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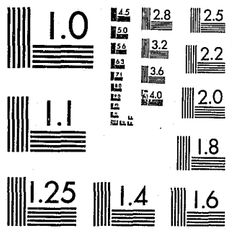

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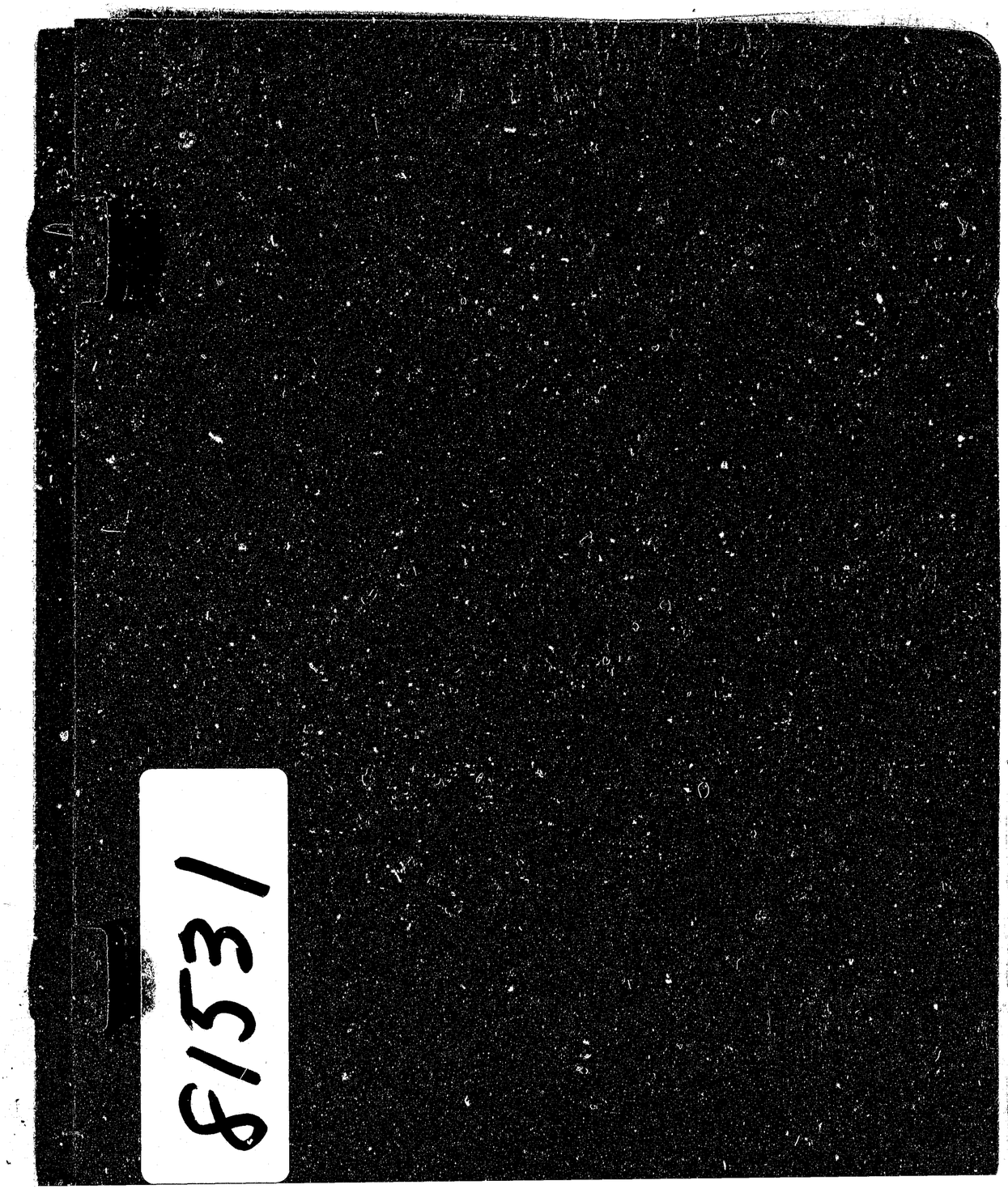

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MF-1

THE IMPLEMENTATION OF THE CALIFORNIA DETERMINATE SENTENCE LAW

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EXECUTIVE SUMMARY OF FINAL REPORT
August 1981
GRANT 79-NI-AX-0042
National Institute of Justice

Introduction

On July 1, 1977, California began a major reform in its policy dealing with prison sentences. The Uniform Determinate Sentence Law (to be referred to here as the DSL) became effective on this day, replacing a system of indeterminate sentencing (to be called here ISL) that had been in existence for sixty years. Long a "leader" in penal reform, California was one of the early adopters of indeterminate sentencing and its concomitant, the rehabilitative or medical model of imprisonment, when this wave of reform swept the nation in the first decades of the 20th Century. Moreover, California's indeterminate sentence policy carried the medical model close to its logical extremes, sentencing most prisoners for terms with a maximum of life. Just as California had been a pioneer in the indeterminate sentence reform movement, so too with the current wave of reform moving many states back from indeterminate to determinate sentencing laws. The DSL introduced many important changes in California sentencing practice: the judge imposing sentence in a prison case was required to select a specific term in years from among an apparently limited set of possibilities specified by the legislature; the discretion of the parole board (called the Adult Authority under the ISL) to determine actual release dates for prisoners was effectively eliminated; new and strict rules making it difficult to prevent prisoners from earning and keeping their time off for good behavior were imposed; and, finally, the system of parole supervision after release and the possibility of recommitment for the original term as a penalty for parole violation were virtually abolished.

The new DSL thus radically changed the process under which prison term lengths were set (shifting the locus of influence from the parole board to decisions made by the judge and prosecutor in the context of case disposition and sentencing) and, it was hoped, might improve the quality of life in prison by removing some of the extraordinary uncertainty characterizing the open-ended sentences of the ISL. The passage of the law itself was the product of extended legislative debate and of a coalition built of law enforcement interests as well as due process liberals and prisoner support groups. The effects of the law upon such things as numbers of people sentenced to prison and length of terms served were the subject of much debate and conjecture during the legislative debate and many conflicting expectations were generated. The administration of the new law has been the subject of much discussion in California and further legislative activity. Indeed, a major change in the original DSL was passed by the legislature during the nine-month period between its initial passage (in September 1976) and its effective date (July 1977). Since then numerous bills have been passed increasing the length of terms and mandating prison sentences in various types of cases.

The California experience has been the subject of keen attention in other states, many of which are considering determinate sentence legislation themselves. The same concerns and interests that produced reform in California are at work in other places as well, and increased determinancy in sentencing appears to be a reform whose time has come. It is clearly early to begin the process of attempting to assess the effects of the California Determinate Sentence Law, for only a few years have passed since it went into effect and its ultimate impacts may take years

to be fully worked out. Moreover, the law has changed rapidly, and in some ways it is hard to decide what the Determinate Sentence Law is or was, for its current form differs in significant respects from the law which went into effect in 1977 (e.g., the terms for many crimes are substantially longer). By the same token, though, because of the importance of the issue of determinate sentence reform, the salience of the California experience, and the fact that other states are currently wrestling with what to do about the same issues that are at play in California, some preliminary research and discussion seemed useful, tentative though our conclusions might be.

Our focus is upon a particular aspect of the impact of the DSL, its effects upon decisions made in criminal courts. Thus, we examine the impact of the law in three California counties (San Bernardino, San Francisco, Santa Clara) and, in particular, its integration into the courtroom work-group culture that exists in these (and all) jurisdictions. How has the law affected the process by which sentences are decided upon in the three counties, particularly decisions about whether to send convicted defendants to prison? Has the law caused, as many said it would, an increase in the proportion of defendants sent to prison? If so, how has this result come about? Has the law had any impact upon the process by which defendants are induced to plead guilty? Has it increased the rate of guilty pleas or their timing? How have the law's provisions dealing with probation eligibility and length of terms been integrated into the negotiation process which is at the centerpiece of most criminal courts? Have its provisions become chips in the bargaining process? Has the new law affected influence patterns in the bargaining process? Has the new law

altered influence patterns in the bargaining process, giving more power to the prosecutor or judge? These are the kinds of questions that were the subject of expectations at the time the law was passed, as well as assertions since, and upon which we focus here. One major issue we do not deal with in any detail is that of the effects of the law on length of sentences. Because under the old law sentence length was determined by a state agency--the Adult Authority--the appropriate unit of analysis for assessing the impact of the law on the length of terms is the state, not the county. Because of our focus upon decisions at the county level, then, we do not have the appropriate data for detailed discussion of the length of term issue.

In addition to providing information about how the new law has affected and been mediated by court disposition processes, we also are concerned with a somewhat broader issue, that of the impact of implementation process in general. How does the impact of California DSL inform us about the general process by which public policy is made at the legislative level and then translated into behavioral changes by other decision makers (bureaucrats, courtroom personnel, etc.) whose job it is to "implement" the policies of the legislature? How, in this case, does implementation of the DSL illuminate the process by which sentencing policy is made, implemented, and modified as time goes by?

Formal Provisions of the DSL

The DSL was in some respects quite limited in its potential impact on court sentencing practices, and in others quite sweeping. It was limited in that it placed relatively few constraints upon the decision about whether to send a defendant to prison--it said nothing about

sentences for misdemeanors, and had only a couple of provisions which attempted to disqualify certain types of defendants from receiving probated sentences (e.g., those who committed great bodily injury on vulnerable victims or those with certain specified current and prior violent offenses). The DSL affected most directly the decision about sentence length for those receiving prison terms. Before turning to the formal provisions dealing with sentence length, though, it is worth observing that many participants in the observers of the process which lead to passage of the DSL were of the view that the law would cause larger numbers of defendants to be sentenced to prison. What we have called the "informal effects hypothesis" suggested that under the old ISL judges were reluctant to send "marginal" defendants to prison when terms were so open-ended and appeared potentially so long. Thus, a second degree burglary was, under the ISL, to be sentenced to a term of one-to-fourteen years. In cases in which the defendant was on the borderline between a prison term and a long jail sentence, the open-ended nature of the ISL was often said to lead judges to select a local term. If prison terms were short and determinate, it was argued, judges would send more marginal defendants to prison. Thus, although its formal provisions did not directly constrain the prison/no prison choice to any substantial degree, many of those supporting its passage were operating on the assumption that it would increase prison rates via this informal process.

The law's provisions appear, on their surface, to be straightforward and simple. For each crime the legislature specified three possible penalties. The most common were the choice between 16 months, two years, or three years; two, three, or four years; or three, four, or five years.

The middle term was the presumptive choice, unless the judge found the case to involve mitigating or aggravating circumstances. Thus, in a single count second degree burglary case, the judge first retained the option to sentence a defendant to a term of probation, perhaps with a jail sentence as a condition of the imposition of probation. Should the judge decide on a prison sentence, the term was to be either sixteen months, two years, or three years. In a strong arm robbery, by the same token, the judge could either impose probation or a term of either two, three, or four years.

The relative simplicity of the above examples in fact covers over a good deal more complexity and discretion in many cases. In cases with multiple counts, the judge must decide whether terms are to be served consecutively or concurrently. In a "simple" burglary case involving four counts of second degree burglary, the possible terms which may be imposed range from sixteen months to five years, and include, at a rough count, a total of eight possible sentences, depending upon how decisions about stacking terms are made.

