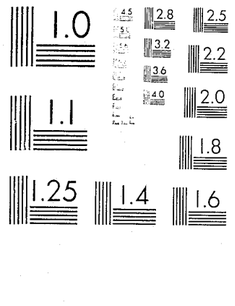

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The Implementation of the California Determinate Sentencing Law

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James L. Underwood
Acting Director

The Implementation of the California Determinate Sentencing Law

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May 1982

U.S. Department of Justice
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Chapter 1

INTRODUCTION

On July 1, 1977, California began a major reform in its law dealing with prison sentences. The Uniform Determinate Sentence Law (to be referred to here as the DSL) became effective on this day, replacing a policy 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 was 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 attention 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 changing the length of terms and the conditions under which judges are supposed to impose prison sentences.

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 workgroup 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, 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, though we do report some simple statewide data gathered from published sources.

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 or 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?

In the remainder of this chapter, we shall discuss some of the general issues of implementation and impact, as well as providing an

overview of the provisions of the DSL and the political process that led to its adoption.

Implementation and Impact. This study is intended in part to add to the growing literature on policy impact. Our objective is to examine the effects of the new DSL, to assess to what extent these effects (or, as the case may be, non-effects) have been intended or not intended by supporters of the reform and to explain why we get the pattern of effects which we do.

We should begin this discussion by noting that determination of the relationship between intended and actual effects is a more difficult task, both conceptually and theoretically, than intuition and the literature on policy impact and implementation often seem to suggest. In part this is because there are often substantial methodological difficulties in even establishing what the effects of the policy are. For instance: What indicators of impact are most appropriate? If we observe change in these indicators, is it real or perhaps just a random fluctuation? Even if it appears to be real, can that change be attributed to the policy per se, or is it the result of some unrelated set of factors? Have we captured all of the effects of the policy, or are new ones likely to appear (and old ones disappear) as the policy evolves? The problems are not limited to determining the actual effects of policy innovations, but also of establishing what the intended effects were. This is where much of the impact literature has tended to simplify the issues involved. Indeed, in some respects the bulk of this work is reminiscent of the traditional "policy/administration" distinction that long characterized work in public administration. Thus, it is assumed that after the "politics" stage, a

policy has emerged in such a form that its salient features (e.g., goals, intent, explicit requirements for behavior) can be established by those affected or by an outside observer, and that we can then measure the success or failure of a policy by the extent to which it has achieved these intended effects.

The problem with this approach, however, is that in actuality the intent of a policy can be quite unclear. In pluralistic political processes, legislation is typically a compromise between a range of groups pursuing a variety of policy objectives, rather than a precise indicator of what all of those who supported the legislation intended it to achieve. Sometimes this political complexity is reflected in vague and ambiguous legislative language. Yet even when the language appears clear, the coalition responsible for passage of the policy innovation may be made up of groups which supported the legislation for quite different reasons and differed also in their expectations of what it would achieve. Thus, to identify a single intent on the basis of a textual analysis of the legislation may serve to give a quite misleading indication of what it was "supposed" to do. This picture can get even more complicated--and often does--if the policy itself becomes the object of "gaming" by the various groups involved in its formulation. If, for example, opponents of a policy know they will lose and the policy will be adopted, they may succeed in formulating it in such a way that it is administratively cumbersome, excessively detailed, contradictory, or generally confusing. In such cases, the failure of a policy to achieve its stated objectives may be better understood as a "success," at least from the point of view of some. This point is well illustrated, albeit in a judicial rather than

legislative context, by the school desegregation cases, Brown I and Brown II. [Brown v. Bd. of Education, 1954; Brown v. Bd. of Education, 1955]

The failure in the decade after 1955 of southern schools to desegregate in any measureable degree spawned the so-called impact literature in the judicial process literature. "Non-compliance" with the original decision holding dual school systems unconstitutional was striking. Yet, as some of the impact literature suggests, the seeds for this non-compliance were in fact planted in the Brown II opinion itself, in which lower courts were ordered to require integration "with all deliberate speed." Given the white community's resistance to desegregation, the southern roots of most federal district and state judges, and the subsequent failure of the Supreme Court to supervise the activities of lower court judges, the failure to implement the Brown decision seems quite understandable. [Peltason, 1961] Some have suggested that the reference to all deliberate speed in Brown II was part of a compromise reached on the Court in order to obtain unanimity, and may have been inserted by members somewhat dubious about either the wisdom of the substance of the decision, or at least its enforceability. Although the original Brown opinion was fairly clear in establishing the policy that dual school systems ought to be abolished, the ambiguity introduced by the second opinion suggests that it is difficult to establish whether the original policy was intended to be enforced or not, or at what pace integration was "supposed" to proceed. [Woodward & Armstrong, 1979, p. 38] Moreover, the suggestion that opponents of the original decision may have consciously muddied the waters suggests that the distinction

between the original formulation of the policy and its implementation may not be easy to make. By insertion of the phrase "all deliberate speed," they may have succeeded in guaranteeing that the implementation would not occur in timely fashion, thus carrying the struggle over the substance of the policy into the stage of its putative implementation. Disagreements among those who participate in the policy formulation stage--mixed motives leading to support for policy, for example--may be mirrored in the subsequent process by which others' behavior implements, modifies, or ignores the original policy innovation.

From the point of view of this study, this all means that we must pay careful attention to assess the "success" or "failure" of DSL, not just against the stated purposes of the legislation, but more importantly against the expectations held by those various groups which were responsible for the passage of the reform. We will also seek to establish the extent to which DSL may have produced effects not anticipated by any of its supporters. Finally, we will attempt to determine to what extent expectations about DSL have been seen by participants in the policy process as confirmed or disconfirmed and what effect this has and is likely to have on the original coalition.

Of course, this study is concerned not just with characterizing the relationship between intended and actual effects, but also with explaining this relationship. In dealing with this question, we examine the mediating roles played by the following factors.:

1. The goals, values, interests, resources, etc. of those responsible for implementing the policy. Not surprisingly, much of the policy impact literature has focused on these variables, particularly where the

object has been to explain the apparent failure of a policy initiative (see, for example, Pressman and Wildavsky, 1973 for an early example). The potential significance of these factors can be seen in the implementation of the exclusionary rule set forth for search and seizure cases in the Supreme Court's 1961 Mapp decision. [Mapp v. Ohio, 1961]

Assuming for a moment that the decision enunciated a clear policy (ambiguities about what constituted probable cause for arrest and hence search incident to a lawful arrest are not, in fact trivial), its implementation remained highly problematic. The policy was designed to reduce the incidence of illegal police activity by making impermissible searches not useful to police, since their fruits could not be introduced into court. Because searches were most often involved in cases in which the crime was possession of some contraband, exclusion of the evidence effectively ended the prosecution. The decision was surely not without effect upon police behavior, but a great deal of illegal search activity continued after the decision and still occurs twenty years later. The exclusionary rule has encountered implementation difficulties for a variety of reasons. For our purposes here, one of the most important is that the decision assumes a set of goals for police officers that is incomplete. The court proceeded as if the only goal of a search was to obtain evidence of criminal behavior and therefore that removing the ability to use evidence obtained in an illegal fashion would reduce the inclination of police to engage in such searches. Yet police officers have a variety of other goals, including the harassment of law violators, the seizure of contraband, as well as maintaining for their superiors the appearance of being on their toes and able to ferret out law violation. All of these goals

can be achieved by an illegal search, even if the evidence itself is not admitted at a subsequent court proceeding and the case is thrown out. [Skolnick, 1966]

Moreover, the model upon which the Supreme Court was proceeding failed to specify properly the goals of lower court participants. The exclusionary principle assumes that lower courts are adversary institutions, in which defense attorneys will use legal defenses available to them by bringing motions in open court. Though this is of course sometimes the case, lower courts typically operate by negotiation rather than adversary proceedings. A possible search and seizure defense may be litigated and the evidence admitted or excluded, or it may be a chip to be used by the defense in bargaining a more favorable outcome. The strength of the state's case is one of the most important determinants of the offer made to defense attorneys in the plea bargaining process, and a motion to exclude may be traded for a concession on charge or sentence.

Both of these aspects of the implementation of Mapp v. Ohio suggests that a policy innovation, even when it is relatively clear in specifying the behavior others are "supposed" to engage in, is mediated by an ongoing social system in which participants have goals of their own. They are likely to adapt new policy innovations to the pursuit of these goals, and to treat new formal rules as resources rather than to simply attempt to implement their letter of spirit.

2. Although will and capacity variables are clearly important in shaping the impact of policy, there has perhaps been too much emphasis placed upon them, at least vis-a-vis other factors. One of these neglected aspects, as we have already seen, is the impact of policy ambiguity.

Where policy intent is ambiguous--either because of its language or conflict in its supporting coalition--the impact of the policy is likely to be also shaped in significant ways by how those responsible for implementing the policy define and interpret its objectives. For example, the ambiguous legislative mandate that programs funded by the War on Poverty should involve "maximum feasible participation" by client representatives was interpreted in widely different ways in different states. [Sundquist, 1969] Thus, the implementation of this policy produced quite different administrative arrangements and levels of participation by poor people in substantial measure because ambiguities in its language provided a context for implementers to interpret their mandate in a variety of ways.

3. Sometimes the intent of a policy appears clear enough and there is little resistance from those responsible for implementing it, but it still fails to achieve the desired effects. As Pressman and Wildavsky suggest, the cause may be that the theory on which the policy was based was flawed, or key sections were poorly drafted, or the policy simply failed to provide implementers with sufficient means to carry out its objectives. For example, a consensus has developed that the policy of using prisons to "rehabilitate" inmates has not worked. The failure to implement this policy may have been the result of flaws in the theory (e.g., that making participation in rehabilitative programs a condition for release doomed such participation to ritualism and ruse) or of the plainly inadequate resources made available to educational, vocational, and psychological programs within most prisons. In either case, one might conceive of the failure of this policy not to lie in a lack of will on the part of prison officials or ambiguities in the policy itself, but in flaws in the policy.

4. Lastly, we may note that policy effects will be shaped by the broader environment in which they are applied. For instance, an alternative view of Brown I and Brown II is that their impact on desegregation was limited because political and social forces in the South were so powerful. At other times, the impact of the environment is not to mute effects but to create additional and intended ones. Implementation of the policy to reduce use of narcotics by invoking the criminal sanction has, at least arguably, not only reduced the incidence of their use but also greatly increased the price of drugs, provided the financial incentive for further development of organized crime syndicates which are active in other types of criminal behavior as well, and provided addicts the incentive to commit crime in order to support their habits. A policy reform may do what it sets out to do, but also may trigger a number of other impacts as well.

These, then, are some of the types of issues in the impact process we shall consider. Clearly we cannot hope to establish in the case of the DSL how all of them affected courtroom processes in our three counties, nor establish which were causally more significant. However, they do provide a framework in which to examine the impact of the law. Now let us turn to a brief discussion of provisions of the DSL and the politics of its passage.

Criticism of the Indeterminate Sentence Law. The "old" policy eventually replaced by the DSL--the California Indeterminate Sentence Law--had been passed in 1917. Based on the "medical" or rehabilitative model of imprisonment, inmates were committed by the judge "for the term prescribed by law" and eventual release was determined by the parole board

(the Adult Authority). The terms "prescribed by law" provided extraordinarily broad ranges, with the majority having a maximum of life. Thus, a person committed on an armed robbery charge would typically receive a sentence of five years to life. Some of the terms had less than life maxima, as for example, second degree burglary, punishable by a term from one to fourteen years. The very long ranges, and the frequency of life terms, were derived from the rehabilitative model--an individual's release should be tailored to the rate at which improvement occurred, and if none came about the person ought to be kept in prison indefinitely. Although eventually the subject of sufficient criticism to bring about its demise, the ISL enjoyed widespread support for many years.

> For years this system was satisfactory to a wide spectrum of opinion, and even when it came under heavy attack it seemed likely to endure because of the difficulty of agreeing on a replacement. The indeterminate sentence appeased liberal sensitivities by purporting to reject such "primitive" notions as retribution and deterrence, and by providing the possibility of speedy release of offenders amendable to rehabilitation. Judges were happy to be relieved of much of the responsibility and pressure inherent in sentencing. Prison administrators considered a flexible date of release an important tool in controlling hostile inmate populations. Politicians were free to be irresponsible: statutory penalties could be raised to grossly unrealistic levels to appease public passions without necessarily affecting the exercise of Adult Authority discretion. Law enforcement officials took comfort because it was possible to confine a "dangerous" prisoner for a very long time even if he could not be proved guilty in court of an exceptionally serious crime, and because many Adult Authority members came from law enforcement backgrounds. . . One of the most useful features of delegating sentencing authority to the Adult Authority was that it made it possible for the legislature to avoid making hard decisions about how severely crime should or could be punished. [Messinger & Johnson, 1978, p. 1617]

Criticism of the ISL began eventually to develop. Rejection of the law depended, however, on the emergence of a curious coalition which

combined due process liberals and prisoner support groups with traditional law and order forces in the state. Although these various interests eventually coalesced to support passage of the DSL in 1976, quite different motives and goals were at work. Liberals and prisoner rights groups primarily focused upon the arbitrariness and unchecked discretion of the Adult Authority and the resulting inequities and uncertainties borne by prisoners. Because prisoners were committed to terms with very large ranges, the Adult Authority enjoyed relatively unchecked power to set the terms of inmates. Prisoners would come before the board or its representatives each year, until finally their term was "fixed" at a certain number of years (some to be served in prison and the rest on parole) and a release date established. This produced, liberals and support groups asserted, a variety of bad consequences which were not outweighed either by evidence that the Adult Authority was able to tailor terms to the rate of rehabilitation or by the reduction in intercounty disparity that a centralized sentence-fixing authority was alleged to promote.

First, it was said, the system gave excessive power to the parole board, and, because of their control over the information upon which the board had available to make its decisions, to prison authorities themselves. This power was relatively uncontrolled and uncontrollable, given the necessarily closed nature of most prisons. In addition to this power and its possible abuse as a result of prejudice or malice, it was also asserted that the uncertainty built into the system produced unnecessary frustration and anxiety on the part of prisoners. Because inmates typically did not know until several months before release how

long their terms would be, and because so many prisoners faced maximum terms of life, the ISL did not give most prisoners a release date upon which they might focus. Rather they lived in a state of constant uncertainty as to how long they would serve, and at the mercy of a set of criteria for release that were not well articulated or understood. This situation, it was said, not only was cruel, but the anxiety and frustration inherent in it might contribute to prison violence. A Berkeley psychiatrist, Dr. Lee Coleman, testifying before a Senate Committee, suggested:

> Although there's no way to gather data on this that I know of, I am personally convinced, at any rate, that most of the violence in [California] prisons is caused . . . by the frustration and the bitterness and the rage and the despair which results from [a prisoner] not knowing how long he has to be there and from a certain group of people having complete control over the decision, the capriciousness and arbitrariness of that system. [San Diego Law Review, 1977, p. 1185]

Moreover, the Chairman of the Adult Authority, which had in 1975 instituted a program of fixing terms shortly after arrival of the inmate in prison, asserted that his version of determinate sentencing had "reduced prison violence and increase motivation of prisoners in job-training and education programs." [Ibid.]

The ISL system had built into it--and was in fact based upon--inequalities in punishment of individuals convicted of similar crimes. Since one prisoner might be rehabilitated quickly and another change more slowly, two persons who had committed equivalent harms were often subjected to very different penalties. Although a system like the ISL might, it was argued, contribute to some reduction in inequity in prison terms across counties, it contributed greatly to inequities among people

who had done roughly equivalent things. For example, among those serving terms for robbery who were released in 1975, the middle 80 percent served terms ranging from 32 to 81 months, while the equivalent group of released prisoners who were serving terms for first degree burglary had a range of 29 to 82 months. These published ranges, moreover, exclude the very short and very long terms, thus substantially underestimating the actual variability in punishment for those convicted of similar crimes. [Calif. Correction Department, 1976]

All of these arguments contributed to support for the abolition of the ISL by due process liberals and prisoner rights groups. Although they did not, presumably, favor the commitment of increased numbers of people to prison, they supported the substitution of the Determinate Sentence Law because it provided to people sent to prison a relatively precise idea of how long they would spend there, and would, it was hoped, contribute to increased equity in punishment of persons convicted of similar crimes. Moreover, the terms specified in the 1976 statute were commensurate with the amount of time generally served by prisoners under the old law and did not seem (to those who did not have to serve, at least) excessively long. This was attractive to liberal supporters. Underlying all of these arguments was the fundamental belief that rehabilitation did not work: prisoners were not being rehabilitated, recidivism rates were high. Put simply, ISL had too many costs and few, if any, benefits.

Individuals and interest groups traditionally at odds with due process liberals and prisoner support groups also supported passage of the DSL. These included "conservative" legislators, the association of district attorneys in the state, and various law enforcement groups.

These factions supported the new DSL for quite different reasons than the liberals. They, too, were disenchanted with the notion of rehabilitation that underlay the old law. Imprisonment for punishment, isolation, or deterrence struck them as a more appealing idea. They, too, distrusted the Adult Authority, though less for its arbitrariness than for its inclination to let people out of prison too quickly. Many saw the DSL as an opportunity to send more people to prison. Such an effect might be achieved in two ways. First, the law could (and did) include provisions making individuals with certain attributes (e.g., certain types of past convictions, infliction of great bodily injury, attacks upon particularly vulnerable victims) ineligible for probation. Secondly, it was suggested, judges were somewhat wary of sending "marginal" defendants to prison when the possible sentences were so long. If they could have a choice of more reasonable punishments, they might be more often inclined to impose the sanction of imprisonment. This would have the effect both of incapacitating more criminals and perhaps of increasing the deterrent effect of the criminal law. Thus, both the formal provisions of the DSL and its informal effects might be expected to increase the number of people sent to prison, a desirable goal from the perspective of law enforcement interests.

In sum, a coalition of interests that normally oppose one another on issues of criminal justice came together to support passage of this reform. Various groups, though, had quite different hopes and expectations about what effects the new law might have. In the early years of its implementation, due process liberals and prisoner support groups have obtained the sentence certainty they have desired. By the same

token, though, law enforcement interests have also gotten many things they desired from passage of the law. Moreover, law enforcement interests appear currently to be firmly in control of policymaking in this area, and we can expect increasing prison terms as time goes by. The coalition that supported the DSL seems dead, and in the final chapter we suggest that its death may contain the seeds for a new cycle of reform, eventually leading to some return to indeterminacy in sentencing. Suffice it to say at this point, however, that from the perspective of assessing the impact of the DSL, the "intent" of the legislation was complex indeed.

Now, let us turn to a brief discussion of the salient provisions of the DSL.

Formal Provisions of the DSL. The scheme of the new law is radically different from its predecessor, conceptually quite simple, and computationally complex. The legislature re-specified the length of prison terms for all felony crimes. Unlike the very wide ranges provided under the ISL, under DSL the judge actually imposes the exact number of years and months the prisoner is to serve. With some potential time off for good behavior, the inmate then serves the sentence and is released to a short period of parole. If the terms of parole are violated, the former inmate can be returned to prison for a period not to exceed six months (now a year).

Before turning to a more detailed explication of the law's provisions, it is important to note that in significant respects the scope of the DSL was quite limited. It did not affect misdemeanants, nor did it have much direct impact upon the decision to grant probation in felony

cases. The law directly affected only those who were convicted of felonies and for whom the judge chose to impose a term of imprisonment. It was by no means a flat sentence law which specified that all individuals convicted of certain criminal acts should receive either identical punishments or prison sentences. It was a sweeping reform of the system for sentencing individuals to prison but not of the sentencing system as a whole.

The law's provisions appear, on the surface, to be relatively straightforward. For each crime the legislature specified three possible penalties. The most common were the choice between terms of 16 months, two years, or three years; two, three, or four years; or three, four, or five years. The legislation directed the judge to select the middle term for most of those convicted, but to impose the lower term for those whose criminal behavior was judged to be mitigated and the upper term for those whose crimes or records seem to merit aggravation. Thus, in a single count second degree burglary case, the judge retained the option of sentencing the defendant to a term of probation, perhaps with a jail sentence as a condition of the imposition of probation. Should the judge decide to send the defendant to prison, the term was to be either sixteen months, two, or three years. In a single count strong arm robbery case, by the same token, the judge could either impose probation or a term of two, three, or four years.

The relative simplicity of the above scheme in fact covers a good deal more complexity in many cases. Rules about consecutive sentencing and "enhancing" of the punishment mean that in all but the most simple cases, a good deal of latitude is available in sentencing. In a case

involving a multiple count conviction, the judge retains discretion over whether terms shall be served concurrently or consecutively. If consecutive terms are selected, the judge selects a so-called "principal" term (one of the three terms available for the most serious conviction charge), and then adds time to it for consecutive terms to be served. The rules specify that when a consecutive sentence is added for an additional conviction charge (called a "subordinate" term), the additional time shall consist of one-third of the middle term specified for the offense. There is a limitation of five years on consecutive terms (on "stacking" terms in court parlance) but an exception for violent offenses renders the restriction of relatively little significance.

As a result of the rules for consecutive terms, as well as the effects of possible "enhancements" discussed below, the judge has a wide degree of discretion in the selection of sentences even for relatively simple cases. For example, in a "simple" case in which the defendant is convicted of four counts of second degree burglary, the first choice to be made is whether to send the defendant to prison at all. The judge might simply impose a term of probation, with a jail sentence of up to 12 months to be served as a condition of the imposition of probation. If the judge decides to send the defendant to prison, the next choice is that of the "base" or "principal" term. The judge may select, at his or her own motion, any of the three possible terms for second degree burglary--16 months, two years, or three years, though the presumptive sentence is the middle term. Once the base term has been selected, the judge may decide that any or all of the remaining three conviction counts be punished by concurrent or consecutive terms. Thus, this hypothetical

defendant might be sent to prison for sixteen months, with the other three counts being served concurrently. This would be the minimum term. The maximum term would be five years in prison. Such a sentence would result from the judge's decision to impose the aggravated base term (three years) plus eight months for each of the additional three conviction counts (one-third of the middle term of 24 months). Between the minimum and maximum possible prison sentences in this "simple" case are a variety of possible intermediate sentences, produced by variation in selection of the base term and decisions about concurrent or consecutive sentences for the additional counts. At a rough guess, for this hypothetical defendant, eight possible prison terms are available, ranging as indicated above, from 16 months to 60 months.

Without belaboring the point with further arithmetic examples, it is important to note that even in what is a relatively simple case, the DSL provides to the judge a great deal of leeway in selecting a sentence, after the most important decision about probation versus prison is made. Two further comments are in order. First, notice that the prosecutor's charging decisions become potentially very important--by dismissing counts in multiple count cases, the prosecutor can constrain quite severely the possible sentence range the defendant faces. Secondly, notice that consecutive versus concurrent sentencing becomes quite significant under the new law, while it was relatively unimportant under the ISL. Under the ISL, the judge did choose between consecutive and concurrent terms. Yet when the terms were so broad (in the above example, one to fourteen years for each count), the Adult Authority was not likely to be greatly influenced by this choice. Moreover, the potential charge bargaining under

the ISL was, by the same token, of limited significance. The prosecutor might drop counts, but they were known as "silent beefs." The Adult Authority had access to and took into account the original charges, and the multiple count burglar was treated more harshly than the single count burglar. Although charges ("beefs") might disappear from the commitment papers, they lived on to affect the decision making of the parole board.

In addition to possible consecutive sentencing, the law's provisions about enhancements provide further complexity, discretion, and uncertainty. Despite the legislature's pleasant euphemism, "enhancements" hardly increase the attractiveness of sentences, at least from the perspective of those who have to serve them. The legislature provided that certain past criminal acts or behavior accompanying a current offense could be used to increase sentences. Thus, to take several examples, an individual who is armed with a firearm in the course of a felony may have a year added to the term; a person who personally uses any deadly or dangerous weapon in the course of a felony may have three years added to the term. A person who commits great bodily injury may have three years added to the term. A person who engages in "excessive taking" can have one year added if more than $25,000 is taken and two years if more than $100,000 is taken. Finally, a person may have additional terms imposed for prior prison terms served. If a person is convicted of one of a group of violent felonies (the so-called "dirty eight") and has served a prior prison term for one of them, three years can be added for each such term (unless the prior term has been "washed out" by a period of ten years free of a conviction or custody); for felonies not on the dirty eight list, enhancements of one year may be added for each prior prison

term. All of the above are started in the form of "may" because the judge is permitted to stay the term on the enhancement. Thus, an enhancing characteristic must be plead and proved (by trial or plea) and its term may be imposed or stayed. Moreover, as commonly occurs, enhancing characteristics may be alleged and then dropped by the prosecution, often for plea bargaining considerations.

When we add the provisions about consecutive sentence to those dealing with enhancements, it becomes apparent that in all but the simplest single-count, no-enhancement cases (in which prison is often not seriously considered anyway), the judge and prosecutor possess a great deal of discretion over the term to be served by the defendant. The judge via sentence calculation and the prosecutor via control over charges and enhancements can both, in many cases, affect the sentence to be served to a significant extent. The "pick one of three" aspect of the law--which appears to reduce so greatly the discretion of the sentencer--in fact papers over a great deal of latitude. The new law is best viewed not as eliminating discretion; rather, it restricts the ultimate amount of sentence uncertainty and shifts the substantial remaining discretion from the parole board and prison authorities to the province of the judge and prosecutor.

A few other featutes of the law are worthy of note. First, the law has fairly liberal good-time provisions. The defendant can "earn" up to a maximum of one-third off his sentence. For every twelve months served, the prisoner can get three months off for good behavior and one month off for "participation credits" for taking part in "work, educational, vocational, therapeutic, or other prison activities." [Cassou &

Taugher, 1978, p. 79] The taking away of good time credits is made difficult by procedural constraints and a "vesting" of credits earned each year. Though there has as yet not been sufficient experience with the new law to know how it will work in practice, most observers and courtroom personnel assume that nearly all prisoners will have their sentences reduced by approximately one-third.

The length of terms to be served under the DSL, as compared to the ISL, is difficult to estimate from simple examination of the provisions of the new law. The middle terms for each offense were selected to approximate the median terms served under the ISL. Thus, in one-count cases, if it is assumed that the prisoner will receive a third off the sentence for good behavior, it might appear that sentences would be on average about a third shorter. Yet this ignores the fact that the median time served under the old law included time assessed by the Adult Authority for behavior that under the new law would be considered an enhancement. Under the ISL, if a prisoner had committed great bodily injury or had an extensive prior record, these facts would be used informally to increase the term served. The 1976 DSL bill took the median time and made it the base term, with provisions for adding additional time to this term for enhancements. From this perspective, one might expect that terms for certain types of crimes would be longer under DSL than ISL. A final confounding factor is the possibility--indeed, propensity would be a better characterization--for the legislature to move to increase the terms specified in the DSL. During the period between enactment of the DSL and its effective date, legislation was passed increasing possible terms, and in the succeeding period further increases have been proposed and

passed. Although there are distinct ambiguities about the effects of the new law on average length of terms, it does appear that on its face the new law should reduce the range of time served. Both the very long and the very short terms under the ISL should occur less often under the DSL.

The law did greatly reduce the power of parole authorities. Under ISL, prisoners released on parole after their sentences had been fixed would frequently have their sentences refixed at the maximum term and be returned to prison as a result of subsequent criminal charges or convictions. Indeed, it was estimated that approximately a quarter of all prison admissions each year were persons whose parole had been revoked, as opposed to those coming on new prison sentences. [Foote, 1972] By limiting both the length of parole (to one year, with a few exceptions) and the possible length of parole revocation (to six months) the new law reduced the power of the new parole board (now called the Board of Prison Terms) not only to determine release dates but to control prisoners once released. Subsequent legislation lengthening prison terms has also increased possible parole periods (to three years) and parole revocation time (to one year).

The DSL is not just the "determinate sentence law," but also the "uniform determinate sentence law." The legislature not only formally renounced the medical model and declared that the purpose of imprisonment was punishment; it also declared a desire that punishments be proportional to the harm inflicted, and that sentences be relatively uniform. To this end, the California Judicial Council is empowered to set forth guidelines providing criteria for judges to use in deciding about whether

to grant probation, whether to impose the middle or lower or upper terms, and decisions about concurrent versus consecutive sentences. These rules tend simply to specify without weighting the criteria that ought to be considered, and in order to deal even more directly with the issue of disparity, the Board of Prison Terms is empowered to hold sentence review hearings to deal with especially disparate sentences. The BPT may on its own motion send a case back to a judge for reconsideration, and can consider not only the length of the sentence but the issue of whether probation was properly denied. Given the need to develop experience with the new law so that both typical and disparate sentences can be identified, the first years of the new law's operation saw very little in the way of activity in this area, though it remains to be seen what the future may bring.

The DSL also requires that the judge offer reasons for the choice of sentences, subject both to the sets of criteria developed by the Judicial Council, and the possibility of appellate review. In addition, the law provides for a sentence hearing. At such a hearing, the judge is supposed to decide such issues as the granting of probation, choice of the base term, concurrent versus consecutive sentence, and imposition or staying of terms for enhancements. In theory, this device might provide a quite extensive and (from the perspective of many court participants) cumbersome procedural roadblock to rapid disposition of cases.

Finally, the new DSL contains a few provisions dealing with probation eligibility. Although the law does not greatly restrict the probation decision, it does introduce some constraints. Moreover, legislation passed in 1975--the so-called "use a gun, go to prison" law--was close

in time and in spirit to at least some of the factors contributing to the DSL. Under the terms of the new DSL, individuals convicted of one of several violent felonies who have two similar prior convictions within the past ten years shall not receive probation. Individuals who commit violent felonies while on parole or who commit violent crimes against elderly or disabled people, are, likewise, ineligible for probation. Under the 1975 law, individuals who personally use firearms in the commission of violent felonies are also ineligible for probation.

Implementing the DSL. These, then, are some of the more salient features of the new law. Combining them with our discussion of the process by which the new law was adopted, a few general observations about the implementation process seem in order. First, the distinction between the political decision about adoption of the innovation and the administrative process seems particularly inappropriate in this case. The coalition structure that produced passage of the new law was extremely fragile and brought together groups with very different goals and expectations about what effects the new law might have. Thus, taking the law as a "given," and examining how it is implemented, as though one can then look back and glean the fit between the implementation stage and the legislation or its intent is not likely to be very useful. Moreover, it is apparent that the seeds for destruction of the supporting coalition were present at the time the innovation was passed. The diverse interests that supported the bill were not likely to be satisfied with the legislation as it emerged, much less with the evolving shape it would take as it quickly was amended. In a sense, then, the DSL existed only for a very brief time (in original form for less than a year, with

amendments passed even prior to its formally taking effect), and it has been changing almost from the day that it was passed.

In addition to these complexities, the implementation process is extremely complicated. It depends upon the subsequent decisions of a wide variety of participants, including the personnel in the fifty-odd California counties, as well as prison and parole authorities. We shall focus here on the process by which the law was implemented in three local communities--San Francisco, Santa Clara, and San Bernardino. Each community differs in a variety of respects, as do their local court systems. The local courts vary in respect to their past practices--the types and numbers of defendants who were likely to be sent to prison--and hence the effects of the new law may be mediated through their differing norms and going rates about what is a prison case and what is a local case. They have different patterns of bargaining: some, prior to the passage of the law, engaged in extensive sentence bargaining, while others were less inclined to do so. Some had plea bargaining systems which were dominated by very active judges, while others were characterized by extensive influence by the prosecutor. All of these characteristics potentially affect the process by which the new law is implemented, and the effects it has upon the decision to incarcerate convicted defendants.

Finally, all share a very important characteristic which is likely to dominate the implementation of the law across all jurisdictions. All depend upon convincing the vast majority of defendants to plead guilty rather than to have trials. This necessity will greatly influence the implementation of the law, for participants are likely to use provisions of the law as resources in the bargaining process. An enhancement or a

probation ineligibility characteristic may be viewed from one perspective as a declaration by the legislature that persons who behave in certain ways shall receive certain punishments. From the perspective of a judge or prosecutor, or defense attorney, such a provision provides something to threaten, to give up, to be gained as cases are bargained out and produce guilty pleas by defendants.

This process by which the new law is integrated into the plea bargaining process in three communities, and the effects that it has in them are the central issues we shall discuss here. We shall begin with a general discussion of expectations about the potential effects of the new law. We shall then turn to a discussion of the three jurisdictions that we have examined in detail. Then we shall look at the effects of the new law in the three jurisdictions, attempting to see how we can relate their characteristics of the process of implementation in them.

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. (See Appendix I for a more complete discussion.) 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. The quotations in the text come from these tape recorded interviews, and a copy of the interview schedule is included in Appendix IV. In addition to interviewing, we spent approximately 3-4 months in each jurisdiction following participants around, observing

pre-trial 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. The quotations from plea bargaining discussions and the discussion in Chapter 3 of the types of issues covered come from these transcripts.

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 1975-1978 (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, 1980), 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 two pre- and post-law periods in which robbery was the most serious charge and a 50 percent sample of burglary cases.

Chapter 2

THE THREE COUNTIES

Three counties--Santa Clara, San Francisco, and San Bernardino--are the subject of our exploration of the impact of the DSL. These particular counties were chosen in part because two were geographically near us, but largely because preliminary analysis indicated that there were substantial differences among them in terms of relative harshness in past sentencing policy, as well as in styles of plea negotiation (importance of sentence v. charge bargaining, influence of judge in the process, etc.). We selected counties which were prima facie different, rather than similar, because we wanted to examine the extent to which the impact of the DSL might have been mediated by local factors. Our assumption was that if the impact, or lack thereof, was similar in the three counties despite their differences, the law's effects would more likely be similar across the state. Conversely, evidence of differences in impact in the three counties would suggest that local factors might produce quite different effects across counties, although our cases differed in too many ways for us to identify the relevant factors that might have caused variation, had we found any. This problem might have been overcome if we had studied a larger number of jurisdictions, but resource constraints did not permit this.

Fortunately, our results are such that we are able to avoid many of the evidential and inferential problems involved in attempting to explain inter-county variations in impact. As shall become apparent in

later analysis, we do not find very strong differences in the impact of the law across the three counties, though some do emerge. This may be partly a function of methodology or analysis. Differences might be "there" but we may have failed to detect them; the limitations of our measures or ways of conceptualizing our dependent variables may mask quite interesting changes. However, perhaps the most powerful explanation for the absence of differences--particularly in rates of imprisonment and rates of guilty pleas--lies in the fact that there is no persuasive evidence that the law has produced any consistent and significant change in the three counties. There is, thus, little variation in type of impact to be explained because there is relatively little impact found. We shall argue later that there was some change across the three counties in prison commitment rates, but that there is little to suggest that the implementation of the DSL can account for it. This general lack of easily-discernible impact suggests that one of the general verities about criminal courts is further bolstered by this project--the inertial forces in such systems are extremely strong, and in relatively short-run periods, at least, the best bet about what will occur next year is that past practice will tend to continue. This is not to say that innovation by "outsiders" never matters, for we believe that it does. But the process takes a good deal of time to filter through the screens provided by on-going workgroup relationships and settled norms and hence we do not find substantial change in a matter of only a few years.

The stress upon the importance of inertial forces--a recurrent theme in the literature on criminal courts--ought not be overstated. It does not amount to an assertion that nothing ever changes, even in the

short-run. Rather the view is that attempts by outsiders to influence courtroom workgroup behavior that do not directly affect resources or goals are likely to have less of an effect than those supporting the innovation imagine or desire (e.g., the finding that introduction of new mandatory sentence laws do not produce immediate changes in the rates at which members of the target population are sent to prison). Outsiders may influence courtroom workgroup behavior much more effectively if they alter goals or resources. In our situation, we believe that the engine which did cause an increase in prison commitment rates subsequent to passage of the DSL (as well as initiating a trend which pre-dated its passage) was a wave of concern over crime and "leniency" in criminal sentencing that emerged in judicial elections and general public and legislative sentiment. This had an impact upon an important goal of courtroom personnel--retention of their offices--and thus may account for their increased harshness in sentencing policy. Thus, we do not mean to argue that the lack of change attributable to the DSL means that change never occurs (for it is currently under way) nor that the DSL makes no difference at all. Rather, we simply wish to suggest that inertial forces are strong and are less likely to be quickly responsive to innovations like the DSL than to others that go more directly to the interests of courtroom participants.

In this chapter, we provide a qualitative description of the formal disposition processes in the three counties, a discussion of influence patterns in the courtroom workgroups, and some case material illustrating the resolution of typical cases. In subsequent chapters, we shall examine statistical data on dispositional patterns, including prison rates, guilty

plea rates, and the filing and dropping of enhancements.

As suggested above, the three counties were chosen because they appeared quite different from one another on such dimensions as harshness, plea bargaining practices, and judicial influence in plea bargaining. The qualitative material presented here is designed to suggest the respects in which the counties differed from one another. In addition, because we are interested not only in the effect of the DSL on prison rates but also upon internal processes (e.g., the timing and rate at which defendants are induced to plead guilty), the data presented here about internal processes will provide a context for evaluation of the statistical data presented later. The basis for these descriptions comes from interviews with courtroom participants and several months' observation of plea bargaining in each of the counties. When the plea bargaining took place at a pre-trial conference--as is typical in all three--we prepared approximately verbatim transcripts of many of the sessions that we were able to observe.

Santa Clara County

The Structure of the Disposition Process. The formal structure of the disposition process in the Santa Clara County Superior Court is straightforward. After defendants have been bound over to the Superior Court on felony charges, they appear first for arraignment. This ceremony is a brief one, and includes formal arraignment, a decision as to bail status (typically continuation of the terms established previously in municipal court) and reappointment of the public defender if the defendant requests. At the end of arraignment, the presiding judge sets a date for trial.

The court is run on a Master Calendar system, with a Master Calendar Judge (MCJ) responsible for administration of the court. At the time of our observation, two days per week were "trial" days, on which all cases scheduled for trial that week were set for appearance in the Master Calendar court. In conference with representatives of the District Attorney and Public Defender offices, the MCJ decided on each trial day where to send the trial cases scheduled for that day. The discussion is based in part upon either already-struck bargains or a feel for what is likely to happen in each case. Cases are referred to at this stage as "goers" (those that are likely to actually go to trial) and "settlers" (those that are going to be resolved by a guilty plea). Those of uncertain status are ones that should be assigned out to be "shaken down"--the process in which the DA, PD and judge discuss the case and attempt to settle it if possible. There was no evidence of substantial judge-shopping in the court, with assignments based in large measure simply upon which judges were "open" (not in trial).

