of ORS chapter 183 in the adoption, amendment or repeal of rules pursuant to sections 2, 3, 6 to 8 and 10 of this Act.

SECTION 18. ORS 144.175, 144.180 and 144.221 are repealed.

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END