In addition, the legislature provided that sentences for defendants might be "enhanced"--that is, increased--if they engaged in certain forms of behavior (e.g., carried a weapon, used a gun, inflicted great bodily harm) or had especially serious prior records. Such terms could be imposed or stayed if the enhancement was plead and proved.

As a result of these changes, the new law effectively turned over control of the sentencing process to courtroom participants--prosecutors via their control over charges (counts and enhancements) and judges via their selection of particular sentences. The opportunities for sentence

bargaining were greatly increased. Under the ISL, the judge simply sentenced the defendant to the term prescribed by law and the Adult Authority set the actual release date. There was substantial negotiation under the ISL about charges and sentences, but it was of somewhat ritualistic character. The prosecutor might agree to drop counts in return for a plea, but these were "silent beefs"--charges of which the defendant was not convicted but which survived to influence Adult Authority release decisions. Moreover, although a judge might agree to sentence concurrently rather than consecutively, the Adult Authority retained such substantial influence over release dates that these decisions, like charge bargains, served more to make the plea acceptable to the defendant than to constrain greatly the actual sentence to be served.

Finally, the law established good time provisions which permitted a defendant to earn up to a third off the sentence imposed for obedience to prison rules and participation in various programs. A prisoner's good time was vested each year, and relatively elaborate procedural protections circumscribed the process by which good time might be taken away in any given year. As a result, at the time of sentencing defendants could know with relative assurance what their maximum terms and actual release dates were likely to be.

As noted above, the combination of impositions of actual terms, rules for consecutive and concurrent terms, the choice of staying or imposing terms for enhancements and statutory good time mean that under the DSL there is a great opportunity for charge and sentence bargaining. Influence over length of term was largely moved from the Adult Authority to the courtroom disposition process. The parole function was virtually eliminated,

both as to release dates and the ability to recommit a released prisoner for a parole violation. In terms of courtroom dynamics, the prosecution's offer as well as the defendant's maximum exposure if the deal is turned down and a conviction at trial resulted can be precisely specified during plea bargaining.

The effects of the new law on length of prison terms were difficult to predict. The middle terms were selected because they approximated median time served under the ISL. Thus, in simple one count cases, the third off for good time might be expected to decrease term length on average. On the other hand, median time served under the ISL included time informally added by the Adult Authority for various case attributes (e.g., violence, use of weapons, prior record, etc.) that were now to be added to the principal term as enhancements. From this perspective, in cases which involved enhancements one might expect on average some increase in term length. A final confounding factor is the possibility--indeed experience has already shown it to be better characterized as a propensity--that the legislature might increase term length under the DSL. It has repeatedly done so, making both comparison with past practice and predictions about the future difficult.

In sum, the formal provisions of the law dealt only with defendants who were sentenced to prison, though most believed that an increase in prison commitment rates would result from the move to determinate sentencing. Although the terms available appeared to be quite circumscribed for each offense, decisions about concurrent versus consecutive sentencing and about the imposition of terms for enhancements meant that judges, prosecutors, defense attorneys and defendants had both increased resources and incentives to bargain over pleas in prison cases.

A Note on Data Sources

Before turning to the presentation of our findings, a brief word about the sources of our data is in order. We utilize both qualitative and quantitative data in our discussion of the impact of the law in the three counties. The qualitative data consist of interviews with courtroom participants and direct observation of plea bargaining discussions. We interviewed 26 experienced judges, prosecutors, and defense attorneys in the three cities, asking their perceptions of the purposes and effects of the new law. In addition to interviewing, we spent approximately 3-4 months in each jurisdiction following participants around, observing pretrial conferences and less formal plea bargaining sessions, and attempting to find out what was going on in each, and how current patterns contrasted with those under the ISL. We observed on the order of 75-150 pre-trial conferences in each city, and prepared transcripts of what was said in 40-50 for each city.

Two sources of quantitative data were used. The California Bureau of Criminal Statistics (BCS) provided us with data tapes for all cases in the three counties during the years 1974-1978 (1977 data were missing for Santa Clara County). BCS data include most serious charge, defendant characteristics like race, sex, past record, as well as mode of disposition and sentence imposed. We focus in our analysis mainly upon two common arrest charges--robbery and burglary--and upon cases disposed of in Superior Court. Unless otherwise noted, all the data discussed here come from the BCS tapes. The other source of data was a small effort we mounted ourselves. We gathered information from Superior Court files on burglary and robbery cases in two twelve-month periods (calendar 1976 and July 1,

1979-June 30, 1979), focusing upon seriousness of arrest and disposition charges, as well as allegation and disposition of enhancement and probation disqualifiers. We gathered such data on the universe of Superior Court cases during the pre- and post-law periods in which robbery was the most serious charge and a 50 percent sample of burglary cases.

The Three Cities

Because the focus of this research is upon the process by which the DSL was implemented at the local level, we chose three cities which were different in a variety of respects. Our field work and data analysis looks at the implementation of the law in San Francisco, Santa Clara, and San Bernardino counties. They varied in several ways, including the nature of plea bargaining under the ISL, patterns of influence in the plea bargaining process, and general levels of harshness in sentencing.

San Francisco best fits the common image of a crowded urban court. In the Superior Court there is great emphasis upon keeping the docket moving and worry about the development of a backlog of unresolved cases. The mechanism developed for dealing with these perceived needs, dating from the early 1970s, is a form of judge-dominated sentence bargaining. Nearly all cases have a formally scheduled pre-trial conference--the bulk presided over by the Master Calendar Judge--at which plea bargains are discussed and typically agreed to. Relatively little bargaining between defense attorney and prosecutor takes place before the pre-trial conference, largely because of the dominant influence of the judge. The pre-trial conferences do not really look like bargaining; rather, they are very rapid presentations to the judge of issues each side believes are important (seriousness of crime and past record, factual disputes, quality of

of evidence) followed by an announcement by the judge of a proposed sentence. The sentence is typically a specific number of months in jail or prison, though occasionally it will involve a range (for example, the judge may specify that a sentence in county jail will be between six and nine months, depending upon the recommendation contained in the presentence report). There is little in the way of negotiation or haggling in the sense that possible sentences are presented, argued about, revised, and agreement gradually zeroes in on a final "bargain." Rather the judge listens, questions, comments, and finally announces a figure, and this sentence is usually not changed as a result of further discussion. The prosecutor's control over charges seems of limited significance in San Francisco--unlike the other cities--because of norms of deference to the judge. Thus, the judge routinely exercises his authority to sentence concurrently or consecutively and to stay time on enhancements, all in service of reaching the number that he has decided is appropriate. Perhaps most telling, in San Francisco judges hardly ever, in our observation, asked the prosecutor to drop allegations that rendered defendants presumptively or mandatorily ineligible for probation (e.g., those with two prior felonies). Rather, if a defendant who was ineligible was to be the subject or a probated sentence, the judge simply assumed that the prosecutor would drop whatever charges were required in order to render the defendant technically eligible for the sentence the judge wished to impose. Under the ISL, San Francisco had routinely engaged in sentence bargaining in jail cases, though of course their ability to do in prison cases was greatly constrained by the nature of the sentence structure. In terms of sentence severity, San Francisco was slightly below average for the state during the years prior to implementation of the DSL.

Santa Clara differed from San Francisco in a variety of respects, though their overall level of harsnhess (as measured by rate of prison commitments among those convicted in Superior Court) was only marginally higher than San Francisco's. If San Francisco looks much like the common image of an over-crowded bureaucratic court system, Santa Clara is closer to the ideal type of a more professionally-oriented, legalistic system. The dominant figure in the disposition process in Santa Clara was the district attorney rather than the judge. Judges were much more deferent to prosecutors' decisions, less willing to become involved in sentence bargaining (though it surely was not unknown), and in general fit better the more "professional" role of an arbiter above the hurly-burly of plea bargaining. The predominant type of bargaining in Santa Clara was a form of modified sentence bargaining, called the conditional plea or no-state-prison bargain. The prosecuting attorney and defense attorney would come to an agreement over charges and the prosecutor would agree that the defendant should receive a local jail sentence. If the judge who ultimately sentenced the defendant (Santa Clara used a Master Sentence Calendar system, as did the others) decided to impose a prison term, the defendant was entitled to withdraw the plea. In conditional plea cases, the bargain was usually open as to sentence, with the ultimate constraint that the term was very likely to exceed twelve months and would be served locally. In prison cases there was sentence bargaining, but the judge was substantially less active and dominant than in San Francisco.

In San Francisco, if the judge desired to impose a probated sentence and the defendant was technically ineligible for probation, the prosecutor was assumed to be willing to drop whatever allegations stood in the way of the bargain. In Santa Clara, in similar cases, the judge

attempted to <u>persuade</u> the prosecutor to drop the allegations that prevented probation and if the prosecutor refused, a no-state-prison bargain simply was not struck. Of course, prosecutors were not indifferent to the suggestions of judges, but they were free of the presumption of the San Francisco system that whatever the judge wanted was to be accommodated by prosecutorial concessions. The system, thus, was one with a limited form of sentence bargaining, more judicial distance from the settlement process than characterized San Francisco, a more legalistic orientation (e.g., the importance of formal eligibility in the discussion decision about probation), and very strong prosecutorial influence.

San Bernardino, a geographically enormous county lying to the east of Los Angeles, was the third research site. As with several other southern California counties, the levels of imprisonment were historically much higher in San Bernardino than in our northern counties. The San Bernardino court system lay somewhere between San Francisco and Santa Clara in terms of terms of influence in plea bargaining. More than either of the others, San Bernardino disposed of a substantial number of its felony cases by an early form of disposition called "certification." In about a third of felony cases, the defendant plead guilty to a felony charge in Municipal Court on the day of the scheduled preliminary hearing and was then "certified" to Superior Court for sentence. Most of these are charge bargains and "open" as to sentence, and often involve serious cases (the rate of imprisonment in certification cases was about the same as the rate in cases disposed of via plea in Superior Court). In the few certifications in San Francisco (typically they are used in fewer than 10 percent of the cases in the other two counties), the agreement both

covers charge and sentence and is cleared with the Master Calendar Judge in Superior Court prior to entry of the plea in Municipal Court. In San Bernardino such clearances are not common, and thus the Superior Court judges do not participate in plea negotiation in a substantial fraction of the cases they ultimately sentence. In cases which do come up to Superior Court for disposition, the judge plays a facilitative role, evaluating the arguments of each side, offering comments, and ultimately suggesting a sentence (or a range to be refined by a pre-sentence report). Although the judge seems more inclined to exercise influence over the prosecutor than in Santa Clara, there is much less dominance than in San Francisco. The feature that seems most to distinguish San Bernardino is a sense of shared expectations about the judge and a generally more relaxed atmosphere. Things are less hurried there, and a single judge presides over all Superior Court pre-trial conferences and does all of the sentencing (with the exception of cases resulting from conviction at trial). Because a single judge does so much, deals are worked out without direct judicial participation that would not occur in San Francisco. The certification procedure seems an example of anticipated reactions--the case is settled early without judicial participation but with strong expectations about what the judge in Superior Court is likely to do. The generally consensual character of the system--agreement not so much on what ought to be done but on what is likely to be done--appears to be the linch-pin for the San Bernardino system, and to permit rapid case disposition without the detailed agreements that characterize San Francisco.