In addition to the Master Calendar judge, the Criminal Court building contains the courtrooms of four judges who handle criminal matters exclusively. The larger courthouse "downtown" houses four or five judges who deal regularly with criminal matters, as well as others who are occasionally called upon to conduct criminal trials. On a typical trial day, "open" judges may have a half dozen or so cases "assigned out" to their courtrooms for trial. The judge meets with the two attorneys to discuss the case (called "settlement discussions" or "doing dispositions") and in most cases a plea bargain is struck and the plea taken at that time. If a disposition cannot be reached, one of three things happens.

The judge will take the "oldest" (longest time since arraignment) case that cannot settle out to trial. The remainder that don't settle will typically be sent back to the Master Calendar judge, there to "trail"--waiting for the next judge available to try them. Finally, and rarely, a case may trail for a short period in the court to which it was originally assigned when there is an indication that a settlement is imminent.

After a case has been assigned out for trial and resolved by trial or plea, sentencing is handled in one of two ways. The large majority of cases--including nearly all that are settled by plea--are sent back to a Master Sentencing calendar. Sometimes in recent years, the Master Calendar judge has handled all Master Sentence matters; sometimes he has rotated this onerous task among other judges. In any event, most cases that are resolved by pleas are not sentenced by the judge who took the plea. If any conditions have been attached to the plea (e.g., a bargain that the defendant shall not receive a prison term), the Master Sentencing judge is obliged to adhere to them or "bust" the plea--that is, permit the defendant to withdraw it and begin the disposition process again. The major argument advanced for the Master Sentencing calendar system is one of consistency--by having one or only a few judges do the bulk of the sentencing, it is argued that variation among judges for similar offenses will be reduced, as will the incentive for judge-shopping.

A small proportion of cases--including all that have gone to trial--are not sent back to the Master Sentencing calendar. Judges sentence defendants in cases they have tried because they presumably have been able to learn more about the defendant and the case than the Master

Sentencing calendar judge could. In addition to trial cases, a judge who has settled a case may occasionally agree to "keep" it for sentencing. Although a variety of reasons may lie behind the decision to keep the case, such a decision is typically part of the bargaining process and results from a desire by the parties--usually the defense--to be sentenced by the judge who settled the case. These were cases in which a more-explicit-than usual bargain had been reached, especially one in which a particular sentence or a maximum sentence had been agreed to. Of course, such an agreement could be placed on the record and sent along with the case back to the Master Calendar, but because this type of explicit sentence bargaining indicated that a judge was relatively heavily involved in the case, he or she usually felt comfortable and justified in "keeping" it.

In sum, then, the formal pattern of the dispositional process is relatively uncomplicated, with the great proportion of cases proceeding from arraignment through a nominal trial date in the Master Calendar court and assignment out to a trial court. In the trial court, the case is typically settled by a guilty plea, and the defendant returned to the Master Calendar, where sentence is imposed a month or so later, after preparation of a pre-sentence report by the Adult Probation Department. The major exceptions to this pattern are cases that go to trial and are kept for sentence by the trial judge, as well as a relatively small fraction that are settled but are also kept by the judge in the trial department.

The Terms of Bargaining. One type of bargain is by far the most common in Santa Clara: the "conditional plea" or "no state prison" (NSP)

bargain. The defendant agrees to give up his or her right to trial and the state agrees that the sentence to be imposed will not involve incarceration in state prison. This bargain does not typically involve any commitment as to actual time to be served in the county jail, if any. These cases are sent back to the Master Sentencing calendar, and unless "busted," the judge is constrained only by the requirement that any time be "local." Most NSP bargains are "on the nose" and hence were direct sentence bargains, though sometimes they included a charge bargain as well. In the following case, for example, the bargain dealt not only with a conditional plea, but also involved dropping of the enhancing charge that the defendants had caused great bodily injury (GBI) in the course of committing an assault with a deadly weapon. The case involved an attack by two men upon a victim, allegedly resulting from some insulting remarks made by the defendants about the woman companion of the victim (adding injury to insult!). The defendants were both charged with Assault with a Deadly Weapon (P.C. 245A) as well as with the enhancement of committing great bodily injury in the course of the assault. If the enhancement was proved, it would almost surely involve a consecutive term of three years in addition to any time on the underlying charge. The plea discussions went as follows:

Judge: Is it disposed of?
DL #1: Probably.
Judge: Let's see [looks at file] . . . We've got a 245A for each defendant, plus we've got a GBI for each.
DA: Here's the proposed disposition. We'll strike the GBI for each, with a conditional plea for one and one without the conditional. This lady was walking down the street. The defendants see her and make some remarks, and the victim, who's with the lady, he objects. Then they went at it, and the victim was stabbed in the stomach and got some internal injuries.

The defendant without the knife had his belt wrapped around his hand, and hit the guy with the steel buckle. The victim ran away at this point, and they followed him around the corner, and defendant #2 stabbed him again . . . Defendant #1's got a record, though it's not the worst I've ever seen. So far as I can tell, defendant #2 hasn't got any record.
DL #1: My guy has a burglary and a state prison sentence suspended. We've got to make sure that the conditional for him also takes care of any probation violation.
Judge: Sure, no problem there. Now, who did the actual knifing?
DA: #2 was the guy with the knife.
Judge: You're expecting him to plead to 245A?
DA: Yeah. It's a 2-3-5. With the GBI struck, that'll save him the 3 years.
Judge: Defendant #1 plead to 245A too?
DA: Yeah, with a conditional. He didn't inflict GBI.
DL #2: The facts of the case are . . . My guy did have the knife, but he hasn't got any record. He's got a steady job. He'd had several drinks that night, and you know that's a part of town where fights like this are pretty common.
Judge: Now you're talking sentence . . . We're not gonna talk sentence here . . . We're not promising him he won't go to prison, but we're not promising that he will. He'll just have to take the risk. Is he agreeable?
DL #2: Yes.
DL #1: Yes.

The prosecutor explained later that the defendant's behavior and their past records were out of kilter--the one with the more serious record had done relatively little damage to the victim (and had himself been injured, as defense photos graphically illustrated), while the defendant whose behavior made him the more logical candidate for prison had no past record. The DA indicated that the GBI clause had been struck because of both substantive and bargaining considerations. Substantively, the DA felt that the GBI allegation would be difficult to prove for defendant #1 (who had been armed only with his belt, had done little damage, and had himself been injured); as for defendant #2 who had done the stabbing, the

DA felt that because of his clean past record he was not going to receive the three-year enhancement in any case (he might not receive prison at all), and thus there was no point in pressing the enhancement. In bargaining terms, dropping of the enhancement "gave" the defense something substantial and thus facilitated the plea.

Several features of the above bargain are illustrative of the Santa Clara plea negotiation system. The first is the use of the conditional plea--the plea with a promise of no state prison but no specification of time to be served locally. The second is the general lack (both in conditional and unconditional pleas) of extensive discussions of actual time to be served. Defendant #2 was pleading to a charge that might involve imprisonment for up to five years, yet there was no discussion of what his sentence would be. This is the general pattern of bargaining, though there are important exceptions. The final feature of the above example that is characteristic is the relative dominance of the prosecutor in the bargaining process. Unlike San Francisco, for example, where the judge is clearly the central figure in the process, in Santa Clara the judge's role appears more facilitative than decisive. Judges choose, in the majority of cases, not to discuss time nor to impose bargains on the others. Rather, they tend to defer to decisions of the prosecutor, unless they feel it very important to become more actively involved.

Three other examples will flesh out our examination of the Santa Clara system, indicating some variations on the basic pattern described above. The first involves an unsuccessful attempt by a defense lawyer to obtain a sentence bargain from the judge, indicating the general unwillingness of judges to make such offers (in sharp contrast to the San

Francisco system). The second indicates that on some occasions judges do become more active, and effectively impose sentence bargains, but that the judge may "make" the DA offer the bargain, rather than doing it himself. The third is an instance of an actual sentence bargain in which the judge takes an active part.

The first example concerned a middle-class 42-year-old man who was charged with two counts of child molesting, involving his 11-year-old stepdaughter. His wife was supportive of him and not only continued their relationship but came regularly to court with the defendant. The case was sufficiently messy and complex that at the stage of the process observed, the prosecutor had already agreed to change the two counts from felony to misdemeanor child molesting. The lawyers entered the judge's chambers on the day the case had been assigned out for trial:

Judge: Have you got a disposition?
DL: More or less. A 647(a) child molest. It's not the world's strongest case. I think if he did what she said he did, it's probably a 647(a).
Judge: This is going to be a misdemeanor?
DL: I wanted to send it back to muni for disposition, but the DA wanted to keep it up here. I'd anticipate probation in this case. I don't want any jail time.
Judge: Has he done any time on this yet?
DL: No.
DA: I don't want any precondition of no time in jail. He already got a misdemeanor, and that's a good deal. I'm going to ask for some jail time later.

[At this point there was some discussion of the facts of the case. The history of the family was discussed, including the fact that the other stepdaughter had also been sexually involved with the man.]

Judge: I'm not willing to give an indicated sentence of no jail. I'll keep the case [for sentencing], but I'll need a probation report and one from juvenile probation about the daughter as well. I'll want the probation report to look at. I don't feel any particular need to incarcerate in this kind of case unless I

think it's needed. But I'll not make a commitment. I may or may not go along with the probation recommendation, but I'll want to look at it. That's the best I can do.

The defendant plead guilty to the misdemeanor charge. The judge resisted the suggestion that he strike a sentence bargain dealing with jail time (the dropping to a misdemeanor charge had already made it a no-state-prison case).

The second case is one in which the judge became more actively involved in the plea bargaining process, though again with a kind of indirection that sharply distinguishes Santa Clara from San Francisco. The case involved burglary of a truck and had originally involved four young male defendants. Two had already been disposed of by juvenile court, after admitting to the police that they and their friends had committed the burglary. The two defendants in Superior Court for disposition were charged with burglary (P.C. 459) and possession of stolen property (P.C. 496). The settlement discussions got underway with the judge walking out to the anteroom of his chambers to talk with the lawyers. He began by saying to one of the defense lawyers, "Why don't you settle this one?"

DL #1: Cause they aren't offering anything.

[The judge then asked about the availability of witnesses if the trial were to start that day and what they would say. The DA said that the main witnesses were the juvenile co-defendants, one of whom had escaped from the ranch and the other of whom was going to say that he did it, but doesn't remember what the other guys did.]

Judge: I've read the preliminary hearing transcript. It tells me something about what the people are like. Have you got the two juveniles?
DA: We've got one of them. The other's escaped. He's saying that he doesn't remember, though he told the cops that the two defendants did it.

Judge: Will he place them on the scene?
DA: Yes.
Judge: Without that, you don't have much.
DA: We've also got the fact that they didn't live in Palo Alto, but in San Jose, so their story about just driving around is not so strong. Also, they gave the cops conflicting statements as to why they were there. Also, we've got some grease on the driver.
Judge: Have they got any past records?
DA: Def. #1 has got a 211 [robbery] from 1971, and an attempted 459 [burglary] from 1975.
Judge: But you didn't allege them?
DA: I'm not sure why [the DA who issued the information] didn't do it. I guess so we wouldn't have to drop them if the defendant was eligible for probation.
Judge: So this leaves them eligible for probation. Good.
DL #1: My guy says he was drunk and passed out in the back seat.
Judge: What do you want?
DL #1: This is a county jail case, evidence-wise. My guy does have the 211 and the attempted 459, but otherwise it's a local case. The tools were worth less than $400.
DL #2: My guy says he was asleep when the burglary went down.

[The judge goes out and asks his clerk that the jury panel be assembled.]

DL #2: We've got a reasonable offer for my guy--496 conditional.
Judge: Would you offer Def. #1 496 and unconditional?
DA: Yes.
Judge: The court can't offer you anything.
DL #1: Well, my client may be right. Maybe he was drunk.
Judge: Would you give the co-defendant [Def. #2] the conditional, regardless if the other guy settles?
DA: Well, might be a problem--suppose Def. #2 pleads out with the conditional and then comes in at the trial and takes all the weight for Def. #1?
DL #1: We're not going to give anything. If we got a promise of county jail, then maybe we'd take it. The convictions are old--71 and 75.

[The DA argues that the defendants' stories are far-fetched and that they really knew what was going on.]

Judge: (to DA) I'd recommend that you very carefully consider a NSP offer to both. You've already got the two burglaries--the juveniles--and I just ask that you consider it. If you need to talk to someone in authority, I think you should do so. Is [a senior DA] around? I just don't like to get into a goddamned jury trial over something like this. You've still got five years probation hanging over their head.

[The DA goes out and comes back ten minutes later.]

DA: Would you give Def. #1 prison time if he went down after trial on a 496?
Judge: I don't know. If I were you, I'd give him a NSP. All I can say is that I'd recommend such a disposition. He'd probably get 12 months--probably 5 years probation plus 12 months county jail.
DL #1: I told him he'd probably get a year.
Judge: (to DA) The way to justify that [to your superiors] is that you haven't got the greatest case. You get certainty of a conviction and you get protection for society. Do you offer it?
DA: I do.
Judge: (to lawyers) It's up to you.
DL #2: If Def. #1 does it, I will.
DL #1: Ok.
Judge: I'll keep the case for sentencing.

A couple of featutes of this case are characteristic of the Santa Clara system. First, the judge is relatively reluctant to become actively involved, though in this case he did eventually choose to do so. The form of the involvement, moreover, is somewhat indirect. Instead of simply settling the case by indicating that he would send neither defendant to prison (in Santa Clara terms, imposing a NSP bargain on his own), the judge convinced the prosecutor to do so. As the deal eventually became a part of the record, it was an offer by the prosecutor, not the judge. Had the prosecutor refused (though at the risk of alienating the judge, who made his preferences very clear), our guess is that the judge would not have offered the bargain himself. The origins of this pattern are not clear, and may have stemmed from an unwillingness on the part of judges to accept responsibility for case dispositions in the fashion which San Francisco judges, for example, routinely do. At any rate, our observations suggest that these judges had internalized a norm which rendered them very uncomfortable in imposing settlements over the objections of the DA, except in very unusual circumstances.

In another case which we observed, the charge was first degree murder, with the prosecution arguing at the settlement conference that it amounted at the very least to a second degree murder case and the defense responding that at worst it was a case of involuntary manslaughter (the gun having gone off accidentally). After the lawyers had left without reaching agreement, both the judge who was conducting the conference, and the Master Calendar judge who had originally stepped in to talk with the trial judge about another matter immediately agreed with one another that the case was clearly a voluntary manslaughter. Yet neither had spoken to the parties about a plea to this charge. Once again we see the operation of a norm that the parties arrive at the decision themselves (often with lesser or heavier nudges from the judges), rather than have it imposed.

The third case was more complicated and clearly was going to involve some prison time for the defendant. It seems characteristic of the limited class of cases in which some relatively explicit form of sentence bargaining is likely to take place.

The defendant had two different sets of charges, which had been joined for purposes of settlement discussions. The first case involved three counts of hand-to-hand sale of heroin to an undercover agent. The second, subsequent to the first, involved a search of the defendant's premises by his parole officer, in the course of which some heroin and three guns were found. The discussion began with the defense attorney suggesting that the defendant was not a "big dealer," but was simply an addict trying to raise the money for his own habit. Moreover, he indicated that there was some question about the legality of the parole search

since it was not entirely clear that the parole agent had been present.

Judge: What're you looking for, a conditional? [A joke, at which no one laughed.] Sorry, it's been a bad day.
DA: The only issue here is the matter of how much time he's going to spend in the joint, and whether the charges are going to be concurrent [CC] or consecutive [CS].
DL: That sounds pretty much like what I think's at issue too.
DA: If you'll plead to everything, I'll agree to CC time--that's 3-4-5 on the sale plus a year on the prior.
DL: Five years?
DA: Probably.
DL: How about throwing out the second set of charges entirely. If they're kept, then they'll be enhancing priors that can be used later, but there'll get you no more time here if it's all CC.
DA: No, I want pleas to all of them, with CC time.
Judge: I'm a little uncomfortable. I think it'll be a minimum of five years, and perhaps six, if I go aggravated on the base term.
DL: How about dropping the charges against the guy's wife?
DA: I'll have to look--I can't commit myself yet, though I think probably I'll do it. Especially if the defendant takes all the weight, then there's not much evidence against her.

[The defense attorney turns again to the second case, wondering whether it's a real case or just "chickenshit" charges.]

DA: The shotgun is real. Normally it'd be CS time of an extra two years.
Judge: There's also the two handguns. The real issue is whether to dismiss the second case or go CC.
DA: The offer is CC.
Judge: If I were sentencing, in general, I'd go CS on the guns. They're unrelated to the drug sales, so the DA is right, it would usually go CS.
DA: Let him plead to everything and then go CC. It's very reasonable.
Judge: I'm not sure I'd buy it. The weapons bother me. Anyone else live there? How old are the kids? [Only 8 and 9, so the guns can't be theirs.]
DL: All the stuff was hidden under the house, inside a briefcase. They'd only lived there a month, so maybe the stuff belonged to someone else. He's real worried about his record.
DA: His record stinks anyway, and the sentence is the best possible.

DL: But what about all those convictions. It'll look really bad. The sentence is good, but the record looks bad for the future.
Judge: What do you suggest?
DL: Let him plead to the sales charges, and drop the rest.
DA: No.
DL: How about dropping two of the three weapons?
DA: No.
DL: Will you drop the charges against his wife?
DA: I may dismiss them, but I've got to look a little further. With the shotgun, it might be aggravated. He'll be lucky if he gets five.
Judge: The Court is having trouble. The weapons are unrelated to the sales. It really troubles me. What could the additional be for the weapons if it's CS?
DA: A year.
Judge: I'd be inclined to treat the sales as one term--possibly middle--plus the prior for one year, plus the guns for one year. I'm not really willing to ignore the weapons. So, it's probably six--four plus one plus one. That's the way I see it. I'm not willing to run the weapons CC.
DL: My guy'll probably take it.
Judge: I will say now that unless there's something I don't know about, I think six years would be appropriate. Plus, if you like, I'll agree to keep the case.

This case is typical of the very limited class of cases in which Santa Clara judges may become actively involved in sentence bargaining. In sure prison cases, inducing the defendant to agree to plead guilty requires some form of concession, for at the most basic level the defendant is going to receive an unpleasant outcome. Such "prison cases" are defined in large measure by the nature of the offense and the past record of the defendant. In addition, as in cases like the one above, they are often characterized by extremely strong prosecution evidence. "Hand-to-hand" narcotics sales do not offer problems of identification and are often accompanied by tape or video recordings. As a result, the prosecutor may be in a particularly strong position, and feel less necessity to offer charge concessions. Moreover, the new determinate sentence law

offers opportunities for sentence bargaining that did not exist under the old law and thus has encouraged judges to become more active in such cases.

A couple of other features of the bargaining ought to be noted. First, the judge was in effect drawn into the bargaining by the prosecutor's initial discussion of time. He could have refused to participate, but awareness that the case required some discussion of time if it were to settle presumably contributed to his willingness to get involved. Second, notice that even here the judge engages in circumlocutions--instead of simply announcing the proposed sentence, the judge talks of being "inclined" to impose a particular sentence. Even when active, judges in Santa Clara tend to be circumspect, indirect, and "judicial." Third, notice that the judge agrees to keep the case, an indication that his participation in the sentence bargain leads him to be willing to continue on to the final stage of sentencing. Finally, notice that this looks like "bargaining." Positions are suggested, subjected to discussion, and revised. This is similar to San Bernardino, and in sharp contrast to judicial domination in San Francisco.

Influence in the Bargaining Process. In any plea bargaining system, potential influence over outcomes is held by the judge, prosecutor, defense attorney, and defendant. In practice, the relative influence of participants varies substantially across jurisdictions, largely as a result of norms or expectations about what is the appropriate way to settle a case. In general resource terms, defendants are typically the least influential. Although they have one very powerful resource--the ability to demand a trial--it is one that must be exercised with great

care, as a result of the sentence differential that exists in most jurisdictions, punishing more harshly those who have trials than those with similar charges and characteristics who plead guilty. [Brereton & Casper, 1982]

By the same token, in resource terms, defense attorneys probably possess fewer resources than judges or prosecutors. They can advise their client to demand a trial, file a variety of motions which take time to litigate, refuse to cooperate in the inevitable small scheduling concessions that a busy court typically requires (e.g., "waiving time" and thus tolling speedy trial rules). Because legal defenses and trials are risky and possibly costly in sentence terms and plea bargains are certain and less costly, defense attorneys are often inclined to take the sure thing over the risky alternative. Secondly, because public defenders and courthouse "regulars" are members of the courtroom culture, they are likely to desire amicable and relatively cooperative relations with prosecutors and judges (while their relationships with clients are relatively transitory, those with other workgroup participants are enduring). This is not intended to suggest that public defenders sell their clients out in the interest of workgroup harmony. But it does mean that, given the other advantages of the plea bargain (certainty; sentence reduction; lighter caseloads; the general amicability of bargaining sessions as opposed to the rancor of trials), it typically appears to be not simply less time-consuming but, in all, a preferable way to resolve most cases.

Because of these considerations, in most systems, the bulk of the influence over disposition of cases is likely to reside with the prosecutor and judge. The prosecutor has virtually unlimited control over initial

charging and subsequent reduction, as well as the ability to make recommendations in court as to appropriate sentence. The judge in turn has the ultimate power to sentence. But even here, the actual influence exerted by these two participants can vary significantly between jurisdictions.

Thus, as suggested in the examples described above, the Santa Clara system is clearly not one that would be described as dominated by the judge, particularly in relation to that existing in San Francisco. The judges are active participants in settlement discussions, and express their views about various aspects of the case, such as whether the case is "triable"; the degree of culpability of defendants; the context that is to be placed around their behavior (e.g., Is this seller of narcotics a real "big dealer" or just an addict maintaining his own habit? Is this burglar really just a "thief," or a kid who got in over his head at the suggestion of others? Is this stomping really a brutal murder or simply the culmination of a long-standing dispute among people who've been working up to something like this for years?); and, most importantly, what the sentence ought to be. In all of these areas, what the judge believes is of great importance. Yet it was clear from our observations of a large number of settlement discussions in Santa Clara that judges were reluctant to have the final say on such matters. Rather, the typical judge was more a participant in the process and a facilitator of the reaching of some consensus between the prosecutor and defense attorney.

If one participant seemed most dominant in the Santa Clara system, it was the prosecutor. The judge typically attempted to induce or persuade the prosecutor to make the crucial concessions necessary to settle the case, rather than doing so directly. Thus, for example, judges did not

offer no state prison themselves, except in very rare circumstances; rather, if they felt such a bargain was important to settling the case and appropriate they would suggest to the prosecutor that such an offer be made. In cases in which there were two priors alleged and the defendant thus presumably ineligible for probation, the judge never, in our observation, granted probation on the grounds of exceptional circumstances; rather, the prosecutor was asked and agreed to drop enough priors to make the defendant probation eligible.

Notice that in none of these are we asserting that the judge was without influence--just that such influence was directed at the prosecutor, who was expected to exercise his or her discretion to reach the appropriate disposition. More importantly, if the prosecutor refused to exercise such discretion (e.g., to drop an enhancement or a prior) or if both sides simply appeared very far apart, the judges would make some effort at producing compromise, but they would not impose it themselves. In San Francisco, to be described shortly, the system involves much more active judicial participation. The judge listens to both sides on the issues suggested above (culpability, context, triability, etc.) and then suggests what the disposition will be. The defendant is not obliged to accept it--and some don't--but most do because they know that it is the best they're going to do and that they may do worse if they go to trial. To offer a small but telling example demonstrating the difference between our two polar cities: In Santa Clara, when a defendant had two or more priors and was not eligible for probation, the judge would often ask the prosecutor if he was willing to drop one. Typically the answer was yes. In San Francisco, the question was almost never asked. The judge indicated

the sentence to be imposed, and if it involved probation (usually jail time plus probation) for someone who was technically ineligible for probation, it went without saying that the prosecutor would agree to drop the prior. In Santa Clara, if the prosecutor refused, the case would not settle on the basis of a NSP bargain imposed by the judge. Granted that this did not happen frequently, it does give a strong sense for how the structure of deference and influence varied across these two cities.

San Francisco

Structure of the Disposition Process. Physically and organizationally the disposition process in San Francisco is similar to Santa Clara. San Francisco is also run on a Master Calendar system by a Master Calendar Judge (MCJ) who is charged with administration of the criminal courts. Three other judges sit in the Hall of Justice and deal exclusively with criminal cases, while several others located in the Civic Center downtown are available for criminal trials if necessary. Perhaps the feature most important to understanding the current structure of the process in San Francisco is its past. The Superior Court had a long history of extensive delay, judge-shopping, and inefficiency. In the early 1970s, a new Master Calendar judge was appointed, and attempted to reduce the backlog and make the operations of the court more efficient. The strategy adopted by the MCJ involved a strict refusal to grant continuances and intense efforts to settle cases and induce the District Attorney to screen cases carefully before bringing them up to Superior Court. These efforts were quite successful, the backlog was pared down, and the court now

disposes of nearly 80 percent of its cases within the statutorily-mandated sixty-day time limit. The legacy of the "bad old days" and the successful reform remains, however, and is manifested by a great emphasis upon keeping the business moving. The spectre of the backlog seems to haunt the participants, and particularly the judge who is acting in the role of MCJ (the position is rotated every twelve months or so among the judges who specialize in criminal matters). The extensive influence on the disposition process exercised by the MCJ seems in large measure attributable to caseload concerns and a belief that judicial intervention is the appropriate strategy to keep the backlog down.

A defendant who is bound over to Superior Court is brought in for arraignment, bail setting, and appointment of the Public Defender. The defendant is required to plead at initial arraignment, and most plead not guilty. A trial date is then set, typically about a month from the day of arraignment, and a pre-trial conference is scheduled for a week prior to the trial. Most pre-trial conferences are conducted by the MCJ, though some are assigned out to one of the other three judges in the Hall of Justice if they are not in trial. Thus, pre-trial conferences are, in contrast to Santa Clara, more centralized in the hands of the MCJ.

Pre-trial conferences are set for every day of the week, morning and afternoon, except for Monday morning and Friday. The morning pre-trial calendar is called at 9:30 a.m. to ascertain whether both counsel and the defendant are present and ready to proceed. Where a deputy from either side is not present, a senior lawyer from either the DA's or PD's office will sit in to allow the pre-trial to proceed.

If none of the other criminal judges is available, the pre-trials will then wait until the MCJ has dealt with the other business on his

morning calendar. Usually it will be about 11:00 a.m. before the MCJ is ready to take the pre-trial matters, and there is an expectation that they will be finished by twelve to allow the court staff to take their lunch break. Thus, there is about an hour for the morning's pre-trial conferences and it is not uncommon for the judge to make reference to the need to keep things moving along in order to get done by noon. The conferences then take place between the judge and the deputies handling the case for either side. A senior lawyer from the DA's office is always present at the conference as well. The defendant is never present.

The atmosphere during pre-trial conferences is informal. The judge removes his robes and is seated behind his desk. He is addressed as "Judge" or "Your Honor" but uses the attorneys' first names and between conferences they talk about general events and social life. The judge will usually have read the preliminary hearing transcript and be familiar with the file for pre-trials he hears. Where the MCJ is involved, he will also have heard any motions in the case. When the case is assigned for pre-trial to one of the other judges, that judge typically will know little about the case.

Pre-trials last 5-10 minutes on average. If it is not obvious, the judge will indicate that the pre-trial is finished by saying something like, "That's the best I can do. Why don't you go to talk to your client and see what he says?" The defense lawyer will then do and confer with his client (in the holding cell if the defendant is in custody or in the hallway if the lawyer doesn't like being in the cell, or in the courtroom if the defendant is not in custody). Meanwhile the judge will hear any other pre-trials. Occasionally, a lawyer will come back to the judge to

clear up an ambiguity or propose modification of the offer to his client, e.g., "Could he be eligible for work furlough?" or waiver of the pre-sentence report.

At the conclusion of the pre-trials, the judge will announce, "Well, let's get back to work" and he will assemble the "troops" so that he can resume proceedings in open court. The cases that have been pre-tried are called and defense counsel will be asked whether there has been a change of plea. If not, the case will be deemed pre-tried and go for trial the following week. Sometimes the judge will announce the status of the offer, i.e., how long the offer is good for, or that it is withdrawn. In practice at San Francisco the offer is open at least until the day of trial, and sometimes even during the trial. In a few selected cases the defense will hold out until the day of trial and occasionally is able to wring extra concessions from the prosecution.

Those defendants who accept the deal move to withdraw their previously entered plea of not guilty and enter a guilty plea. Before entry of the plea, the defendant's lawyer reads his rights to him from a printed form informing him of the constitutional rights he is waiving by entering the guilty plea:

> Mr. X, I am going to make a statement to the court about your case and it is very important that you should listen to it. Your Honor, John X wants to withdraw his previously entered plea of not guilty of a breach of S459 of the Penal Code, a felony, and enter a new and different plea of guilty. I have warned him that in entering such a plea he is giving up several of his Constitutional rights. . . .

The defense counsel informs the accused of his right to a trial, to see and confront the witnesses against him, etc. At the end of the statement, the defense lawyer outlines the terms of the proposed disposition:

> I have indicated to my client that the intended disposition is that sentence will be suspended, he will be placed on 3 years probation to the Adult Probation Department, and as a condition of that probation he will serve 12 months in the County Jail. As a further condition of that probation his premises, person or property will be subject to a warrantless search at any time in the day or night by a peace officer or a probation officer. This disposition is offered as a result of discussions between the court, the district attorney and myself.

The judge then asks the District Attorney if that is his understanding of the discussions and once this is confirmed, the judge takes the defendant's formal waiver of rights (e.g., "Do you waive your right to see and confront the witnesses against you?" "I do."). The charges and any enhancements are then read to the defendant by the clerk and his plea is entered. In cases where it is relevant, the District Attorney will then move to dismiss other counts or strike allegations "in the interests of justice." The defendant is then referred to the Probation Department for a pre-sentence report.

About a month after the plea, the defendant is brought back to the Master Calendar court for sentence. (Defendants who elect to go to trial and are convicted are sentenced by the judge before whom they were tried. A defendant who pleads guilty on the day of trial or during the trial to an offer made by the MCJ will be sentenced by the judge before whom he pleads, but the judge will consult with the MCJ to prevent judge shopping.) The defendant is brought before the bench and the clerk reads out the charges to which the defendant has pleaded and he is asked if there is any legal cause why judgment should not be imposed. Usually there is no legal cause. The judge then announces that:

> The court has ordered, read and considered the report of the Adult Probation Department and the sentence of this court will be . . . .

The judge will specify the reasons for the sentence choice, although the reasons he gives appear ritualistic rather than substantive. The most commonly offered reason is "early admission" of guilt in the criminal process, even though that admission only came at the stage of pre-trial, a week before the trial. This appears to be simply a means of formally complying with the Penal Code and Judicial Council requirements for the specification of reasons.

The Terms of Bargaining. As in all three cities, the facts of the case are almost invariably discussed, though the degree of detail is generally abbreviated, and clearly constrained by the limited amount of time spent on each case:

> Judge: What's this one factually?
> PD: This is a shooting on 2/11/79 with two Chicanos. They were drinking and arguing and then either the defendant pulled a gun or the deceased pulled a gun. The gun was found on the victim along with a [shell casing] from the victim's gun. The only reasonable offer would be a plea to voluntary [manslaughter], admit the gun [use] and take the four year midterm and two for the gun. He has only a minor record.
> Judge: What type of weapon did the deceased have?
> DA: A .38.
> PD: Our version is a little different. The gun was originally pulled by the victim, who was a bad guy with a bad reputation. The prosecution witnesses are all relatives of the victim. I think there is a possibility of self-defense.

In a case like this, there are "real" factual issues, and the "negotiation" may in substantial measure consist of what Utz calls "settling the facts"--that is, coming to some consensus about what actually happened and hence what degree of culpability (and punishment) is appropriately attached to the defendant's behavior. [Utz, 1978; Mather, 1979]

In most cases, "the facts" were not the subject of extensive dispute, and the major item of discussion was the sentence itself. Unlike Santa Clara, "numbers" always matter in San Francisco, and we did not observe any cases--whether jail or prison--in which there was not some direct discussion of the sentence to be imposed. The "bottom line" takes precedence over such considerations as counts; mitigated, mid- or maximum term; enhancements; or consecutive v. concurrent time.

Judge: Then you have the burglaries. What's your position on the burglaries?
DA: There are three completed and three attempted. So I want them consecutively. Aggravated on the narcotics, plus a year for each of the burglaries, two years, plus four for the narcotics, plus a year for the prior and the motion to revoke.
PD: The prior is an 11350 [possession of drugs].
DA: Up to the court on the consecutive/concurrent.
Judge: You're gonna dismiss the attempts?
PD: The number floating around seems to be seven.
DA: The most he could get is ten.
PD: No, there's the double [the base term] limitation.
DA: O.K. Eight.
PD: You're gonna give me a whole year off. That's the same as Dan White's gonna get for two murders. I can't sell that.
Judge: I said six years before the preliminary [hearing].
PD: I'd suggest the burglaries concurrent with the drugs and stack on that. About four years eight months.
Judge: It's too cheap. It shouldn't be six now but I'll give him another crack at six.
DA: Let's say the prosecution is not participating.
Judge: Consecutive two years on the burglaries, mid-term, prior, plus three burglaries consecutive, six.

* * * *

DA: Well, this is a case of five robberies. One attempted and four natural robberies. No gun involved. They were all business establishments.
Judge: Five separate robberies?
DA: Yes.
Judge: Was there a simulated gun?
DA: No, it was his hand in his pocket. And this guy is really clean. I've run his record 10 different times and I can't find any evidence of a past record except for a [drunk driving charge] in Los Angeles.

Judge: Why is he in the career criminal program?
DA: Because he has more than three counts.
Judge: Why does he steal? Does he need the money? Is he crazy?
DA: I'm not sure either. I think he's an alky.
Judge: What kind of places does he rob?
DA: Various kinds of businesses: auto parts stores, things like that.
Judge: Small amounts of money?
DA: It was about $600 total for all four of them.
PD: This guy's an alky. I had him checked by a doctor and he says he was in an alcoholic state at the time of the robberies. He's from Denver. He was out here, he had some problems--some affairs of the heart. He wanted to go back. He's mentally competent, but he was really out of it at the time of the robbery. Now the guy's an emotional wreck. He nearly fainted when I told him how much trouble he was in. He never intended to hurt anyone. He never even owned a gun in his life, not even a rifle.
Judge: He could have gotten himself killed by doing this.
DA: So we'll know what we're talking about: our offer is 5 years on count 2 and concurrent time on counts 3 and 4.
Judge: How do you get 5 years?
DA: The higher term on the robbery and concurrent time.
Judge: I'm seeing whether you do this with a straight face. I'm looking at the corners of your mouth to see whether there's any turning up--to see whether there's any smile.
DA: I'm just reporting what [my superior] says he wants.
Judge: What's the maximum on this?
DA: Eight years, 8 months.
Judge: [PD], what're your thoughts on this?
PD: I don't think this is a state prison case. This is a once-in-a-lifetime thing, no intent to harm anybody. He was being treated at the time, as an in-patient for alcoholism. State prison is just not right.
Judge: Tell you what I'm gonna do. Send him [to the Correction Department for a diagnostic evaluation]. Find out if he's a menace or if this is truly aberrant behavior.
DA: My hands are really tied on this.
Judge: I can see that.
DA: Okay, let him plead to all five counts, open to the court.
Judge: It's OK with me, but no matter what, he's not really looking at five. Three's going to be the maximum, I think.
PD: He's got to plead to all five counts? Five's too many. It's gonna make him look like Dillinger on his rap sheet.
DA: [My superior] says he wants 5 counts.
Judge: Five seems pretty harsh. There was no weapon, no past record.

DA: Well, both sides are squeezing on me, and there's not much that I can do.
PD: The court can stay the terms, but I'm balking at 5 counts. It's just too much. It would look too bad on his record.
DA: I just spoke to [my superior] and the answer is no. I'll go ask him again if you want, but the answer is going to be no. I would if I could, but I can't change him.
PD: I can't go for 5 counts.
Judge: You tell [your superior] that there's no gun and there's no way he's going to get over 3 years and 5 counts are not going to make any difference.

These two cases are typical of bargaining in prison cases in San Francisco. They illustrate the focus upon actual sentence to be imposed. Once the judge has gotten a feel for the case from the DA and defense attorney and has begun to focus in on a particular sentence, charges, counts, enhancements, and the like are tailored to reach the desired figure. This is not to say that such factors are regarded as irrelevant, for they go to the seriousness of the offense, but it does mean that it is the appropriate punishment that is the main focus for discussion, and then the others follow from it. This is quite different from the more legalistic process in Santa Clara, where the actual charges and the terms they carry are much more the focus of judicial concern. Moreover, as we shall discuss in the next section, both cases illustrate the degree to which the judge is the central figure in the process, even when, as in the second case, the district attorney is being exceptionally hard-nosed.

In non-prison cases, the prosecutor typically indicates that they are not seeking prison and says that the amount of jail time is "up to court":

DL: This is a little case--only one bindle of heroin
DA: He was arrested on a warrant. They found a bindle. It's a small amount.

Judge: Just one bindle? Any priors?
DA: Prior possession, a charge which makes him ineligible for probation, but I'm willing to strike it if that's what the court wants to do.
DL: He didn't have much activity lately. He's had a bunch of arrests in 1974 and 75 and that's it. He's been out of custody. He's a responsible client--he shows up. He's a user, but he's not a major one.
Judge: He's a hype? I'm listening.
DL: Are you listening for anything in particular?
Judge: I'm listening for your thoughts on the matter.
DL: Probably a sentence, but not much jail.
Judge: How much?
DL: Not over 45 days with one bindle, no priors recently. He's not doing much.
Judge: OK. ISS, search condition, drug treatment, 30 to 60 days. We'll see what the probation department says. I agree that treatment's more important in this case than the jail. We'll need something to get his attention.

* * * * *

PD: He got busted with a gun. Addict under the influence.
DA: He's an up to court. No record.
Judge: When did he get out of CRC?
PD: He was free, on the streets, discharged.
DA: What did he go on?
Judge: After 3 years they cut him loose.
PD: He's been in custody from the time of his arrest. Give him that.
Judge: ISS, 3 years probation, 6 months maximum in jail.
PD: Why don't you just let him out?
Judge: Today? No, he's got a gun. He's not a new kid on the block.
PD: What about the day of sentence.
Judge: I probably will, but he can stew a bit.

Unlike the no state prison bargains in Santa Clara, even local cases involve specification of either a fixed amount of jail time or a range which indicates the maximum possible sentence that might be imposed. The examples above indicate, as well, the centrality of the judge in the process. The prosecutor indicates preferences in some cases, but it is always relatively clear that negotiations are not between the DA and the defense attorney, but are rather discussions directed at attempting to influence the judge.

Influence in the Bargaining Process. In San Francisco the judge is the dominant party in plea negotiations. The judges stamp the pre-trial with a firmer imprint than do the judges in either Santa Clara or San Bernardino.

Two judges alternated as MCJ throughout most of the past decade and set the tone in the San Francisco court. They were senior in criminal court experience to all but a very few prosecutors and defense attorneys, and in most cases many years more senior. When such an experienced "old hand" appeals to a lawyer to know a good deal when it is suggested or to be reasonable, such a suggestion carries weight in the courthouse culture. When such an old hand is also the administrative judge, the suggestion carries even more weight. Moreover, everyone in the San Francisco courthouse culture is very concerned about caseload pressure and avoiding the build-up of a case backlog. This pressure is felt by all participants, but perhaps most of all by the MCJ, and it is in substantial measure the basis for the dominant role played by the judge in the disposition discussions. It affects not only the inclination of the judges to be active in attempting to settle cases, but also leads others in the process to expect judicial activism and influence and to defer to it.

During the course of our observations, one of the criminal court judges who had not previously served as MCJ took over the post. In the pre-trial conferences we had observed prior to his taking over and in his initial weeks as MCJ, he tended to be somewhat less assertive than his precedessors. This resulted in fewer cases being settled, the first signs of a build-up on the trial calendar, and general grumbling among

DA's and PD's that the MCJ had better start settling more cases. He was himself quite aware of the problem, and quickly became more assertive in the pre-trial conferences, assuming a role that appeared not only important to keeping up with the calendar but which was comfortable for the other participants as well.

In a way that was accurate but rather understated in terms of his influence, one of the experienced judges talked about his view of pre-trials:

> Interviewer: Has the [DSL] affected the dynamics between the the three main participants in the process; the judge, the DA and the PD? Has there been a shift?
>
> Judge: I don't think so. I take a position on this. My position on the pre-trial is both sides will tell me the story. If they want to make a recommendation they can. If they want to ask me what the case is worth, I tell them, subject to verification through the probation department. But it hasn't changed my philosophy about the pre-trial conference. If you sat in on some of my conferences, I don't really waste too much time on them. You know, I view it as an attempt to apply whatever experiences I have, and the number of cases I've had, and try to be consistent with all of them. I think both sides can just about read me, and very often they'll just plead out. . . .

We have puzzled over how to characterize this dynamic. There is relatively little direct interchange between defense and prosecution. They discuss the case very little, if at all, between themselves prior to pre-trial or during it. Certainly it is unlike Santa Clara, where the judge typically stamps his seal on an agreement reached between counsel. The focus of remarks from both sides is the judge, and the "bargaining" that does go on is between him and the lawyer looking for his favor. Usually this will be the public defender trying to get the judge to offer a lower figure, but sometimes it will be the DA looking for an extra year,

or at least encouraging the judge not to concede anything further to the defense. Both sides formally have some sort of veto power: the defense has the right to go to trial; the prosecution may refuse to strike a gun use allegation. But both sides typically accept the judges's proposed disposition.

In saying that judges are the dominant party in San Francisco, we do not mean to suggest that they are domineering. All parties are controlled by the informal norms of the system and the judge is also constrained by these. For instance the judges do not often strike counts or enhancements over the real as opposed to formal objections of the DA. Occasionally the DA would have it recorded that he had recommended state prison in a case where the judge had granted probation, but even then it was often just for the record and the DA had at least acquiesced in, if not accepted, the judge's offer. Except in cases where there is a mandatory probation disqualifier which the DA can refuse to strike, there is little else he can practically do. If the judge makes an offer that the defendant accepts then the DA can only state his objection. Thus, if the defendant violates probation or the judge's record comes into question, the DA can simply point to the record. The norms of the system limit the field of possible choices in which the DA's influence can be exercised.

Most often the DA is content to indicate the broad parameters of the sentence, i.e., state prison or county jail, and then leave the actual time "up to the court." Sometimes he or she will specify the counts and/or enhancements on which pleas are desired (once again this is for the record) but there is a general expectation of cooperation in striking counts or allegations necessary to come up with the length of

time decided on in the pre-trial.

Compared to Santa Clara, the supervising DA has much less influence. Often a deputy will refer to what the supervisor said or clear something with him, but if the judge is going to take a given course of action it is accepted that the deputy can do little about it. Often the deputy will let it be known that he agrees with the judge but is bound by what the supersivor wrote on the file. In this sort of situation the judge simply takes responsibility for the decision, thus relieving the deputy.

The defense is in a similar position vis-a-vis the judge. Both parties are looking for an indication of the judge's position. This probably explains the lack of discussions between them prior to and during the pre-trial. Arguably in a court like San Francisco which is so overtly concerned with its disposition rate, the defendant's waiver of a trial makes the defense potentially more influential than in the other counties. This is, of course, mitigated by the fact that in any particular case a client is likely to get a substantially more severe sentence at trial.

San Bernardino

Structure of the Disposition Process. San Bernardino is, in geographic area, among the largest counties in the United States, stretching from the eastern border of Los Angeles to the Nevada border. Because of its size, the Superior Court for the county is divided into three areas, each with a courthouse, and separate divisions of the district attorney and public defender offices. The jurisdiction upon which we focused, Central, encompasses the city of San Bernardino, the location of the county seat and the financial and retail center of the county. There

are fourteen departments of the Superior Court, thirteen trial courts, and the Master Calendar court for criminal cases.

The Master Calendar Court deals almost exclusively with criminal matters although the judge will occasionally take a civil case when his workload allows. Court opens at 8:30 a.m. every day, hearing miscellaneous motions not involving much argument. These range from bail applications, probation reports, discovery, certification of guilty pleas from the Municipal Court, hearings on the return of bench warrants, pronouncement of judgment and sentence, probation revocations and continuances. Continuances are rather easily obtained compared to San Francisco and the court routinely gets the defendant's waiver of the 60 day limit for trial.

The shorter motions have usually been dealt with by 10:00 or 10:30 a.m. and then formal hearings are held for the rest of the session. These hearings usually relate to sentence or probation and can take up to two or three days with a number of witnesses on either side and formal argument. They provide the court with a much more extensive body of evidence than is available in normal cases where the judge indicates a proposed sentence on the basis of material available at the pre-trial conference or from a pre-sentence report. Formal hearings are quite rare in the other counties studied and it is hard to estimate the difference they make to the sentencing decision. The judge in San Bernardino said he found them very useful but attorneys we spoke to thought they were of importance only in marginal cases. Certainly one function they perform is to provide the judge with a record on which to base a potentially controversial disposition. It may be that this public justificatory function

is more important than any information function the hearings may serve.

In the afternoon there will usually be more short motions and when these are completed the court continues with formal hearings.

The District Attorney's office has a senior deputy on assignment to the Master Calendar Court. He argues most of the matters arising in the course of the court's business, save for some of the longer motions or hearings which are handled by the deputy in charge of the case. The DA's office has a policy of keeping its trial deputies away from the sentencing process to keep them "case hardened" (i.e., as far as possible to avoid an organizational structure that would make it easy for a deputy to lighten his workload by taking a plea to a lesser offense rather than going to trial). This policy also operates in pre-trial conference where another senior deputy handles the bulk of the cases for the DA's office. A probation officer also is present to assist the court, often participating in proceedings and discussions in chambers in the same way as lawyers for the DA and Public Defender do.

The Public Defender himself does the Master Calendar work on behalf of his office and he performs a similar role to the DA's Master Calendar deputy.

Pre-trial conferences are heard by the MCJ only twice per week, on Thursday afternoons for Public Defender cases and on Fridays for private counsel cases. Two features of the San Bernardino system account for the fact that there are substantially fewer pre-trial conferences than in the other two jurisdictions. First, a procedure called Certification is relatively commonly used in the county, and relatively rare in the other two. Under Section 859(a) of the Penal Code a defendant may (typically on the

day of a scheduled preliminary hearing) choose to plead guilty to a felony in Municipal Court and have his case certified to Superior Court for sentencing. In recent years, about a third of the felony convictions in San Bernardino were produced by such certific ations, while they accounted for less than 10 percent in the other two counties. A case that is certified does not undergo a formal pre-trial conference in Superior Court, for all that remains to be resolved is the sentence. In addition to the use of certifications, courtroom participants estimated that only about a third of felonies that get to Superior Court without a disposition actually have a pre-trial conference. The remainder are settled without such a conference or simply announce as ready without bothering to have a conference. As a result of these processes, it appears that the opportunity for direct judicial participation in the settlement process is somewhat diminished, for so much goes on outside the presence of a judge.

859(a) Pleas. About a third of cases originally charged as felonies are settled on the day of preliminary hearing in Municipal Court by means of a plea pursuant to Section 859(a) of the Penal Code. Because of the circumstances of the bargaining it was very difficult to obtain direct transcripts of the exchanges, but it was possible to get the gist of some of the conversations and to piece together a more detailed picture by interviewing the lawyers involved.

The cases listed for preliminary hearing come up as part of the calendar in the Master Calendar Court of the Municipal Court. Typically, when the case is called they will request that it be put over to the second calling to allow them to discuss it. Between first and second

calling of the calendar the prosecution and defense counsel go out into the hallway outside the court, or cluster around counsel's table, and discuss the case in muted tones. The judge is not party to the negotiations, nor is the defendant. The discussions are short (about five minutes) and sometimes they will break up while defense counsel discusses the offer with the defendant, or the deputy DA handling the case discusses a variation of the offer with the senior DA who is usually present. The deputy handling the case has very limited discretion in varying the offer that his or her superior has approved prior to coming to court.

Although less serious offenses are somewhat more likely to settle via the certification procedure than are very heavy cases, cases resulting in prison terms do get disposed of by this procedure. The proportion of defendants convicted of felonies receiving prison, jail, and straight probation were, in recent years, virtually the same in certification cases and regular Superior Court dispositions. The MCJ in Superior Court is not consulted, in contrast to the procedure that typically occurs in the limited number of certifications that occur in San Francisco. The bargains deal with counts, charges, and enhancements rather than sentence, though the former clearly constrain the eventual imposition of sentence. The District Attorney maintains a policy in all cases of refusing to engage in sentence bargaining. What this means in practice is the deputies are not supposed to discuss particular sentence lengths or recommendations either with defense attorneys or in pre-trial conferences.

Thus in 859(a) pleas the defendant leaves the length of the sentence open. This is later fixed, in effect, by the probation department

in the pre-sentence report. In a case where the probation department strays too far from the norm, the defendant can obtain a formal sentence hearing in Superior Court. Otherwise the Superior Court MCJ considers the pre-sentence report and imposes sentence after brief discussions in chambers with the DA and defense counsel. A formal sentence hearing is the exception rather than the rule.

One important consideration, not applicable once the case has gone to pre-trial conference in Superior Court, is that at the stage 859(a) pleas take place, the deputy DA may only have had the case for a few days. This often means he or she will either be unaware of extra counts or enhancements which may be filed against the defendant (this applies especially to prior convictions which are hard to track down), or be aware of them but not have had the time to file them. This can be used as a bargaining lever to induce an early plea. The price of not pleading at that stage is that the DA will go ahead and file the additional counts or enhancements which may well result in an increase in sentence. The strength of this factor is bolstered by the DA's policy of making his best offer at the 859(a) stage. Any offer from the DA subsequent to the preliminary hearing is either the same or worse for the defendant.

Thus, a substantial number of felony convictions in San Bernardino are "open" pleas, at least as far as sentence is concerned. Those that come up by certification typically involve some type of charge bargain, but no direct discussion of sentence, either in terms of a recommendation by the DA or actual participation by the judge. Under the DSL, charge concessions--e.g., dropping of counts or of enhancements or an agreement not to file them--do directly reduce the defendant's maximum exposure,

but for this class of cases there is little in the way of judicial participation of actual discussion of what sentence the defendant will ultimately receive. This is not to say that the plea is made in total ignorance, for experienced attorneys know a good deal about what the probation department and MCJ are likely to think appropriate, but that direct negotiation about sentence at the disposition stage is much less frequent in San Bernardino than in San Francisco. Now, let us turn to disposition negotiations at the Superior Court stage.

Terms of the Bargining. The conferences take place in the small library attached to the judge's chambers, and the atmosphere is relaxed and friendly. The judge takes off his robe and usually engages in some banter with counsel present. There is a coffeepot to which people can help themselves and people come and go quite frequently while the pre-trial conferences are going on. There will usually be some attorneys watching the conferences as they await their own matters. Sometimes there will be asides between them and occasionally they will comment to those participating on some point of the negotiations. The defendant is not present.

Almost all conferences are handled for the DA's office by a senior deputy who has authority over the trial attorneys in felony matters. He is the same deputy who handles and supervises the 859(a) pleas and authorizes the offers to be made. As mentioned earlier, he has the control necessary to ensure that the offer made at pre-trial is no better than that offered at the stage of preliminary hearing.

The senior deputy DA receives the files from the trial deputy a few days before the pre-trial, along with a recommended disposition from

the trial deputy. He then reviews the file and where necessary will discuss the case with the trial deputy and his own superior. Responsibility for decisions to strike enhancements, etc. lies with the senior deputy and his supervisor.

By contrast, in the Public Defender's office the deputy handling the trial also conducts the pre-trial.

Of the felony cases listed for pre-trial conference only about a third actually elect to have a conference. The remainder either settle or go for trial. Cases in which there is some uncertainty about the sentence or what the view of the judge is likely to be tend to be the ones that go to conference. At the conclusion of the pre-trial conferences the court reconvenes to take the pleas of defendants who have opted to accept the offer made in the conference.

The MCJ hears all the motions in San Bernardino and usually has looked at the file in the remaining cases so a brief introduction to the facts is all that is necessary in most cases. This introduction is done either by the DA or the PD.

Like San Francisco, and unlike Santa Clara, numbers are the subject of discussion at San Bernardino, and the judge will typically offer some specific period of time or specify no time.

While the judge is prepared to suggest a figure, the DA's policy is not to make any commitment on the length of time to be served. This does not mean that deputies do not express opinions on sentence; they quite frequently do. It only means they will not formally agree to say, mid-term, or six months county jail. Counts and enhancements are also bargained about and of course they affect sentence. Most of the discussion

is between the defense and the judge as to what the judge proposes by way of sentence length. The DSL seems to operate as a constraint rather than a determinant. It seems to be a tighter constraint in San Bernardino than San Francisco, for the deputies are much more aggressive about the counts and enhancements to which they want pleas and they will suggest them rather than have them specified by the judge. The fact that we did not observe a single case in which the judge at San Bernardino circumvented a probation disqualifying allegation, compared with several in San Francisco, is evidence of this narrower constraint.

The following case illustrates most of the points made above. The defendant was charged with multiple counts of forgery in two cases.

DA: We need one count on each case. Both forgeries. There are also misdemeanor marijuana cases.
Judge: He withdrew his plea. He's got two counts and a prior. You'll give him a plea on two counts. He'll go consecutive for two years eight months.
DL: Consecutively?!!
Judge: Yes. The prior is dismissed and all the other counts are dismissed.
DL: We'll go to trial.
Judge: What's wrong with that?
DL: Give me a year in county jail and we can go.
Judge: No.
DL: Why don't you go concurrent?
Judge: What's his record?
DA: Grand theft and he went to prison.
DL: The misdemeanor would merge anyway. We're just down to haggling on sentence.
DA: The most he could do is three years eight months. The judge offered two years eight months.
DL: How did you get that?
Judge: One third off on the consecutive. He'll get eight months off in good time.
DL: I don't mind the two counts.
Judge: He's got a grant theft, a burglary. He just loves forgery.
DL: Why not double the probation office recommendation?
Judge: No. He's a snake in the grass. His fifth conviction and he failed to appear on the sentence.
DA: His rap sheet shows a lot more.

Judge: I don't know why you dropped the prior. He has custody of his kids. Sounds righteous to me. He got out of state prison in 74. He has no redeeming graces. Plead and refer him to probation. We won't tell them what I think.
DL: You won't give him aggravated?
Judge: No.
DL: You won't go concurrent?
Judge: No. Based on his record. Maybe he'll sell probation on concurrent.
DL: You know he can't.
Judge: He hasn't got anything to lose.
DL: What's the DA's position? What will you argue for?
DA: I won't talk to them.
DL: I want something to sell to the client.
Judge: Tell him two years eight months. We'll do better and send him to probation. That's a good deal. He could get six years.
DA: He'll do less than two years. He's been in since September.
DL: I don't want to go to trial. He'll get clobbered. Will you accept probation?
Judge: If they recommend concurrent, yes. Then he'd do about two years.
DL: What about one year or eighteen months?
Judge: I might but I doubt they will. It's two years or two years eight months.
DL: The only way to dispo is to plead to one count on each case, then tell him to convince probation.
Judge: I'll make a note in my file about mid-term consecutive for 32 months. I'll consider mid-term concurrent if probation recommends it.

The final observation concerns the use of referral to probation as a bargaining device by which the defendant may be induced to plead. In this case the realistic prospect was a further eight months off the sentence. The case was unusual in that the referral to probation was within a quite specific range with the upper end nominated by the judge and the lower fixed by expectations about the probation department. Referrals to the probation department were usually much less well defined in terms of time. The type of disposition (i.e., county jail or state prison) was nearly always specified.

Influence in Bargaining. The dimension that distinguishes San Bernardino from the other two counties is the influence of the judge, particularly with respect to the DA. There are two factors here, although they are almost certainly related. The first is that the judge at San Bernardino has far less opportunity to exercise his influence directly because of the lower percentage of cases that go to pre-trial conferences. The second factor is that within the pre-trial conference the judge generally plays the role of a neutral third party offering advice. He does not pressure the parties, and in particular he does not pressure the DA to drop counts and/or enhancements as the judges in San Francisco do. Nor does he adopt the role of a facilitator to bargaining between the parties as do the judges in Santa Clara. Rather, he remains fairly detached giving his assessment of what the case is worth, usually towards the end of the pre-trial. When interviewed, he asserted that calendar management was an important factor but this concern was not manifested in his pre-trial demeanor. To quote what is admittedly a single instance, his response to a defense attorney's trump card, to take a case to trial, was "What do I care, they can't send it to me." The remark is ironic but exemplifies a sort of detachment characteristic of the MCJ at San Bernardino.

The two factors are connected because if the judge were more assertive towards the DA there would be more incentive for defendants to take their cases to conference. That would cause calendar "problems" which in turn might lead to the judge becoming even more assertive in an attempt to cope with increased caseload. However, compared to San Francisco there seems to be much less case pressure, at least as perceived by the

courtroom participants. Many felonies are dealt with at the Municipal Court and time waivers of the defendant's right to a speedy trial are routine. These organizational factors give rise to a greater degree of influence for the DA than that enjoyed by the San Francisco DA's office, and create a correspondingly more difficult role for the PD. In contrast to Santa Clara, however, the judge in San Bernardino is still far more involved and influential. This is in some measure due to the DA's policy of not agreeing to a specific length of sentence. The judge is expected to and does specify a figure. (Because of the DA's policy, this figure is the responsibility of the judge alone and renders him vulnerable to criticisms from which the DA is isolated by his policy. Indeed, it allows the DA to join the criticism. In the context of San Bernardino, this is an influential constraint on the judge.)

The case just quoted confirms the analysis to some extent. The judge arrived at his figure independently of the DA who gave no indication of the amount of time he wanted, although he did specify the counts for which he wanted pleas. It was up to the PD to persuade the judge to offer a better deal. He was able to get something of a concession from the judge in that the judge was prepared to take a lower figure if the pre-sentence report recommended it. However, as the comments indicate, given the nature of the probation department at San Bernardino, that was unlikely. It was a small concession. Cases in which the DA and the judge were in conflict are scarce at San Bernardino and that makes it more difficult to assess the relative influence of the two participants. We did not, however, see any instances of the judge successfully pressuring the DA to drop a probation disqualifying allegation, while we saw several

in San Francisco. Further, in the cases where there was some conflict, the judge emerged as less assertive than in San Francisco. This is illustrated by the following case in which the defendant was charged with robbery. There were also allegations that he was armed with (S.12022) and had personally used a gun (S.12022.5).

DL: This guy has never been convicted. Got out of the navy with an honorable discharge. After the offense he went into the army. This happened in 77. If I plead and he gets aggravated he'll have only 41 months to go. If I don't they'll file ADW [assault with a deadly weapon]. If he gets consecutive and they can use it as a double he'd get 55. But I did research and they can't use the second "did use" (a weapon). So there's the problem.
Judge: Is he serious that he didn't do it?
DL: They ID'd him a year later.
Judge: The photo ID was close to the event?
DL: Yes but he had whiskers in the photo. It's nine out of ten chances he'd get 50 months at trial, and for nine months I'd risk going to trial.
DA: We have a sheriff and a marshall.
Judge: You have one count plus "did use?"
DL: And if he doesn't plead they'd throw in another eight months.
Judge: Why don't you drop one of the specials?
DL: You can't sentence on both.
DA: We'll drop the armed and take the used.
Judge: Why not drop the used and take the armed?
DA: No we can't do that.
DL: What about stipulating to the mid-term?
Judge: Why don't you plead him and argue the mid-term?
DL: But I can't tell him how much time he'll save. If it were 14 months that would motivate him. My opinion of the law is that he's only saving nine months.
Judge: What's so aggravating about it?
DA: There's a whole bunch of people and threat of bodily harm. I don't know what the court . . .
Judge: Three years mid-term plus two for five.
DL: It comes out to 34 months. That I'd recommend with CTS because he'd save 15 months.
DA: Go argue it.
DL: He hasn't agreed.
Judge: He won't but I'll do it.

There is no doubt that the judge in San Francisco would have pressured the DA to drop the use allegation which is worth two years.

In San Bernardino the judge suggests that the DA do it and is refused. That line of attack, which could have saved the defendant a year, is immediately dropped. Attention switches to the defense to argue for the mid-term. The best the defense could do was a guarantee that there would not be an aggravated sentence. Since this was unlikely anyway, it is a minor concession and there is little significance in the judge's ignoring t e DA's lack of agreement on this point.

A couple of other points about the style of bargaining should be made here. First, the DA is only minimally involved and the interaction is predominantly between the defense and the judge. Typically the judge indicates a figure at the end of the pre-trial and there is not much deviation from it. We saw only very few cases where a particularly stubborn public defender was about to get the judge to come down significantly on a figure. Occasionally the offer of referral to probation with the opportunity to do better there was made by the judge, but usually when the figure is specified there are no retreats from it. Any bargaining that occurs has gone on prior to pre-trial between the lawyers. Then defense counsel takes the matter to the judge in an attempt to get a better offer. As noted, there are very few concessions by the DA in the course of the conference. The discussions proceed between the defense and the judge, with the defense making the best possible case before the judge announces his position. Once the judge has taken his position it is usually final.

Summary

The three jurisdictions share a common formal structure for disposition of felony cases in Superior Court, though San Bernardino utilizes the certification procedure more than the others. San Francisco is

characterized by very active and influential judges who engage in quite specific sentence bargaining in nearly all cases. It most clearly approximates the general image of a very busy urban court whose participants are manifestly concerned with case pressure considerations, are relatively well integrated into the local political culture, and who value informality over legalism. Santa Clara is different in a variety of respects, including a substantially more "professional" set of reference groups, less overt attention to caseload concerns, a more legalistic approach to disposition decisions, and substantially more influence exercised by prosecutors, largely because of a sense of judicial deference. In the course of our research we described the two systems to participants in the other, and members of each expressed surprise that the other worked at all. Santa Clara participants found the activism of the judge in San Francisco unseemly and uniformly believed (quite incorrectly as it turns out) that the San Francisco system was substantially more lenient than their own. San Francisco participants could not understand why defendants plead guilty to no state prison bargains in Santa Clara, given that most did not know how much jail time they were going to receive. San Bernardino seems to fall somewhere between the two on a variety of dimensions. The MCJ was substantially more active in those cases in which he became involved, but the certification procedure meant that many cases involved relatively less judicial participation. The system had a more relaxed and informal air than the others, though in terms of sentencing it was by far the most harsh. The DA's passivity in refusing to become implicated in sentence discussions tended to make them less influential in pre-trial conferences, but in the context of certifications they appeared to exercise

a good deal of influence indeed. What seems to distinguish San Bernardino from the others was the stronger role played by norms and expectations--issues were less often discussed and debated not because the various sides didn't care about them but because there was a stronger consensus about what was likely to happen.

Given these differences in the jurisdictions, we now turn to a discussion of how they responded to implementation of the Determinate Sentence Law.

Chapter 3

COURTROOM PARTICIPANTS' RESPONSES TO THE DSL

In this chapter we begin to discuss the evidence gathered on the impact of the DSL in our three counties. Here we deal with the perceptions of judges, prosecutors, and defense attorneys of the new law's goals and their attempts to begin the process of complying with it. Succeeding chapters deal with changes in prison commitment rates, guilty pleas, and the use of probation ineligibility and enhancement provisions.

Perceived Goals of the New Law

The DSL represented, in some respects, a radical departure from past sentencing policy and procedures in California. The new law renounced the ideal of rehabilitation and asserted that the purpose of sending people to prison was punishment. It seems doubtful that many people who worked in criminal courts actually believed that they had been sending people to prison for the purpose of rehabilitating them, for so many of the defendants they encountered had extensive past records, had been to prison, and now were back in court again. But the new law presumably meant something beyond a simply procedural change in setting of sentence lengths, and interpreting its purposes constituted the first step in the implementation process.

Policy reforms, particularly those of a complex character, do not speak for themselves. Rather, before they are put into practice they must be understood and interpreted by those responsible for their implementation.

To some extent, this may be simply a matter of coming to terms with the technical aspects of the legislation. But in order to know how, and when, to apply new provisions, it is often necessary for implementers to look to the purposes of the legislation itself. In the traditional model of public administration, the task of establishing purpose was quite straightforward--implementers simply relied upon whatever statements of intent were to be found in the legislation itself. However, in practice, the process may not always be that simple. Legislative statements of purpose have the potential to be ambiguous, contradictory, or pitched at such a level of generality as to be of little operational significance. Moreover, even when they are apparently quite clear, the politically astute implementer will be aware that stated and actual purposes may not necessarily be the same, given that legislative language is itself typically a compromise between groups with quite distinct policy goals. When this is the case, implementers are likely to rely not only on the legislation, but upon their analysis of the politics behind it as a guide to what is "really intended." This is likely to increase the scope for interpretation still further.

Insofar as purpose is unclear and must be interpreted, we would expect the perceptions of implementers to be possibly a significant independent causal variable in shaping policy impact. At the most straightforward level, how the goals of the reform are defined in the legislative context may influence the way in which it is applied. Somewhat more tentatively, we might suggest that how policies are interpreted may influence the willingness of implementers to carry them out. These issues may be illuminated by considering the preamble to the DSL of 1976 which declared

that the purpose of imprisonment is punishment. The meaning of this provision--both in the minds of those who voted to accept it and those who were expected to operate now under a sentencing law whose expressed goals were punitive--was quite unclear. The emphasis upon punishment might have signified (or have been interpreted as) indicating a kind of "get tough" attitude toward defendants, a signal to courtroom personnel to sentence more harshly. In the context of the old ISL and its medical model of imprisonment, though, the stress upon the goal of punishment in imprisonment might be interpreted (by legislative supporters or implementers) in a quite different light. It might mean simply that the old medical model was being rejected and that the new law was embracing the goals of proportionality in sentencing (a just deserts model) as well as renouncing the disparity in terms that a rehabilitative model of prison implies. Thus, this crucial section of the legislation pointing out its meaning is quite ambiguous. This is presumably because of the coalition building process in the legislature, which lead both law enforcement interests and prisoner support groups to agree that the "change" in penal philosophy connoted by the new language was desirable, though their views of what it imported may have been very different.

As a result of these concerns, our initial starting point in attempting to assess the impact of the new law is an examination of the perceptions of implementers about what the new law meant. Our implicit hypothesis is that the relationship between the perceived goals of a policy innovation and those of implementers are the first step in understanding how the innovation actually affects behavior.

In addition to the preamble and its stress upon punishment, the new law potentially altered the disposition process in a variety of ways. The probation/prison decision was mildly constrained by the additional probation disqualifiers (the two prior felony and GBI against vulnerable victims provisions) and great vistas for sentence bargaining in prison cases were opened. Enhancements and concurrent versus consecutive terms meant actual months or years in prison, not simply hopes that the Adult Authority's discretion might be marginally constrained. The costs and benefits of a particular offer were manifest, and could be impressed upon the defendant. The judge could potentially become a much more influential participant in plea discussions in prison cases. How the participants reacted to these new rules of the game comprises the second area of concern in this chapter.

Many courtroom participants were well aware of the debate surrounding passage of the DSL, especially because interest groups in which they were members (e.g., the state district attorney and public defender associations) participated in legislative drafting and lobbying and kept their members apprised of what was going on in Sacramento. The relatively wide publicity surrounding the new law, as well as the varied interests and concerns of the supporting coalition, had two important consequences. First, most court participants knew a good deal about the law prior to its passage in 1976-77, and many had formed fairly strong impressions about its goals and purposes, whether it was a desirable innovation, what its weaknesses were, etc. Second, because the new law was relatively simple in its major provisions, but also complex in its possible ramifications, there was a good deal of variation in participants' beliefs about what purposes the new law was supposed to serve.

Before turning to a discussion of the views of courtroom participants about the goals of the DSL, it is useful to make some preliminary observations about the actual goals of the legislature, and about how this particular case study might fit into some more general notions about the implementation process.

As suggested before, the complex structure of the coalition supporting the DSL makes generalizations about the new law's intended effects difficult. Law enforcement interests hoped that larger numbers of people would be sent to prison if the DSL were substituted for the ISL; civil liberties and prisoner support groups did not particularly desire this result, but felt that any effect on prison rates was outweighed by the new law's advantages in increasing certainty of sentencing, promoting equality across people who committed similar crimes, and reducing the arbitrary power of the Adult Authority.

The ambiguity in regard to the purposes of the legislation was heightened by the fact that the strategy followed by those who supported increased prison rates was indirect rather than direct. Those who desired increased prison commitment rates did not attempt to impose broad probation ineligibility provisions (expanding the model of the use-a-gun-go-to-prison statute of 1975, applying mandatory prison terms to wider classes of defendants), perhaps because their bedfellows in the DSL coalition would not have supported such provisions, and because courtroom personnel, especially judges, might balk at restriction in judicial discretion. Instead, the strategy they adopted appears similar to some ideas discussed in Bardach's study of the implementation of mental health care reforms in California. [Bardach, 1977] Bardach suggests that when groups

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in a legislature desire to achieve goals which require state or local bureaucracies to change their behavior, they must be aware of the various "games" that bureaucrats are likely to play. This is because bureaucrats have their own agendas, goals, resources, etc., and are likely to respond to legislative innovation by themselves playing "games" which may operate at cross-purposes to those of the winning legislative coalition. One particular counter strategy that legislators may play, Bardach suggests, is to engage in "scenario-writing" at the legislative stage, attempting to gauge how bureaucracies will react to possible legislation. In this way they can take account of possible responses before the legislation is enacted, and thus increase the likelihood that the implementors will, indeed, do what the winning legislative coalition desires them to do.

The DSL, from the perspective of law enforcement interests at least, appears to be a possible example of this strategy. Those who desired increased prison rates, perhaps anticipating opposition from courtroom personnel and due process interests in the legislature, wrote a scenario about local courts. The scenario was apparently as follows: Under the ISL, judges and prosecutors were reluctant to send "marginal" defendants to prison because of the apparently very long and uncertain terms. Participants would be likely to respond to shorter, more certain terms by sending more marginal defendants to prison. Thus, the goal of increasing prison rates could be achieved not by attempting to tie the hands of courtroom participants via legislative fiat, but by indirection. By providing the nudge towards increased punitiveness in the preamble and by changing the type of terms available to courtroom participants, law

enforcement interests created a scenario in which local court personnel would respond by sending more defendants to prison.

Legislative interests who did not desire this outcome supported the bill, as indicated above, because of a belief that determinancy offered advantages--certainty for prisoners, perhaps more equality in sentencing--that outweighed its costs in terms of possible increase in prison commitments. Moreover, they engaged in a calculation that in hindsight appears to have been quite mistaken. Evidence available from published statements, press accounts, and interviews suggest that due process liberals and prisoner support groups may have believed that the DSL would produce somewhat shorter prison terms. Since the middle terms for most crimes approximated median time served under the ISL, for "average" prisoners the one-third off for good behavior or program participation might be expected to reduce terms somewhat. Moreover, an informal but publicized understanding was reached that legislation to increase terms would not be introduced, or if it was, that it would be opposed by the governor. In fact, the "clean-up" bill (AB 476) which was passed after DSL but before its effective date, began the process of increasing terms and extensive subsequent legislation has continued this trend. From the perspective of length of terms, at least, liberal hopes for the DSL appear to have quickly foundered.

Thus, coalition building which attracts to a single policy innovation supporters with diverse and contradictory goals may be likely to produce rather vague language and conflicting expectations about the effects legislation is "supposed" to have. This confusion and complexity will, we suppose, be enhanced if different groups of legislators have

attempted to engage in scenario writing and have devised policies in part on the basis of anticipated reactions of implementers. Moreover, since bureaucrats are not stupid, they may be themselves aware of the scenarios that legislators have written, and attempt to make legislative prophecies self-stultifying. Particularly if implementers have their own goals and agendas, and if legislative policy is vague, indirect, and amenable to a variety of interpretations, one might expect implementers to believe that whatever they want, the legislature intends. From this perspective, indirection and ambiguity may be either politically necessary or appear strategically clever to legislative coalition builders, but it may enhance the discretion of implementers to go about their business as usual.

Taking these ideas and putting them into the context of courtroom participants and the DSL, we begin with the hypothesis that those in various roles would tend to have substantially different beliefs about the purposes of the new legislation and its possible effects on prison commitment rates. To the extent that they mirrored the various coalition members in the legislature, defense attorneys, prosecutors, and judges might all think the DSL was a good thing but also believe that it was passed for quite diverse purposes and intended to have quite different effects. We expect, for example, that defense attorneys would believe that the primary goals of the law were to increase sentence certainty, reduce the arbitrary power of the Adult Authority, and, perhaps, to increase equality in sentencing across defendants convicted of similar crimes. When considering the "intent" of the legislature about prison commitment rates, defense attorneys might focus upon the lack of formal constraints on the prison/probation choice, and believe that the new law was not a

signal to increase prison rates. Prosecutors, on the other hand, might cast about in the sea of conflicting signals that constituted the "intent" of the DSL and conclude that it was primarily designed to emphasize the punitive character of imprisonment. They might, when considering what the legislature "meant" about prison commitment rates, emphasize the scenario leading to more prison sentences that law enforcement-minded legislators had in mind when they supported the short, determinate terms. Thus, at the crucial first stage of implementation, the relevant "bureaucrats" in the local court systems might well be expected to adapt to the legislative compromise and indirection embodied in the DSL by finding its intentions, lo and behold, quite consistent with their own beliefs about what was right and proper.

What evidence can we bring to bear on this issue? We conducted interviews with 26 courtroom participants from the three cities, and asked them a variety of questions about the new law. Nearly all thought it was preferable to the ISL, with the only dissenters being a couple of judges who resented even the very mild restrictions on judicial discretion represented by the new probation ineligibility provisions of the DSL. All were asked an open-ended question dealing with their perception of the purpose of the new law: "What do you think are the major purposes of the determinate sentence law? How do you think its goals differ from the indeterminate sentence law?" The responses to this question were then coded, and the great bulk of them fell into one of the four general purposes which had been discussed at the legislative stage: to inform prisoners how long their sentences would be (sentence specificity); to replace rehabilitation with punishment as the primary goal of imprisonment

(punishment); to increase equality in sentencing among individuals being punished for the same crime (equality); and, to reduce the arbitrary power exercised by the Adult Authority (reduce arbitrary power).

The numbers of respondents make analysis across cities or across role incumbents very speculative, but some interesting patterns do appear to emerge in the responses, which are summarized in Table 1. The fact that a wide variety of purposes were mentioned by respondents is in part a function of our permitting them to mention several. Yet beyond this artifact of our question, it seems fair to say that respondents tended to believe that a variety of purposes were intended by the legislature in passing the DSL. This simply reflects, we believe, the fact that they were sophisticated observers, knowledgeable about the complex nature of the interests that had come together to pass the new law. Examination of a few responses to the item dealing with prison rates suggests both division and a good deal of knowledge of legislative politics surrounding passage:

> Yes, I think that that was one reason for changing over to the determinate sentencing law. I think there was a feeling that not enough people were going to prison. [DA, SB]
>
> * * *
>
> Yes, I think so. I think that's a fairly clear message . . . I think it's an intention of the new law that there be more people sent to state prison. I think that's based on the assumption that under the prior law too few people were sent to prison. I don't know, however, whether that assumption is accurate at all. [Judge, SC]
>
> * * *
>
> I suppose that might. . . well have been in the mind of the people who were supporters of the determinate sentencing law scheme that by making uniform and essentially shorter, based-on-the-statute-books penalty for crimes, that there

TABLE 1: COURTROOM PARTICIPANTS' PERCEPTIONS OF GOALS OF DSL

"What do you think are the major purposes of the DSL?"

	Sentence Specificity	Punish-ment	Equality	Reduce Arbitrary Power	Other DK
A. Percent of respondents citing purpose first:					
Total (26)	42%	23%	19%	12%	4%
Judges (7)	57	14	14	0	14
Prosecutors (11)	36	18	27	18	0
Defense Attorneys (8)	38	38	12	12	0
B. Percent of respondents ever citing reason (multiple responses permitted)					
Total (26)	50	38	38	19	
Judges (7)	20	29	43	29	
Prosecutors (11)	54	27	45	18	
Defense Attorneys (8)	62	62	25	12	

"Do you think that the legislature intended that more people should go to prison under the DSL?"