In sum, then, the three cities have somewhat differing styles of plea bargaining, emphasis upon and concern for legal formalities, and

influence patterns. It was these different environments into which the DSL entered and which mediated its implementation. Our general finding is that in terms of the most discussed and important dependent variable--rates of prison commitment--the law's impact was similar across the three jurisdictions. The best predictor of what happened after passage of the DSL was what had been happening before it. The differing styles of plea bargaining do not appear, on the basis of our limited observation at least, to have had important effects upon alterations in decisions about imprisonment.

Office Policies, Rules, and Other Formal Responses

The first stage of response to the passage of an innovation like the DSL is the adoption of formal policies. These occurred both at the state and the local level. At the state level, the California Judicial Council followed its legislative mandate and promulgated rules about how the new law ought to be administered. It produced long lists of things to be taken into account in making such choices as probation v. prison, consecutive v. concurrent terms, how to handle enhancements and the like. The approach of the Judicial Council was so broad and general as to be of little guidance to (or constraint upon) courtroom participants. Their lists of criteria to be considered were sufficiently inclusive that they encompassed nearly everything that anyone thinking about sentencing might conceive of, thus providing little guidance and much in the way of available "reasons" for sentence choices made the basis of existing practice. Thus, in San Francisco the standard reason given for acceptance of a guilty plea and imposition of a less than maximum possible sentence was "early admission of guilt," even though the admission took place only a week or so prior to the formal trial date.

More important for our purposes were the decisions made by district attorneys about what to do about probation disqualifiers and enhancements. These provisions gave important resources to the prosecutor, for dropping of an allegation of probation ineligibility or an enhancement potentially had important consequences for the ultimate sentence that was likely to be imposed. Dropping of an allegation that a defendant had committed great bodily injury meant that a possible three-year term was avoided (the judge could stay time on an enhancement and thus a prosecutor's refusal to drop it did not guarantee the term would be imposed; but dropping it did prevent the possibility that a judge might impose it if he or she were so inclined). In all three cities the prosecutor adopted formal policies that seemed to approximate "full enforcement." That is, they announced that all probation disqualifiers and enhancements would be filed at the outset and that they were not to be subsequently dropped simply for purposes of settling the case. Dropping of such allegations should only be done if the state of the evidence changed--e.g., a gun turned out to be a toy, injuries thought to be serious turned out to be minor, etc. As a result, in formal terms at least, one might expect that enhancements or probation disqualifiers would not often be dropped after they had been alleged. Yet even the formal policies had sufficient flexibility to permit use of them as bargaining chips. For example, one supervisory prosecutor from San Bernardino characterized a common approach to enhancements:

> If the enhancement is there and it's provable, it is to be charged and our general policy is not to drop any enhancement unless there is some failure to prove. You get into situations, say where we have enhancements for gun use, and sometimes your proof is going to rely upon the testimony of the victim who claims a gun was used, and you will be unable to ascertain whether it was a real gun or a toy gun. We would charge the allegation normally.

> In a case like that, I would not be adverse to striking it if we could get a plea on the case. But if, in fact, a gun was recovered by the police at the time of arrest, and it was a real gun, then the policy is not to strike the enhancement . . . If we feel, for instance, the mid-range state prison term would be appropriate in a given case, we might give up the enhancement. You're dealing in terms of years and a specific period of confinement so it depends on each individual case. You have to look at it and see just how much time in custody do you want for the particular defendant, and if you can get that amount of time by striking an [enhancement], okay; if you can't get it, you're going to hold it.

Thus, if problems of proof developed with an enhancement it was generally thought that half a loaf was better than one and conviction and sentencing on the underlying charge was more important than attempting to obtain a conviction at trial and imposition of an enhanced sentence. Since the trial deputies had control over information about the strength of the evidence, this meant that it was relatively easy to justify dropping of an enhancement for an organizationally acceptable reason (e.g., a witness who saw the gun had turned soft, or done poorly at the preliminary hearing) when the need to induce a plea was in fact the more important reason. Sometimes such decisions were made to evade office policy; more often they were done with the tacit or explicit concurrence of organizational superiors.

The probation disqualifiers and enhancements are, from one perspective, promulgation of public policy asserting that defendants with certain attributes or who engage in certain types of behavior shall be punished in certain ways. From the point of view of courtroom workgroups which are accustomed to settling cases by negotiation, they are resources to be used in the bargaining process. In terms of formal office policy, the norm was one of full enforcement; yet recognition both of the

possibility that the state of evidence might change and the importance of conviction and sentence meant that even such full enforcement policies were open to use of these provisions in the disposition process.

Prison Commitment Rates

We have been able to discover no one who seemed to believe that the DSL would reduce the number of prison commitments, and most believed that it would cause an increase in the rate at which defendants were sent to state prison. This, indeed, was one of the major features of the reform that attracted the support of the law enforcement community. Three related factors associated with the move to determinate sentencing were typically suggested as reasons why prison rates would be likely to increase: (1) the increased inclination of judges to send "marginal" defendants to prison if the terms were short and determinate; (2) the effects of the probation disqualifiers that were part of the bill itself (though they were of admittedly rather limited scope); (3) the general thrust of the legislation, with its renunciation of rehabilitation and emphasis on punishment might cause a general toughening of sentencing policy.

Prison commitment rates in the years immediately following implementation of the DSL did increase in the state as a whole and in our three counties. Most observers, including many court personnel we interviewed, found, therefore, that their expectations had been fulfilled. Our own examination of the available data in the three counties makes us somewhat skeptical whether this conclusion is well supported. Prison commitment rates are subject to substantial variation over time. They may be tied to economic conditions and alterations in demographic characteristics

of the population, both of which may influence crime rates; changes in penalty structures (e.g., the move to decriminalize certain consensual crimes); prison capacities; changes in penal philosophy (e.g., the "community corrections" and "alternatives to incarceration" movements of the 1960s and 1970s); and changes in public attitudes toward sentencing practices. These and other factors produce both secular trends and short-term fluctuations in prison commitment rates. There are great difficulties in sorting out all the potential effects of any particular innovation from rival causal factors, and thus attributing changes to it. In the case of the DSL in our three counties, examination of long-term and short-term trends in prison commitment rates suggests that the rate of imprisonment rose "prematurely" in relation to the assertion that the move to determinate sentencing "caused" the increases in prison commitment rates seen in the post-law years. Figures 1, 2, 3, and 4 present trend data on commitment rates for all offenses and robbery and burglary cases over both a 25-year period and during the five years in which the implementation of the DSL is embedded. The lack of extensive post-innovation data makes assessment of the impact of the law particularly difficult, and there are also some problems with the quality of the data from Santa Clara County, but the evidence available does suggest that in all three the rate of imprisonment appears to begin to rise in 1976 or earlier, too soon to be attributed to the effects of the DSL (which was formally implemented on July 1, 1977).

A better measure of the effects of the DSL, we believe, examines not simply prison commitment rates themselves. The primary mechanism by which DSL was supposed to cause an increase in prison commitment rates

FIGURE 2: PRISON RATES FOR ALL SUPERIOR COURT CONVICTIONS, 1974-78

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K+E 10 X 10 TO THE INCH • 7 X 10 INCHES KEUFFEL & ESSER CO. MADE IN U.S.A.