	Yes	No	DK/ Can't Say
Total (26)	46%	42%	12%
Judges (7)	29	57	14
Prosecutors (11)	36	45	18
Defense Attorneys (8)	75	25	0

would be more inclination on the part of the court or the prosecutor or the defendant himself to get into a state prison commitment situation. [Judge, SB]

* * *

Yes, I do. I think the legislative intent is to make state prison an alternative that is more acceptable to sentencing judges. [DA, SC]

* * *

I don't know if it was an objective or a result. I am inclined to believe that it was an accidental result, which I foresaw, but I don't think, considering those persons who were active in formulating the new law, that they really foresaw it as one of the primary results. [Judge, SF]

* * *

I have no knowledge of that. I think that's a by-product, I think that's an accident rather than intended. [DL, SB]

* * *

No. Definitely not. I would think it wouldn't have changed anything, or at least the thinking or philosophy behind it [wouldn't have changed anything]. [DA, SB]

* * *

No, I don't read that into it. I don't read that as a factor or legislative intent. [Judge, SC]

* * *

I have some problems answering questions about what the legislature intended, because everybody who voted for the bill probably had a different conception of what they were doing. [Liberal supporters] thought it would keep the terms the same or decrease them. The bill does not address itself to the issue of the numbers of people to be sent to prison, unless you look at other legislation, like probation ineligibility rules. If you look just at SB 42 and the bill that followed it, it doesn't address itself to who should go to prison. It purports to leave that decision unencumbered. So . . . their intentions . . . I'm sure the liberals did not intend to send anybody there who would not have already gone there. [DA, SC]

Not only do respondents seem to be about evenly divided on this most fundamental question of the purposes of the new law, but they are also relatively aware of the character of the legislative coalition and its effects on one's ability to judge "intent." Moreover, they have some appreciation for the indirect strategy being pursued by those who wished to increase prison commitment rates under the DSL.

We do not, however, find the pattern we initially expected: given ambiguity in legislative history and statutory language, we expected that implementers might tend to believe that whatever they wanted to do was what the legislature intended that they do. Although the number of role incumbents in each category is small, there is a tendency for the reverse, at least insofar as defense attorneys and prosecutors are concerned. Defense attorneys more often see the law as operating <u>against</u> their preferences, in that they see it as punitive in character; prosecutors, on the other hand, seem somewhat more likely to perceive the purposes of the law that were consistent with the interests of due process liberals and prisoner support groups in the legislature.

We believe that this reversal of perception--at least insofar as prosecutors and public defenders are concerned--may be more compatible with an alternative strategy for sense-making under ambiguity. Specifically, there may be a tendency not so much to see what one wants to see in a policy, as to interpret it by reference to the perceived goals of others. Thus, in some instances it might make more sense to approach ambiguous policies warily, with as much an eye to how they might reflect and enhance one's opponents objectives, as to how they might help one's own. This, it could be argued, may be particularly true of policy arenas where

lines of division between different interests are fairly sharply defined. Needless to say, courts are one arena where such relatively clear-cut lines are found. The adversary system tends to stress that law enforcement and defense interests are opposing and that each side cannot win. This, in turn, may lead each side to adopt a defensive posture vis-a-vis the other and to perceive, evaluate, and respond to policy innovations accordingly.

In sum, then, it appears that at the initial stage of implementation, a good deal of uncertainty surrounded the beliefs of participants about what they were "supposed" to do. This uncertainty was largely a product of the nature of the legislation itself, of the coalition building that had produced it, and of the strategy followed by law enforcement interests which desired to increase rates of imprisonment. Implementers were, at least with respect to the basic question of prison commitment rates, free to believe what they wished about the purposes of the new law. This situation produced a good deal of disagreement about the purposes of the new law, and a curious but potentially interesting tendency to interpret ambiguity not in terms of one's own goals, but those of one's opponents.

Now, we wish to turn to another aspect of implementation, the formulation of rules and office policies.

Learning How to Use the New Law

The second stage of implementation involved learning how to use the new law and establishing policies about how its provisions should be applied. The law's application could entail quite complicated arithmetic

computations. In a case with more than one count and/or enhancement, numerous sentences were possible. Rules for consecutive sentences, decisions about whether to impose or stay terms for enhancements, etc., made the process of computing the maximum exposure, as well as settling on the actual sentence to be imposed, matters of "higher math," at least as far as many courtroom participants were concerned.

In each of the jurisdictions studied, the three major agencies--district attorneys, public defenders, and judges (often with the assistance of the Probation Department) made efforts early on to figure the new law out. Seminars were held at the local level as well as through statewide organizations. Each office usually assigned a few people to become specialists in the DSL, charging them with learning the computational intricacies of the new law and acting as consultants to others in the office. Many developed forms that assisted in the computation of possible maximum terms, indicating the steps to be gone through in computing time for consecutive terms and enhancers.

Most could not engage in a great deal of advance planning because the "clean-up" bill, AB 476, did not pass until a few weeks before the DSL went into effect. However, because the new law specified that only offenses committed after the effective date of July 1, 1977 would be subject to the new penalties, while those committed before would proceed under the ISL, in most jurisdictions several months passed before large numbers of DSL cases reached the disposition stage. A prosecutor in Santa Clara gives a typical account of how he and his officemates learned how to use the new law:

[B]eing a professional and being in the job of criminal law one hundred percent, I think you would be derelict in your duty if you didn't go out and study it. So there was a certain amount of initiative you had to take on your own. You can read the Penal Code. In this office it was . . . you know . . . we were assisted greatly by a sentence handbook that was put together by [two District Attorneys who were assigned to become expert on the new law] and also had--I'm not certain how many--but we had training sessions in which [the two specialists] would explain what the law was and what the application of it would be. There's an awful lot of areas in the determinate sentence law which I don't think have been fully decided yet. And [they] would both give us their opinions as to what, as to how you should interpret given provisions of the sentence law . . . But basically, we have the handbook, which helps greatly. It . . . the front part of the handbook enumerates, oh, probably 99% of the crimes we deal with. . . . It is easy to find and it tells you what the mitigated, middle, and aggravated terms are for given crimes. Then it also deals with the enhancements, and then there are also pages behind it that deal with the application of those rules, and also there's in this handbook . . . we have a copy of the court Rules which get into things like what are factors that are properly considered by the sentencing judge in terms of mitigation or aggravation. So that handbook is tremendously valuable and the fact that we deal in this job . . . you deal with sentencing fairly constantly and so you become aware of it by experience, probably by mistakes.

Most respondents indicated that although they anticipated that the law would be difficult to figure out, in practice it turned out to be relatively straightforward:

> It wasn't that difficult once you got down and figured out what it was. The only difficulty was that it was such a total revamping that you had to start from scratch in doing things and a tremendous number of code sections that we were familiar with were totally changed. And there are a lot of things in it which you had to get used to. The basic theory of it is not that tough. There's a lot of very complicated calculations which you have to sit down with a pencil and paper sometimes and figure out, but they are doable and once you get used to where to look for pieces and where buried in the penal code all these things are . . . they are not all together. The things are scattered all over in the code and you have to put all those pieces together each time you want to sit down and figure something out. But it's also something which is relatively susceptible to diagramming or setting up charts or setting up some form to process through, and as a result everybody has done that. There are numerous different sources for these things and those are very helpful as well. . . . I think the main difficulty was having to incorporate an entirely new system all at once which had no connection to what you were used to. [PD, SF]

When asked whether others were well prepared to deal with the new law, respondents, not unexpectedly, tended to suggest that others were not so well prepared as themselves. The group that was generally singled out as having the most difficulty coming to grips with the new law was private defense counsel. Their problems were attributed to their lack of administrative apparatus available to others for developing forms or receiving day-to-day advice about use of the new law.

Our observations of plea bargaining sessions, which began about a year after the law went into effect and continued on and off for the next year, suggested that the participants had by that time generally gotten the hang of sentence calculation, though in complicated cases there was still a good deal of discussion. As noted above, two issues are at stake in prison cases: what is the maximum exposure, and what terms can actually be imposed. In a complicated case, with multiple counts and various enhancements, computation of the maximum term can be difficult. Some judges began discussions of these cases by specifying what the maximum was (this procedure is tactical as well as informational, for it opens the discussion with the worst possible outcome, setting the stage for compromise by the prosecution and defense). It was not infrequent for there to be some initial disagreement about the maximum term, as a result of mistakes in computation on the part of the judge or a DA or PD. Although

there is a single theoretical maximum term in all cases, not all lesser terms can be imposed. Rules for calculating sentences constrain the possible outcomes to a set of discrete numbers, ranging from the mitigated term on one count up to the maximum possible sentence. Occasionally, we would observe sentence bargaining in a prison case which settled on a particular sentence, say four years, only to discover that it was not possible to run the terms in such a way that four years could be the sentence. More often, though, the problem did not arise, as the discussions on sentence went back and forth between some notion of deserved time and the actual charges and possible sentences.

In sum, learning about the formal and computational aspects of the new law was viewed as more of a problem prospectively than in practice. The availability of training materials and forms to lead the participant through the sentence calculation, as well as consultation by others working under the law, made the transition often quite confusing but did not seriously challenge the ability of the participants to get on with their work.

California Judicial Council Rules

Another aspect of the process of implementation involved the development and application of rules about how the new statute's provisions were to be applied. Several sources for such rules or policies existed: the California Judicial Council; appellate court decisions; local policies developed by judges, prosecutor offices, etc. The kinds of decisions that could be affected by such policies include the conditions under which defendants should be considered for probated versus prison sentences;

the use of consecutive versus concurrent sentences; the choice of the middle or mitigated or aggravated term in prison cases; the alleging, striking, and imposing of terms for enhancements; the alleging and dropping of probation ineligibility provisions. The development of such "rules about the rules" is another potential source of influence on the process by which the DSL was implemented.

The DSL called upon judges to follow rules about sentencing to be set forth by the California Judicial Council. The Judicial Council promulgated a series of rules in May 1977, instructing judges about various aspects of the law and on how they should proceed in applying its provisions. In part, these rules simply repeated and interpreted the provisions of the law. For example, they drew attention to the so-called "double-the-base-term" provision which limited the number of years to be served by those with enhancements. The rules also purported to provide some guidance for decisions not greatly constrained by the law itself, in the form of a long list of criteria which judges were supposed to take into account in their sentencing decisions.

One set of rules specified the factors which the judge was supposed to consider in deciding whether to grant probation or to impose a prison term. This list included statutory limitations (the probation disqualification provisions), danger to others, a variety of defendant characteristics, and the nature of the crime and harm done. These four general categories are elaborated by eighteen more specific factors (e.g., prior performance on probation, whether defendant is remorseful, provocation, etc.). Although the list is very long, its operational meaning remains somewhat unclear. Presumably, it is designed to fill a general

educative function for judges, but it includes nearly all factors that might conceivably affect sentencing decisions, without specifying any weights. To say that they should be "considered" provides little in the way of guidance, and in practice they seem to provide little more than a kind of talisman which can be waved over whatever sentence is selected by the plea-negotiation process.

In order to assess the impact of the CJC rules on disposition discussions, we undertook a rough content analysis of the transcripts of pre-trial conferences observed. Table 2 indicates the percentage of cases in which at least some reference was made by participants to criteria falling into one or the other of the CJC's four general categories. As can be readily seen, in each of the jurisdictions there was considerable attention paid to the facts of the case and the characteristics of the defendant, but relatively little to questions of statutory eligibility or danger to others. The table also indicates that the average number of specific criteria discussed per case was quite small (the maximum possible was twenty). Moreover, even this tends to overstate the significance of the rules, for our observations of the hearings indicated that even when criteria were discussed, the discussion was brief. Our general, but strong, impression is that the rules had little impact on court decision making. Rather, court personnel simply continued to discuss and appraise cases largely by reference to the criteria which they had used in the past.

The CJC Rules also cover probation ineligibility. There are two types of probation ineligibility characteristics now in existence. The general section on probation, section 1203, specifies that probation shall not be granted to certain offenders (e.g., those who were armed with deadly

TABLE 2: FACTORS DISCUSSED IN PRE-TRIAL CONFERENCES (PERCENT OF CASES IN WHICH CJC CRITERIA MENTIONED)

	San Bernardino (36)	San Francisco (44)	Santa Clara (30)
Statutory Eligibility	8.3%	0.0%	23.3%
Danger to Others	27.8	.9	3.3
Facts of Crime	75.0	88.6	80.0
Defendant Characteristics	88.9	97.7	96.7
X number of specific factors mentioned (maximum possible equals 20)	4.3	4.4	4.7

weapons, who committed great bodily injury, had prior felonies, etc.) "except in unusual cases where the interests of justice would be best served by granting probation" (these may be called "presumptive" ineligibility characteristics). The second set of probation ineligibility rules ("mandatory" provisions) are non-discretionary, stating that for certain persons, regardless of any other provisions, probation "shall not be granted." These include those convicted of specified felonies who personally used a weapon (1203.06); those convicted of possession for sale or of selling more than a half an ounce of heroin (1203.07); those convicted of specified felonies who have, within the past ten years, been convicted of two designated prior felonies (1203.08); those who commit certain sexual assaults (1203.065); those who commit great bodily injury in the course of certain crimes (1203.075); those who commit specified crimes against elderly or disabled persons (1203.09); and those who commit violent felonies while on parole (1203.08). Some of these preceded the passage of DSL (personal use and heroin sale), some were part of the DSL package (two priors, crimes against elderly and disabled, crimes while on parole) and some were passed in the 1979 toughening of the DSL (sexual offenses, commission of GBI).

Of course, discretion remains even when the legislature attempts to be unequivocal in its specification of rules to be followed by court participants. One of the major courses of discretion when sentencing decisions are constrained is the alteration in charges, a feature of implementation of the DSL which we shall turn to shortly. Insofar as the mandatory probation ineligibility rules are concerned, the Judicial Council

rules did not entertain the possibility that a judge would refuse to obey them. Instead, for the presumptive provisions, which prohibit probation except in "unusual cases," the CJC offered some guidance about what constituted an unusual case. This included the presence of such factors as a lack of advance planning or circumstances of great provocation, a substantial period of time having passed since a prior conviction, youth or lack of serious past record, ill health on the part of relatives, etc. Finally, the CJC rules deal with the issues of selection of terms (lower, middle, and upper) and with consecutive versus concurrent sentencing. Judges were provided with a list of circumstances which could be considered as aggravating, and hence as justifying imposition of the upper term (e.g., violence; viciousness; vulnerable or multiple victims; serious past record; etc.), as well as those which may be considered in imposing the mitigated term (e.g., defendant was passive participant or was provoked; exercised caution to avoid harm; has relatively minor past record; shows remorse or acknowledges wrongdoing at early stage; is ineligible for probation but would have received it but for that ineligibility, etc.). Concurrent or consecutive sentences were to be selected on the basis of such factors as whether the crimes were independent of one another, whether they were committed at different times and places, as well as by reference to any circumstances in aggravation or mitigation. Again, the intended impact of the rules is not entirely clear. The list of factors to be considered on the question of sentence length--selection of the base term and consecutive versus concurrent sentencing--is long, and in any particular case there are presumably a number on either side which might be cited. In San Francisco, for example, in nearly every case

in which the defendant pleaded guilty and a prison term was imposed (almost invariably a term somewhat below the maximum term, as a result of sentence bargaining), the judge mentioned that the defendant had made an "early admission," presumably fulfilling the requirement that a reason for the sentence chosen be offered. The frequency with which this factor was mentioned is suggestive of the ways in which such rules are reasonably flexible and adaptable to the needs of courtroom participants, especially if the list of relevant criteria is sufficiently inclusive.

The various "rules" of the CJC provided little in the way of guidance to judges in making decisions under the new law. The lists of factors to be considered included nearly all possible criteria and the rules provided no real guidance about how the several present in any case ought to be weighed against one another. Presumably the strong norms of judicial discretion in sentencing lead the CJC to this approach to its task. Whatever its motivation, the rules--in their initial form at least--provided little more than laundry lists of factors of which court participants were already quite well aware.

Office Policies

Another source of influence on the implementation process was provided by office policies developed by agencies in local courts. Thus, for example, a group of judges might conceivably get together and make decisions about the application of rules for sentence length, establish a policy about staying time for enhancements, etc. Or, a District Attorney might establish a policy about the conditions under which probation ineligibility characteristics or enhancements were to be alleged and under which

it was appropriate for deputy DA's to consider dropping them. In addition, mechanisms for monitoring the behavior of deputies might be put into place to increase the likelihood of compliance with such rules.

In none of the jurisdictions was there evidence that judges got together and attempted to formulate policy about how the law should be implemented. Although they talked about the law's provisions, and often discussed computational issues or sought advice from others about the advisability of certain settlements, in none did they appear to develop what might be called policies. Because of the stress on discretion in the role of judge as sentencer and the statutory mandate to a statewide organization, the Judicial Council, to develop such policies, none of the judges interviewed indicated that their local cohorts had discussed or developed policies, and most expressed some dismay at the very idea. The only type of implementation policy discernible in all three jurisdictions, and an informal one at that, was an attempt to reduce judge-shopping. In all, the norm developed that if a judge made a sentence offer at a pre-trial settlement conference and the offer was refused by the defendant, a judge dealing with the case later (e.g., the judge to whom the case was assigned out to trial) ought not make a better offer without first clearing it with the original judge. However, such rules were not directly associated with the DSL although they became more prominent as the new law permitted increased sentence bargaining in prison cases.

The District Attorneys in all three counties did promulgate policies dealing with implementation of the new law. Though there were some variations, they basically followed the same line: whenever a defendant fell into a class specified by the legislature as meriting either probation

ineligiblity or a sentence enhancement, all such allegations were to be made as soon as they became known (typically no later than the filing of the information, when firm rap sheets were supposed to be available) and they were not to be struck or dropped unless they were later demonstrated to be factually incorrect. All developed some means for supervision of the behavior of charging and trial deputies to insure that they followed the policy, usually via a nominal requirement for clearance with a supervising DA before a probation ineligibility allegation or enhancement was dropped. By the same token, all offices were aware that such policies required flexibility in their administration. Moreover, as we shall discuss below, such policies in substantial measure require cooperation of the judge if they are to be effective. Comments from upervising DA's in two counties suggest these office policies, as well as their somewhat flexible nature:

> Generally speaking, it is our policy that we will not strike enhancements to get pleas. If we have some factual difficulties in proving the case, whatever, that's a different situation. But, for instance, if we have an individual charged with robbery with use of a firearm and it's a provable case, we will not strike that use allegation simply to get a plea. If the individual does not want to admit the use of a firearm, he's just going to have to go to trial.
>
> What is your position [on filing of enhancements]?
>
> We file all enhancements that are provable. And that's always been the policy.
>
> What mechanisms exist in your office for supervision to insure that deputies are in fact carrying out these office policies?
>
> It's my responsibility, as I mentioned earlier, to supervise all the lawyers that are handling any of the felonies here in this court. So it is my responsibility to review those files and their responsibility to discuss those cases with me to be sure that we are on the same wave length. If for some reason a decision has to be made to strike an enhancement, or whatever, it is either my decision to make or [my superior's]. Either one of us have to be consulted on these matters. That's the general policy or guideline. [DA, SB]

* * *

> 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.
>
> What sorts of methods do you use to ensure that [these] policies are being followed?
>
> Well, we have a record keeping system where the office recommendation on every felony case is written down and placed in a file, and if there's going to be any deviation from that recommendation which lowers the disposition or custodial time of the defendant it is to be cleared through me. And if it's not, I can look at the sentencing calendar on any given day and compare them with our recommendation sheet to see if there's a discrepancy. People who are in court will advise me sometimes if there's some kind of discrepancy. But by and large, the attorneys are very good: we have an open door policy and if they disagree with my recommendation they can come in and talk to me about it. If they are in a pre-trial conference and the judge thinks we're too high, they come in and talk to be about it. We haven't had any real problems about control. [DA, SF]

We shall return to some of the issues raised by these policies later. How do the control mechanisms operate in practice? If the office policy is to allege all possible enhancements and probation ineligibility characteristics, do most defendants against whom they are alleged suffer the sentences that the legislature mandated they should? If not, why not? At this point, it is simply worth noting that in all jurisdictions the District Attorney established the policy of not attempting at the charging stage to tailor the charges to some desired outcome. Rather, in a perfectly rational fashion--both in terms of "following the will of the legislature" and in terms of subsequent bargaining leverage--prosecutors in all three counties nominally tried to charge everyting at the outset. From the perspective of office policy, then, failure to do so should only have been the result of an oversight or mistake, and not to some substantive judgment about the nature of the defendant or the possible outcome of the case. By the same token, a subsequent decision to drop an allegation of probation ineligibility or an enhancement should only have been justified if there was a change in the available evidence, or in the evaluation of its strength.

Summary

The first stage of implementation of California's DSL occurred at the local level. Participants in court systems had to learn what the purposes of the new law were and how its formal provisions might be applied, and then formulate rules about how to use it. In this endeavor, they were assisted by what they knew of its legislative history, by seminars conducted by various statewide organizations, and rules formulated

by the California Judicial Council. Local participants were quite cognizant of the complex and confusing legislative coalition that had supported the law, and of the consequent difficulty in establishing what the law's "intent" was. It was, after all, a Uniform Determinate Sentence Law, whose preamble announced that the purpose of prison was not rehabilitation but punishment. Thus, it seemed to have in mind some movement towards equality in sentencing (either within or across jurisdictions), as well as some desire that sentencing practices be more punitive. Even the latter, though, is ambiguous. Many courtroom participants tended to believe that the reference to punishment suggested increased punitiveness, while many academic supporters simply saw it as a move from rehabilitation to a backward looking just desert model punushment. The law made few direct references to prison commitment rates, but many participants were aware that influential supporters of the bill hoped that it would produce increased resort to imprisonment. If implementation is conceived as carrying out the will of the legislature, then, the DSL involved a probably quite common situation in which such will or intent was by no means simple to discern.

The assistance given by the California Judicial Council was minimal. Local prosecutors formulated office policies that may be conceived of, theoretically if not practically, as "full-enforcement" strategies. That is, they formally charged all provisions of the law (e.g., probation ineligibility allegations or enhancements) at the outset, and stated that these would not be dropped for bargaining considerations. As we shall see later, the full-enforcement policy does not appear to have been

carried out in any of the jurisdictions, both because of administrative slippage and disposition bargaining, but at the outset there does appear to have been an intention to attempt to carry out the "letter" of the new law.

Chapter 4

PRISON COMMITMENT RATES AND SENTENCE LENGTH

Introduction. Many of the strongest expectations developed in the course of consideration and passage of the DSL dealt with its effects upon the proportion of convicted defendants who might be sentenced to prison and upon the length and variation in terms imposed. In this chapter we consider these expectations, how evidence might be gathered to evaluate their accuracy, and what our data suggest about how the DSL appears to be working in practice. No commentator we have been able to discover seems to have believed that adoption of DSL would reduce the prison commitment rates and most asserted that they would increase under DSL. Its potential effects on sentence length were the subject of all possible conjectures--that terms would remain about the same, would increase, and that they would decrease. We argue here that it is difficult to assess the impact of the implementation of the DSL on prison rates, given the short time that has passed since it went into effect and difficulties in controlling for rival hypotheses that might account for observed increases since its passage. The data on sentence length are touched here only briefly, for they are best addressed at the state rather than the county level. Under the ISL, terms were fixed by a state agency, the Adult Authority. Although one might expect that length or variation of sentences would be reduced under the DSL, there is little reason to anticipate that such a change might vary across counties in any interesting way.

Effects on Prison Rates. Nearly all who discussed the potential effect of passage of DSL ventured the opinion that the new law would produce an increased proportion of convicted defendants sent to prison. This, indeed, was one of the features of the legislation that most attracted support from the law enforcement community.

Three distinct but related reasons why the law would result in increased rates of imprisonment were advanced: (a) an increased willingness on the part of judges to send people to prison for determinate terms; (b) the general political message of a desire for increased punitiveness implicit in the legislation; and, finally, (c) the additional formal probation ineligibility provisions included with the law.

The first argument was the most commonly offered. Under the ISL, it was said, judges were reluctant to send defendants to prison when the terms were so open-ended. Especially when the defendant was viewed as a "marginal" candidate for prison, the ability of the judge to specify a relatively short term would increase judicial willingness to send people to prison:

> The reasoning behind the belief that imprisonment will increase is roughly this: judges have been thought to be reluctant to imprison marginal offenders when they could not guarantee a reasonably brief term. Instead, they placed them on probation or, increasingly, in jail and on probation. Now, however, 16-month prison terms, to be reduced through "good time" to about 11 months, will be available, to be followed by a relatively brief period of parole. Judges, it is said, will be more willing to commit marginal offenders for this and other relatively brief periods of time and they may be encouraged to do so by county officials who would rather have the state pay for incarceration and supervision than the county. [Messinger & Johnson, 1978, p. 31]

* * *

> [S]ome judges have expressed the opinion to the authors that they are now more likely to send marginal offenders to prison. Their attitude in the past was to favor probation, since the high maximum terms under indeterminate sentencing created the fear that the Adult Authority might actually keep a marginal offender for an extended time. Now that a property offender can be sent to prison for 16 months, which with good-time credits is about 10 2/3 months in prison, courts may use the prison sentence instead of a "bullet" in county jail (12 months in county jail as a condition of probation) so frequently used now. The actual time served would be about the same in either case, after being reduced by the good-time credits that can be earned under either the county jail sentence or the prison term, but the state prison sentence is at state instead of county expense. [Cassou & Taugher, 1978, p. 31]

* * *

> [M]ore persons may go to prison because of the new certainty of time to be served . . . [Parnas, 1976, p. 1]

A variant on this argument, offered by some court personnel, involves not only an increased willingness on the part of the judges to impose prison sentences, but an increased inclination of defendants to accept plea bargains which involve a prison term. When the difference between time served in jail and prison is diminished (e.g., the 16 month sentence versus the bullet in county jail), it is sometimes argued, the defendant will pay increased attention to the period of supervision following incarceration. The six-month or one-year parole period following a DSL prison sentence is viewed as more desirable than the customary three-to-five-year term of probation following a county jail term for a felony conviction. Thus, although defendants typically prefer to do time in local facilities, if the time is roughly equivalent, the "tail" hanging over them may lead some to prefer prison to jail.

Notice two implications of the above arguments. First, they suggest that one should expect the most significant increases in prison rates for

"marginal" cases--that is, those cases in which prison is not the modal punishment. Operationally, then, one would expect that crimes with relatively low prison rates under the ISL would experience the greatest rise in prison rates under the DSL.

Secondly, the argument suggests that if the terms under the DSL are markedly increased, one might see a reversal in the expected trend. If what concerned judges under the ISL was not the uncertainty of time in and of itself, but the potential for terms longer than the judges felt appropriate, then at some point increases in the terms to be served under the DSL might cause judges to begin, once again, to be leary of sending "marginal" offenders to prison. Moreover, to the extent that shorter terms, combined with short parole periods, encouraged defendant acceptance of prison under the DSL by reducing the differential between prison and jail time, increased terms (or parole periods) would presumably lessen this effect as well.

The second argument that the DSL might promote increased resort to prison is somewhat more amorphous. The new law's preamble, renouncing rehabilitation and embracing punishment as the justification for imprisonment, bespeaks a kind of "get tough" attitude towards criminals. This political message, it was sometimes said, would not fail to be heard by judges in California, all of whom face the electorate at periodic intervals. Thus, the DSL was sometimes pictured as part of a general wave of sentiment against excessive leniency and under its administration there might be pressure to use imprisonment more freely: "[M]any police and many prosecutors simply believe that too few offenders are imprisoned; they will press for more imprisonment." [Messinger & Johnson, 1978, p. 31]

The Los Angeles Times story reporting passage of the DSL, as well as other press coverage, referred to it as a "law and order bill." [L.A. Times, 1976, p. 3]

Finally, as noted above, the law contained some provisions that formally restricted eligibility for probation for those with certain characteristics (two prior felonies and a designated offense conviction in the current case; crimes against the elderly). Because the ambit of these provisions denying probation eligibility is not particularly broad, one might not expect a great deal from them, but they might have some marginal effect.

Thus, for a variety of reasons, most expected that the new law would produce an increase in the rate of imprisonment of those convicted of felonies. We shall shortly return to a discussion of some more complex ways in which this process might operate, but before doing so we wish to discuss briefly a quite contrary expectation. Criminal courts are on-going social systems. They involve day-to-day interactions among relatively small groups of participants whose working lives are greatly affected by their interpersonal relations with one another. They are also very busy and crowded institutions. Almost all adapt by moving from the adversary setting of the criminal trial to plea bargaining as the predominant method of disposing of their caseloads. One of the primary facets of plea bargaining systems is the development of "going rates" or "ball-park figures." These norms about what is the appropriate penalty for defendants convicted of various offenses usually depend upon the nature of the crime (e.g., injury to others or risk of injury versus property or "victimless" crimes) as well as the past history of the defendant (is this a hardened

criminal or a young kid who may still be saved from a life of crime?). [Mather, 1979] Most criminal courts in California had, prior to the passage of the DSL, reasonably well understood, if not formally articulated, sets of norms dealing with what types of offenders merited prison and what types did not. As Heumann so nicely demonstrates in his study of court personnel in Connecticut, learning these norms is the crucial socialization experience that personnel undergo when they join a criminal court. [Heumann, 1978]

These norms are neither universal nor are they impervious to attempts to modify court behavior. For example, localities may differ significantly in their propensity to send individuals to prison--the "going rate" for a robbery may be quite different in one county than in another. There was variation in going rates across our three counties in the last full year prior to implementation of DSL.

Table 3: PRISON RATES, ROBBERY AND BURGLARY CASES, 1976

Conviction Charge	Robbery	Burglary 2nd
San Bernardino	80.0% (75)	29.4% (145)
San Francisco	51.0 (145)	20.3 (266)
Santa Clara	71.3 (227)	21.7 (493)

The going rate for robbery was substantially lower in San Fransicco than in the other two localities, while there was less variation among them in treatment of burglars. Moreover, in all three jurisdictions the going rate for robbery was quite different from that imposed for burglary.

The development and persistence of norms is important in evaluating the effects of innovation on criminal courts. Just as the exclusionary

rule had a limited impact upon police behavior because it came into conflict with the norms and goals of police officers, attempts to change sentencing policy may be mediated through the existing going rates of a court system. Heumann and Loftin have examined the impact of a use-a-gun-go-to-prison statute in Michigan. [Heumann & Loftin, 1979] This innovation required that those convicted of possessing a firearm while engaged in a felony must be sent to prison and must have an additional two years added to their sentence. Heumann and Loftin found that the actual impact of the law--despite its apparently stringent provisions and a policy directive issued by the chief prosecutor which forbade charge reductions in gun use cases--was affected strongly by the norms of the local courts about whether people "deserved" to go to prison. The two primary adaptive mechanisms they observed were (1) an increased use of bench trials and findings of guilty on lesser charges (a method of getting around the inability of deputy prosecutors to reduce charges); (2) a willingness of judges to decrease by two years the sentence on the primary charge in order to compensate for the necessarily-imposed two-year enhancement for gun use. Thus, court participants were not totally unaffected by the innovation, but tended to continue to pursue their own notions of what was equitable, even in the face of strong pressures to change their sentencing policies.

This perspective suggests that one might not expect as rapid a change in sentencing policy as might have been anticipated by the arguments advanced at the outset of this section. To the extent that jurisdictions had fairly well-developed notions of what was a prison case and what was not, the law might

be expected to have limited impact. As one commentator observed at a conference held just before the DSL went into effect:

> Bargaining patterns established in response to California's distinctive regime of indeterminate sentences may not change dramatically with the implementation of the new sentencing law. Perhaps the offer of county jail sentences even in rape and armed robbery cases became common because of the perceived necessities of the plea bargaining process when the Adult Authority reigned supreme. Nevertheless, the view that this sort of offer is appropriate may now have become internalized. Prosecutors may have persuaded themselves that their offers of county jail time in serious felony cases are just, or they may simply not pause to reconsider this established way of inducing guilty pleas merely because the new statute has been enacted. [Alschuler, 1978, p. 75]

To sum up, many who participated in or observed the process of passage of the DSL believed that it would increase rates of imprisonment, even though not all believed this to be a desirable result. From the perspective of students of criminal courts in general, the importance of inertial effects of past disposition patterns suggests, on the other hand, caution in predicting that innovations will produce immediate effects.

A variety of problems--both conceptual and practical--plague attempts to measure the effects of the law on rates of imprisonment in our three jurisdictions. We shall begin our discussion with a brief foray into these issues, focusing upon the question of how one might go about attempting to assess whether the new law has "caused" an increase in the prison rate in the three counties, and some of the practical data problems that we have encountered. We then turn to a discussion of the evidence available. We shall examine both "long term" and "short term" trends in rates of imprisonment in the three counties, as well as introducing some data from our interviews dealing with what courtroom participants believe to have been the effects of the law.

Because the issues are complex, let us state our conclusions as simply as possible here at the outset. There seems to be a relatively widespread belief--evident in press accounts, the statistics provided by the California Judicial Council, and current discussions of the need for new prison construction--that the expectation that the new law would produce increased rates of imprisonment has proved correct. However, our data suggest a more complicated account of what has happened. Although the data do indicate some increase in rates of imprisonment since the law went into effect in 1977, they do not permit the inference that such an increase has been "caused" by the passage and implementation of the law. Prison rates in the three jurisdictions, as well as the state as a whole, were rising before passage of the law, and this trend may in fact account for the rise seen since passage of the law. We therefore conclude that the law may have contributed to the increase in prison rates since its passage, but that such an assertion cannot be demonstrated by the data available. In fact, another way of viewing what happened in California over the decade of the 1970s is to argue that changes in the general political climate contributed to a law and order movement which was manifested in legislation and an inclination on the part of judges to send more defendants to prison. From this perspective, the DSL may be viewed not as a "cause" of increased prison rates, but as itself a "result" of forces at work that demanded and produced a more punitive sentencing policy. Now let us turn to the considerations that lead us to these conclusions.

Measuring Change in Prison Rates. The most intuitively plausible approach to evaluating whether the DSL has caused an increase in prison

rates is to examine such rates before and after passage of the law, to see whether there has been change. The simplest approach would be to look at prison rates in a year prior to passage of the law, and in a year subsequent to its passage. If a difference were found, one might attribute it to passage of the law. There are, however, a variety of perplexing issues in such an approach. This discussion of difficulties may strike many readers as belaboring the obvious. Yet a good deal of the evidence cited to support the view that the law has increased prison rates does appear based on a simple before-and-after comparison, and hence some difficulties with this approach ought to be explicitly noted.

The first possible confounding factor is that the aggregate characteristics of the defendant population or charges might have changed before and after passage of the new law. If, for example, robbers in the post-law period on average have committed a larger number of robberies, or have more often been armed or more often injured their victims than those in the pre-law period, this might account for an increase in the prison commitment rates for robbers subsequent to passage of the law. By the same token, if burglaries in the post-law period have, on average, more serious past records, this might be the cause of increased rates of imprisonment for burglars in the post-law period, rather than the effects of administration of the new sentencing law. In short, any comparison of "before" and "after" commitment rates must take account of characteristics of crimes and defendants before asserting that the law has caused a change.

This first problem can to some extent be overcome by statistically controlling for changes in aggregate defendant characteristics, but there

is a further and more perplexing difficulty. Put most simply, under the best of circumstances two data points are not sufficient to justify a conclusion about the effects of passage of the DSL on the rate of imprisonment. This is because it is next to impossible to establish whether any observed change was real or not, in the sense that it co-varied with the passage of the law as opposed to other possible factors that might account for the observed change. (Even with a large number of time points, statistical analysis of change cannot establish "true" causation, but it can determine whether the co-variation was independent of the effects of other factors.) For example, it is conceivable that the rate of imprisonment is, over time, subject to extensive and random variation, as illustrated in Figure 1. If the pattern were of this form, over several years there would be no "real" change in rates of imprisonment, though there is substantial year-to-year variation. If our "before" and "after" periods happened to coincide with random fluctuation upwards (e.g., if our "before" period was Year 5 and our "after" period was Year 6 in the hypothetical illustration), we might conclude that the law had "caused" an increase in the prison rate, when in fact there was no "real" change.

Figure 2 illustrates another possible pattern in rates of imprisonment which could also render use of two points deceptive. Here, we see a long-term trend towards increased resort to imprisonment, which both predates the passage of the law and continues on after it. If we choose as our before and after points any particular year (say, for example, the law was passed in Year 4, and our before period is Year 3 and our after period is Year 5) we will observe an increase in the rate of imprisonment. Moreover, unlike the previous example, the change is "real," rather than

HYPOTHETICAL PATTERNS IN PRISON RATES

FIGURE 1

Variation Around Unchanging Rate

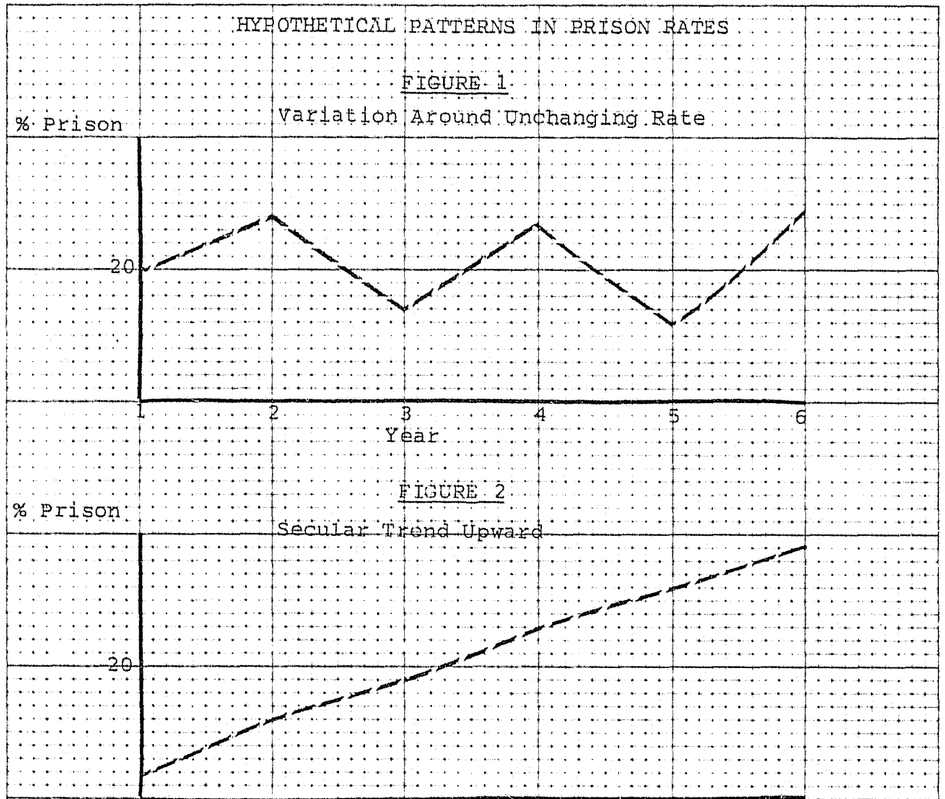


FIGURE 2

Secular Trend Upward

FIGURE 3

Response Followed by Decay to Old Rate

being simply a random fluctuation around an unchanging rate, but to attribute it to the passage of the law could be misleading.