FIGURE 1: PRISON RATES, SUPERIOR COURT CONVICTIONS, 1954-78

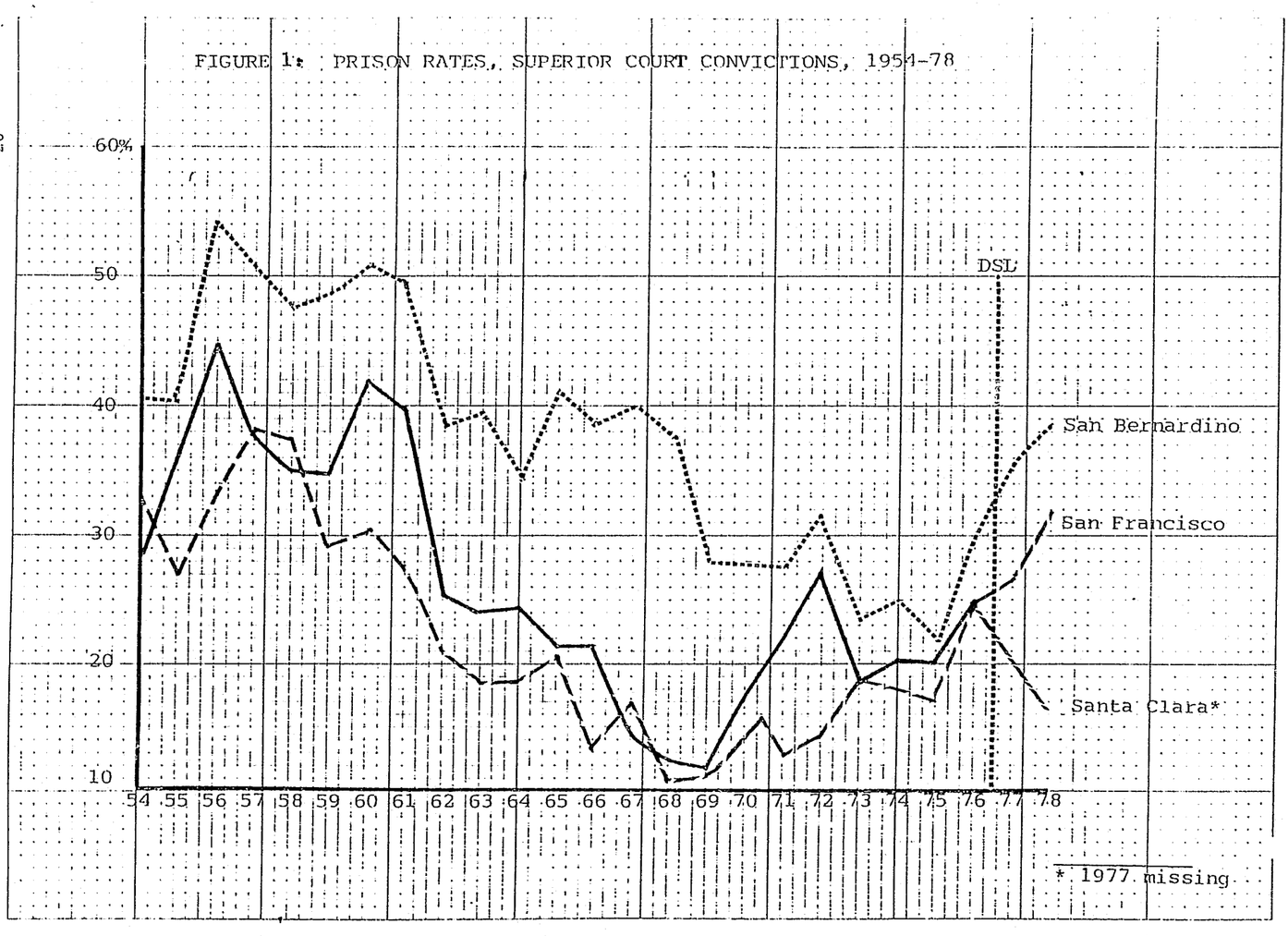

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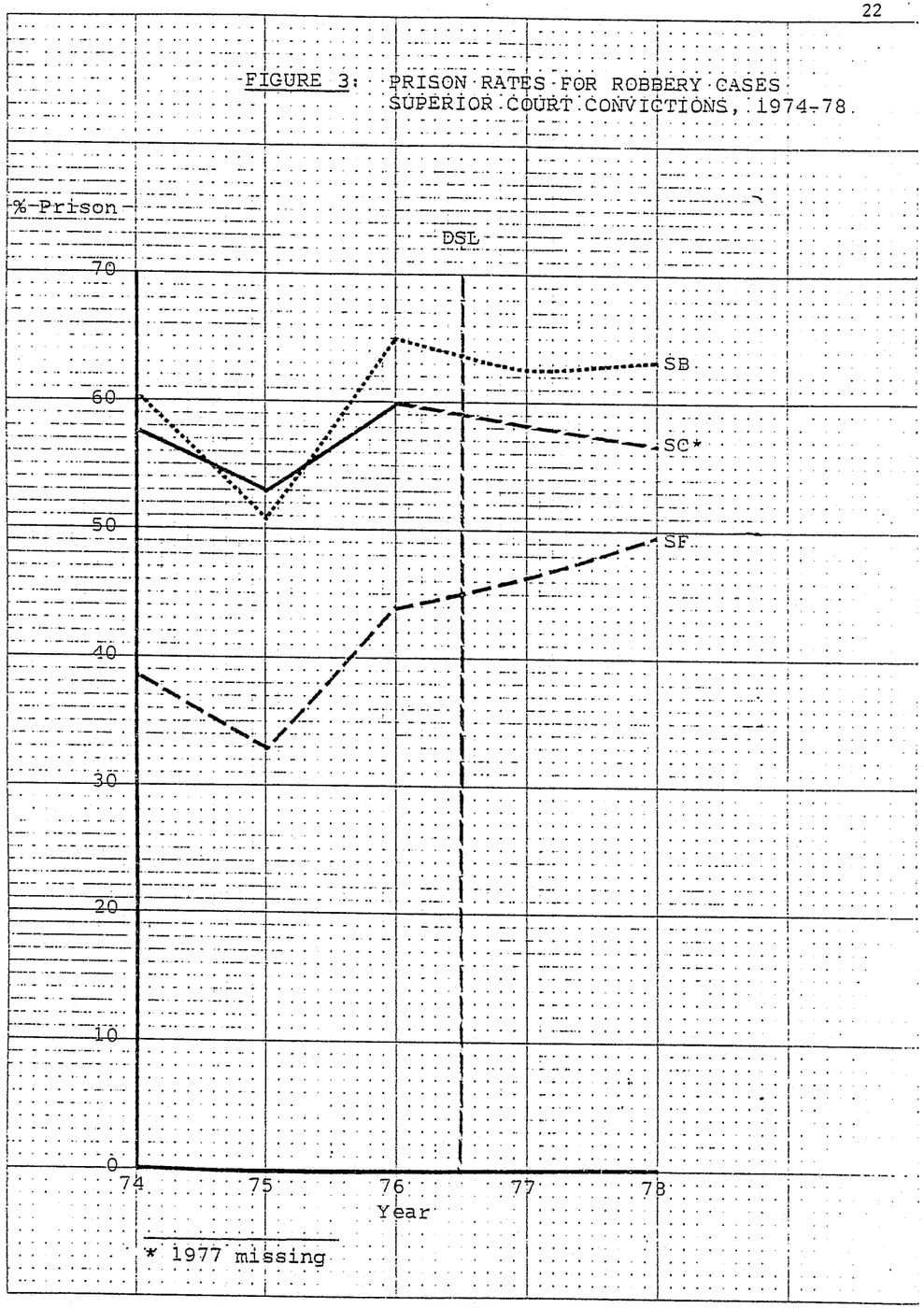
FIGURE 3: PRISON RATES FOR ROBBERY CASES SUPERIOR COURT CONVICTIONS, 1974-78



* 1977 missing

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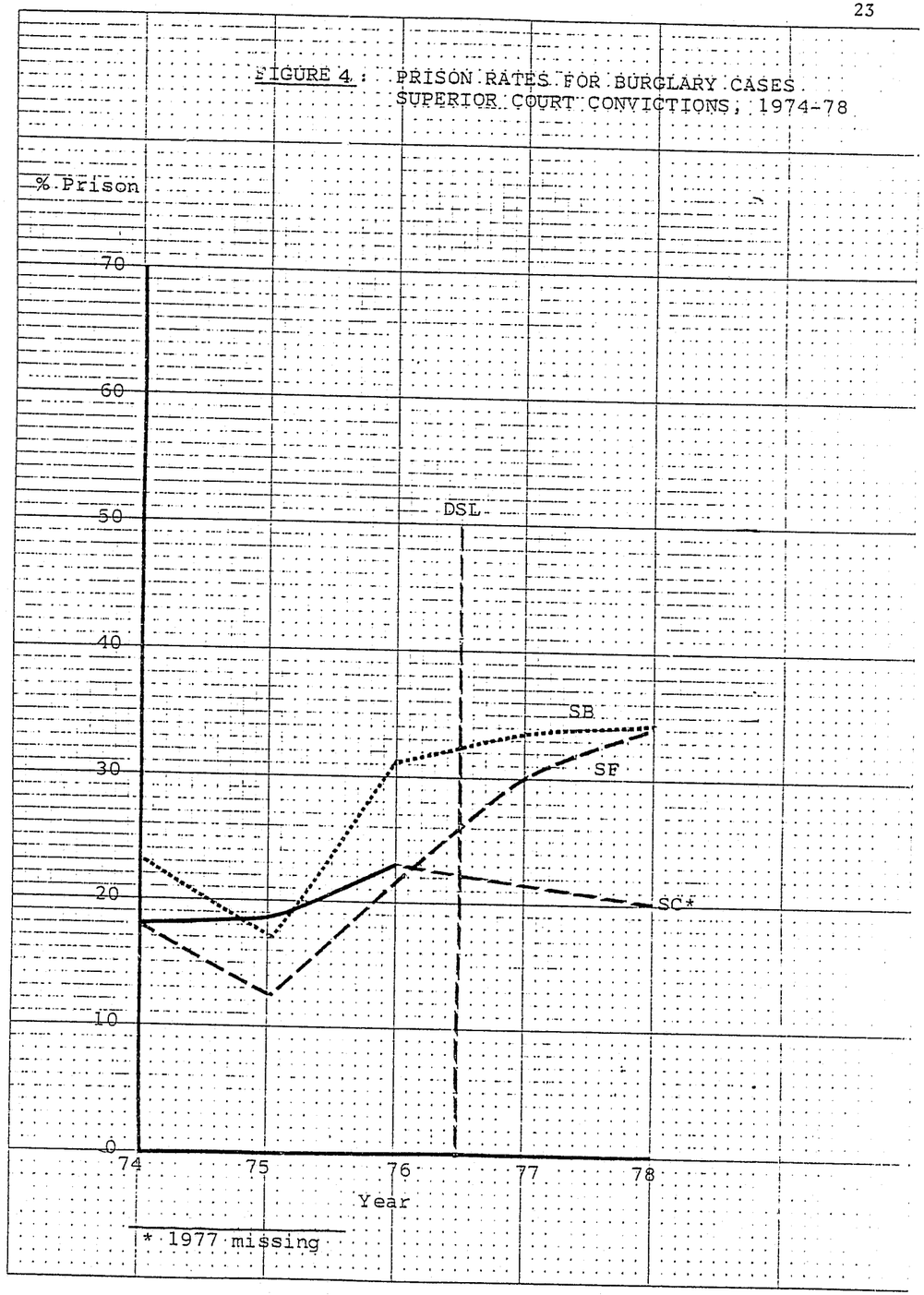
FIGURE 4: PRISON RATES FOR BURGLARY CASES SUPERIOR COURT CONVICTIONS, 1974-78



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involved the movement of defendants who in the past received long jail terms into the category of short prison terms (the so-called "marginal" defendants). Thus, we would expect that the fraction of all those incarcerated (jail plus prison) who receive prison terms should increase. If it does not (that is, if both jail and prison sentences rise equally), this would suggest a generally more punitive sentencing policy, a racheting up of probation to jail, jail to prison, rather than the expected effects of the DSL on marginal defendants. Figures 5, 6, and 7 examine various rates, including the proportion of all those incarcerated who receive prison terms. The expected rise does not appear in two of the counties and only weakly in San Francisco.

Finally, we may note that examination of available data on defendant characteristics and charges does not suggest that there has been substantial change during the pre- and post-law periods. Defendants in the post-law periods in all three counties have somewhat more serious past records, an attribute that would in general lead to increased prison rates quite independent of the effects of DSL. There is no evidence, then, for the proposition that defendants in the post-law periods have attributes that make them less likely to be candidates for prison, thus masking the potential impact of the DSL on prison commitment rates.

What, then, are we to say about the effects of the DSL on prison commitment rates in our three counties? This is the issue on which many supporters pinned their hopes, and which worried many others who chose to support the legislation for other reasons. Moreover, the distaste which many original supporters of the bill are now evincing, has emerged not only because of law enforcement supporters' success in raising prison terms, but because of the belief that the new law is leading to increased prison commitment rates.

FIGURE 5: TREND IN INCARCERATION RATES, SAN BERNARDINO SUPERIOR COURT CONVICTIONS, 1974-78

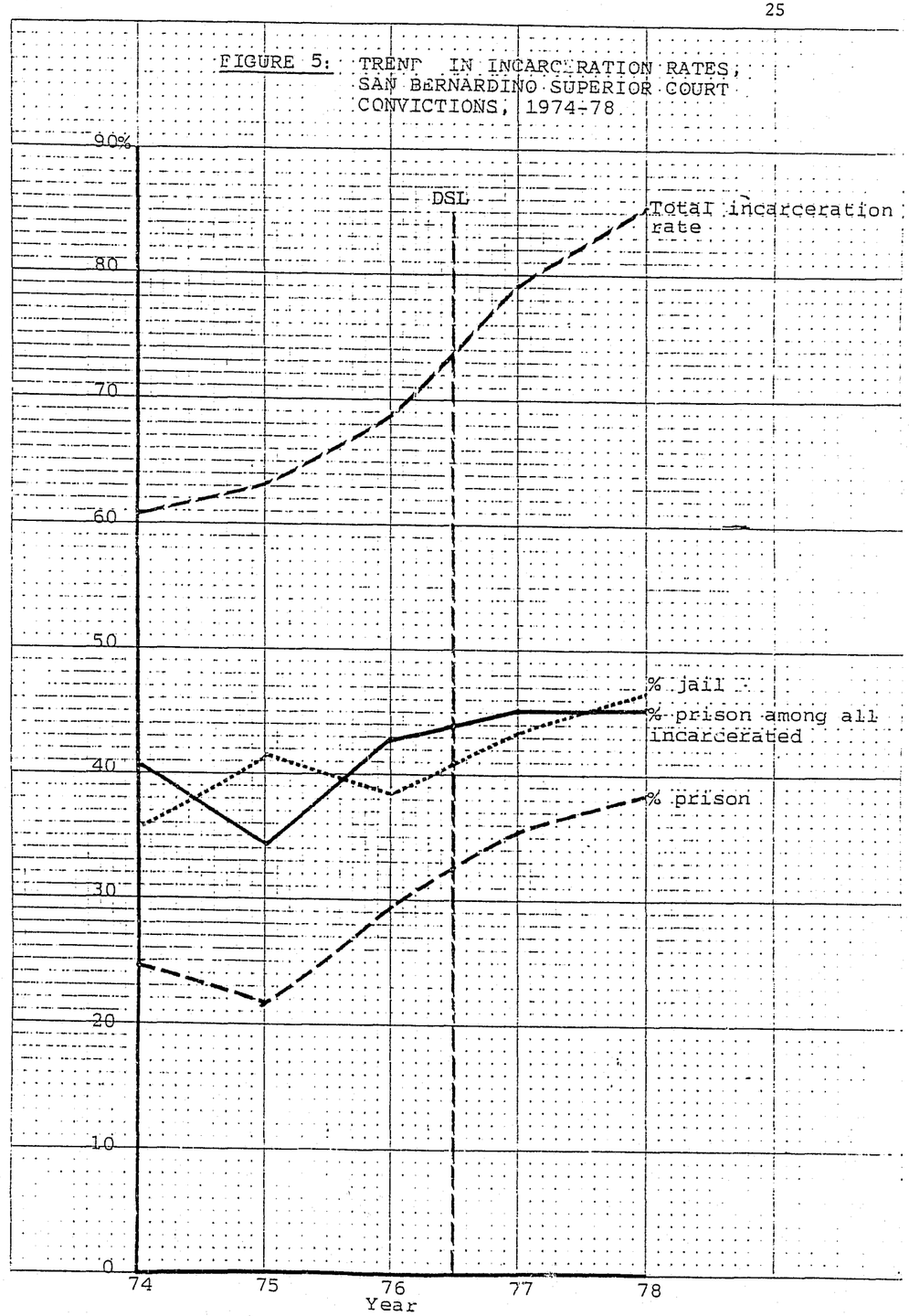

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FIGURE 6: TRENDS IN INCARCERATION RATES; SAN FRANCISCO SUPERIOR COURT CONVICTIONS, 1974-78

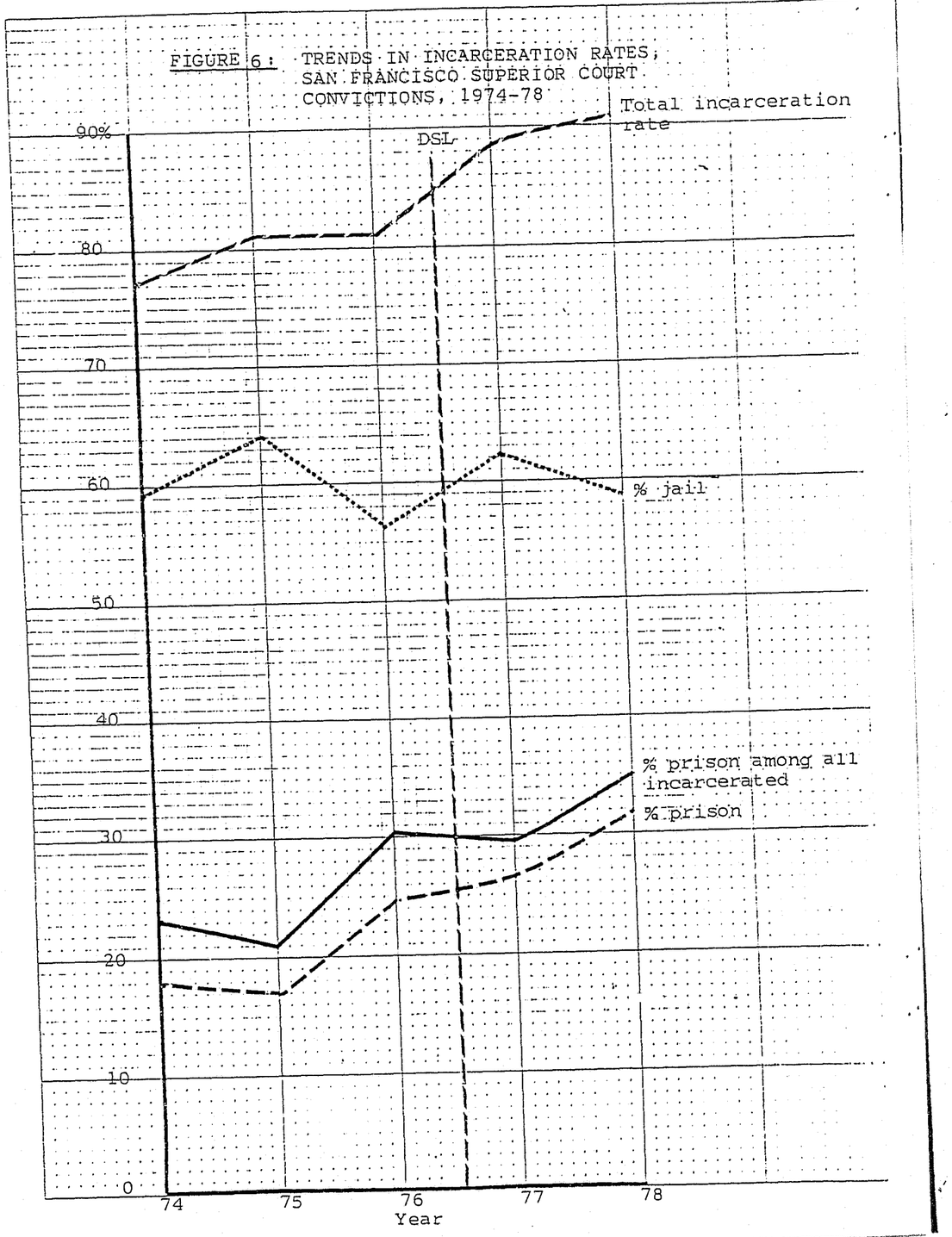

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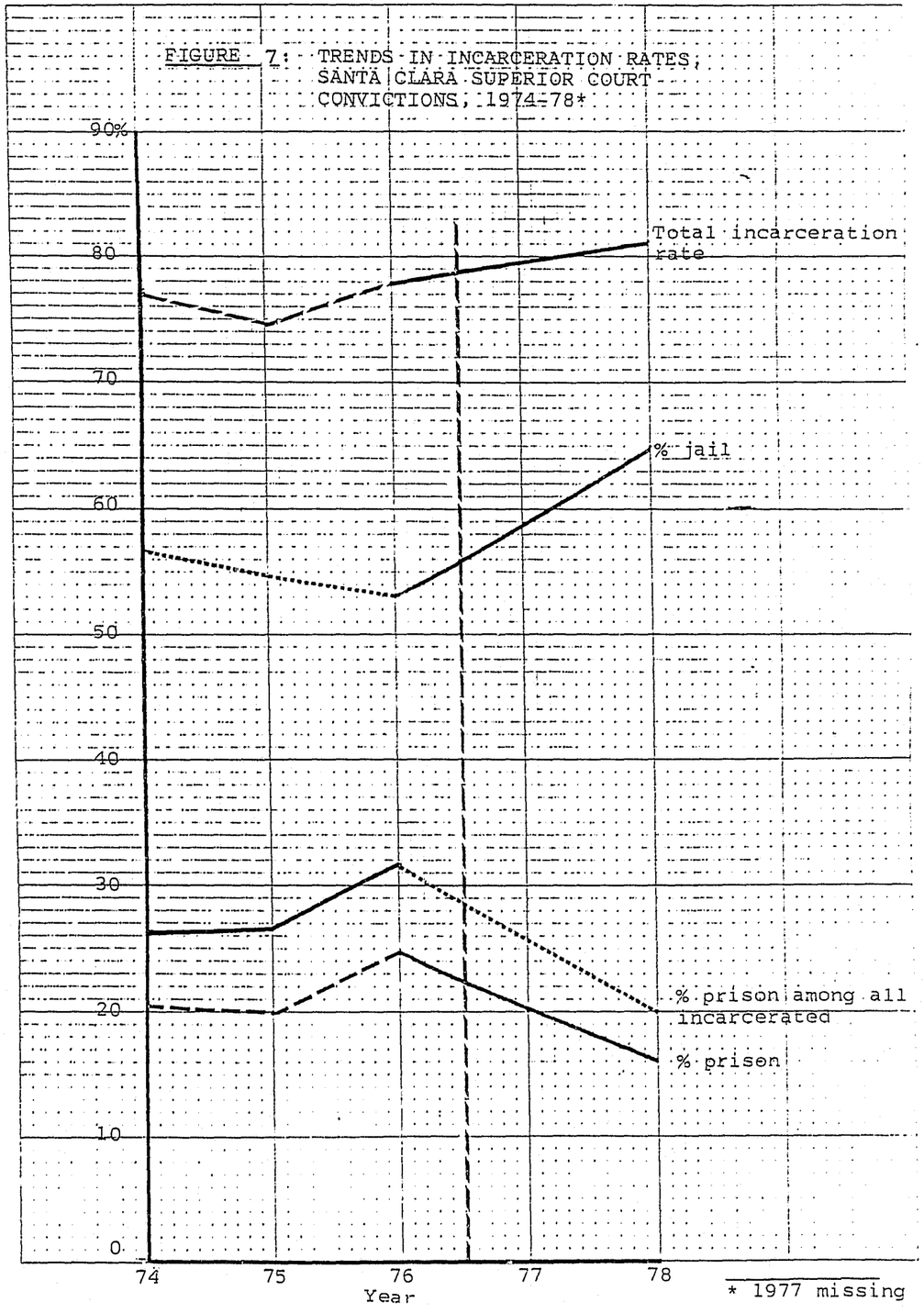
FIGURE 7: TRENDS IN INCARCERATION RATES; SANTA CLARA SUPERIOR COURT CONVICTIONS, 1974-78*



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Although we do not have the data available to make a statewide assessment, and although there are problems with the data for the three counties, we believe that the conservative conclusion is that there is no persuasive evidence that prison rates have increased as a result of implementation of the new law.

We note that rates began to increase in all three counties prior to passage and implementation of the new law, and that an argument that this reflects anticipation of the DSL is not convincing. Much of the evidence cited in support of the view that the law has, as expected, "caused" an increase in prison rates seems based upon the fact that rates have gone up since the law was implemented. But this conclusion fails to take account of trends already at work, and relies too heavily on simple before and after comparisons.

We do not want to argue that the evidence available is inconsistent with attributing an increase in prison commitment rates to passage of the DSL, though the San Bernardino and Santa Clara results seem to point in this direction. It may be that courtroom participants who perceived this effect were correct. Even if the rates of imprisonment were rising before the law came into effect, its implementation may have had some impact upon the rate (e.g., made it go up faster than it might have absent passage of the law; made it rise more for some crimes than it might have). Rather we are simply arguing that the evidence does not permit a clear inference, for our counties at least, that the law has had such an effect.