A third possibility that makes use of only two points difficult is illustrated in Figure 3. Here, the passage of the law might cause "real" change in rates of imprisonment, but this might be simply a "blip" which gradually dies out as various participants adjust to the new law and learn ways to minimize its effects. If this were what happened, data from a single before and after year might greatly over-exaggerate the "real" effects of the law, for it might not capture the gradual decay back to the original mean.

Given these difficulties in measuring the effects of an innovation and the uncertainties surrounding use of only a single before and after measurement, the optimal way to measure change is to collect a large number of data points before and after the innovation. It has typically been suggested that thirty or more points, evenly distributed on either side of the policy innovation, should be gathered, and then subjected to an appropriate statistical procedure, such as interrupted time series analysis. [Campbell & Cook, 1979] However, such a strategy is not available to us here. Only very crude data on commitment rates are available for more than a handful of years prior to passage of the DSL. Moreover, even if such data were available, the fact that we are concerned here with a very recent policy innovation means, perforce, that we have available only very limited information about what has occurred in the post-law period.

What, then, are we to do? Keeping these limitations in mind, it is nonetheless possible to bring to bear some evidence on the subject.

We shall discuss this evidence, and then attempt to assess what, on balance, we seem entitled to conclude on the basis of available data, keeping in mind the conceptual and measurement difficulties we face.

What Do Courtroom Participants Believe About the Effects of the DSL on Prison Commitment Rates? Perhaps the most straightforward way to begin assessing the impact of the new law is to ask those who work with it daily, the judges, prosecutors, and defense attorneys whose case disposition decisions comprise the impact of the new law. There are a variety of considerations that might be taken into account in evaluating the general weight to be attached to their views though on balance we believe that they should be taken seriously.

On the one hand, those involved in the courtroom decision making process might be unreliable observers of the effects of the DSL. Their very closeness to the process and to each other may bias their responses. Their evaluations may, for example, be influenced by the views of others involved in the process, such that their reports reflect how the collectivity of participants have constructed a version of reality, rather than an individual account of what it is in fact like. Even in the absence of social pressures and processes, individuals within the process may make systematic errors in drawing inferences about what they observe. For instance, they may be inclined, when asked about the effects of the DSL on prison rates, to trot out a single example of an individual who was a sure candidate for county jail under the old law but who received the 16-month mitigated term under the DSL. This process by which observations may be distorted has been discussed in recent literature on cognitive psychology. For example, some recent experimental work has argued that

individuals are predisposed to embrace a law of small numbers in which even a very small group of observed cases (for example, a few individuals who might have unexpectedly been sent to prison under the DSL) are considered representative of the universe from which they are drawn. Similarly, it has been shown that people tend to exaggerate the importance of well-elaborated, graphic and concrete data about specific instances, as compared to statistical generalizations based on more representative samples. [Nisbett & Ross, 1980]

On the other hand, there are also some good reasons for not dismissing the perceptions of participants lightly. They may not be trained to think as rigorous social scientists are supposed to think, but they do have access to data superior in many respects to that available to many researchers. They are more likely to know the nuances of particular cases, the characteristics of the judge involved, about what wasn't on the record but really important, and so on. Likewise, a judge or prosecutor is presumably in the best position to know what would have been done in other circumstances (e.g., under a different sentencing system). To the extent that such observers have had experience under both laws (a condition that was met by some but not all of our respondents), they are likely to be able to provide in some ways a more rigorous test than a correlational approach (the before and after comparison using aggregate data). They may still exaggerate or otherwise misread their experience, but the errors are not likely to be simplistic ones, especially since courtroom participants tend to work with quite elaborate conceptions of the going rate for particular crimes or classes of defendants [Mather, 1979] and thus intuitively to exercise a fair degree of control for other possible determinates of sentence.

On balance, then, we would argue that although the perceptions of court participants cannot be regarded as sufficient proof that a particular phenomenon exists, they are well enough grounded that they ought to be taken quite seriously. This means, in turn, that if there is a strong consensus about something, a fairly convincing counter case has to be made before we dismiss their perceptions as incorrect.

What, then, do the participants interviewed conclude has been the impact of the DSL on prison rates? As with nearly all the evidence available to us, the results are equivocal. Among the 26 participants interviewed, responses about whether they thought the DSL had had any effect on numbers of people sent to prison were as follows:

	More	No Change	Can't Say/ Don't Know
San Bernardino (7)	2	2	3
San Francisco (8)	7	0	1
Santa Clara (11)	2	7	2
Total (26)	11	9	6

The very small numbers of respondents make any analysis difficult. Aggregating across the three cities, those interviewed appear about evenly divided between those who believe the law has produced increased prison rates and those who believe it has not had effect. If we examine responses within cities, it appears that respondents in San Francisco believe that the law <u>has</u> produced increased prison commitment rates, whole those in Santa Clara believe it has had <u>no effect</u> and San Bernardino personnel are about evenly divided.

Proponents of both views were often quite sure of the correctness of their beliefs:

> [J]udges are not as reluctant to send offenders to state prison because they know they're not going to get buried there and they know precisely at the time of sentence, at the time they made the decision on sentence . . . they know precisely how long the guy is going to spend in state prison, and they are not worried about an administrative board burying him. [DA, SF]

* * *

> Under the old law . . . more judges then felt that if a case is either a probation and county jail case or a 1-to-15 case or a 2-to-10 case, they would more tend to favor the local sentence, rather than sending somebody up for . . . on [an ADW] for example, six-months-to-life. A lot of judges realized, well on [an ADW], the actual sentence will only be 3 or 4 years, but . . . we kept telling the judges about these cases that the guy did 10 or 15 years on those indeterminate sentences. And I think that was a very telling factor with a lot of judges, and especially the ones that weren't very strong and would have a hard time making up their minds. Those people who aren't very strong, I think, tend to favor local time, especially if we get a [Correction Department recommendation] for local time. Now, many, many judges are disregarding [such] recommendations that recommend local time, because they know the guy's only going to for 16 months, two years, or three years. And so they disregard their feelings that they had before about not sending somebody to prison because now they know they can send them for a specific, limited term. [PD, SC]

* * *

> I think the result was . . . because the terms on state prison were so small . . . that that resulted in a lot of people going to state prison who perhaps would not have gone to state prison. [Judge, SF]

* * *

> It hasn't changed my sentencing pattern one bit. I have not sent one person to prison that I would not have ordinarily sent before, and I haven't kept anybody local that I would not have ordinarily kept before. [Judge, SC]

* * *

According to all the seminars I've gone to, yes. But from what I've seen here, no. Everybody says now we have the mitigated term where the judge can say, well, I'd rather send him there rather than 365 days in the county jail. I haven't seen a judge do that yet . . . So, as to the amount of people going to state prison in this county, at least . . . I'd have to say there is really no difference. [DA, SB]

* * *

Well, I think that was some of the advanced advertising, if you will, that that was one of the benefits to lure the support of the police and the district attorneys. Hey, look, we want the DA and the police to support this so it can get through committee, so it can be passed by all the Assembly and the legislature. That this will insure that people who get probation in the past will go to prison. Well, that wasn't true. The law before was pretty clear about who was eligible and who was not eligible and I'm not that conversant with it, but I've looked at the . . . law prior to July 1, 1977, and there doesn't seem to be that much difference. I think that if you took a man prior to July 1, 1977, that is sent to prison under the new law, he would have been sent to prison under the old law. I think the standards haven't changed that much. There have been a few things that have differed, but the things that the judge had discretion on whether to grant probation or sentence him to prison--he would look at a report and he would see numerous felony convictions, he would see a series of crimes--and the guy went to prison. I don't think that's changed. [DA, SC]

Thus, both sides appear to believe that they understand what has happened in their court system, and there is substantial disagreement about whether the law has had the effect of increasing resort to prison or not.

Trends in Prison Rates in the Three Counties

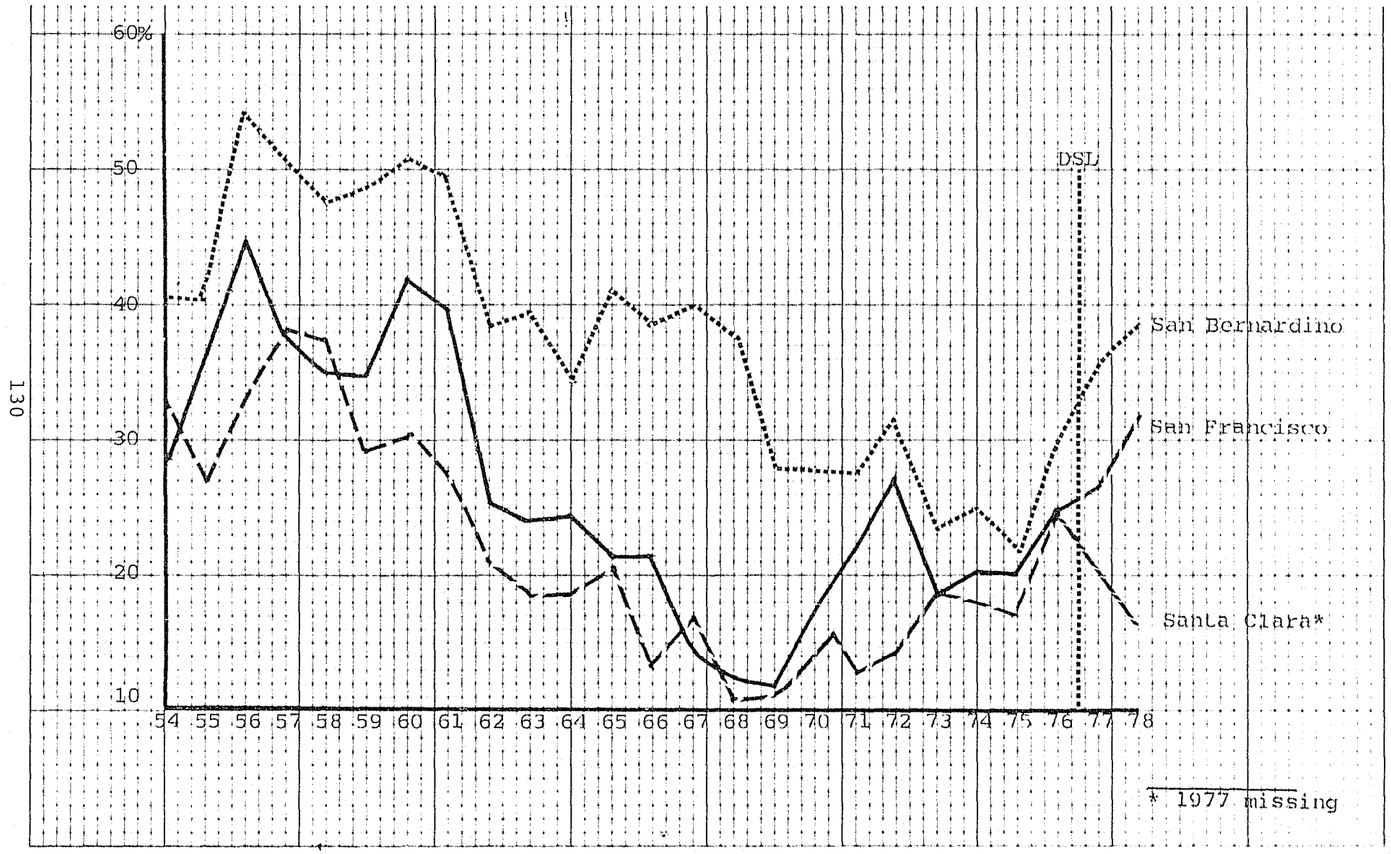
If we move from thinking of "before" as simply a single year prior to passage of the law to placing the effects of the law into a longer-term context, we might conceive of both "long" and "short" term trends in rates of imprisonment. What is "long" and what is "short" is an arbitrary matter.

For purposes of discussion, though, we shall divide out trend data into two groups. The "long" term data involves prison commitment rates between 1954 and 1978, with the early date determined by the availability to us of published data for the three counties. For shorter term trends, we shall examine 1974-78, the period in which the idea of a determinate sentence system began to gather real political currency, leading to its passage in 1976 and formal implementation in mid-1977.

Long-Term Trends in Prison Rates. The rate at which convicted defendants are sentenced to prison varies over time. Factors related to it presumably include the crime rate; changes in statutorily defined penalty structures (e.g., in recent years, the moves to decriminalize certain offenses or to increase the penalty for rape); prison capacities; changes in penal philosophy (e.g., the so-called "community-based corrections" movement of the late 1960s), and public attitudes towards sentencing, which may affect the selection of prosecutors and judges, and thus sentencing decisions of those who hold these offices. It is difficult to sort out these various effects in any jurisdiction at any particular time, and we do not propose to do so here. But it is important to note that evaluation of the effect of any particular factor on prison rates must take account of the overall context in which a change occurs.

Thus, examination of the effects of the DSL on prison rates in our three counties should place these rates in the context of longer-term trends in resort to prison as a sanction. In Figure 4, we present the prison rates for the three counties over the period from 1953-78. Several patterns appear salient. As might be expected, these rates tend to vary considerably over time. Although each jurisdiction has been characterized

FIGURE 4: PRISON RATES, SUPERIOR COURT CONVICTIONS, 1954-78



by quite a bit of year-to-year variation, in all three the period saw a steady decline in prison rates beginning in the late 50s. There appear to have been some similar forces at work in all three counties, for although they tend to resort to prison at quite different rates, changes in the rates move together. Thus, over the period, the bivariate correlations of yearly prison commitment rates are moderately high:

	San Francisco	Santa Clara
San Bernardino	.68	.72
Santa Clara	.76	

There are patterns in prison commitment rates across the three counties over a substantial period of time, but the patterns are somewhat different. San Bernardino is the harshest of the three counties, consistently sending higher proportions of defendants to prison. The rate in San Bernardino falls relatively consistently throughout the period, but appears to turn up in 1976, and continues upward in the next two years. In San Francisco and Santa Clara, on the other hand, the trough in prison commitment rates appear to have been reached in the late 1960s, and during the decade of the 70s, prison commitment rates seemed to be on the rise in San Francisco. Santa Clara is a bit more of a puzzle, showing a trough in the late 60s and somewhat unstable rates in the 1970s. Data problems for 1977 and 1978 make the actual prison rates in these two years something of a mystery. (See Appendix I for a discussion of data sources.)

We can only speculate about the factors that produced these trends. The generally lower prison commitment rates during the 1960s may have been associated with the increased concern with defendant rights associated with

the Warren Court's criminal procedure decisions; the community-based correction movement; a state program designed to subsidize local sentences; and increased concern with treatment of racial and ethnic minorities who have traditionally been disproportionately represented among the defendant and prison populations. The late 60s and 70s brought a variety of changes that might be related to increase prison rates, including the development of the "law and order" issue along with a perceived rise in violent crimes and fear of victimization; reactions to the urban uprisings of the 60s; and changes in correctional philosophy as witnessed by the developing view that rehabilitation does not "work" and the increasing prevalence of neo-conservative rhetoric stressing the punitive and incapacitative purposes of incarceration. Finally, it is conceivable that the "liberalization" of laws dealing with soft drug use might have contributed to the increases in prison rates. To the extent that such offenses were in the past generally processed through Superior Court but rarely received prison terms, reducing the penalties (i.e., taking marijuana possession cases out of the felony category) might produce an apparent increase in harshness simply because the denominator upon which prison rate is computed includes fewer trivial offenses. We do not, however, find much evidence for this factor at work in our three counties. For the five years in which we have detailed data by offense (1974-78), exclusion of marijuana cases (on January 1, 1976, possession of less than an ounce made punishable by up to $100 fine only) has no appreciable effect on change in prison rates over time.

From the perspective of evaluating the effects of the DSL on prison rates, use of imprisonment appears to turn up in advance of the implementation

of the law. San Bernardino suggests a nice example of what we think is a "premature" (at least from the perspective of attributing an increase to the impact of the DSL) upturn in prison rates. Although subject to year-to-year variations, the overall prison rate in San Bernardino fell reasonably steadily from 1956 to 1975. If we look, for example (as well as inspecting Figure 4), at five-year averages over this period, we find the following prison commitment rates:

1956-60	51%
1961-65	41%
1966-70	35%
1971-75	26%

In 1975, the rate increased to 30 percent, followed by rates of 36 percent and 39 percent in the succeeding years. Although we cannot be sure what the future will bring, the rates had been falling steadily until 1975, and began to rise in 1976. To attribute this to the new law seems implausible, unless one argues for very strong anticipation effects, for which we found little evidence. In sum, the upward movement seen in the post-DSL period is embedded in a long-term pattern of variation. In the context of this pattern, the evidence available suggests that prison rates were rising in all three jurisdictions before one could reasonably believe that the DSL was "causing" an increase. We shall return to a discussion of this point when we examine short-term trends, with a similar conclusion argued there.

Short-term Trends. The data provided to us by BCS for the three counties during the years 1974-78 enable us to examine prison rates for various crimes, as well as to examine some defendant characteristics (age, race, sex, prior record) which might be associated with changes in sentences. These years covered the period in which the ISL began to come

concerted attack (see, for example, In re Lynch, a California Supreme Court decision which required the Adult Authority to take proportionality into account in fixing sentences), the adoption of the Adult Authority of a form of determinate sentencing via administrative decree (their policy change of 1975 provided that sentences for new inmates be fixed within the first year of confinement), as well as debate, passage and initial implementation of the DSL itself.

Figures 5, 6, and 7 present data for the three counties on prison commitment rates for all Superior Court convictions, as well as cases in which the most serious arrest charge was robbery or burglary. (Note: We have chosen to present much of our data in graphic form, plotting rates over time. For those who wish to see the same data presented in terms of tables indicating marginal frequencies, please consult Appendix II.) The data on Santa Clara are somewhat suspect, as indicated before, but the phenomenon alluded to in the long-term trend data is apparent in the 1974-78 period as well. The rates of imprisonment in the post-law period do appear somewhat higher than in the pre-law period. Thus, a simple comparison using 1978 as the "after" year and either 1974, 1975, or 1976 as the "before" year, would suggest an increase. Yet in all three counties, the rate rose between 1975 and 1976 and this upward shift not only predates the implementation of the DSL (which was passed and amended during the spring and summer of 1976, signed in September 1976, and formally went into effect in July of 1977) but was greater than shifts seen in later years. In percentage terms, the 1975-76 increase for all offense categories under discussion here (all Superior Court cases, robberies, and burglaries) is larger than changes in the "post-law" period. Moreover,

FIGURE 5:

PRISON RATES FOR ALL SUPERIOR COURT CONVICTIONS, 1974-78

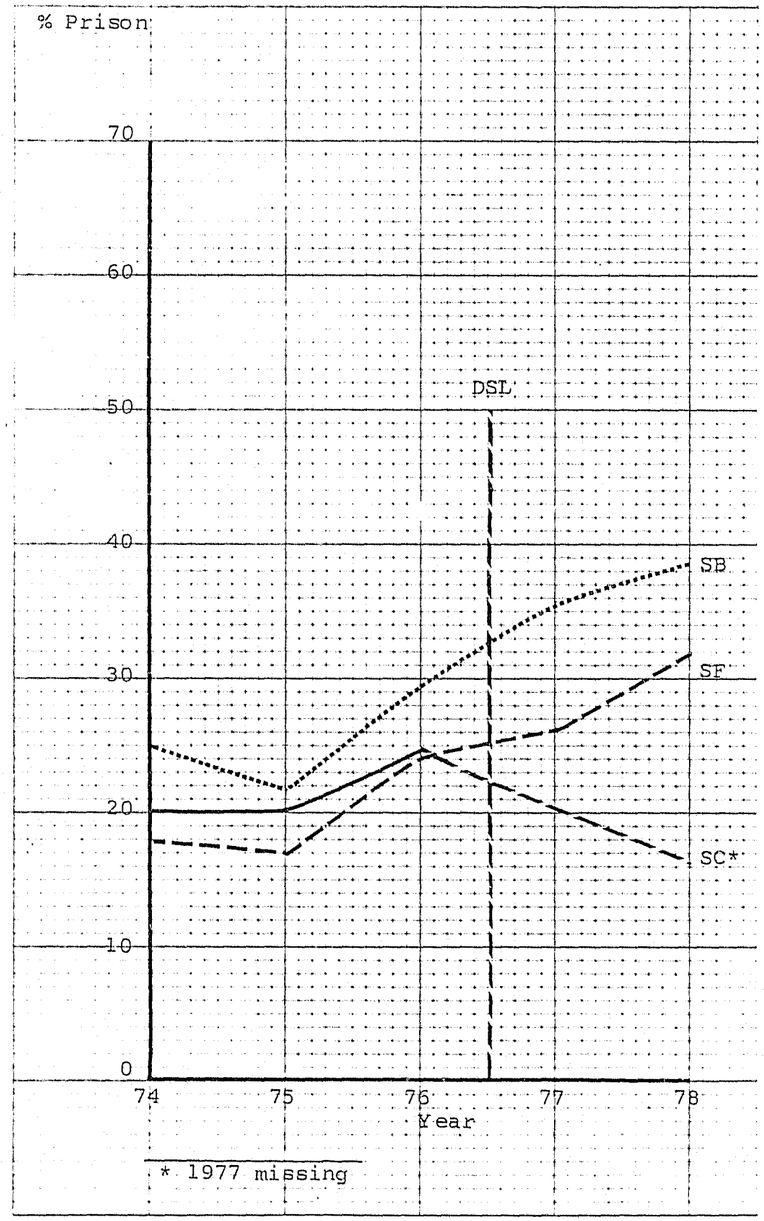


FIGURE 6:

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

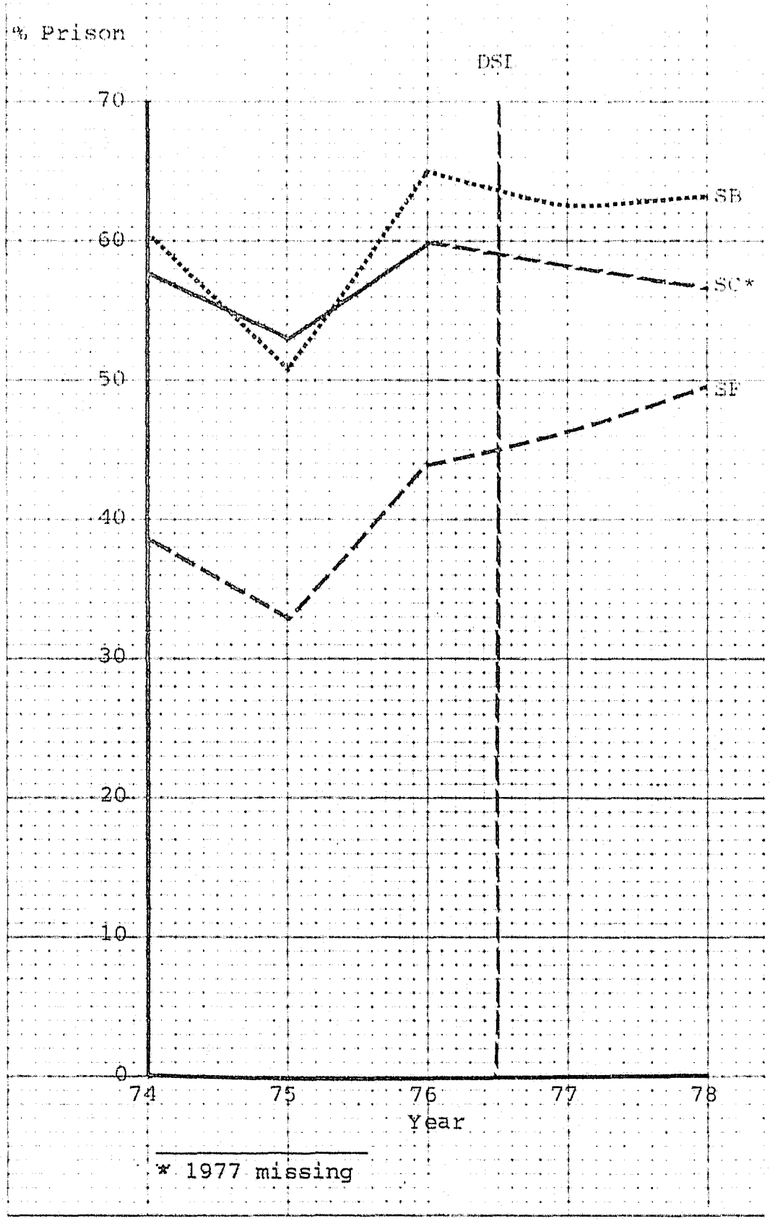
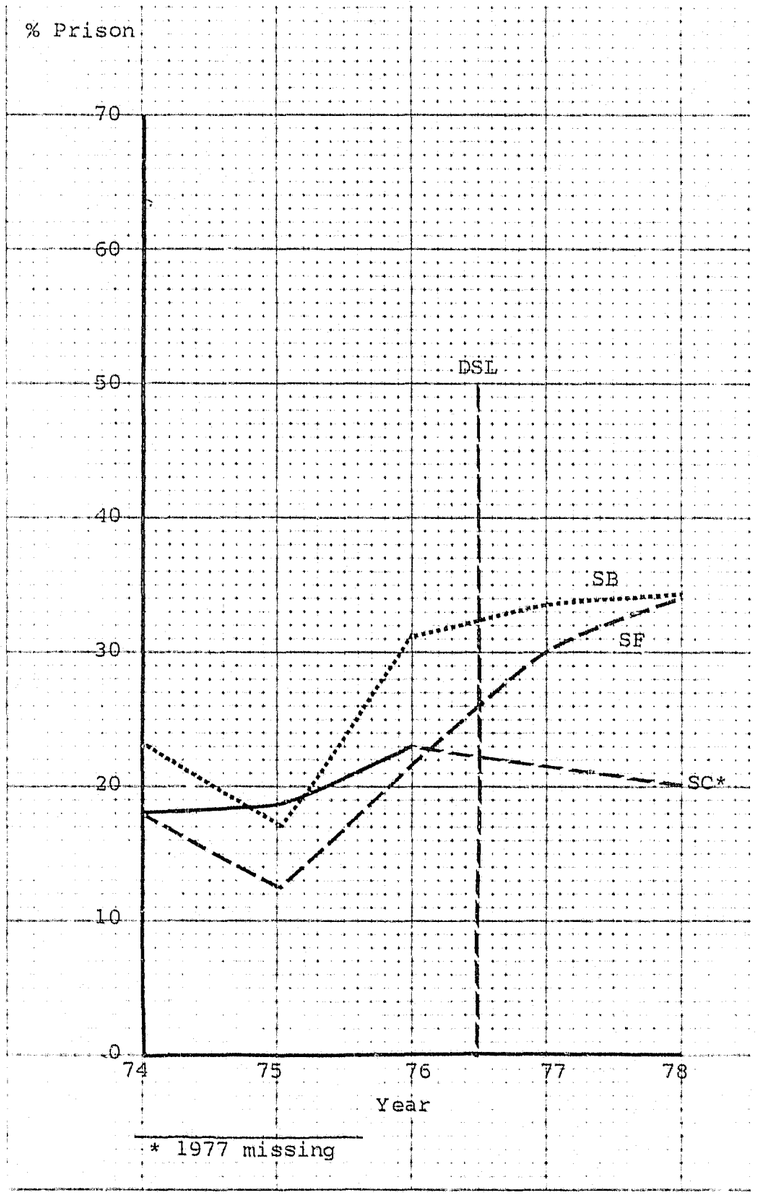


FIGURE 7:

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



as suggested in the previous section, 1975 was not an abnormally low year vis-a-vis long-term trends in the three counties. Thus, there is some evidence that prison rates rose "prematurely," at least vis-a-vis the hypothesis that an increase was caused by passage and implementation of the DSL.

Data on defendant characteristics during the 1974-78 period suggest relatively few changes. The only variable related to prison commitment is past record, and there was a small increase in defendants with prior prison records in San Francisco and San Bernardino. The data on defendant characteristics do not suggest, therefore, that a different mix of defendants was being dealt with in the post-law years, thus masking the effects of the DSL on prison commitment rates. What small changes in defendant characteristics there were went, in fact, in the direction of suggesting increased prison commitments independent of the law's effect. (See Appendix II for presentation of these data.)

The BCS data do not provide information on the nature of the initial charges against the defendant (e.g., number of charges or charges other than most serious charge). However, some data that we gathered from Superior Court files on burglary and robbery cases in 1976 and 1978-79 suggest that charging patterns and offenses did not change markedly between the year prior to and after passage and implementation of the law. As indicated in Table 4, the mean number of charges, the percentage with more than one charge, and a measure of seriousness of charges are all relatively stable across the two years, with the exception of San Francisco robbery cases. However, the increase in the number of charges in robbery cases seen in San Francisco does not appear to render the modest increase

Table 4: CHARGES AGAINST BURGLARY AND ROBBERY DEFENDANTS

	San Bernardino		San Francisco		Santa Clara	
	1976	1978-79	1976	1978-79	1976	1978-79
Most Serious Charge						
Robbery						
$\bar{X}$ number of charges	2.0	2.6	2.3	3.2	2.5	2.6
% with more than one charge	53.5%	59.5%	52.3%	74.0%	61.9%	56.9%
$\bar{X}$ seriousness score*	33.5	36.2	33.7	40.0	37.6	35.9
	(97)	(173)	(284)	(289)	(291)	(232)
Burglary						
$\bar{X}$ number of charges	1.8	2.2	1.6	2.2	2.6	2.3
% with more than one charge	57.5%	51.7%	49.6%	56.7%	67.1%	62.7%
$\bar{X}$ seriousness score*	29.4	30.1	25.3	28.1	32.8	31.7
	(221)	(300)	(260)	(293)	(350)	(346)

SOURCE: Superior Court Records

*The seriousness score for charges is one we adopted from Hubay, 1978. BCS assigns a so-called hierarchy score to criminal charges, with lower numbers denoting more serious charges. In order to make the number more intuitively plausible--with increasing scores associated with increasing seriousness--Hubay takes the reciprocal of the score, and multiplies it by 100,000. The score reported here consists of the sum of the hierarchy numbers for the three most serious charges facing a defendant in Superior Court, transformed in the manner described.

in prison sentence spurious, for the change in prison rates remains the same across single and multiple charge defendants.

In sum, then, evidence available on defendant characteristics does not suggest changes that might be masking or suppressing change caused by the DSL in the direction of increased prison rates. Indeed, to the extent there has been change in past records, it is in the direction of contributing towards increased harshness. The premature up-turning is not an artifact of change in prior records, and the relatively modest increases in harshness have not been artificially reduced by a "pool" of defendants with better past records or less serious charges.

To recapitulate the argument thus far, it appears that there was, in the period subsequent to passage of the DSL, some increase in the rate at which convicted defendants were sent to prison. Overall as well as for burglary and robbery cases, the increases were modest. The increasing rate of imprisonment, moreover, appeared to commence somewhat before the DSL was passed. Finally, in terms of defendant attributes and charges, changes between the pre- and post-law periods were consistent with some increase in prison commitment rates independent of the passage of the DSL itself. The evidence available from examination of trends in prison commitment rates themselves, then, does not tend to support the view that the implementation of the DSL had a large effect, though it may have had some.

There is another way of examining data on prison commitment rates in the pre- and post-law periods that seems to us an even better test than simple prison rates themselves. The DSL is supposed to increase prison commitment rates because judges are more inclined to send "marginal" defendants to prison if the terms are short and determinate. This account

suggests that the population from which increased prison commitments might be expected to come is comprised of defendants who, in the past, received jail terms. That is, the informal effects notion would not seem to suggest that any substantial proportion of defendants who in the past received straight probation ought, under the DSL, to now receive prison terms.

Thus, if we consider the population of defendants who receive some form of incarceration--that is, those who receive either jail terms or prison terms--the proportion of this group receiving prison sentences ought to rise and the probation/jail ratio should remain relatively constant. Using this percentage as a measure of increased resort to prison, moreover, tends to control for the effects of a general law and order movement, which may be pushing up both prison and jail rates simultaneously. Figures 8, 9, and 10 present data on several rates over the 1974-78 period. The rates plotted include the proportions of convicted defendants sentenced to jail and prison, total incarcerated (jail plus prison) and the proportion of those incarcerated who received prison terms. The marginal effects hypothesis suggests that the latter measure--the proportion of all those incarcerated who receive prison terms--should increase. A rise in this rate would suggest the anticipated trend to send more marginal defendants to prison rather than jail.

The data do not argue for a strong DSL effect. For two of the three counties, there is no evidence of a shift upward in the use of prison in the post-law period (San Bernardino and Santa Clara). In San Francisco there is some evidence of an upward trend in 1978. In Appendix III, we present similar figures for burglary and robbery cases in the

FIGURE 8:
TRENDS IN INCARCERATION RATES, SAN BERNARDINO
SUPERIOR COURT CONVICTIONS, 1974-78

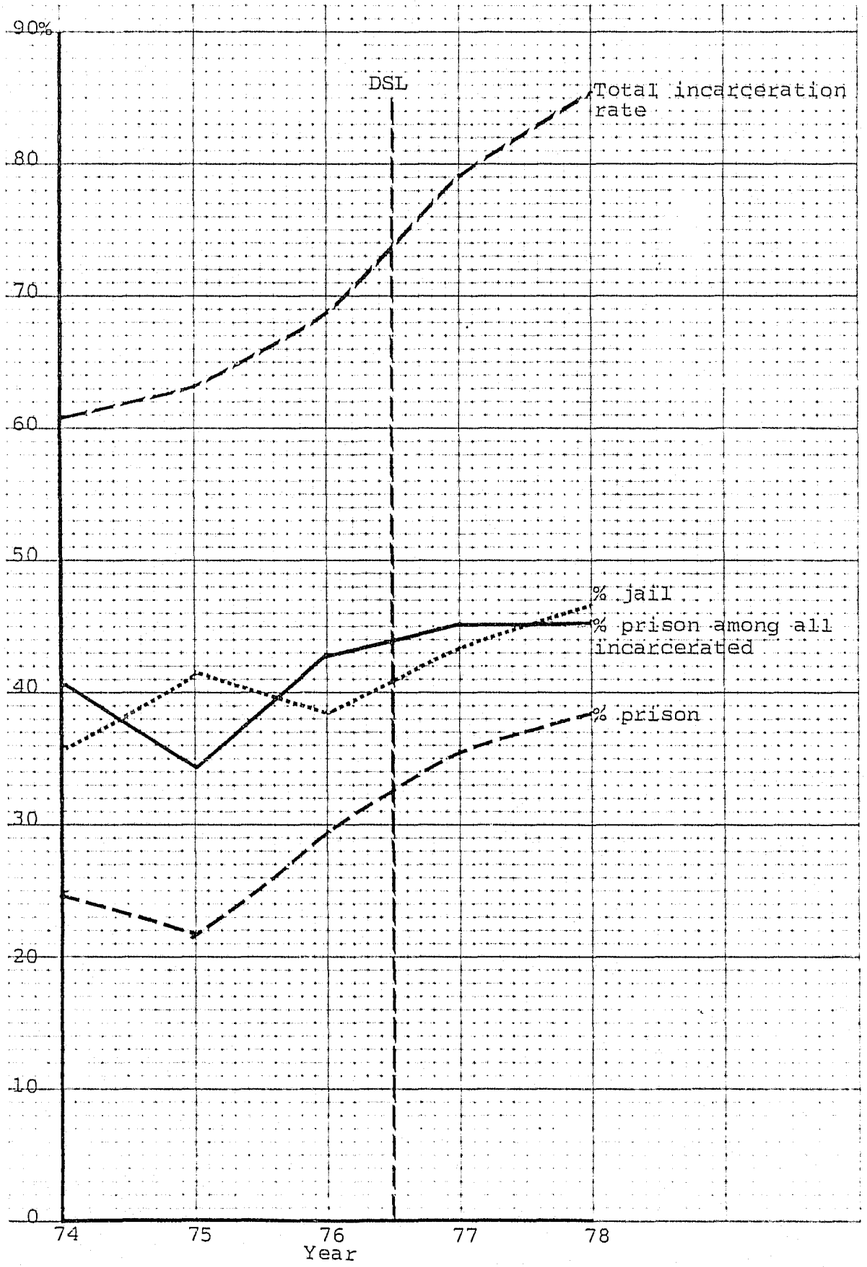


FIGURE 9:
TRENDS IN INCARCERATION RATES, SAN FRANCISCO
SUPERIOR COURT CONVICTIONS, 1974-78

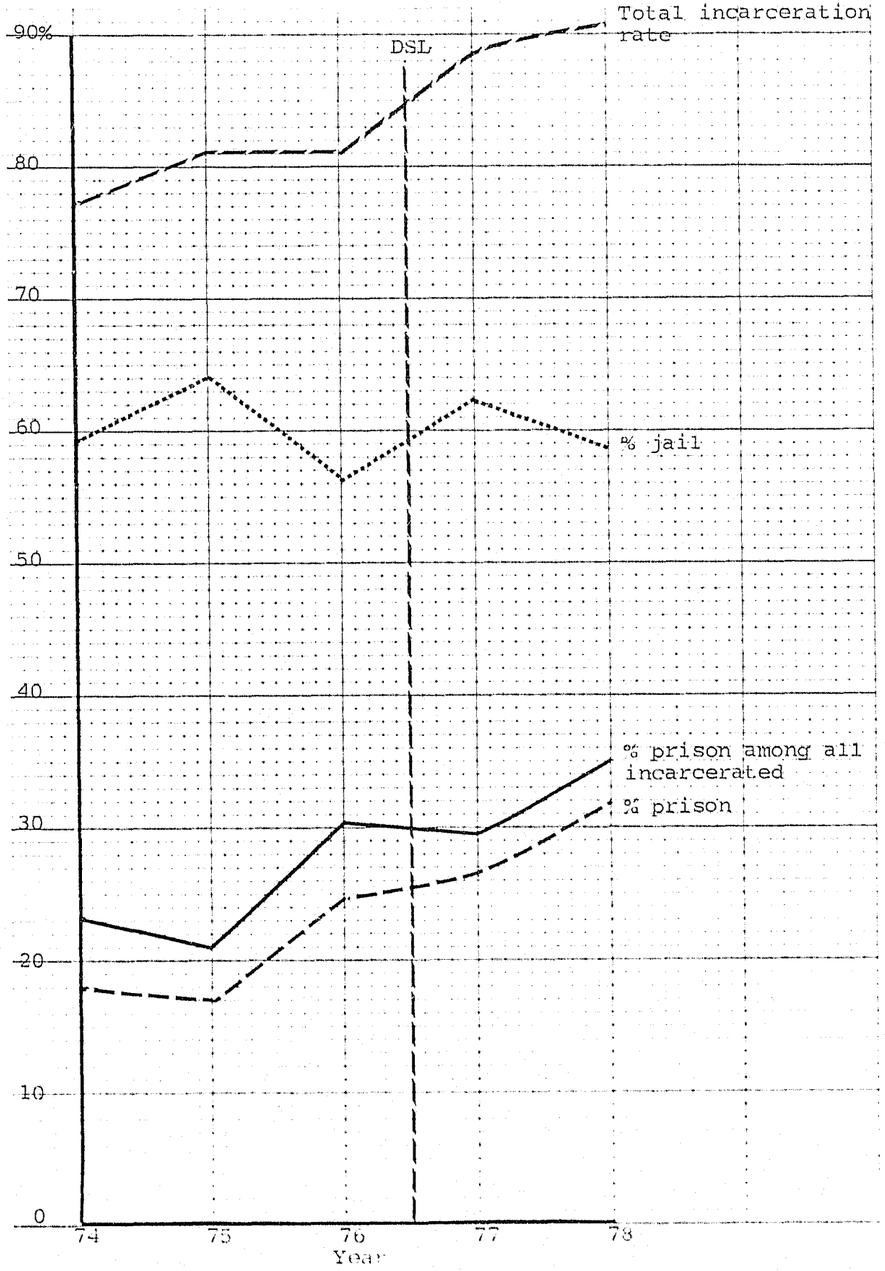
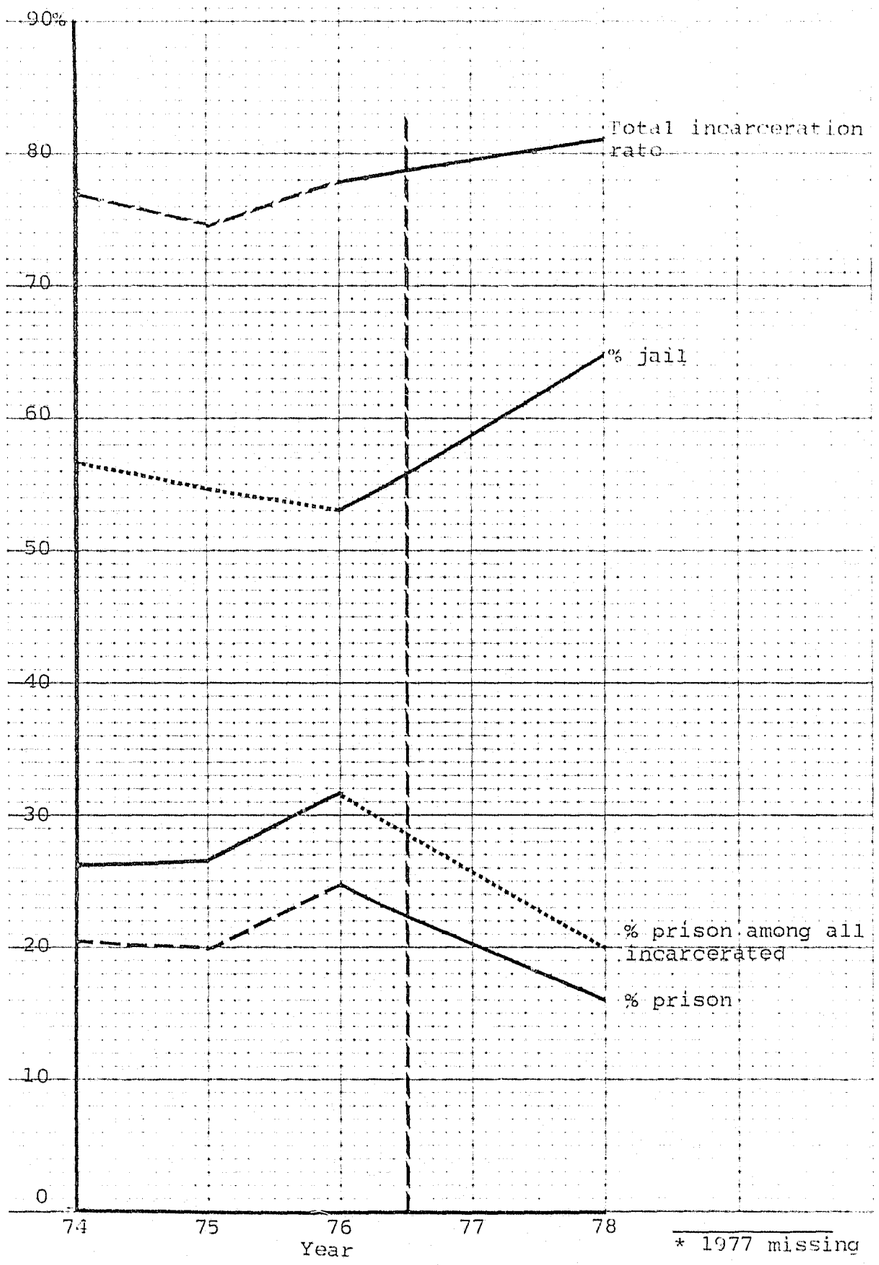


FIGURE 10:
TRENDS IN INCARCERATION RATES, SANTA CLARA SUPERIOR COURT CONVICTIONS, 1974-78*



three counties which suggest that when offense is controlled, we see similar patterns. On the statistical evidence available to us, therefore, we do not believe that it can be argued for these three counties that the DSL had a marked effect on imprisonment rates. Though the post-law period saw increases in proportions of defendants sentenced to prison, this trend began before passage of the law and appears to have applied not only to prison rates but to incarceration rates generally.

The data we have analyzed suggests that the prison rates turned up "too soon" for the formal implementation of the DSL to have been at work. An alternate view, which somewhat widens the concept of "effects" of the DSL, might suggest that the "premature" upturn in 1976 was related to the controversy over the DSL. In 1975, in part in an effort to head off criticism of the administration of the ISL, the Adult Authority began to fix terms of new inmates within a year of their commitment, thus moving towards more determinate terms without requiring any legislative reform. Moreover, in 1976 the DSL was under active consideration, and perhaps courtroom personnel were looking forward to its passage, and modifying their behavior as a result. Thus, an "anticipation effect" might account for an upturn in prison rates prior to actual implementation of the new law. Our interviews with courtroom personnel produced little evidence of such anticipation effects.

The anticipation effects argument might take several forms. To the extent that we might attribute increased prison rates to anticipation of the DSL, this might result from its formal provisions (e.g., probation ineligibility rules); the informal effects hypothesis (short, determinate terms result in more marginal defendants receiving prison terms); or the

general "symbolism" of an increased punitiveness associated with the law. The first two processes would have required great sophistication on the part of courtroom participants. They would have had to follow, for example, the course of proposed legislation and begin to "apply" probation ineligibility provisions to defendants before they have the force of law. To "anticipate" the informal effects of the new law, courtroom participants would either have had to be aware of the change in Adult Authority policy in 1975 and send more marginal defendants to prison as a result; or have anticipated that under the new DSL, when it went into effect, those sentenced to indeterminate terms would have their sentences converted to the equivalent determinate terms. Both of these hypotheses impute to courtroom participants an unrealistic degree of foresightedness, and one for which we observed little evidence.

The third version of an anticipation effect strikes us as more plausible, though by the same token it requires a much broader notion of "impact." In 1975, the legislature passed the "use-a-gun, go-to-prison" statute, indicating a "get tough" policy for certain defendants. The general mood of the state (and nation as well) was drifting towards increased emphasis on law and order, and the "liberal" Governor Brown was a vocal proponent of more severity in sentencing. The debate surrounding the DSL reform had, as noted above, a strong contingent of law enforcement interests expressing a preference for increased punitiveness in sentencing. To the extent that courtroom participants saw these trends as mandating, suggesting, or making politically advantageous a move towards increased resort to prison, they might well have "anticipated" the actual passage and implementation of the DSL. The difficulty, of course, is that under this

view the DSL may be usefully viewed as an "effect" of a general social trend towards law enforcement, as well as itself a "cause" of changes in sentencing patterns.

Thus, the premature upturn in prison sentences observed in our statistical data may reflect some anticipation of the new law, but to argue this point requires substantial expansion and weakening of the notion of "impact."

Summary. 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.

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.

Sentence Lengths Under ISL and DSL

The potential effects of DSL on the length of terms and variation across prisoners and counties was the subject of a great deal of debate. Support from prisoners' rights groups and due process liberals was based, in part, on the assertion that the new law would not only inform prisoners of how long their terms would be but that the terms would be characterized by less disparity. It was, after all, the Uniform Determinate Sentence Law.

Most who ventured opinions appeared to believe that the range of time served would be reduced. Even though the judge retained a good deal of discretion in selecting the sentence to be served, removal of the life top from nearly all prisoners would likely result in the elimination of the small but significant number of very short or very long terms served under the ISL:

> [I]t is almost certain that the total range of time to be served for any given crime will be dramatically compressed. For example, of all releases under the indeterminate sentence law during the period from 1970 to 1975, for male felons convicted of second degree murder, one felon had served only 19 months, while another had served 321 months. Various predictions about practices under the new law for the same offense vary from 48 to 104 months. Thus, even if median times served remained the same, the upper and lower ends of the range will tend to shift significantly towards the middle. [Cassou & Taugher, 1978, pp. 30-31]

There was a good deal of uncertainty, however, about the effects of the new law on median time served. The middle term approximated median time served under the ISL for similar conviction charges; yet the fact that enhancements were added to this base term and the possibility that good time would be taken off made predictions hazardous. One set of commentators suggested that "median terms will probably fall about three months" if good time were earned by nearly all prisoners. [Cassou & Taugher, 1978, p. 32] Another, focusing upon the addition of enhancements, argued that "the new statute does not promote shorter sentences for California offenders." ["SB 42 and The Myth of Shortened Sentences," 1970, p. 1200] Finally, focusing again on enhancements added to base term, Messinger and Johnson predicted that "if they were added on to many terms, terms, on the average, will increase." [Messinger & Johnson, 1978, p. 31] Finally, Governor Brown stated on signing the bill that it "will probably lead to increased prison terms" and may require the state to build more prisons to house them. [San Francisco Chronicle, 1976, p. 1]

In sum, uncertainties surrounded the effects of the provisions of the new law on the length of time to be served by California prisoners. The effects of the law on median terms would depend to a substantial extent upon how the law was administered by prosecutors, judges, and

correctional authorities. No one, though, appeared to believe the law would produce substantially shorter median terms.

A final uncertainty was frequently mentioned. However the law was administered, it had the appearance of mandating relatively short terms for prisoners. Even though the middle terms were in line with past release policies of the Adult Authority, an aggravated term for burglary of four years surely looks like much less than a term of one year to life. As noted above, the coalition structure that enabled passage of the DSL involved a compromise in which liberal groups inside and outside of the legislature supported the new law in part because its terms were not substantially longer than under the old law. Law and order forces, on the other hand, accepted the new terms while waiting (not very long, as it turned out) to attempt to lengthen them. Anticipation of such moves caused liberals in the legislature some concern:

> In the legislature, a bloc of Democratic liberals voted against the measure for that reason, charging that the legislature would respond to sensational crimes and public demands to do something by increasing prison terms. "I believe this bill will lead to greater incarceration," declared Assemblyman Alan Sieroty. Initially, in the Assembly, the bill was opposed by a partisan bloc whose members believed that prison terms and parole requirements in the measure were not tough enough. [Los Angeles Times, 1976, p. 3]

The legislator who sponsored the DSL bill stated that making actual sentences imposed by judges a public process would lead to increased sentences in the long run. This would result, he asserted, not only from increased scrutiny of judicial sentencing by interested publics, but from the fact that the legislature would take over control of setting prison terms:

> Nejedly told the Senate that sentence ranges in his bill are roughly equivalent to those being handed down by the Adult Authority now. However, he predicted more public

> interest in sentences and said "if the Legislature finds it necessary to respond to change, it can do so." [Ibid]

A drafter and supporter of the bill, writing a few months after its passage, somewhat wistfully and unconvincingly tried to dismiss the fears of liberal supporters:

> What our legislators will do remains to be seen. I would, however, hate to have to admit that Sen. Alan Sieroty was right in distrusting the collective ability of his legislative brethren to withstand the pressures of the multitude for perpetually higher penalties. [Parnas, 1977, p. 8]

Thus, a final uncertainty surrounding the long-term effects of the new law on length of prison terms dealt not with its original provisions but with the fact that once the legislature got into the business of setting sentences, political pressures for increasing terms might prove irresistible. Indeed, they have been, for it is difficult for a legislator to make much hay by arguing that three years in prison for a robber is "enough," when another is arguing that ten is hardly sufficient.

As we noted in the introduction to this chapter, the appropriate level of analysis for evaluating effects of the DSL on sentence length is the state as a whole, not the county level. The evidence available to us for the state comes from published materials available by the Department of Corrections. Further confounding the problems of assessing the effects of the DSL on sentence length is the fact that, as of this writing, relatively few prisoners have served out their terms, and hence the actual length of time served is unknown. This means that we must rely on some estimate of how the good time provisions will be applied. The term actually imposed by the judge represents the maximum, while a third off this term represents the minimum, and presumably average actual time served

will fall somewhere between the two. The Department of Corrections currently estimates that most prisoners will have their sentenced reduced by close to the maximum possible.

Some general estimates of the possible effects of the DSL are still possible, though they are tentative. In Table 5 we present data on sentence length for prisoners convicted of burglary and robbery. The expectation that the range of terms served under the DSL was likely to be reduced appears to be borne out in the early experience with the law. The Department of Corrections did not publish the range of terms served under the ISL, but did publish the median time served and a measure of dispersion around the median, i.e., the terms served by the middle 80 percent of those released in a given year. This has the effect, to be sure, of cutting off the tails of the distribution, but is of some use in gauging the length and range of time served. If we examine the middle 80 percent in terms of time served under the ISL v. actual terms imposed under the DSL, we see that there is relatively little difference in robbery cases, but a substantial reduction in burglary cases. If we assume that all prisoners receive the maximum time off for good behavior and program participation, the differences are substantially greater. In robbery cases, 90 percent will serve less than 56 months (versus 66 months under the ISL) and in burglary cases, 90 percent will serve less than 32 months (versus 61 months under the ISL). Put another way, the difference between the 20th and 80th percentiles under the new law will be reduced from 37 months to 32 in robbery cases and from 40 months to 21 in burglary cases. This no doubt somewhat overestimates the differences, since not all prisoners will receive the maximum good time credits, but

Table 5: LENGTH OF PRISON TERMS IN ROBBERY AND BURGLARY CASES, 1975 AND 1978-79 (months)

	1975 Releases*	1978-79** Actual Imposed	Parole Adjusted***
Robbery Cases			
Median Term	43	48	32
Middle 80 percent	29-66	36-84	24-56
Range	(na)	16-240	11-160
Burglary Cases****			
Median Term	33	24	16
Middle 80 percent	21-61	16-48	11-32
Range	(na)	16-112	11-75

*Data on 1975 releases obtained from California Department of Corrections, California Prisoners 1974-75.

**1978-79 data obtained from testimony by Department of Corrections officials before Assembly Committee on Criminal Justice, December 14, 1979, and covers prisoners received by the Department during fiscal 1978-79.

***Parole adjustment involves reducing all terms by one-third.

****Burglary cases involve both commitments for first and second degree burglary.

it does appear that the range of time served under the new law will be compressed.

One other feature of sentence lenghts under the DSL is worth noting: the ranges remain quite large. Thus, despite the fact that the new law prescribes selection of one of three possible terms, all of which are reasonably close to one another, multiple counts and enhancements mean that prisoners convicted of similar crimes still vary substantially in the amount of time they may receive. Robbery convictions produced sentences ranging from just over a year to twenty years; burglary convictions from just over a year to a bit over nine years. We do not have data on the contribution of consecutive terms of sentence length, but Department of Corrections data indicate that in fiscal 1978-79, defendants in 55 percent of robbery cases had enhancements imposed. These enhancements added a median of 24 months to the term of prisoners serving terms for robbery. In burglary cases, only 17 percent had enhancements, with a median of 12 months. The moral, then, is that sentence ranges appear to have been somewhat compressed as a result of the DSL. By the same token, the data indicate that a good deal of sentence disparity among those convicted of similar crimes still remains. The DSL, despite its expressed concern for increasing uniformity, has not by any means produced a narrow range of relatively equal sentences.

The effects of the new law on "average" time served are also somewhat hard to assess, again in large measure because we do not know what actual time served under the DSL will turn out to be. Those who expected that the new law would have relatively little effect on average sentence length focused upon the fact that, in general, the middle terms were

selected on the basis of median time served under the ISL. Those who anticipated a reduction in time served noted that although the middle terms approximated the old medians, the good time provisions might have been expected to reduce average time served. Those who expected somewhat longer terms noted that under the ISL, the median time served included that "added" informally by the Adult Authority for such aggravating circumstances as gun use, violence to victims, and prior record. Under the new law, the middle term derived from the old median would formally be increased by the additional time for enhancements, thus potentially increasing the typical time served, at least in cases involving enhancements.

The data in Table 5 suggest that if we examine actual terms imposed (which assume no good time will be earned) the median for robbery cases is actually up slightly, and down by about a quarter in burglary cases. If we assume that all good time credits are earned, the median is down somewhat over 25 percent in robbery cases, and nearly cut in half in burglary cases. The difference lies in part in the fact that robbery cases involved enhancements relatively frequently (55 percent in these data) and burglary relatively rarely (17 percent). In addition, the middle term in second degree burglary cases (the bulk of burglary convictions) was somewhat below the median of time served under the ISL (in 1975, the median time for release in second degree burglary cases was 31 months, while the middle term for second degree burglars under the DSL was 24 months). In robbery cases, on the other hand, the median time served for 1975 releases for armed robbers--the bulk of cases--was 45 months, while the middle term for an armed robbery under the DSL was, initially, 48 months (thirty-six months was the middle term for a

robbery conviction, plus a year's enhancement for weapon or gun use). As a result, in burglary cases, independent of enhancements, we would expect lower terms simply by virtue of application of the good time rules and a middle term below the old median; in robbery cases, the old median was slightly below the new middle term, as we would expect, therefore, a smaller reduction simply by virtue of the application of the good time provisions.

In sum, then, the new law in the form it took when it originally went into effect would apparently have reduced sentences for burglars quite significantly--by a quarter at minimum, and probably closer to a half. Those convicted of robbery would also see some reduction, but because of the operation of enhancements, these would be somewhat less marked. Any reductions that appear to be emerging in Table 5 are going to be themselves made less marked by subsequent legislation raising terms. Thus, amendments passed subsequent to the DSL raised the term for robbery from 2-3-4 to 2-3-5 and the enhancement for use of a firearm from one to two years; first degree burglary has been raised from 2-3-4 to 2-4-6. The reductions observed under the original terms of the DSL may be diluted by subsequent legislation raising the terms further.

The very tentative evidence available to us suggests, then, that (1) the range of terms has likely been reduced under the DSL, though substantial variation remains; (2) sentences will, under the original law at least, be somewhat shorter, with this effect more pronounced in cases not involving enhancements; (3) this shortening may be temporary as new legislation lengthening terms is passed. Finally, to the extent that terms are not greatly shortened under the new law--and may in fact

be lengthened if more legislation increasing terms passes--the prison population should rise markedly. Longer terms in conjunction with higher commitment rates and the elimination of the safety valve of parole to deal with overcrowding are likely to produce increased prison populations. This will lead to further overcrowding in the short-run and the need for prison construction in the longer term. The alternative available to this would be to decrease the rate of prison commitments by local courts. Although it is possible that longer terms may lead judges to be more reluctant to send marginal offenders to prison, this does not appear likely to have a substantial effect on prison commitment rates in the short run.

Chapter 5

CASE DISPOSITION AND PLEA BARGAINING UNDER THE DSL

In the previous chapter, our focus was upon the impact of the DSL on sentences imposed. Here we deal with the impact of the law upon the disposition processes by which these sentences were generated. There are a variety of aspects of the court disposition process that might have been affected by the introduction of determinate sentencing, including the terms of plea bargaining (e.g., charge v. sentence negotiation); the rate at which defendants were induced to plead guilty or the timing of such pleas; or influence in the bargaining process. In this chapter we shall take a look at all of these issues, with particular emphasis upon the rate at which guilty pleas are entered. Our discussion of the terms of plea bargaining and influence within it are somewhat more speculative because of the lack of direct evidence from observation of pre-DSL bargaining and because of difficulties in operationalizing the concept of "influence." Yet the issues are worthy of discussion, if only because so much comment on the effects of the new law has suggested extensive shifts in the terms of and influence in bargaining.

Overall Trends in Charges and Dispositions in the Three Counties. How has the law affected initial charging patterns, disposition charges, and the general levels of charge reductions offered to convicted defendants? Under the ISL, the crucial decision was whether to send a defendant to prison. In prison cases, decisions about counts and concurrent versus

consecutive sentences were also of some significance, but mediated by the ability of the Adult Authority to "see through" the conviction counts and sentence to the "real" offenses committed by the prisoner. Under the DSL, on the other hand, conviction counts carried specific terms. Although the judge could, of course, eventually choose to impose concurrent rather than consecutive terms, the extended "maximum exposure" provided under the DSL was important in terms of bargaining leverage available to the court. Not only could it be useful in inducing a guilty plea, but it provided fertile grounds for sentence bargaining in prison cases.

Under the new law, prosecutors might have been inclined to increase the number of initial charges, since this strategy would provide additional leverage in disposition negotiations. Moreover, one might expect this to occur more frequently in cases in which prison was, at the outset, perceived as a real option. The bargaining resources provided by additional charges are most effective if there is a real chance that terms will have to be served (or, to put it another way, if the prosecutor is able to offer more tangible concessions--years off the sentence). Application of this type of a priori rational actor theorizing does not suggest such unambiguous expectations about the effects of the DSL on prosecutor decisions about dropping charges. On the one hand, in prison cases under the ISL the prosecutor had relatively little to lose by giving up conviction counts because the Adult Authority had most of the influence on sentence length. Under the new law, giving up a count may involve giving a direct and measurable sentence concession to a defendant. From this perspective, one might expect that conviction charges would have been reduced more frequently under the old law than under the DSL. By

the same token, though, because conviction charges carry specific terms, one might expect that defendants would, under the DSL, require more in the way of sentence concessions to induce a plea of guilty. Finally, we have suggested that another underlying process might be at work--a general law enforcement emphasis which might lead to a reduction in sentence concessions independent of the effects of the new law itself.

What effects, if any, has the law had on initial charging patterns? According to the supervisory prosecutors we interviewed in each of the three jurisdictions, the DSL did not have any impact, for office policy had always been to insure that cases were fully charged. However, when we compare burglary and robbery cases for 1976 and July 1, 1978-June 30, 1979, we do find a slight upward shift in the number and seriousness of charges lodged against defendants in San Bernardino and San Francisco, particularly where robbery cases are concerned (see Table 6 and Table 7). To be sure, we must be wary of claiming that this change is "real" or that it can be attribuged to DSL, but these data are at least consistent with the interpretation that in these two counties passage of the DSL may have led to a tightening up of charging patterns. What is equally interesting, though is that this possible increase in initial charges did not result in any increase in the seriousness of the conviction charges. Indeed, as tables 6 and 7 indicate, San Bernardino and particularly San Francisco appear to have "corrected for" this change in charging patterns by reducing charges by a greater amount than before. This suggests that whatever the explanation for increased charges, older court-wide conceptions of what are appropriate conviction charges for particular types of crimes have remained somewhat resistant to change. Again, then, we have some

Table 6: OVERVIEW OF FLOW OF CHARGES IN ROBBERY CASES, 1978 and 1978-79

	San Bernardino		San Francisco		Santa Clara	
	1976	1978-79	1976	1978-79	1976	1978-79
$\bar{X}$ # Superior Court Charges	2.0	2.6	2.3	3.2	2.5	2.6
$\bar{X}$ Seriousness of Initial Charges*	33.5	36.2	33.7	40.4	37.6	35.9
$\bar{X}$ Seriousness of conviction charges*	23.3	20.4	22.0	22.6	23.2	22.5
$\bar{X}$ Bargain Score**	82.9	71.2	74.9	65.4	69.5	72.2
Approx N	(85)	(140)	(240)	(250)	(280)	(200)

SOURCE: Data gathered from court files.

*For an explanation of the offense seriousness score, see Table 4, Chapter 3.

**The bargain score is computed by dividing the sum of the seriousness scores for the three conviction charges by the sum of seriousness scores for the three worst initial charges. Thus, the score comprises the percentage of initial charges represented by conviction charges. A score of 100 would indicate conviction on all original charges. The lower the score, the greater the charge reduction obtained.

Table 7: OVERVIEW OF FLOW OF CHARGES IN BURGLARY CASES, 1976 and 1978-79

	San Bernardino		San Francisco		Santa Clara	
	1976	1978-79	1976	1978-79	1976	1978-79
$\bar{X}$ # Superior Court Charges	1.8	2.2	1.6	2.2	2.6	2.3
$\bar{X}$ Seriousness Initial Charges	29.4	30.1	25.3	28.1	32.8	31.7
$\bar{X}$ Seriousness of Conviction Charges	13.1	14.6	13.4	14.6	13.1	14.0
$\bar{X}$ Bargain Score	53.8%	57.6%	59.6%	58.4%	45.8%	49.3%
Approx. N	(200)	(270)	(240)	(280)	(330)	(330)

SOURCE: Data gathered from court records. See above for explanation of scores.

evidence of how on-going processes of these systems may have tended to mute the impact of the DSL.

Changes in Rates of Pleas and Trials Under the DSL. Did the introduction of DSL have any effect upon the rates at which cases went to trial or resulted in guilty pleas? Discussions about the possible effects of a shift to determinate sentencing, prior to the passage of the law, suggested that such a move might lead to an even greater proportion of pleas being entered, especially where "sure" prison cases were involved. The reason for this was that DSL was seen as introducing much greater certainty into the plea bargaining process. In the past, defendants could not be sure of how much time they were actually going to serve. Even if they were offered charge reductions it was always possible that the Adult Authority would "see through" the conviction counts and tailor release dates to the "real" crime. Under DSL, by contrast, it became possible to fix in advance the maximum time a defendant could be expected to "save" if he or she pleaded guilty. As a result, the benefits of pleading guilty--and conversely the costs of going to trial--could be much more starkly represented to those defendants who belonged in the "sure prison" category.

Moreover, it was argued that even where courts did not overtly offer concessions for guilty pleas, the determinancy offered by the new law might be enough to discourage some defendants from going to trial. Under the old law, it was possible that some defendants were frightened off by the life terms attached to many offenses. Despite explanations by their lawyers that they would not be obliged to serve these long sentences, the very possibility of an indefinite term might have led them to

believe that they had nothing to lose by going to a trial, and potentially much to gain. DSL altered this calculation because defendants now knew that the actual time to be served for most crimes would be much less than life. Knowing this, some might then have become more willing to forego a trial and the stress and uncertainty associated with it, especially when conviction seemed a foregone conclusion.

Another set of observers, it should be noted, took a somewhat contrary position, arguing that the DSL might lessen rather than increase the number of guilty pleas in certain types of classes. [Alschuler, 1978] According to this view, DSL might--for reasons suggested above--lead to an increase in pleas in "sure" prison cases but a decline in pleas in "marginal" prison cases. If, as many predicted, one of the effects of the new law was to increase the prison commitment rate in marginal cases, such defendants might be less inclined to plead guilty than they had been under the ISL. At least in the short run, the defendant who had now just "made it" into prison might balk at accepting what seemed, suddenly, a harsher penalty than past experience or jailhouse scuttlebutt might have predicted. Moreover, in many marginal prison cases--where there were no multiple counts or enhancements--a balky defendant upset that the traditional "bullet" in county jail was not being offered might reason that the possible losses after trial were worth the risk. If the offer was the mitigated 16-month term and the circumstances of the crime and past record were such that after trial only a 24-month middle term seemed likely, a defendant might see the additional 8 months (actually, a bit over 5 months with good time) as not sufficient to induce a plea:

> Under the new law . . . prosecutors will gain the power to make "intermediate" offers of relatively short prison sentences. With this new found power, the extraordinarily favorable (and extraordinarily coercive) offers of the past may gradually become less frequent. Of course a defendant who would have pleaded guilty in exchange for a county jail sentence followed by a term of probation may refuse to plead guilty in exchange for a two-year reduction in his prison term. Thus, although the guilty-plea rate in "automatic prison" cases may increase, the guilty-plea rate in other sorts of cases may decline. [Alschuler, 1978, p. 76]

Such an effect might be stronger shortly after the implementation of the new law, before expectations about the "going rate" for marginal cases is gradually shifted upward from a "bullet" in county jail to 16 months in prison.

What is the evidence available from our three jurisdictions about plea rates before and after the law? It should be noted that even before the law was implemented, plea rates were so high--around 90 percent for all defendants--that only a small upward movement would have been possible anyway. This, however, did not deter most courtroom participants from believing that the law had led to a significant rise in the plea rate.

> I see it as part of simply the dynamics that operate on any person. I think if you know how deep the water is, you're much more likely to jump in, even if you know it's only three feet deep. But if you're uncertain as to whether it's six inches deep or ten feet deep--that's not a very good image--but it adds an element of certainty and I think, therefore encourages more dispositions. [Judge, SC]

* * *

> I think they are more willing to accept the state prison sentence . . . They are more willing to deal for the joint than before. If you go for 16 months, you're there about a year and then you only have a

> year parole . . . so many of them felt that that was preferable to taking a year in the county jail and having a three-year probation. So it may, I think, negotiate to the joint a lot easier. [PD, SB]

* * *

> I think in some respects, some types of crimes, put it that way, it has made the defendants much more willing to plead guilty. It's made defendants much more willing to plead guilty for state prison because they know at the time of the plea exactly how many months they are going to spend in state prison. [DA, SF]

* * *

> I've seen quite a few times now where if you tell a defendant a specific amount of jail time that he will have to serve, that is really all he cares about. He doesn't care whether he's going to serve it for rape or [assault]. All he cares about is the amount of jail time. It does make a difference and I have noticed it is easier to negotiate with a defendant and his attorney if you can give a specific state prison [term] that is going to be served. [DA, SB]

* * *

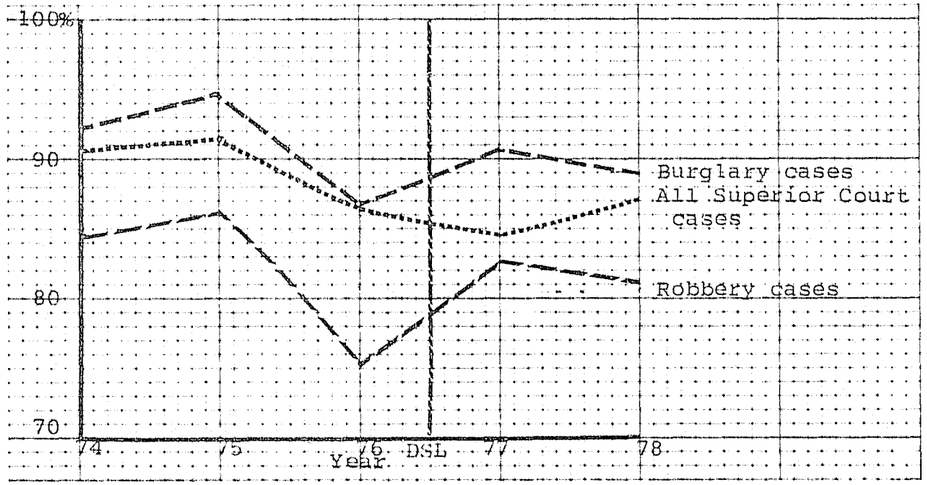
> On the murder counts, first and second, yes [there are more trials]. More people are going to go to trial because you are talking there of 25 and 50 years, a long time. On these other offenses, the answer is no, because it's not an indeterminate term like the murder counts. You start talking about forcible oral copulations, here the mitigated sentence as compared to the aggravated sentence is a very large difference, like . . . 286 by force or threats of GBI goes 3, 6, and 8. Now, there is a big inducement for a person to really consider the problem between 3, 6, and 8 years. That could be said for a lot of things . . . in concert--same offense if in concert--5, 7, and 9. There is a lesser crime like [assault]--2, 3, 4. Robbery is 2, 3, and 5. Where there is a spread, that gives people a good deal of food for thought. [Judge, SF]

The statistical evidence available to us does not offer support for these beliefs of court participants. First, let us examine the overall rates at which guilty pleas were entered by defendants convicted in Superior Court during the 1974-78 period. In Figures 11A, 11B, and 11C,

FIGURES 11A, 11B, 11C:

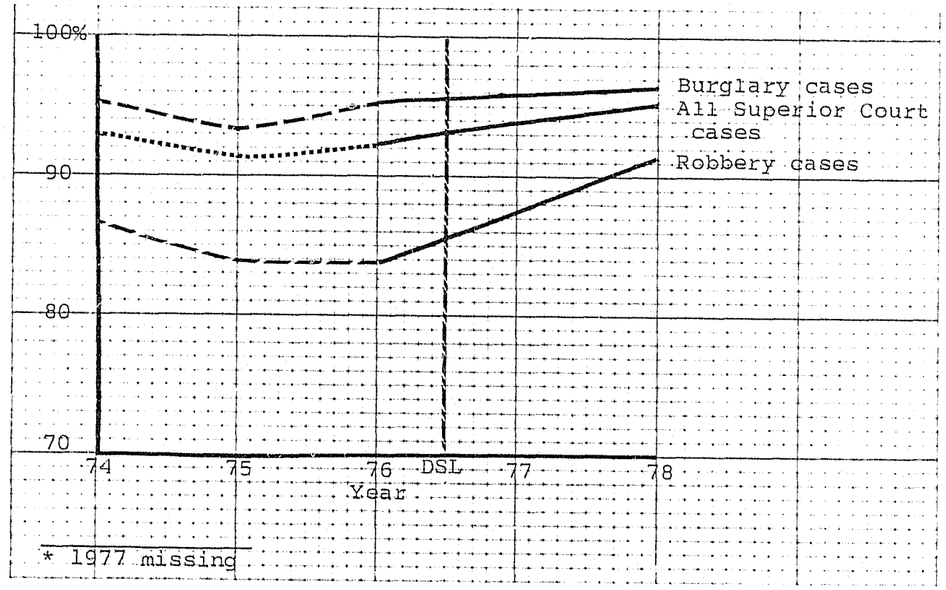
GUILTY PLEA RATES
SUPERIOR COURT CONVICTIONS, 1974-78

11A: San Bernardino



11B: San Francisco

11C: Santa Clara*



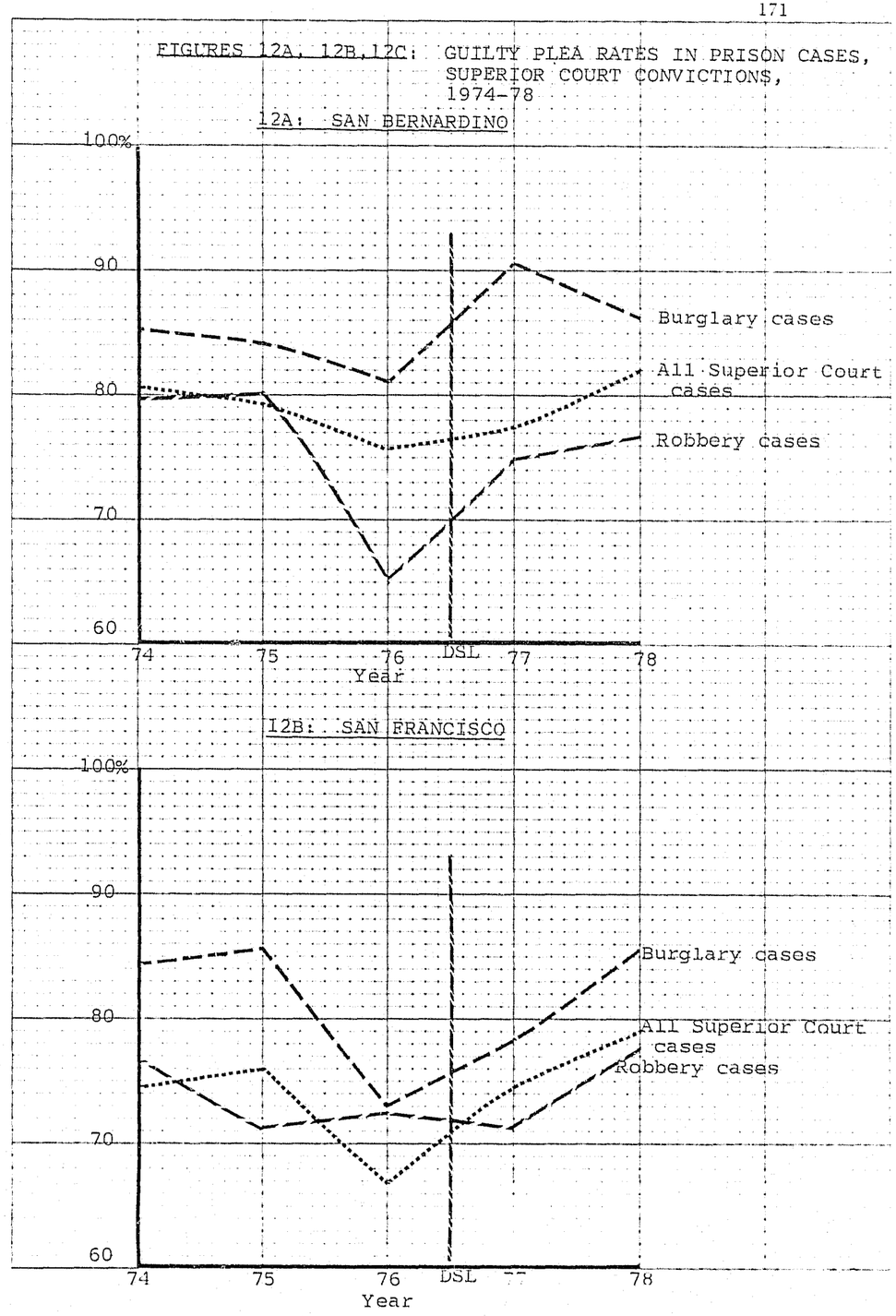
* 1977 missing

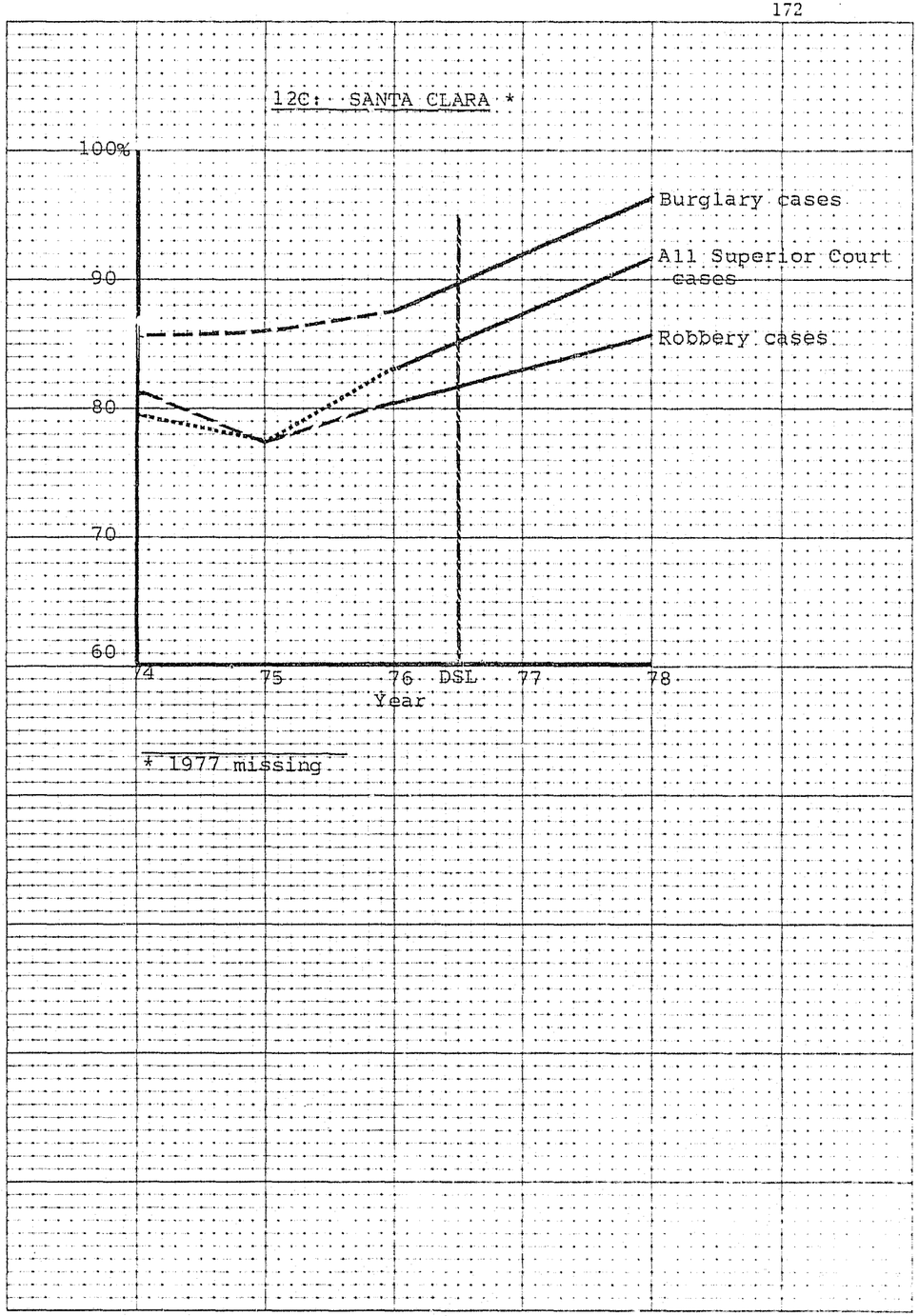
we present data for 1974-78 on guilty plea rates in the three counties for all defendants convicted in Superior Court, as well as those arrested on robbery and burglary charges. Clear trends do not emerge in the three jurisdictions, with the exception of an apparent drop in guilty plea rates in 1976 in San Bernardino and San Francisco. We shall return to this issue shortly. Taking into account cases which resulted in prison as well as lesser sentences, though, we do not find an indication that during the 1974-78 period there was an increase in guilty pleas (with the possible exception of a slight upward trend in Santa Clara, again made suspect by the lack of 1977 data).