Finally, we believe that the evidence available is potentially supportive of the view that the law is in part better viewed not as a "cause" of increased prison rates but rather as itself an "effect" of

broader social processes militating towards increased resort to imprisonment. Recall that the 25-year trends indicated an upward movement substantially predating passage of the DSL in two of our counties. Recall that in our short-term data, it is not only prison rates that are rising, but total incarceration rates as well, suggesting a general trend towards increased punitiveness in sentencing. Recall, finally, that the history of consideration of the DSL suggests that criticism of the defects of indeterminate sentencing by due process liberals and prisoner support groups predated support for determinate sentencing by law enforcement interests. It was the coming around of law enforcement interests that provided the crucial addition to the coalition that pushed through determinate sentencing. All of these pieces of evidence suggest that California was experiencing shifts in opinion--both mass and elite--that favored increased resort to imprisonment for several years prior to passage and implementation of the DSL. These shifts were already being linked to judicial sentencing policy during these years, as the prison as well as the jail commitment rates turned up. The passage of the DSL may have accelerated this trend via the informal effects process but the evidence available to us does not permit firm assertion of such a conclusion. Rather, the evidence is simply that the prison rate continued upward after passage of the law, in two of our three counties, at least, and that this may or may not have been influenced by the effects of the law itself.

The Rate and Timing of Guilty Pleas and the Plea Bargaining Process

The Superior Courts in all three counties, as in California generally, relied upon guilty pleas to produce the bulk of their convictions. Rates of pleas varied by crime, but ranged from 80-95 percent for all

crimes in all three counties. These pleas were typically the product of bargains in which the defendant received charge or sentence concessions in return for foregoing a trial. Many suggested that a move to determinate sentencing might increase the rate of guilty pleas and perhaps cause them to be entered somewhat more rapidly. Although the high rate under the ISL imposes a ceiling effect--there were so many to begin with that they simply couldn't increase too much--several features of determinate sentencing were said to facilitate plea bargaining. Particular attention was focused upon "sure" prison cases--those in which it was a relatively foregone conclusion that the defendant would go to prison and the only real issue was for how long. Under the ISL, the room for negotiation about prison terms is quite limited in scope and often cosmetic. Charge concessions could be made (e.g., dropping two of three counts of armed robbery) but the defendant still went up on a five-to-life term and the parole authority "saw through" the conviction offense to the initial charges and tended to tailor release dates to the "real" offense as opposed to the convicted offense. The same was true for concurrent v. consecutive sentences, with the judge able to agree to impose concurrent terms but the extraordinarily open-ended quality of the sentencing making such "bargains" often more cosmetic than real in terms of constraining the actual time to be served by the prisoner. Under the new law, though, with counts tied more directly to time served, and concurrent v. consecutive sentencing making a precise and measurable difference in time served, the opportunities for bargaining were greatly enhanced. This means that under the law a defendant who is facing a prison term can see much more graphically the advantages of a plea bargain (or, conversely, the costs of going to trial

and receiving a harsher term). If a defendant's maximum exposure is ten years and the deal offered is a six-year term, the defendant sees directly what is to be gained by the plea. An offer to drop a three-year enhancement for GBI is, likewise, much more tangible than under the ISL. As a result, it was suggested before passage of the new law that more pleas in prison cases might be produced under the DSL.

A more subtle and cross-cutting expectation suggested that there might in another class of "prison cases" be some dimunition of pleas, at least in the short-run. If more marginal defendants were moved from the long county jail term to the minimum prison term, and they expected--on the basis of their own past experience or jailhouse talk--to be offered a jail term, they might initially balk at pleading guilty for a short prison term. If the defendant in a burglary case, for example, was offered a 16-month term instead of a "bullet" (12 months in the county jail) and felt that the worst she was likely to do after trial was the middle term of 24 months, such defendants might turn down the deal and risk a trial. As time went by, of course, the going rate for such defendants would move up to a short prison term, and such dashed expectations would diminish.

Interviews with courtroom participants revealed that most believed that the new law had increased the rate at which defendants were pleading guilty. They felt that defendants were more willing to dispose of cases which resulted in prison terms because they now knew how long they were going to go and could see the advantages of the plea more clearly. The data available on guilty plea rates, however, suggests a somewhat different picture. As with prison rates, time perspective is important. If we compare guilty plea rates in the last year before the law went into effect,

1976, with those in 1978, there appears to have been a marked increase in all three counties. This, presumably, is the effect being detected by our respondents. Yet if we examine guilty plea rates in prison cases over a five-year period (see figures 8A, 8B, and 8C), we see that in two of the three counties 1976 was an abnormally low year for guilty pleas. The increase in 1978 is in fact simply a return to rates of pleas that were common in the 1974-75 period. Finally, we examine the more refined hypothesis that guilty plea rates in "sure" prison rates will go up while those in "marginal" cases may go down. Operationalizing a "sure" prison case as one in which a robbery defendant has a prior prison term and a "marginal" case as one in which a burglary defendant has no prior record, and looking only at defendants who were convicted and received prison terms, we do not find the expected trends.

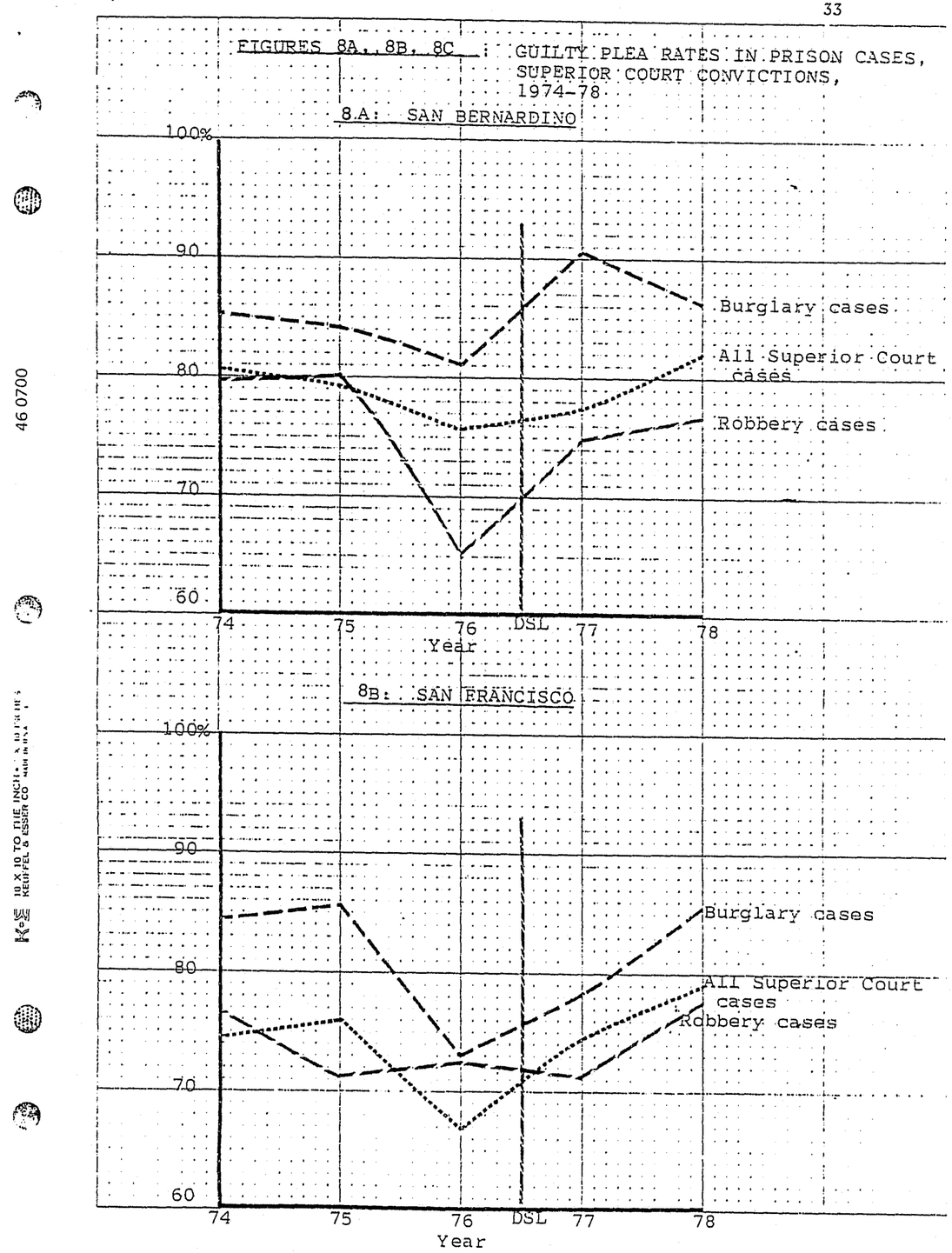
Thus, the view of many courtroom participants that the new law has "caused" an increase in guilty pleas in prison cases does not receive strong support in our statistical data. Although participants were correct in identifying a rise in the guilty plea rate from the last year under ISL, a more extended consideration of the "before" period might have made them more cautious about attributing this increase to passage of the new law.

A similar finding appears when we examine the timing of guilty pleas. It has been suggested that the new law may lead defendants to plead guilty more quickly because of the certainty about sentence available under DSL:*

> Data . . . indicate an appreciable increase [of] guilty pleas at the time of arraignment and a decline in cases where a defendant changes from a not guilty to guilty

*Albert J. Lipson and Mark A. Peterson, California Justice under Determinate Sentencing: A Review and Agenda for Research (Santa Monica, Calif.: The Rand Corporation, 1980), pp. 16-17.