These data, though, are not as responsive as they might be to the hypothesis that the DSL might increase guilty pleas, for they include both defendants who received prison terms and those who got off more lightly. It is defendants who received prison terms, after all, who were expected to alter their inclination to enter pleas. In Figures 12A, 12B, and 12C we focus on robbery and burglary convictions that resulted in prison sentences, indicating for each type in the three counties the proportions entering guilty pleas.

When we focus on prison cases, we see trends similar to what we found for all cases combined. In San Bernardino and San Francisco, it appears that the 1976-78 period saw quite marked increases in guilty pleas in prison cases. Yet this is largely because 1976 was a particularly low year for guilty pleas. The level of guilty pleas in 1978 basically returned to the levels experienced in 1974-75, suggesting that the post-law increase may have simply been a return to some general equilibrium level rather than the product of the law itself. In Santa Clara there is some

FIGURES 12A, 12B, 12C: GUILTY PLEA RATES IN PRISON CASES, SUPERIOR COURT CONVICTIONS, 1974-78





evidence--meager as usual--for what may be a "real" increase in plea rates in the post-law period.

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

We have no very convincing evidence as to why 1976 ought to have been an abnormally low year for pleas in two of the three jurisdictions. It may be recalled that when we examined overall prison rates over time, there appeared to be a rise in 1976, which was "premature" vis-a-vis the potential effects of the new law. There is clearly a chicken-and-egg problem here, though, for we do not know whether the increase in prison rates that occurred in 1976 "accounts" for the decrease in trials (e.g., a harder line taken by prosecutors in negotiations lead to fewer guilty pleas) or whether the increased inclination on the part of defendants to demand trials produced more frequent imposition of the "penalty" associated with having a trial. Suspicion that the 1976 jump in prison commitments might be associated with the first full year's operation of the use-a-gun-go-to-prison statute is undercut by the similar rises in prison commitment and trial rates observed for both robbery and burglary cases, even though weapons allegations are very rare in burglary cases. Arguing that the drop in guilty pleas in 1976 is related to the DSL itself seems highly implausible. Anticipation that the law would be passed and that those

sentenced to prison in 1976 would have their terms retroactively converted to determinate terms implies a sophistication on the part of the defendants and their attorneys that flies in the face of what we know about how such decisions are made. Moreover, even if such calculations were made, they would tend--if the notion that determinate sentencing is associated with higher rates of guilty pleas is correct--to a higher level of pleas in 1976, not the lower one observed. Thus, we can only speculate why 1976 was, in two of the three jurisdictions, an especially low year for guilty pleas. It may well be implicated with the increase in prison commitment rates that also occurred in that year, though sorting out the causal connection is not possible with our data.

One factor that may be confounding our analysis is the existence of the two somewhat contrary effects the implementation of determinate sentencing might have on guilty pleas. The view we have been addressing suggests that the ability to specify prison terms might increase the rate of pleas in cases in which prison was viewed as a certainty. The other hypothesis about guilty pleas in prison cases cuts somewhat the other way: the suggestion that in "marginal" prison cases--which receive short terms under the new law but which would have received long jail terms under the old law--defendants might be less inclined to plead guilty.

One way to examine these two hypotheses in a quick and crude way is to contrast robbery cases with burglary cases. Robbery cases ought to experience an increase (for they are relatively "certain" prison cases vis-a-vis burglary cases) but burglary cases ought to see a decline or at least a smaller increase. Examination of Figures 11A, 11B, and 11C provides

scant support for this view. We have already noted that robbery cases, with the exception of possibly Santa Clara, do not appear to have experienced an increase in guilty plea rates over the 1974-78 period. Moreover, there does not appear to be any diminution of guilty pleas in burglary cases nor any clear trends vis-a-vis robbery cases.

A somewhat more refined test of the two hypotheses is also possible, though small numbers of cases make it only suggestive. We can attempt to isolate a class of relatively certain prison cases by examining robbery defendants who have served prior prison terms. Their rates of imprisonment in current cases are relatively high, typically 80-90 percent in San Bernardino and Santa Clara and about two-thirds in San Francisco. At the other end of the spectrum are burglary cases in which the defendant has not previously served a prison term. In such cases, prison terms are imposed in typically only 15-20 percent of cases in all three jurisdictions. In Table 8 we contrast the rates of guilty pleas over time in "marginal" and "sure" prison cases, examining cases in which prison terms were in fact imposed. Thus, the defendants in what we are calling marginal prison cases received a prison term and had attributes that were associated with not doing so badly (property crime, no prior prison record), while in "sure" cases, defendants might well expect prison terms (crime against person and previous prison commitment).

The two hypotheses about the effects of the new law on guilty plea rates would suggest that we might observe a decline in plea rates for marginal cases and an increase for sure prison cases in the post-law period. The former does not receive any support in the data, for plea rates in marginal cases remain high across the 1974-78 period and, if

Table 8: GUILTY PLEA RATES IN "MARGINAL" AND "SURE" PRISON CASES

"Marginal"	1974	1975	1976	1977	1978
San Bernardino	94.6% (37)	93.1% (29)	83.7% (49)	96.3% (27)	90.0% (40)
San Francisco	93.1 (29)	77.8 (9)	80.0 (40)	75.4 (61)	90.0 (50)
Santa Clara	86.7 (45)	87.9 (66)	91.5 (94)	(na)	97.3 (37)

The cell entry comprises the proportion of convicted defendants who entered guilty pleas. "Marginal" is here operationalized as defendants in burglary cases who do not have a prison record but who received prison sentences.

"Sure"	1974	1975	1976	1977	1978
San Bernardino	61.1% (18)	70.8% (24)	61.5% (26)	82.4% (17)	76.5% (34)
San Francisco	66.7 (24)	50.0 (18)	71.4 (28)	54.0 (37)	72.0 (50)
Santa Clara	70.8 (24)	78.3 (23)	66.1 (56)	(na)	90.0 (10)

The cell entry comprises the proportion of convicted defendants who entered guilty pleas. "Sure" is here operationalized as defendants in robbery cases who had previous prison records.

anything, appear slightly higher in the post-law period. A trend in guilty plea rates in "sure" prison cases is also hard to discern, both because of missing data and small cell sizes which make the percentages unstable. Some increase may have occurred in San Bernardino; San Francisco does not appear to have experienced one (or, if they did, it turned up a year too soon); and Santa Clara's very small number of cases in 1978 makes it impossible to make a judgment.

One last observation about the future of guilty plea rates may be in order. Although we do not have evidence that the initial introduction of the DSL has contributed to an increased inclination to plead guilty in prison cases, it is conceivable that subsequent changes in the law may militate toward this result. Revisions of the law have already raised the penalties, both base terms and enhancements, and more such legislation appears on the way. As terms become longer, the "advantages" of a plea or the "cost" of going to trial will appear greater, even though the deals offered may involve longer terms. On the one hand, this may produce an increased inclination to plead guilty. On the other, if the terms become "too" long, an increasing group of defendants may decide that although they have much to lose by going to trial, their losses as a result of a plea are sufficiently intolerable that "taking a shot" may seem more worthwhile than it did under the original, shorter version of determinate sentencing. Thus, increased terms might have either effect, depending upon how long the terms become and the types of calculations engaged in by future defendants.

In conclusion, the evidence available does not support the view that the DSL has had a significant effect, with the possible exception of Santa Clara, on guilty plea rates. The various hypotheses about why it

ought to have increased the plea rates do not seem borne out by the data, even though the 1976-78 comparison does reveal a marked increase in guilty pleas. However, there remains the possibility that imposition of harsher terms under a revised DSL may increase the proportion of guilty pleas in prison cases, as sentence differentials--possible and actual--increase.

The Timing of Guilty Pleas. In addition to possible effects upon the rate at which defendants plead guilty, it has sometimes been speculated that implementation of a determinate sentencing system might affect the timing of guilty pleas. For example, it has been suggested that sentence certainty might lead defendants to enter guilty pleas somewhat earlier within the process:

> 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 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. [Lipson & Peterson, 1978, pp. 16-17

In Figure 13, 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

FIGURE 13:

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

CONTINUED

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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.

The Nature of the Bargaining Process. Much comment on the potential and actual impact on the disposition process centered on the rate and timing of guilty pleas. We are skeptical about whether the DSL has had a demonstrable impact in our three counties on either. We are also somewhat skeptical about the other commonly-asserted impact of the DSL on the settlement process--the assertion that it has greatly increased the influence of the prosecutor. The move to determinate sentencing has clearly caused a devolution of influence away from the Adult Authority and to the 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 DA 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 chapter, 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. Yet, 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 dominate 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 all across the state, 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 do so, 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.

Chapter 6

PROBATION INELIGIBILITY PROVISIONS, ENHANCEMENTS AND THE DISPOSITION PROCESS

In addition to altering the sentence process, the new law has two features that may affect and be affected by the disposition process, the provisions dealing with probation ineligibility and the so-called "enhancements." The former are several additions to the penal code which specify that certain classes of defendants must receive prison terms; the latter are the provisions designed to lengthen the terms of certain types of offenders. There are a variety of ways of thinking about these provisions and what their "implementation" might mean.

From a formal-legal perspective, these provisions appear to comprise a decision by the legislature that certain types of defendants should be punished in certain ways. The new probation ineligibility provisions are not simply presumptive. They appear to mandate, for example, that, without exception, a person who commits great bodily injury in the course of committing a crime shall be sentenced to state prison. Or, to take a common enhancement, the legislature has specified that when a defendant is sentenced to prison for a specified conviction offense and has within the past five years served a term in prison for a felony, the judge "shall impose a one year term for each prior separate prison term" to be served "consecutive to any other prison terms" imposed on the current offense. What these statutes apparently purport to do, then, is to constrain

judicial discretion by specifying that defendants with certain types of characteristics shall be punished in certain fashions.

If the formal-legal perspective provided an accurate description of how courts functioned, we would expect to find that potential enhancements and ineligibilities would be charged to the fullest. We would also expect to find that these allegations would be subsequently dropped in the disposition process only if there had been some mistake, or if there were significant evidentiary problems (e.g., a robbery defendant may be charged with a gun use enhancement but the victim may prove to be a poor witness at the preliminary exam). However, court systems might respond to the imposition of these mandatory requirements in other ways as well. For instance, to the extent that courts depend upon extensive negotiation between prosecution and defense to obtain guilty pleas, such provisions may be treated not simply as mandates about how to behave, but also as resources to be used in the bargaining process. Thus, for example, allegation of probation ineligibility may be an important lever to be used in inducing defendants to plead guilty to a long county jail term; or, allegation of a three year GBI enhancement in a robbery case may be useful in inducing the defendant to plead guilty to the underlying offense and its middle term, in return for the dropping of the allegation. Where enhancements and ineligibilities were incorporated in this way, we would expect to find that although they were initially charged to the fullest, they would be subsequently dropped much more frequently than the formal-legal perspective would predict.

Another consideration here is that courts are arguably concerned not only with maximizing conviction and plea rates, but also with ensuring

that some kind of "justice" is dispensed. To the extent that court participants are agreed on what constitutes appropriate sentences for particular types of defendants committing particular types of crimes--either because the sentence is perceived as innately fair, or simply because "this is always how we have handled this type of case"--they are likely to see mandatory enhancements and ineligibilities as either superfluous (in that they simply formalize current practice) or as leading to excessive sentences. In both cases, we would expect to see that not only are allegations dropped much more frequently than the formal-legal perspective would predict, but that they are also less likely to be alleged in the first place. In the following discussion, we will examine the extent to which the impact of mandatory enhancements and ineligibilities has been mediated by these and other factors.

We shall begin with a brief description of the provisions themselves, and then discuss office policies concerning their application set forth in the three jurisdictions. Next we shall present some evidence drawn from the case material and interviews suggesting that the allegation and subsequent dropping of these provisions--a not uncommon occurrence when they were initially invoked--is often the product of bargaining considerations. Statistical evidence supporting this view follows, and we end with a discussion of the implications of these findings for the plea negotiation process in general.

The Statutory Provisions

Probation Ineligibility. There are two types of probation ineligibility provisions in the California Penal Code, presumptive and mandatory.

The former, all of which predate the passage of the DSL, state that probation shall not be granted to certain types of defendants "except in unusual circumstances where the interests of justice would be best served if the person is granted probation." [California Penal Code, S. 1203(e)] Such cases include, inter alia, those in which a defendant used or attempted to use a deadly weapon while committing a crime; in which a defendant commits great bodily injury; and in which a defendant has previously been convicted of two felonies. These provisions, in addition to being presumptive rather than mandatory, do not require formal allegation in the pleadings nor that ineligibility be formally proved. Although the judge might note when imposing a prison sentence that the defendant had two prior felonies and there were no unusual circumstances that indicated that the best interests of justice would be served by a probated sentence, this was not formally part of the charging or sentence document. As a result, developing data on the incidence of the use of such provisions without examination of the transcripts of sentence proceedings--which we could not do--is impossible. The only other way of attempting to assess the use of these provisions is to make inferences about their existence from the filing of enhancements, which often covered similar forms of behavior.

The legislature began in the mid-1970s to adopt "mandatory" probation ineligibility provisions, ones that did not refer to the possibility that a defendant might receive a lesser sentence under unusual conditions. These provisions, in addition, generally required that the probation ineligibility characteristic be formally charged as part of the pleadings, and that it either be proved at trial or admitted by the defendant at the

time of plea. In 1975, for example, the legislature passed two provisions dealing with probation ineligibility, both of which appeared to be mandatory. The first, the so-called "use a gun, go to prison" section, was the subject of extensive publicity and subsequent litigation. The provision specified that if a defendant personally uses a firearm in the course of one of ten enumerated crimes, "probation shall not be granted to, nor shall the execution or imposition of sentence be suspended." [Penal Code, S. 1203.06] Similar provision was made for defendants who sold or possessed for sale a half-ounce or more of heroin, the so-called "half-ounce clause." [Penal Code, S. 1203.07] As part of the bill which comprised the DSL, some new mandatory probation ineligibility provisions were added in 1977. The new mandatory "two felony" rule states that defendants must receive prison sentences if they are convicted of any of several specified felonies (including murder, kidnapping, rape, robbery, burglary) and if they have in the preceding ten years been twice convicted of specified felonies [1203.08]. Mandatory prison sentences are also specified for those who committed certain violent felonies while on parole [1203.08]; and those who committed violent crimes involving great bodily injury against an elderly or disabled person [1203.09]. In 1979, as part of a bill which increased the length of prison terms for a large variety of offenses, the legislature further expanded the class of defendants for whom prison sentences were to be mandatory, including those who were convicted of various sex offenses [1203.065] and those who intentionally commit great bodily injury in the course of designated serious felonies [1203.075].

Enhancements. Another important feature of California's approach to determinate sentencing is the concept of "enhancements." This euphemism, which has a nice ring to it (we are "enhancing so-and-so's sentence" sounds not simply humane but positively desirable!), applies to those provisions dealing with increased prison sentences for defendants who have certain attributes or have engaged in particularly harmful acts in the course of their offenses.

Thus, for example, Section 667.6(b) provides that defendants who are sentenced to prison and who have in the past five years served another term in prison shall receive an additional year added to their new term. Section 12022.7 provides that a defendant who has committed great bodily injury upon a victim in the course of a crime shall receive an additional three years in prison. 12022.5 provides an additional two years for one who uses a gun in the course of a crime. Other sections deal with increased penalties for those who are armed with a gun, use a weapon other than a gun, and who steal exceptionally large amounts of money (the so-called "excessive taking" enhancements--one year for $25,000 to $100,000; three years for over $100,000).

Some of these enhancements--those dealing with GBI, prior prison terms, and excessive taking--were added to the penal code by the DSL legislation itself. Those dealing with various types of weapons use were already in the code under the ISL, but the DSL legislation specified in years the time to be added to a specific base term.

The provisions state that such enhancements shall be formally alleged by the prosecution as part of the charging document, and must be proved beyond a reasonable doubt (either at trial or as part of a plea).

The statute provides that the additional term shall be imposed unless the judge formally stays it, offering reasons on the record for doing so. The law has provisions akin to the concept of double jeopardy, providing that if an offense itself involves certain behavior, this behavior cannot both be an element of the offense and an enhancing characteristic. Moreover, an act cannot be at the same time used by the sentencing judge as the basis both for imposing the aggravated term and as the basis for an enhanced term.

The enhancement provisions are an attempt to provide some flexibility in the sentence ranges provided by the DSL. Thus, although those who committed robbery were, under the terms of the original DSL legislation, to be punished by a term of either 2, 3 or 4 years, the enhancements were available to distinguish between various types of robberies. Simple robberies not involving weapons, harm to the victim, or large sums of money were to be punished by one of the three base terms; more heinous robberies were to be punishable by substantially longer terms. The Adult Authority under the ISL routinely took some account of the degree of seriousness of the offense in fixing the release date (whether or not a formal enhancement had been imposed by the sentencing judge); under the DSL this process of assessing the gravity of offenses within the same general rubric (e.g., robberies, burglaries, rapes) was made part of the fact-finding process of trial or plea, and then of the formal sentencing decision of the judge. To the extent that the new law rejected the rehabilitative idea and embraced the notion that the punishment ought to be tailored to fit the crime and not the criminal, the enhancement provisions are an attempt to more finely tune the penalty to the gravity of the

offense. The provisions dealing with enhanced terms for those who have served prior prison terms are harder to embrace under the umbrella of the "new" penal philosophy, for they appear more nearly allied to the old medical model, with its notion that the person who has a more extensive past record has indicated a greater "need" for rehabilitation. Past behavior does not seem directly related to the gravity of the current crime, unless one adopts the position that defendants who repeat an offense are more blameworthy and deserving of greater punishment because they have proved recalcitrant or unwilling to learn from prior mistakes. These enhancements, then, are either a kind of throw-back to the old rehabilitative model or might be conceived as part of a focus on isolation as a justification for punishment, under the view that those with serious prior records are more likely to be dangerous and thus in need of more extensive periods of isolation from the community.

Summary. The probation ineligibility and enhancement provisions indicate that those committing certain crimes with certain past records should receive special forms of increased punishment. The enhancement provisions retain a role for some judicial discretion in this process, as they permit the terms to be stayed rather than imposed. However, judicial discretion is greatly restricted in respect to the mandatory probation ineligibility procisions, for there does not appear to be a formal allowance for any exceptions. This is graphically illustrated by the controversy over the Tanner case, which involved an attempt by a trial judge to impose a jail term for a defendant convicted of using a firearm. Although the California Supreme Court initially held that the judge retained judicial discretion to impose a lesser term, despite the language of 1203.08, the

Court was forced to retreat under heavy political pressure. [People v. Tanner (1977); People v. Tanner (1979)] The initial resistance by the trial judge illustrates the importance of prior going rates--this naive robber was simply not perceived as meriting prison, regardless of the fact that the legislature had mandated that he receive it. Even though the Supreme Court ultimately upheld legislative authority to require prison terms in such cases, prosecutorial discretion remains largely unfettered. Both the decision about whether to initially allege ineligibility or an enhancement and the decision to drop such an allegation is left thus far unconstrained (though recent legislative proposals have suggested attempts to constrain prosecutorial discretion as well). As Alschuler (1978) points out in his discussion of determinate sentencing, the effect of some reforms is to shift the locus of discretion from the judge to the prosecutor, rather than remove it entirely. Finally, as suggested in the preceding chapter, the exercise of such prosecutorial influence clearly is dependent upon a willingness on the part of the prosecutor's office to use it.

Office Policies

Policies adopted in all three counties were similar and simple. As noted in Chapter 4, the District Attorney in each county promulgated a policy of full enforcement of both the probation ineligibility and enhancement provisions of the DSL. This meant that charging and trial deputies were instructed that all provisions were to be fully charged at the outset, and that they were not to be dropped simply to obtain a plea. Thus, there was to be no bargaining over these provisions: defendants who met the conditions specified by the legislation were to receive

the punishment prescribed by law. This latter policy--full enforcement--was, of course, a bit more complex. First, full enforcement requires that DAs concerned with charging become aware of the relevant provisions and develop methods for discovering whether defendants in fact have the requisite characteristics necessary for probation ineligibility or an enhancement to be alleged. Second, the trial deputies must be induced to follow the policy; that is, they have to agree not to bargain over the provisions in order to obtain guilty pleas or to drop them in order to reach a "just" disposition. Moreover, when judges are actively involved in plea bargaining, full enforcement of the policy--even at the level of charge bargaining--requires their cooperation. Finally, some method for supervision of cases appears necessary to monitor compliance and to take remedial action where necessary.

The second and third stages are particularly problematical. A policy of full enforcement by a District Attorney's office must inevitably provide for exceptions in cases in which the state of the evidence changes. In the simplest example, an allegation of probation ineligibility or an enhancement because of personal use of a firearm may occur at the charging stage. As the case proceeds, it may turn out that the weapon was not a firearm but an air pistol, thus rendering the defendant no longer subject to the provisions. In such a situation, the deputy must, of course, be permitted to strike the original allegation. Such "exceptions" to the policy of full enforcement are simple, and although they do involve striking of allegations, they do not violate the notion of applying the provisions to all who are appropriately subjected to them. The second class of exceptions--by far the most numerous--comes closer to compromising

the policy of full enforcement. What is a trial deputy to do when the evidence in a case changes such that it becomes less clear that the defendant can be convicted of the underlying offense, much less the probation ineligibility allegation or enhanced term? For example, suppose the gun is not recovered, and the allegation that it existed (and was real rather than a toy) depends simply upon the testimony of the victim? Suppose that the victim's testimony in general appears weaker than was first thought? In all three jurisdictions the office policy called for some case-by-case evaluation, but the general view was that half a loaf was better than none--i.e., drop the enhancement or probation ineligibility provision if the case as a whole was in jeopardy, or if the evidence on the allegation was soft, provided that the defendant agreed to plead guilty in return.

The problem with such a strategy--in terms of the notion of a policy of full enforcement--is that it actually cedes a great deal of control over the process to trial deputies. They, after all, are the ones who are familiar with the testimony of witnesses, know who will be good and who will be less than fully convincing, etc. Supervising prosecutors cannot screen potential witnesses in all or most cases in which a trial deputy proposes to drop an allegation or is called on the carpet for having done so. Not only do they lack the time to do so, but it involves impugning the professional judgment of their staff members. As a result, these apparent and quite reasonable exceptions provide, potentially at least, pretexts for straight plea bargains which may (and often were) dressed up for superiors as necessary in order to save the case.

In sum, then, office policies called for full enforcement of these provisions. Difficulties in oversight made it unlikely, though, that such full enforcement would, indeed, occur. Let us now turn to some evidence on the extent to which these provisions were in fact even alleged in the first place.

The Extent of Allegation of Probation Ineligibility and Enhancements

Some of the provisions we are concerned with here were relatively new: the new mandatory probation ineligibility provisions, the prior prison term enhancements, etc. Some were of older vintage, including the use-a-gun-go-to-prison probation disqualifier provision. Several of the enhancements existed under the ISL, but their new import was quite different, for they now carried actual years in prison. Finally, some of the provisions applied to only very few defendants. Thus, part of the implementation process involved simply familiarizing deputy prosecutors with the provisions so that they would become part of the routine charging process.

Probation Ineligibility Provisions. Our data gathered from 1978-79 case files suggests that a year after the DSL went into effect relatively little use was made of the mandatory provisions in any of the jurisdictions (see Table 9). In San Bernardino, in only three of the approximately 500 burglary and robbery cases sampled was there an allegation of any of these provisions. Only in Santa Clara--and there in a quite limited number of cases--was there any appreciable use of the provisions. Moreover, as we shall see later in the small number of cases in which a defendant was alleged to be ineligible for probation, this allegation was very often subsequently dropped by the prosecution.

Table 9: 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.

There are at least four possible reasons for infrequent use of these provisions in burglary and robbery cases. The first is that few defendants fell within the legislatively-defined classes. For example, few might have attacked elderly people or have had the requisite mix of current and past designated felonies. Second, it is possible that prosecutors were unfamiliar with the provisions and failed to file them because of ignorance of their relevance. Although the period under consideration in the data in Table 9 begins a year after these provisions went into effect, they may have simply been frequently overlooked. The relatively low use might reflect a bargaining strategy, in which prosecutors agreed early in certain cases not to allege the probation ineligibility provision in return for an early agreement to plead guilty. Relatedly, they may not have been filed but have been threatened, and the threat may have produced a plea without the necessity of actual filing.

The final possible explanation revolves around the relationship between new probation ineligibility provisions and established going rates. To the extent that a new probation disqualifier already approximates a going rate (e.g., that gun-using robbers are almost invariably sentenced to prison prior to passage of a disqualifier covering this behavior) there may be little incentive to go through whatever bureaucratic processes are required for use of the provision. To the extent that a mandatory prison provision is greatly at variance with past practice, one adaptive strategy is to simply fail to file it in order to avoid having to drop it later. Our evidence and intuition suggest that in these jurisdictions the best explanations for low use of probation

disqualifiers lie in ignorance, the narrow scope of several of the prohibitions, and their relationship to pre-existing going rates rather than in conscious bargaining strategies.

For the provisions dealing with prior felonies and crimes against the elderly and disabled, it seems likely that few defendants met the criteria specified by statute. For example, 1203.08--the two prior felony provision--applies only to defendants charged with one of several designated felonies who have in the past ten years been twice convicted of a designated felony. The designated felonies include murder, manslaughter, kidnapping, robbery, assault with intent to kill, ADW, rape, child molestation, and first degree burglary. The net cast by this particular provision may not be very wide. For example, a supervising DA in San Francisco offered this as the reason for the relatively rare allegation of this provision:

> All I can say is that it's not that often you find a situation where 1203.08 comes into play. This office has published a memorandum to all our attorneys who charge felonies indicating that the provisions are there and should be alleged and charged when it's proper. But the situations are just rather rare when the section does come into play. . . It's just like the old habitual criminal section . . . It's just a rare instance, one out of hundreds of cases where it's appropriate to charge.

First degree burglary, for example, occurs rarely as a conviction charge. In most cases, even those that result in prison terms, the burglary charge is reduced to second degree. Such a prior conviction becomes irrelevant for purposes of 1203.08, for it specifies only previous convictions for first degree burglary. Thus, we are inclined to believe that some, though not all, of the low incidence of allegations of this provision, as well as 1203.09, probably results from the relatively restrictive nature of its provisions.

This explanation seems much less plausible for the relatively infrequent resort to 1203.06, the provision disqualifying from probation defendants who personally used a firearm while committing designated felonies. This is suggested by comparison of robbery cases in 1978-79 in which personal use of a weapon was alleged for enhancement purposes with those in which a probation ineligibility allegation for personal use was made.

	San Bernardino	San Francisco	Santa Clara
% of robberies with gun enhancement alleged (12022.5)	31.8	27.3	30.6
% of robberies with gun use prob. enelig. allegation (1203.06)	0 (173)	10.0 (289)	22.0 (232)

The terms of the two provisions are such that every defendant in a robbery case who was "eligible" for initial allegation of an enhancement for gun use was, likewise, subject to an allegation that he or she was ineligible for probation. The difference in allegations of the two types--quite large in San Bernardino and San Francisco--suggests that substantial proportions of robbery defendants who might have been subjected to probation ineligibility allegations escaped. The explanation for the low use of this particular provision, then, cannot lie simply in the fact that defendants did not fall in the relevant class. Moreover, prosecutors were aware of the attribute that rendered the defendant subject to such an allegation, though they may have been unaware of the availability of the probation ineligibility provision itself.

As noted above, among those defendants who did meet the legislatively specified criteria, failure to lodge an allegation might be the

product of a bargaining strategy on the part of prosecutors or ignorance on the part of district attorneys either about defendant attributes or the law's provisions. However, we have uncovered little evidence to support a bargaining explanation. First, participants did not report that this in fact occurred. Second, the bargaining process was such that the prosecutor seemed to have little incentive to engage in such a practice. There was nothing in the statute that forbade allegation and dropping of an allegation, and the bargaining process did not typically involve extensive discussions prior to the filing of the information. As a result, the prosecution would seem to have little to lose and substantial bargaining leverage to be obtained by filing of the allegation. Moreover, although there might be administrative costs associated with record gathering and filing of papers in a case involving the prior felony conviction provision, the gun allegation simply involves a police report, and no requests to other agencies for information. As a result, there seems little reason to believe that tactical concerns explain the failure to file gun allegations.

Although we have no direct evidence on the point, another tactical consideration may have some limited explanatory force. It is possible that probation ineligibility characteristics are filed less frequently than they might be because prosecutors perceive there is little point in filing them. They might, for example, believe that defendants against whom they might be alleged are going to receive prison sentences anyway, and hence regard such allegations as unnecessary paperwork. Or, they may be operating in a system in which the judge so dominates the sentencing decision that the prosecutor may perceive that such allegations

are unnecessary. This explanation is given some support by the fact that probation ineligibility characteristics are most often alleged in Santa Clara, a system in which the prosecutor exercises the greatest degree of influence on the prison/no prison decision, and in which judges are not inclined to overrule a prosecutor who demands a prison term on the basis of statutory ineligibility. Such an explanation would suggest, though, that San Francisco should not only utilize such provisions less frequently than Santa Clara, but least frequently of all three, for in San Francisco the judge appeared most dominant. This expectation is not borne out, for San Bernardino used the provisions by far the least.

The evidence available suggests that the most powerful explanation for the low use of the probation ineligibility provisions lies simply in the fact that many prosecutors were unaware of them or unfamiliar with their applicability. The provisions were, for the most part, relatively new. Although some had been in force for several years, others had existed for only a year or two. This might help account for why in our interviews we occasionally encountered confusion about their meaning. For example, a prosecutor in San Bernardino offered a long explanation dealing with the provision making those with two prior felony convictions ineligible for probation, asserting that one of the major difficulties with it was obtaining records. His explanation suggested that the section applied to prior prison terms rather than simply to prior felony convictions:

> Q. In the case of the prior designated felonies, you only have to prove the conviction, don't you? You don't have to, on that particular provision, prove that he served time?
>
> A. O.K. . . . There's a conflict on that, and it's running through the office. I personally think that you don't, but the office policy is that you do have to show that he actually went to state prison.

Given that there is little or no ambiguity in the terms of the provision, what this presumably reflects was confusion in the office between the probation ineligibility provisions of 1203.08 which apply to prior convictions and the enhancements for prior prison terms contained in 667.5.

An explanation based simply on the fact that prosecutors may not have been familiar with the new provisions is lent further credence by the differential application of the personal use enhancement and the provision making those who used guns ineligible for probation. As indicated in the data presented above across all three counties, it appears that in nearly a third of the robbery cases covered in our data charging prosecutors were aware of the fact that defendants may have used guns, for they alleged the 12022.5 person use enhancement; yet in a substantial proportion of such cases (100 percent in San Bernardino; 63 percent in San Francisco, 28 percent in Santa Clara) they failed to allege that the defendant was also ineligible for probation. A supervising prosecutor in San Francisco suggested this problem:

> What concerns me more than [failure to use the prior felony section] is 1203.06, which makes the defendant ineligible for probation in certain circumstances. I've been getting on our attorneys constantly for missing that . . . They'll put on a usual firearm allegation, pursuant to 12022.5, and yet not allege a 1203.06 which makes the defendant ineligible for probation. The court says it doesn't make any difference, but under . . . in a jurisdiction like we have, it's best to have it on there.

The latter point, though not followed up in the interview, is intriguing. Presumably, in San Francisco with its dominant judges, "the court says it doesn't make any difference" because "the court" will decide

who merits prison and who does not (or, alternately, because those who use guns will not get lesser sentences anyway). Yet, "in a jurisdiction like we have"--one which relies heavily upon plea bargaining--"it's best to have" all the leverage possible.

In sum, then, the evidence indicates that, generally speaking, during a period beginning a year after the DSL was enacted, probation ineligibility provisions were not the subject of extensive use in two of the three jurisdictions. This failure to allege the provisions appears to have mainly been the product of unfamiliarity rather than conscious tactical decisions. Moreover, they appear to have often been confused with the enhancements which covered similar types of behavior. As time passes, presumably, there may be more recourse to these provisions. They offer potentially great leverage to prosecutors in inducing pleas, and will presumably be of increasing use. Moreover, recent legislation adding further to the classes of defendants said to be ineligible may make the old provisions more salient.

Enhancements. If the probation ineligibility provisions were infrequently used, what of another important aspect of the new law, the provisions providing for increased sentences for certain types of defendants? In Table 10, we present the basic data on the allegation and disposition of several of the most commonly used provisions. Unlike most of the probation ineligibility provisions, the enhancements that were in effect prior to the DSL required formal allegation and proof; hence, our data reflect use both in the pre- and post-law periods. The enhancement provision dealing with prior criminal record charged under the DSL, becoming applicable only for prior prison terms as opposed to prior felony

Table 10: 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.

convictions, thus rendering fewer defendants liable to its provisions.

If we look across the three counties at the filing of enhancement allegations, it certainly does not appear that they are being indiscriminately charged by prosecutors for bargaining leverage. Several were almost never used (excessive taking, assault on elderly or disabled person, GBI) and, as might be reasonably expected, among burglary defendants only the prior felony/prior prison enhancement was used with any frequency at all.

Indeed, as with probation ineligibility allegations, there is some evidence of significant under-filing of enhancements. Data gathered by the state parole authority, dealing only with defendants who ultimately received prison commitments, indicate that a substantial proportion of those "eligible" for an enhanced term on the basis of a prior nonviolent prison term were, in 1979, not the subject of such an allegation, much less imposition of a term.

	State	San Bernardino	San Fransisco	Santa Clara
Offenders with prior nonviolent prison terms	37.6% (10,395)	40.3% (518)	45.7% (600)	40.4% (463)
Of those with prior prison, % against whom allegation filed	44.2% (3,907)	22.5% (209)	58.8% (274)	65.8% (253)

SOURCE: Board of Prison Terms, Sentencing Practices, 1981.

Thus, among defendants who ultimately received prison terms, 40-50 percent had prior prison terms that might have been charged as enhancements. However, the rate of actual charging varied widely, with very few charged in San Bernardino and nearly two-thirds in the other cities. The common image of the DA who overfiles a case, tacking on implausible, dubious, or technical charges in order to gain bargaining leverage simply does not seem to fit the initial experience in these three counties with enhancements. The low level of filing does not appear, from our interviews, to reflect early plea bargaining with unfulfilled threats to file an enhancement resulting in a bargain. Office policy in all three was to file all appropriate charges. The very low levels of use of the prior prison enhancements in San Bernardino was said by some respondents to flow from difficulty in obtaining information about past commitments, but it is not entirely clear why such ambiguous cases were not routinely resolved by initial filing of an allegation and dropping later if the allegation was not proved.