FIGURES 8A, 8B, 8C: GUILTY PLEA RATES IN PRISON CASES, SUPERIOR COURT CONVICTIONS, 1974-78



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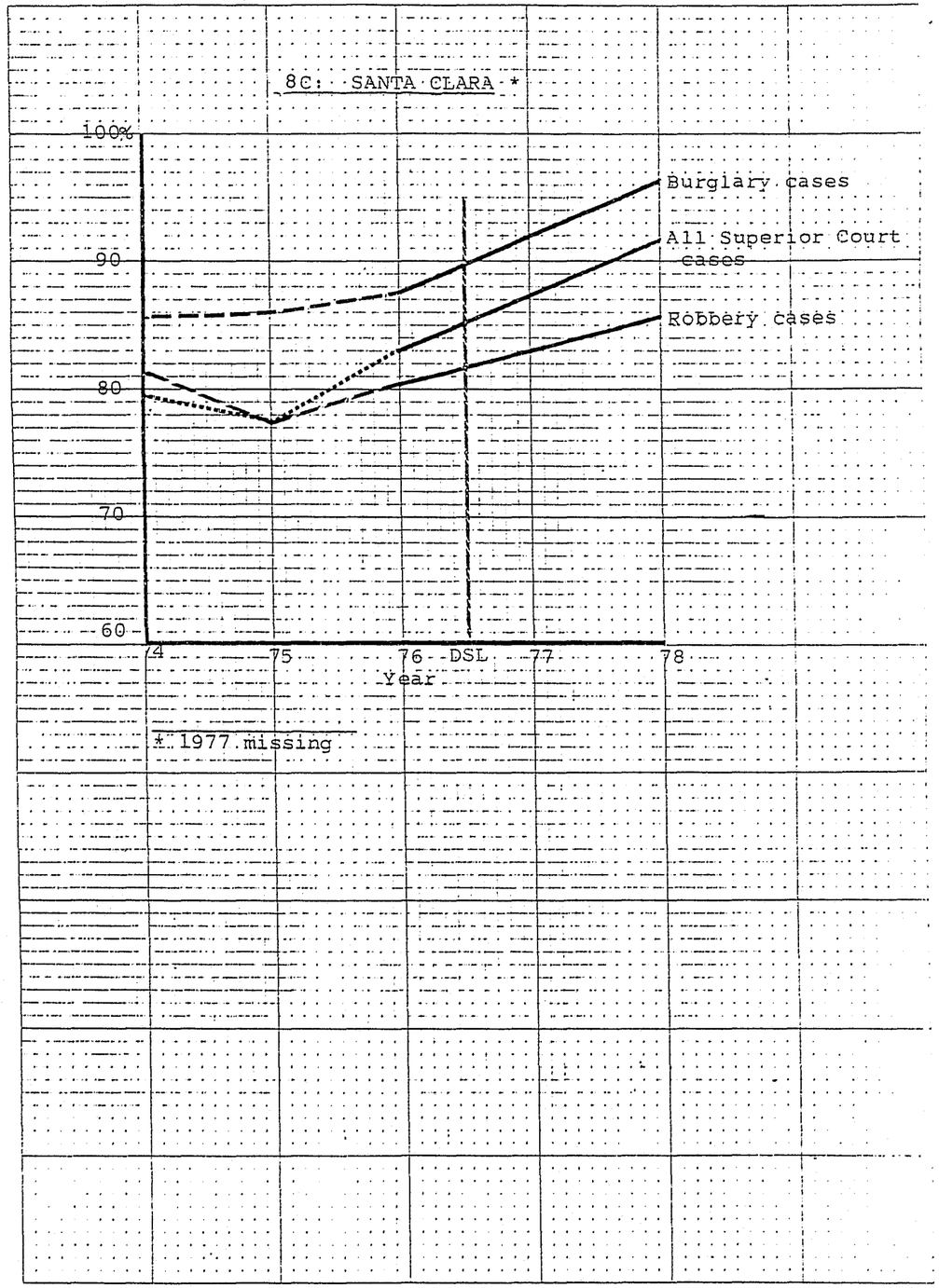

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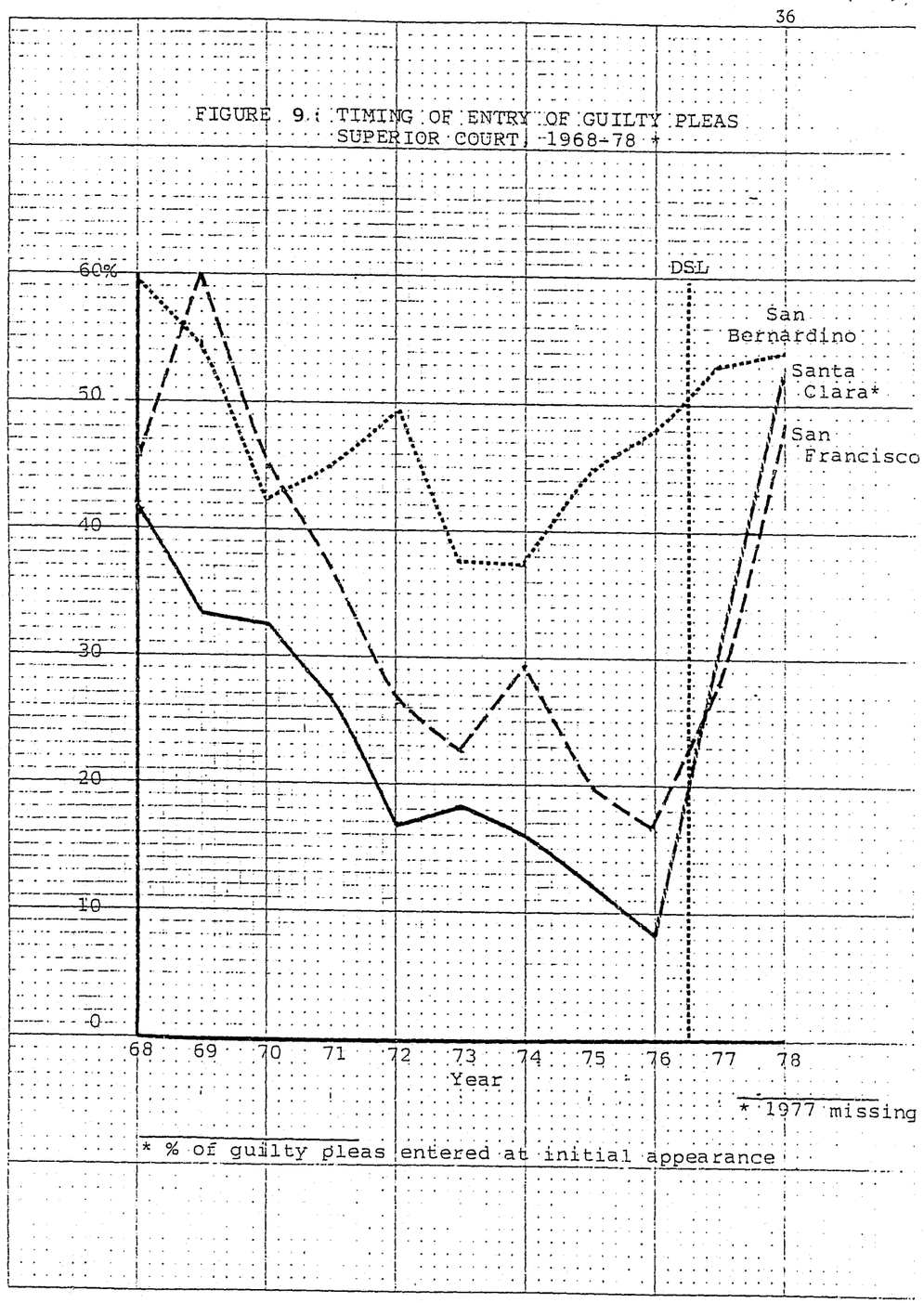
> plea after arraignment. Perhaps this reflects the greater certainty, under the DSL, of what a case is "worth," so that a bargain can be struck at the time of arraignment for minor cases or cases involving no serious questions about guilt. . . . Data indicate that many cases are being disposed of more quickly. Attorneys and judges identify those more readily settled cases as those involving the least serious offenses. If so, this suggests that the DSL may have accomplished a more desirable use of courtroom resources--ready disposition of minor cases, permitting more thorough consideration of serious cases.

In Figure 9, we present aggregate data from the three counties dealing with the timing of entry of guilty pleas in Superior Court. The rates at which pleas were entered at an early stage in the proceeding do appear higher in all three counties in the post-DSL year than in the years just preceding enactment of the legislation. Placing these rates in the context of the decade for which data are available, though, somewhat muddies the picture. In all three there appears to have been substantial variability over time, and the quite high rates of guilty pleas experienced in 1978 are typically matched by similar rates in the late 1960s. This suggests that although the DSL may have "caused" a quite substantial jump in 1978, some caution must be exercised, particularly in light of the very small number of "post" innovation observations. Because the longer trend data indicate that there is variability in the rate at which early guilty pleas are entered, a substantial number of post-law data points would be necessary to exclude the possibility that other factors might explain the increase.

We are also somewhat sceptical about another commonly discussed impact of the DSL--the assertion that it has greatly increased the influence of the prosecutor in the disposition process. The move to determinate sentencing has clearly caused a devolution of influence away from the Adult

FIGURE 9: TIMING OF ENTRY OF GUILTY PLEAS
SUPERIOR COURT, 1968-78 *



* 1977 missing

* % of guilty pleas entered at initial appearance

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Authority and to courtroom participants. It is frequently suggested that in fact the new law has put prosecutors firmly in the driver's seat, making them more influential in the courtroom setting than the judge or defense attorney. One difficulty with assessing this assertion is simply that of operationalizing "influence" in the interaction of judge, prosecutor, and defense attorney that occurs in most cases. Moreover, in purely doctrinal terms, the DSL does increase the influence of the prosecutor vis-a-vis the Adult Authority, for the ability to drop counts and enhancements much more directly affects time served than it did under the ISL. Finally, as we shall indicate in the next section, we have some evidence that prosecutors in all of the three counties have tended to exercise their new-found influence by dropping enhancements less frequently under the DSL than they did under the ISL (thus "real" bargains are being offered less frequently than the cosmetic ones available under ISL when the Adult Authority did the actual term-setting).

Although it seems unarguable that the DSL has shifted important influence over sentencing from Adult Authority to courtroom participants, it is not necessarily true that this has given the bulk of influence to one of these participants, the DA. In our three counties, interviews with courtroom personnel suggest that most do not perceive a substantial shift in influence vis-a-vis prosecutor and judge. Moreover, our observations suggest variation in prosecutor and judge influence in the three counties. More specifically, in the county in which under the ISL the judge was the dominant participant in plea negotiations--San Francisco--a similar pattern appeared to be continuing. The DA in San Francisco might refuse to drop a count or an enhancement, but judicial power to stay

sentences for either plus a traditional inclination on the part of DAs to defer to judges has resulted in continued judicial dominance.

The two counties which were said to be more prosecutor-dominated under the ISL also continue as before. Moreover, to the extent that the DSL appears to have changed prosecutor/judge influence, it may have increased the influence of the judge. In Santa Clara, for example, the crucial bargaining was and is over the decision about whether to send a defendant to prison at all. If the DA does not offer a conditional plea, the judge typically declines to do so. But if it is clearly a prison case, there appears to be a good deal of explicit sentence bargaining, in which the judge is an active participant. Such bargaining was much less possible under the ISL, for there was little to discuss about sentence length. As a result, it appears to us that in the two prosecutor-dominated jurisdictions there has been some increase in influence by the judge, at least in prison cases. This is largely a result of the peculiar feature of California's indeterminate sentence scheme, in which the extraordinarily open-ended nature of the terms made sentence bargaining relatively difficult. The new law makes sentence bargaining much more attractive in prison cases and enables judges to participate more actively than under a system in which choices were restricted to concurrent or consecutive time and enhancements, both of which were somewhat ritualistic exercises.

The DSL does provide the DA with the resources to put the heat on the judge and hence to exercise increased influence in the disposition process. Under the old law, the judge in a prison case might send a defendant to prison for a one-to-life term instead of accepting a prosecution demand for two counts carrying five-to-life terms and hardly fear

appearing lenient. Under the DSL, with terms tied to counts, a prosecution staff can routinely demand harsher terms than judges choose to impose, and thus make judges appear lenient in more graphic ways than were available before. Moreover, the mandatory probation disqualifiers do give the DA substantially more leverage. The crucial issue, though, is whether prosecution offices choose to exercise their influence. In the long run they may, and in some jurisdictions they may already be doing so. What our observations suggest though, is a cautionary note: when prosecutors were dominant before, they may continue to be dominant under the DSL (though even here, the judge may have an opportunity to be more active in sentence bargaining in prison cases). Yet where judges were dominant before, they may continue to be for the norms of courtroom culture are powerful inertial forces. What the future will bring in such judge-dominated systems remains to be seen, but our evidence does not suggest that the DSL has quickly or inevitably made the prosecutor the dominant participant in the disposition process.

Probation Disqualifiers, Enhancements and Plea Bargaining

We have noted above that these provisions can be viewed and utilized in a variety of ways. From a formal-legal perspective, the probation disqualifiers state the legislative policy that certain types of defendants shall receive prison terms. Moreover, the DSL and other recent legislation moved the status of several disqualifying characteristics from simply presumptive (to be operative unless the judge found exceptional circumstances) to mandatory (not envisioning the exercise of judicial discretion to impose a lesser sentence upon a person whose status as ineligible has

been alleged and proved). The enhancements, seen from a similar perspective, would seem to establish legislative policy that defendants who commit certain types of acts (e.g., use a gun, inflict great bodily injury) shall receive punishments beyond those of others who commit similar crimes but do not engage in such aggravating behavior.

From the perspective of courtroom participants, such provisions may have quite different meanings. In addition to their role as statements of legislative policy, they clearly provide both issues over which compromise may be reached in the plea negotiation process, and may run up against existing norms about sentencing practice that have grown up in a local court system. Thus, if a "going rate" is approximated by a new probation disqualifier, one would expect more ready compliance than if it varied from new legislative policy substantially. In the case of conflict between going rates and new policies one would expect various adaptive strategies to be pursued by court participants, for example dropping of allegations of ineligibility in cases in which participants believed that the defendant did not merit prison. In the long run, given turnover in criminal court personnel, one might expect that the going rate would gradually shift towards that embodied in legislative policy, but one would not expect that such change would occur immediately in the case of provisions which called for sentencing decisions widely at variance with on-going practice.

Although in the localities we examined prosecutor offices had declared "full-enforcement" policies, both probation disqualifiers and enhancements were relatively rarely alleged and when alleged they were commonly dropped.

Tables 1 and 2 present data on allegation and disposition of selected probation disqualifiers and enhancements for burglary and robbery cases in the last year prior to implementation of the DSL and the first full year thereafter. The common pattern in both is the relatively light use of both types of provisions. This relatively infrequent resort to the provisions is partly the result of the limited scope of several, for some simply do not cover very wide groups of defendants. For others, this explanation does not seem plausible. For example, Correction Department data suggest that in 1979, among all prisoners who were committed, the rate of allegation of a past prison term enhancement among those who had in fact served prison terms was about 44 percent for the state as a whole and ranged from 22 percent to 59 percent to 66 percent for San Bernardino, San Francisco, and Santa Clara, respectively; the numbers who suffered the actually enhanced terms were, of course, even lower.

The evidence available to us from interviews with participants suggests that low use of these provisions at the allegation stage did not reflect a sophisticated bargaining strategy--for example, threatening to file the provision but refraining in return for an early plea agreement. Rather, low use apparently reflected largely ignorance and confusion about the provisions (e.g., confusion between the enhancement for prior prison terms and the probation disqualifier for prior felony convictions), varying degrees of bureaucratic efficiency in discovering defendant attributes (e.g., the case with which past records could be obtained and verified), and simply a slow learning process.

The disposition of the allegations, on the other hand, suggests their integration into the plea negotiation process. In our observations

Table 1: ALLEGATION AND DISPOSITION OF PROBATION INELIGIBILITY CHARACTERISTICS, 1978-79

	San Bernardino	San Francisco	Santa Clara
Two Prior Designated Felonies (1203.08)			
% of robberies in which alleged	0 (173)	1.4 (289)	6.9 (232)
% of allegations struck	-	*	25.0 (16)
% of burglaries in which alleged	1.0 (300)	1.0 (293)	10.4 (346)
% of allegations struck	*	*	47.3 (36)
Personal Use of Gun (1203.06)			
% of robberies in which alleged	0 (232)	10.0 (289)	22.0 (232)
% of allegations struck	-	37.9 (29)	35.3 (51)
Crimes Against Elderly or Disabled Person *(1203.09)			
% of robberies in which alleged	0 (232)	2.8 (289)	0
% of allegations struck	-	*	-

SOURCE: Superior Court records.

*No percentage calculated for N's less than 10.

Table 2: ALLEGATION AND DISPOSITION OF SELECTED ENHANCEMENTS 1976, 1978-79

	San Bernardino		San Francisco		Santa Clara	
	1977	78-79	1976	78-79	1976	78-79
Robbery Cases	(97)	(173)	(264)	(289)	(291)	(232)
Use of Gun (12022.5)						
% of cases alleged	36.1	31.8	25.8	27.3	43.6	30.6
% allegations struck	60.0	40.0	64.7	22.8	48.9	40.8
Armed with Gun (12022)						
% of cases alleged	7.2	26.6	1.9	9.0	15.7	15.5
% allegations struck	**	58.7	**	19.2	87.0	38.9
Prior Felony/Prison Term (667.5)						
% of cases alleged	6.2	6.4	27.7	19.0	23.4	10.8
% allegations struck	**	45.5	86.3	43.6	83.8	44.0
GBI (12022.7)						
% of cases alleged	*	4.6	*	4.8	*	4.3
% allegations struck	*	**	*	64.3	*	70.0
Burglary Cases	(221)	(300)	(260)	(293)	(350)	(341)
Prior Felony/Prison (667.5)						
% of cases alleged	5.0	5.7	51.9	16.0	24.3	11.0
% allegations struck	81.4	23.5	89.6	38.3	94.1	28.9

SOURCE: Court records.

*Law not in effect.
**No % computed when N less than 10.

of plea bargaining sessions, agreements over dropping enhancements were common and seemed often not to be the result of changes in the state of evidence (the gun turns out to be a toy) but weakness in the state's case, a feeling that the defendant was not likely to receive the enhanced term anyway and hence it could be dropped without losing too much, or simply hard-nosed bargaining in which the defense attorney persuaded the district attorney that the defendant would not plead unless the one or three years was saved. Evidence about the use of probation-ineligibility provisions was more sparse as a result of the infrequency with which they were alleged. Observation of negotiations suggested that dropping of an allegation as a result of a bargain was common. Very tentative evidence, discussed in the full report, suggest that those provisions furthest from going rates--e.g., the prior felony rule in burglary cases--were most often the subject of bargains to avoid application of the provision.

In sum, these provisions were quickly integrated into the bargaining process, and became the subject of negotiations designed to settle cases. Given the importance of guilty pleas and the workstyle of negotiation that characterizes criminal courts, this result is not surprising. Indeed, a finding consistent with a formal-legal perspective--that such provisions were fully used and legislative policy quickly followed--would have been implausible. Provisions like disqualifiers or enhancements deal with matters crucial to the operation of courts and affect on-going norms that are perceived by participants as being important. Legislative changes are by no means irrelevant, and the fact that they may not be immediately implemented does not mean that they make no difference. Rather their effects are mediated by settled patterns within court systems, by

the need to settle cases by negotiation and the consequent inclination to treat doctrinal changes as not only policies but resources, and by the relationship between the legisaltive policy and participant's developed norms about what types of outcomes are appropriate.

The Future of the California DSL

Speculation about the future is, to be sure, a risky enterprise, and made more so by the relative newness of the innovation we have been studying. Yet a few possibilities seem worthy of discussion. Our interviews with court personnel and with lobbyists and legislative aides suggests that the coalition that came together to support the DSL is well on the way to dissolution, if it has not been pronounced dead already. Due process liberals who supported the bill with reservations have found one of their fears borne out: once legislators get into the business of setting prison terms there is little to stop them from raising them substantially. Terms have been raised several times already, and many new probation disqualifiers have been introduced since the 1976 passage of the DSL. Law enforcement interests are likely to be difficult to satisfy. Even though increasing numbers of defendants are sentenced to prison for increasing amounts of time, there will always be "mistakes" and for some prisoners a determinate sentence will never be long "enough." The "mistakes" will be comprised of the inevitable number of defendants in any given year who will receive probation and then prove by their subsequent crimes that society would have been served had they been isolated in state prison. The other "mistakes" will not be noticed, for those who are locked up in prison but who are not in need of incapacitation cannot, by definition, prove that they are not dangerous. The other difficulty

that is becoming increasingly apparent to law enforcemtn interests is twofold: the terms appear to be too short and they are, by definition, determinate. Thus, prisoners will, under the DSL, be let out sometime, even those who may be likely to commit crimes again. We envision that the short-run solution to these two problems will be that California will see in the next several years increasing prison commitment rates and increasing terms for those sent to prison.

These policy outcomes are not going to please due process liberals, though they may feel themselves powerless to resist effectively. Two factors may intervene to cause increasing dissatisfactions on the part of law enforcement interests as well. First, without the escape valve provided by a parole system, longer determinate terms and increased commitment rates will produce larger prison populations. Prison construction is an expensive proposition, and the siting of new prisions is an especially difficult chore. Thus, political and fiscal problems may come to confront those pleased by the increase in prison terms and rates.

Moreover, they may encounter increased resistance in the implementation of new prison term laws. As terms get longer, the sense of equity for judges and prosecutors may be offended. The "informal effects" of the DSL--sending marginal offenders to prison for short terms--may prove less effective as the terms get longer. Moreover, to the extent that the legislature couples increased terms with attempts to reduce judicial discretion by probation disqualifiers, further resistance may be encountered. Defendants may, moreover, begin to resist the temptation to plead guilty to sure and long prison terms. Though the advantages

of a plea will be manifest, the length of the term and knowledge that they cannot be released before serving a minimum of two-thirds of their time may prove sufficiently unpleasant to induce some not to agree to plead guilty. Given overcrowded courts, a small increase in the trial rate is potentially of great significance. Thus, putting these two together, we imagine that the implementation process will produce increased resistance to legislative attempts to increase prison commitment rates and prison terms.

This resistance will, in the short-run, produce attempts to restrict judicial discretion by tighter rules about probation eligibility and staying of time for enhancements or counts. The latter legislative strategy will turn further influence over to the prosecutor, and both because of equity and disposition concerns, many will engage in evasive behavior. Moreover, law enforcement interests may increasingly feel the fiscal pinch of increased prison populations.

Eventually, we would surmise, law enforcement interests may come to identify the problem as being the determinate sentence law itself. Determinancy removes the discretion of the parole board, as well as forcing "weak" judges to impose long terms, which they have proved (in this scenario at least) less than willing to do. An administrative authority to "advise" the legislature about the appropriate terms for various crimes is a proposal that has already been advocated. But such a version of determinate sentencing may not meet the objections of law enforcement interests that some form of indeterminancy is needed for prisoners who continue to be dangerous. Reintroduction of some form of indeterminate sentencing and a parole board may thus appear a "solution" to the problem seen by both camps. Due process liberals, long unhappy

with increased prison rates and terms, may welcome the chance to get the legislature out of the business of setting prison terms, even though it will be at the cost of reintroducing the discretion of the parole board. As a result, a new "solution" to the "problem" of sentencing may eventually be adopted, and it may look quite like the old ISL (though perhaps with somewhat less open-ended terms).

Clearly, the above is speculative, and it may not turn out to characterize policymaking in the future. Yet it does sound suspiciously familiar and it is. Sentencing reform has typically involved coalitions which supported common solutions to quite different "problems." As a result they have been relatively fragile, have broken apart and eventually come together again. Whether this will happen again, what form it will take, and how long we may have to wait for the next wave of reform are all open questions. What seems less open to question is the assertion that the difficult policy choices in this area are the products of substantial political and ideological conflict and that the evolution of policy over the long run is intimately tied to the process by which one wave of reform is worked out in local courts and how this process becomes tied to evaluation of the reform and efforts at introducing new ones.

END