Thus, enhancements do not appear to have been over-used, and there is some evidence for the proposition that defendants against whom this leverage might have been applied not infrequently escaped allegation of conduct that might have lead to an increased sentence. This under-utilization reflects the newness of the provisions and lack of information about defendants, not a bargaining strategy.

Use of Probation Ineligibility Allegations and Enhancements in the Plea-Bargaining Process

When the probation ineligibility and enhancement provisions are alleged, do they become chips in the bargaining process? As noted above,

office policy in each jurisdiction nominally called for full enforcement and no bargaining over these provisions. Yet our interviews and observations, plus the statistical evidence that they are often dropped after being alleged, indicates that prosecutors frequently do use them as resources to induce defendants to plead guilty. Some of the ways in which this is done can be guaged from the following examples.

The first, called the "flute case" by courthouse regulars, not only illustrates probation ineligibility provisions, but also shows how difficult it is to constrain prosecutorial discretion by the imposition of office rules. This Santa Clara case took more than a week to resolve, bounced from judge to judge, and was viewed with amusement by courthouse regulars not involved in it. The case was not a particularly serious one, and its difficulties stemmed from a recalcitrant defendant who did not trust public defenders and who refused to plead guilty to anything less than a no-state-prison bargain, as well as from office policy constraints involved in the case.

The defendant was charged with receiving stolen property (RSP). He was on parole at the time of his arrest, and because of three prior felony convictions was the subject of a presumptive (not mandatory) probation ineligibility section. In the Santa Clara system, though, with its deferent and rule-oriented judges, even the presumption of probation ineligibility was of substantial significance. By and large judges there would not impose probation in such cases unless the prosecutor agreed by striking allegations of prior convictions and offering a no-state-prison bargain. Complicating the case further was the fact that the defendant had been designated a "career criminal." Under a state statute, district

attorney offices were offered financial assistance to set up special teams of prosecutors designed to deal with "career criminals." Under the law, prosecutors working in such offices were, in general, forbidden to permit pleas to lesser charges or to drop counts. The defendant in the flute case was, at least arguably, only technically a career criminal, given the criteria that had been established by the statute and the prosecuting attorney's office, but his case was assigned to this division, and the prosecutor thus was constrained in what he could offer. As a result, two sets of rules appeared to forbid probation in this case--the prior felony rule and the no-plea-bargaining rule that generally applied to career criminal prosecutions.

The facts of the case were straightforward. The defendant was on parole after serving part of an indeterminate term for a series of several burglaries. The burglaries had been committed about the same time, and he had received concurrent sentences in prison. A condition of his parole was that any law enforcement officer could search him or his premises without probable cause. The police believed that he was committing burglaries and had enlisted the aid of his parole officer to come to his house and search it. They found a flute, a jean jacket, and a box of tools, all of which were stolen. Upon his return the defendant asserted that he had bought them from a stranger but had no receipt. The parole officer questioned him and told the police that the defendant had intimated that he knew the materials were in fact of questionable origin. He was charged with receiving stolen property. The case was not unusually serious, but the defendant did not have a particularly strong defense, especially because he might be subject to impeachment on the basis of his past record

if he took the stand. Moreover, his parole officer might testify to his damaging admissions. On the other hand, his status as a career criminal was somewhat dubious because his prior prison commitment was for burglaries that all occurred about the same time and had resulted in a single sentence. His exposure was 16 months, two, or three years on the receiving charge, plus an additional year for the prior prison term.

The defendant, as noted, wanted a no-state-prison bargain. The prosecutor was initially unwilling to offer it because of his career criminal status. The PD thought the defendant should plead guilty without a NSP bargain, but he refused. Conversations with the defendant's girlfriend--in which the PD stressed the flimsy nature of his defense--failed to move the defendant, who believed that his previous prison term was the result of his being sold out by another public defender. Two judges had attempted to settle the case without success when it was sent out for a third time for disposition discussions. The DA began discussions by saying that it was technically a career criminal case--three prior felonies--though on the facts it might not be, because all three had occurred in proximity to one another and had resulted in a single prison commitment.

> Judge: Do you have any room?
> DA: I have some discretion. If this weren't a career criminal case, I'm 80% sure it's not a state prison case. Now I'm even more sure, cause the police say that the pliers they found don't match up [with marks on doorknobs at other burglary sites]. Now I'm less inclined to think he's active.
>
> [The judge sought further facts about the defendant. The PD says that he's 25 and does, in fact, play the flute. The judge tells a story about a current movie involving a flute player.]

Judge: [to PD] What're you looking for?
PD: A conditional.
Judge: What about the priors?

[The three then discuss the meaning of the probation ineligibility statute dealing with prior felony convictions. The issue is whether it requires simply separate counts or entirely separate convictions. The DA clearly knows the law on the point better than the PD, says there's a case on it, and two counts are sufficient.]

Judge: Tell me about your client.
PD: He's very leary of public defenders. He's very difficult to handle.
Judge: Does he require a commitment [of no-state-prison]?
PD: Yes. He doesn't want to take any changes.
Judge: I won't offer a conditional over the DA, but if the PD and the DA agree he is eligible for probation, there don't appear to be any unusual circumstances arguing for prison. But I'd need to see something . . . It doesn't look like a state prison case . . . How long's he been out?
PD: A year or so.
Judge: Any evidence of assaultive behavior?
PD: No.
Judge: Any extensive juvenile record?
PD: No.
DA: If this weren't in the career criminal program, I'd offer a NSP. This case is almost a joke--the "flute case"--but . . .
Judge: When a prior judge has sent a man to prison, it's very hard for me to offer a NSP. I can't. The best shot is to amend the information [and drop mention of the three prior prison terms]. The prosecutor says he won't push for prison . . . Shall I order a jury?
PD: Yes.
Judge: Here's my final offer, which you might take back to the defendant. I'll keep the case for sentencing. I won't talk to him directly--some judges will--but I don't want to do that. Tell your client that I'm not predisposed to state prison in this kind of offense.

[The judge had gone as far as he felt he could to indicate that a prison sentence was not in the offing, but was unwilling to agree to find the unusual circumstances which the statute said were required to impose a jail term upon someone with two prior felonies. The defendant refused the offer and a panel was called in and the jury selected.]

The next morning the lawyers and the judge met prior to beginning presentation of evidence. The DA said that he was no longer willing to argue against a no-state-prison bargain. His explanation was that one of his primary witnesses was to be the parole officer and that he had just learned that the officer had not informed the defendant of his Miranda rights before questioning him and hence the incriminating remarks would presumably be inadmissible. The DA was now offering a conditional plea. They discussed how to get to the conditional, and the DA agreed to strike reference to two of the three priors, thus making the defendant eligible for probation. The defendant agreed to the deal, was brought into chambers and the DA moved to strike two priors.

The judge later said that he was unwilling to impose the NSP himself (i.e., to find the "unusual circumstances" that permitted probation even when the presumptive sentence was prison for those with two priors) because such a plea was harder to "bust"--to renege on after an unfavorable pre-sentence report--if imposed by the judge. Moreover, he alluded to recent election results in which severaljudges had been defeated, suggesting that although he himself was not up for reelection for several years, he was not inclined to offer no-state-prison bargains over a prosecutor's objections.

This case reveals successful bargaining by a defendant--faced with probation ineligibility, he called the prosecution's bluff and won. Whether the prosecutor really obtained new information about the case on the day of trial or simply decided that the trial was not worth the effort given the nature of the offense is unclear. What is clear is that the

prosecutor had a strong leverage point, though it was not sufficient to carry the day. The case also suggests that a non-activist judge who is unwilling to shoulder the burden of overruling a prosecutor can be constrained even by a relatively weak statutory provision (the case did not involve a mandatory probation ineligibility allegation, only a presumptive one). In San Francisco, such a problem would not have arisen, for the judge would have paid little attention to the priors if he felt prison was inappropriate. Finally, the case reveals the flexibility of the probation ineligibility provisions--what was three prior felonies became only one simply by a sentence uttered by the prosecutor. By the same token, a career criminal case in which concessions were forbidden by both statute and office policy was converted, albeit grudgingly, into a run-of-the-mill, no-state-prison bargain. This is not to say that the prosecutor in this case did not act in an entirely just and fair way; it is only to say that doctrinal rules must, by necessity, leave room for discretion, and this discretion may often be influenced by the general desire on the part of the courtroom participants to avoid costly and time-consuming trials.

Another case, this one from San Francisco, also illustrates use of these provisions as bargaining chips. A defendant was charged with armed robbery of a cab (a 211); personal use of a firearm (an enhancement carrying an additional two-year term); two prior prison terms (worth a year each); and was ineligible for probation because of an allegation of 1203.06, the "use-a-gun-go-to-prison" provision and because of two prior convictions (1203.08). In the case, the judge in San Francisco used the probation ineligibility provision as a lever to force the defense attorney to accept a prison term:

Judge: It's a 211.
DA: Robbery of a cab. The guy gets in as a passenger and robs the driver at gun point. Monday they see the guy and capture him.
PD. There's a substantial ID problem. It was late at night. The victim was able to turn around three or four times but the lights were out. The problem two days later is that the victim only ID'd the yellow cap. There is no ID of any distinguishing characteristics.
DA: It's just an ID problem. I talked to the cop and he said he didn't see any weapons, injuries, or blood and that the defendant said "I didn't do it." I don't know where he's got the loot. He has prior, a 288 [child molest] and a rape. He's been in state prison, and CYA, and on probation. He also has another prior.
PD: He's not presently on probation. We have an alibi. Mr. _____ says they were together putting a VW engine in on that day and he stayed at the defendant's house on that night.
Judge: What's the offer?
DA: State prison, up to court. The gun can go concurrent, or anything you want.
PD: It's triable for both sides. He said a year in county jail.
DA: Yes, it's the hat and it's seen in many places. It's not probation.
PD: I'd plead him to robbery with the gun for a year in county jail. Then you have a nice tail on him [i.e., a guilty plea to robbery with the enhancement, with the prison term suspended, would mean that should the defendant violate probation after serving his county jail sentence, a very long sentence could then be imposed.]
DA: No.
PD: That's six years.
Judge: There's 1203.06, the gun [the "use a gun go to prison" section stating that terms cannot be stayed for those convicted of use of a gun in certain specified offenses]. I can't stay it--Tanner [a celebrated case involving the gun section]. You can strike it.
PD: I'll take the aggravated term [suspended].
DA: They don't want prison. I don't know about striking the gun.
PD: That's two years. I'll plead 6 years aggravated [suspended], with a year in the county jail or to 211 for the mitigated [two year] term.
Judge: That seems reasonable to me.
DA: That requires me to strike the gun.
Judge: This [deal] will stay the probation.
DA: We'll agree to strike the gun if you'll keep the priors.
PD: Mitigated term [of two years in prison].

In this case, as noted, we have a straightforward use of the enhancement as a bargaining chip. Dropping the gun enhancement saved the defendant a mandatory two additional years in prison. Dropping it, from the prosecutor's side, avoided a trial and possible problems of proof. We see the use, by the judge, of a doctrinal constraint as a lever to make prison a more likely outcome (the decision is the DA's and he is unwilling to accept a local sentence). Finally, the probation ineligibility provision dealing with two priors came into play peripherally, as a means of insuring a prison term.

In addition to observing bargaining over enhancements and probation ineligibility provisions, interviews with courtroom participants suggests that the practice is not uncommon:

> It's a great tool that we use. The law has given us a great tool . . . The enhancements have a double-sword. Not only do they enhance your time in prison, but they say you gotta go to prison. So we say, look, by dropping the enhancement to the defendant, we make you eligible for probation and we lessen your time in prison by maybe two years or one year. And invariably it's so tempting that they'll plead to a major charge and will go to prison so that they'll do less time. We make the decision based upon the evidence in the case--whether it's a case we want to risk this guy just walk in and out scot free or not. [DA, SC]
>
> * * *
>
> There are things in the law that we didn't have before, or for the most part, there weren't things which precluded granting of probation in cases. The Tanner type of situation didn't even exist under the old law. So that the existence of a gun use allegation nowadays precludes the granting of probation. So you can't afford sometimes . . . you've got a probation offer going in, you maybe cannot afford to go to trial and take a chance that you're going to lose because no judge would ever give you probation after a trial, even if he's inclined to. So those things can be used as very powerful negotiating levers on behalf of the DA. . . [W]hat you're going to get from the other side is, if he doesn't plead, we're going to try . . . he's going to go to trial and state prison--a mandatory prison case. Therefore, we'll be willing to drop the enhancement if he pleads, and that may be for state prison for a lesser term, or may not, or maybe even for probation in some cases. So, and most people under those circumstances . . . it is a very strong client, or a very unusual client who is willing to take that kind of chance. [PD, SF]

The Value of Bargaining over Probation Eligibility and Enhancements

The most commonly alleged probation disqualifiers were typically dropped in more than a third of the cases in which they were alleged. In 1978-79, the most frequently alleged enhancements were typically dropped in a third to half the cases (see Tables 9 and 10). Although dropping of these allegations is sometimes the product of changes in the state of the evidence, new information available to the prosecution , etc., a substantial number of them are dropped for purposes of obtaining a disposition. Despite a policy of nominal full enforcement, trial deputies are often able to obtain (or forced to accept, as a result of judicial intervention) "reasonable" sentences by dropping initially alleged enhancements of allegations of probation ineligibility.

From the defense point of view, some bargains which resulted in dropping a probation disqualifier are "real" bargains and some are not. By a "real" bargain, we mean ones that involve reduction in the sentence that might be reasonably expected if the case went to trial. An illusory bargain--similar to charge bargaining under the ISL--might involve dropping of a probation disqualifier but imposition of a prison term anyway. To some extent, whether the bargaining over these provisions is real or illusory (or, to frame the issue another way, how much difference these legislative attempts to restrict courts' discretion make)

depends upon whether the legislative attempt generally comports with settled sentence patterns or diverges greatly from it.

In Table 11, we present some data dealing with the proportion of defendants who received prison terms in cases in which a probation disqualification was originally alleged. We focus on San Francisco and Santa Clara (for there was virtually no use of these provisions in San Bernardino) and upon the two provisions which were most frequently used. The small number of cases in each cell makes the findings only very tentative, but the table suggests that in robbery cases in which probation ineligibility was alleged as a result of use of a firearm, defendants who received a "bargain" of dropping the allegation were imprisoned at nearly the same rate as those who did not receive such a "bargain." In the one example we have involving the two prior felonies rule, burglary in Santa Clara, we find that those who received a bargain were, indeed, much less often sentenced to prison.

Robbers armed with guns were typically sent to prison, regardless of their technical eligibility for prison. Those who became technically eligible for jail or probation as a result of the prosecutor's striking the 1203.06 allegation were simply "rolling the dice." That is, they were pleading guilty in return for the possibility of a jail sentence, though they very rarely received it. The going rate of prison for robbery with a gun was sufficiently strong that judges would impose such a sentence regardless of whether they were required to do so by statute or were legally free to impose a lesser sentence. Thus, having an ineligibility allegation dropped was more psychologically satisfying than directly advantageous to defendants. A bargain which involved the two prior rule

Table 11: SENTENCES IN CASES WITH PROBATION INELIGIBILITY ALLEGED (% receiving prison)

	San Francisco		Santa Clara	
	1976	78-79	1976	78-79
Robbery Cases				
Gun Use (1203.06)				
alleged and found	87.5% (8)	100.0% (19)	*	100.0% (33)
alleged and struck	77.8 (9)	90.0 (10)		90.0 (10)
Prior Felonies (1203.08)				
alleged and found	**	*	**	91.7 (12)
alleged and struck	**	*	**	66.7 (3)
Burglary Cases				
Prior Felonies (1203.08)				
alleged and found	**	*	**	100.0 (19)
alleged and struck	**	*		46.6 (15)

SOURCE: Court records.

*No cases.
**Law not in effect.

in a burglary case was, on the other hand, more likely to be worth something to a defendant in Santa Clara. The going rate in burglary cases was jail, and only especially "bad" burglars "earned" a prison term. One of the attributes of the going rate for burglars was that those with extensive past felony records were more likely to do to prison, though even here it was not certain. In Santa Clara, all of the 19 burglary defendants who had the requisite two priors and who did not make a deal about dropping the allegations were sent to prison. Among those who succeeded in reaching a bargain to drop the allegation (some of whom were "rolling the dice" and some of whom had obtained formal no-state-prison bargains at the time of plea), more than half evaded the legislative mandate that they be sent to prison. Though the evidence is admittedly slim, this suggests that when the going rate diverges substantially from a new legislative policy, bargaining is not only likely to occur, but also likely to be quite important in case dispositions.

What about bargaining over enhancements? Although some enhancements may have been dropped because of changes in the evidence, our interviews and observations suggest that many were not. It is hard to imagine that, for example, typically half of the guns used in robberies turned out on further examination to be toys; or that a third to a half of the cases in which the charging prosecutor thought a defendant had two prior prison terms turned out to involve clerical errors. Moreover, if we look back to Table 10, we notice that the frequency with which enhancements were dropped decreased between 1976 and 1978-79. This is presumably because they came to be worth more in sentence terms in the post-law period. Under the ISL, a prosecutor could give up an enhancement in the

belief that the Adult Authority would still see through the conviction charges to the "real" offense. As an experienced San Francisco judge noted:

> Well, they always have had [enhancements]; they always had some of those. Those are more expensive now, but they have always had enhancement provisions. They always had priors; priors were greater than they are now, in fact . . . you didn't have to be in state prison for it to be considered a prior. Even though you struck them, they went up as a silent beef on you . . . against you. You always had that aspect of it.

However, with the new law an enhancement has a much more specific meaning, for a term of years is now directly associated with its imposition or striking. This, in turn, has made prosecutors more cautious, given that the deals which they offer defendants have become real in their consequences, rather than primarily symbolic.

In sum, there appears to be evidence, as might be expected, that the enhancements are routinely the subject of negotiation in all three jurisdictions. Given the fact that all depend upon inducing the vast bulk of defendants to plead guilty rather than have trials, this fact is hardly surprising. Indeed, what would be surprising would be a finding to the contrary. Although prosecutors are less willing to offer concessions when they are "real" than when they are symbolic, they do offer them in a substantial number of cases, and these bargains do appear to offer substantial inducements to plead guilty. "Real" chips are given up less easily, but when they are played, they do offer greater winnings to the defendant. Adult Authority discretion has, in some measure then, devolved to the prosecutor.

Probation Ineligibility Provisions, Enhancements, and the Implementation Process

What are we to make of this material about the implementation of the probation ineligibility and enhancement provisions? The clearest finding is that in all three jurisdictions there appears to be some inclination to use the enhancements as bargaining chips. The tying of sentences to enhancements has given the prosecutor a potentially important resource, for such concessions are no longer symbolic but real. Enhancements have quickly become part of the plea-negotiation process. Their implementation at the court level will no doubt produce somewhat longer sentences, on average, for those who fall within their ambit, but some substantial proportion of such defendants will also escape imposition of the additional penalties in return to pleas on the underlying offenses. What is from one perspective an example of an expressed legislative policy that certain types of defendants shall receive increased terms is, from the courtroom workgroup perspective, a potential change in the resources available to judges and prosecutors in the bargaining process.

Examination of the probation ineligibility provisions provides a somewhat different view of the implementation process at the courtroom level. These provisions provide what appears to be an unambiguous legislative policy that certain types of defendants shall receive prison terms. The new, mandatory probation ineligibility provisions are much tougher than their predecessors. Moreover, the legislature has passed a number of new provisions in recent sessions, suggesting that there may be increased resort to this type of policy as time goes by.

Our evidence about the implementation of these provisions is somewhat mixed. First, they were not used very much in their early years.

Their lack of use appears to reflect their somewhat narrow coverage and ignorance about them rather than an assessment by prosecutors that legislative policy should be evaded by failure to allege the provisions or dropping of allegations after they have been made. The lack of this type of "evasion" may result from the fact that legislative policy about probation ineligibility has in large measure approximated already-existing going rates. As the legislature extends coverage of its probation ineligibility provisions to defendants who in the past were not likely to receive prison anyway, increased problems of implementation may occur. We lack at the current time the appropriate data with which to test this notion--two probation ineligibility provisions, one of which approximated an already-existing going rate and one which did not--but there are some suggestions which may be gleaned from our data.

The most widely publicized probation ineligibility provision that has been used extensively thus far is the 1975 use-a-gun-go-to-prison law. The evidence available on implementation of this provisions suggests that it approximated already-existing going rates and that it is difficult to attribute increases in imprisonment of defendants using guns to use of this provision.

We have data on what happened to robbery cases in 1976--the first year of the use-a-gun-go-to-prison law--and also for 1978-79. Moreover, because of the overlap between the provisions of the penal code dealing with enhancement of sentence and probation ineligibility for use of a firearm, we can determine which robbery cases appeared to involve firearms, even when there was not an actual allegation of probation ineligibility.

If we examine, first, the bottom row of Table 12, we see that in both years in all three counties the large majority of those who used guns in robberies were sentenced to prison. This suggests, as indicated above, that the going rate in such cases was a prison term. The "slippage" of the 10 to 30 percent of gun-using robbers who escaped prison presumably reflects the fact that the going rate is just that--a presumption, and a strong one, but not an invariable rule. Some robbers may have turned out to be using toy or air guns; some may have been viewed as particularly naive offenders or their offenses may not have been regarded as "real" robberies. If we examine the middle two rows, it appears that the propensity to send gun-using robbers to prison cannot be attributed in either year to the formal effects of the probabion ineligibility rule that went into effect in late 1975 (1203.06). Thus, only in Santa Clara in 1978-79 did even amajority of those who apparently committed robberies while armed with guns even suffer the allegation that they were probation ineligible. It will be recalled from Table 9 that in a third of the cases in which such an allegation was laid, it was subsequently dropped.

This suggests that the probation ineligibility provision probably simply approximated the going rate that already existed in the three locales, rather than imposed a new standard for sentencing. There is no evidence that any increase in prison commitment rates between 1976 and 1977-78 were produced by the actual application of the 1203.06 procedure--allegation and proof that the defendant is ineligible for probation because of use of a gun. The proportion of cases in which gun using robbers were charged with being probation ineligible remained zero in 1978 in San Bernardino, and went up only moderately in San Francisco. The most marked

Table 12: ALLEGATION AND DISPOSITION OF ENHANCEMENTS AND PROBATION INELIGIBILITY PROVISIONS DEALING WITH FIREARM USE IN ROBBERY CASES

	San Bernardino		San Francisco		Santa Clara	
	1976	1978-79	1976	1978-79	1976	1978-79
Number of cases with 12022.5 allegation*	35	55	68	79	127	71
Number of cases with 1203.06 allegation**	0	0	18	29	0	51
% of cases with 12022.5 allegation in which 1203.06 alleged	0	0	26.5	36.7	0	71.8
% of cases with 12022.5 allegation in which prison sentence imposed	68.6	80.0	72.9	88.6	77.2	80.2

SOURCE: Superior Court records.

*S. 12022.5 provides that defendants who personally use firearms shall receive enhanced terms.
**S. 1203.06 provides that defendants who personally use firearms shall be ineligible for probation.

increase in use of this provision occurred in Santa Clara, where the rate of imprisonment remained about the same.

Thus, in evaluating the use-a-gun-go-to-prison statute, there is evidence that the legislative policy in robbery cases, in our three counties at least, were carried out. By the same token, this result appears to have occurred because the statute tended to mirror past going rates reasonably well, not because it modified the behavior of courtroom participants, especially since they chose so infrequently even to apply its formal provisions.

To the extent that probation ineligibility provisions begin to deviate markedly from existing going rates, we would expect more initial evasion. The frequency, for example, with which the two prior rule was dropped in the one jurisdiction which used it, Santa Clara, and the fact that prison sentences were much less frequent in cases in which the allegation was dropped, suggested some movement towards adaptive strategies when a legislative policy runs up against an existing going rate. The legislature seems inclined towards adopting an increasing number of probation ineligibility provisions. Recent sessions have seen the passage of mandatory provisions dealing with specified sex offenses (1203.065) and manufacture of PCP (1203). The recent presumptive ineligibility provision dealing with those convicted of first-degree burglary is most likely to run up against going rates, for a substantial proportion of such defendants do not receive prison terms.

The forces in the legislature that are promoting increased resort of probation ineligibility provisions are the same ones advocating increased prison terms under the DSL. It seems possible that these two

developments may be related to one another in the future development and implementation of laws dealing with sentencing in California.

As noted before, one of the major ways in which the determinate sentence law was expected to increase rates of imprisonment was because it was anticipated that judges might sentence more people to prison for short, determinate terms than they had been willing to for long, indeterminate terms. Yet if the future continues to bring increases in the length of prison terms, this may produce some decrease in the willingness of judges to sentence people to prison, either because the terms appear excessively long or because it may become difficult to induce sufficient numbers of defendants to plead guilty for long and determinate terms. This development may, it might be hypothesized, lead to an increasing resort by the legislature to probation ineligibility provisions. From the perspective of those forces who desire increased rates of imprisonment, judges are always going to appear to be excessively lenient, if only because of the odd but highly publicized case in which a person apparently committing a heinous crime receives probation. As terms become longer, not only may judges become more reluctant to send defendants to prison, but the constraints imposed by physical capacity of prisons will become greater, especially without the safety valve provided by a parole system.

This trend suggests that the seeds for non-compliance with legislatively-mandated probation ineligibility provisions are already planted and perhaps already at work. The strategy available to evade such provisions is manifest--even if the judge's hands are tied, the prosecutor still retains the ability to drop such allegations. Although use of the provisions has been sufficiently sparse that we cannot discuss

their impact with as much confidence as we wish, there is already evidence that they are being dropped with some frequency in cases in which they have been alleged.

It will be difficult for legislators to deal with this type of prosecutorial discretion. In a recent provision dealing with those who commit great bodily injury in the course of designated crimes, the legislation not only forbids the judge from imposing a sentence less than imprisonment, but also forbids the granting of a motion to dismiss a finding that the defendant has committed GBI once it has been made. The difficulty with going much further than this is that, doctrinally, about all the legislature could do would be to constrain the dismissal of such an allegation once it had been made. Should this policy be adopted (a version is currently being considered in the legislature), evasive strategies still remain--e.g., earlier plea negotiation in which the prosecutor agrees not to file the allegation in return for a plea of guilty, or, as in the Michigan case, a movement towards bench trials in which the defendant is found not to have the attribute that renders him or her probation ineligible. [Heumann & Loftin, 1979] Substantively, such a provision would make little sense, since there clearly is a class of cases in which the prosecutor sincerely believes that a defendant has an attribute that renders him or her probation ineligible and then finds that this is not true. Forbidding the dropping of allegations in such cases would seem inappropriate, while permitting such exceptions opens the way for use not only in that class of cases but also ones in which for either considerations of "equity" or of plea bargaining, it is decided that dropping of a probation ineligibility allegation is desirable.

In sum, then, the limited evidence available about the implementation of recent probation ineligibility provisions suggests, first, that they have been relatively little used thus far. This lack of use reflects, for some, the fact that they simply do not apply in many cases; for others, it appears that a substantially broader class of defendants might have been the subject of such allegations, and failure to use them reflects the lack of knowledge of their relevance that one might expect shortly after passage. We see, further, that those provisions that have been used with some frequency do not appear to vary greatly from general sentencing practice in the three localities. By the same token, though, we foresee the possibility of difficulties in the future. As the legislative determination to send more people to prison runs into constraints imposed by local going rates, by a conflict with judges' sense of justice as terms are increased, or physical incapacity in the prison system, there will be an inclination to evade the provisions. The ability to do so appears to inhere in the exercise of prosecutorial discretion to allege and then drop such allegations, or to fail to allege them at all. We would predict that, in the next few years at least, there will be increased resort to such provisions, in part sparked by perceived evasion in the past. Such legislation will, we would guess, produce further non-compliance. Thus, in the short-run at least, we anticipate the possibility of a cycle of legislative "innovation," some court resistance, and further attempts by the legislature to tie the hands of judges and prosecutors.

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Chapter 7

CONCLUSIONS

We wish to recapitulate briefly some of the basic themes suggested in the body of the report.

Prison Rates. None of those who participated in consideration of the DSL or commented upon it, so far as we can gather, expected that it would lead to a decrease in the proportion of defendants sentenced to prison. Indeed, an important segment of support for the new bill came from those who believed that it would achieve an appreciable increase in prison rates. The strength of this expectation, in fact, is one of the very things that makes it difficult to sort out the actual effects of the new law upon this crucial court outcome.

Our data from three counties suggests to us that prison commitment rates--overall and in burglary and robbery cases--has shown some increase in the period after implementation of the DSL. The increases, however, are modest, and appeared to continue a pre-existing trend that makes attribution of the result to the DSL somewhat problematical. The DSL was supported by those concerned with law enforcement and is properly viewed in the context of other legislation mandating increased prison terms (e.g., the 1975 use-a-gun-go-to-prison statute, and the probation disqualifiers that were part of the DSL bill itself as well as those which have subsequently been passed). This suggests that it is possible to conceive of the bill and its implementation not so much as a cause of

increased prison rates but as itself a product of a set of social forces which independently produce increased prison commitment rates via effects on judicial and prosecutorial decision making.

The argument that the increases in the post-law period may not be attributable to the law per se also makes the evaluation of future changes in prison rates somewhat difficult as well. If the rates in succeeding years (1979 and after) increase at a relatively steady rate, will this be evidence for an effect of the law or simply a continuation of our putative law and order trend? Clearly, an appropriate test would involve examination of the implementation of the law in a context which permits controlling for our "law and order" hypothesis. Examination of California jurisdictions in which the prison rate had not risen prematurely would be useful, as would looking at implementation of determinate sentence laws in political contexts (e.g., other states) not associated with a trend toward punitiveness. Our data, however, do not permit us to test the effects of the law in this fashion, and hence our conclusion is one of caution.

We believe that this caution is one that should be taken seriously by those who are considering sentencing reforms which involve increased determinacy of terms. It would be a mistake, we believe, to take the California experience as suggesting conclusively that determinate sentence laws produce increased prison commitment rates. The process by which this result was hypothesized to occur--what we have called the "informal effects" hypothesis--seems quite plausible to us. Judges might well be expected to send more marginal defendants to prison for short determinate terms than they were accustomed to do under an open-ended indeterminate

sentence law. Perhaps they have done so in California, perhaps even in our three counties, but on the evidence available, it is difficult to draw this conclusion.

Those who have supported determinate sentence laws have done so for a variety of reasons, including a belief that certainty of terms is a more humane way of imposing prison terms and a belief that determinacy may promote equality in sentencing and remove discretion from the hands of administrative agencies removed from public view and accountability. Given these advantages of determinacy, we would find it unfortunate if supporters took the California experience as an indication that determinate sentence laws inevitably produce increased prison commitment rates. They may do so, but the evidence is, we believe, simply not yet in.

The DSL and the Plea Bargaining Process. In our three counties, we find little evidence that the DSL has produced any change in the rate at which guilty pleas are entered, and only very equivocal evidence about its effects on the timing of such pleas. Again, time perspective seems crucial. Comparison of the immediate post-innovation years with the immediate pre-innovation year suggests changes that seem deceptive, in our three counties at least. One of the major reasons why an effect on guilty plea rates is difficult to discern is a ceiling effect. Such a large number of defendants plead guilty under the ISL that the pool of available trials that might be converted into pleas was small. Of course, small changes can be of great significance for busy courtroom workgroups, but the best evidence we have available in our three counties suggests to us that little, if any, effect can be attributed to the DSL.

The future effects are also murky. If future legislation continues the trend toward longer determinate terms, it is difficult to predict the possible effects on guilty plea rates. From one perspective it might be argued that such a trend will produce an increase in plea rates, for longer terms permit the offering of more graphic and substantial discounts to guilty pleaders and conversely penalties for those who exercise their right to trial. On the other side of the coin, though, long terms are long terms, and some defendants may choose to risk trials rather than accept them, even though the offer involves a substantial reduction from the sentence that may be imposed after trial. Finally, to the extent that the legislature attempts--as seems likely--to couple longer terms with legislation designed to reduce judicial and prosecutorial discretion (e.g., probation disqualifiers or rules aimed at making it more difficult to drop or stay terms for enhancements), the combined effects of these two continuing trends will be even harder to predict. Below we shall argue the possibility that these two trends may in the long run reduce the rate of guilty pleas, but this is largely a speculation. But on the basis of our evidence here, we believe that in these three counties there is no evidence that the DSL has had any consistent effect on the rate at which guilty pleas are entered.

We also find only mixed evidence in respect to the proposition that the DSL would shift discretion to the prosecutor. The law clearly moves the locus of influence over time served from the A Authority to the courtroom. Whether it places as much influence in the hands of the prosecutor as many have suggested seems more problematical. In these three counties, initial experience indicates a continuation of the

influence patterns that predominated before, rather than a massive shift to the prosecutor. Moreover, in the two prosecutor-dominated locales, the new law appears to have somewhat increased judicial influence to the extent that it has opened possibilities for sentence bargaining in prison cases. The law does, in theory, provide substantially greater resources to the prosecution, but how these will be exploited remains to be seen.

Finally, we have seen evidence in all three counties of a propensity to integrate the enhancement and probation ineligibility provisions into the bargaining process. To the extent they have been alleged, they have been dropped frequently, and it seems apparent that they are being used as counters in bargaining between prosecution and defense. In addition, the systems have, as expected, tended in the short run to produce sentencing decisions somewhat like those that prevailed under the old law. Despite the fact that these provisions may express legislative intent that certain types of defendants receive prison terms or increased sentences, a contrary finding would have been surprising. The need to induce defendants to plead guilty and the inertial effects of going rates are powerful motivating factors in determining courtroom workgroup behavior. By the same token, we have examined this behavior very shortly after passage of the law, and in the longer term we believe that these legislative mandates will have the effect of nudging sentencing practice in the desired direction, though as pointed out below, perhaps never to the extent that supporters of such policies desire.

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 enforcement 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 the due process liberals, though they may feel themselves powerless to resist effectively. Two factors may intervene to cause increasing dissatisfaction 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 prisons 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" hypothesis--sending marginal offenders to for short terms--will 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 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.

Evantually, we would surmise, law enforcement interests may come to identify the problem as being the determinate sentence law itself. Determinacy 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.

APPENDIX I: DATA SOURCES

In this Appendix, we describe the two major sources of data used in the project, suggesting issues that must be considered in evaluating their validity. The two major sources of data were tapes provided by the California Bureau of Criminal Statistics, and our own small collection effort carried out using Superior Court files in the three counties.

BCS Data. The California Bureau of Criminal Statistics (BCS) compiles data each year on activity by criminal justice agencies. They provided us with data tapes prepared for each of the three counties covering the years 1974-78. Each tape includes data on individuals arrested on felony charges in the county during each year, including most serious arrest charge, data on disposition of the case and sentence, if any, as well as some demographic information (age, race, sex, past criminal record). The data thus cover dispositions from arrest, through declination to prosecute, dispositions in Municipal Court, as well as cases disposed of in Superior Court. We have focussed in our analysis upon dispositions in Superior Court. In addition to looking briefly at disposition of all cases in Superior Court, we have focused upon defendants in two kinds of cases: burglary and robbery. These cases are among the most common in Superior Court, and represent two differing types of cases. Burglary, while a serious charge, is a crime against property and one for which prison terms are not the most common punishment. Robbery, a crime against the person, is treated in all three counties as a much more serious crime, and prison terms are the modal outcome for those convicted.

In examining the outcomes of "burglary" and "robbery" cases, we have relied upon the arrest charge to classify the type of case. Thus, when we examine "burglary" cases in Superior Court, and present evidence on the rate at which convicted defendants plead guilty or were sentenced to prison, we are dealing with defendants whose most serious arrest charge was burglary, and whose cases ultimately resulted in a conviction in Superior Court. Not all such defendants were convicted of burglary: indeed, substantial proportions were convicted of lesser offenses. In terms of our strategy of attempting to control for charge and seriousness of offense and examine trends over time, it appeared more sensible to focus on arrest rather than conviction charge. Although there may have been some change in disposition of original charges over time (see below), so far as we can tell from our interviews there do not appear to have been any changes in charging practices. Moreover, it is the arrest charge that both constrains eventual dispositions and best measures the seriousness of the original charged offense. Thus, this appears the most useful way of classifying cases in order to control for offense seriousness.

Finally, it should be noted that the BCS codes for arrest charges are quite crude. They include only the most serious offense, typically without specifying degree (e.g., first and second degree burglary cases are lumped under "burglary general"), and without an indication of the number of counts or other charges. Thus, among burglary and robbery cases, there may be substantial variation in terms of how serious a burglary or robbery offense is involved. By the same token, there are no empirical or theoretical reasons why such differences ought not be random across counties and over time, so they ought not bias our findings.

Sample problems are potentially more severe, though there is little we may do about them except report them and advise some caution because of their existence. The BCS system, in theory, should provide not a sample but the universe of cases that became involved with criminal justice agencies in each year. That is, their data gathering process does not aim to sample cases but to gether the relevant information about all defendants. BCS indicates, however, that they believe their data tapes under-report actual defendants by approximately one-third. These substantial losses are said to be the product mainly of human error--the misplacing of forms, failure to report, mistakes in completing forms, etc. BCS personnel told us that they knew of no bias in the under-reporting process. Thus, although in any given year BCS data "missed" around a third of the defendants whose cases had been disposed of, they knew of no reason to think that the "lost" cases represented systematic sub-samples of defendants (e.g., that defendants with more serious cases, different types of past records, etc. were represented in differing proportions in the reported and unreported cases).

Although we have an inadvertent "sample" in any given year of burglary, robbery, or other types of cases, we have no reason to believe that this misrepresents the population of such cases in any systematic fashion. Moreover, although there is some variation across California counties in the under-reporting rate, with the exception of the problems in Santa Clara discussed below, they knew of no reason why these three particular counties ought not be compared (that is, there was no systematic bias across these counties in patterns of under-reporting, with one important exception).

Another source of potential bias involves changes in reporting over time. Here, substantially more difficult problems arise. The difficulties stem from the fact that BCS changed its reporting procedure during the period under consideration here. Until 1974, in all three counties, Superior Court cases were the object of separate reporting procedures. Thus, the data on these dispositions was gathered at this point, and combined with data from earlier points. Put another way, the reporting procedures focused not on following individual defendants but on reporting outcomes at various stages in the process. During the 1970s, BCS switched to the Offender-Based-Transaction-Statistics (OBTS) format for data collection. This involves following each defendant through the process and hence the physical passing of a defendant-specific form from one agency to another, as cases proceed from police to Municipal Court to Superior Court, and the forwarding of the form to BCS at whatever point the defendant's case is terminated. BCS cautions that because of differences in the reporting procedures, comparison of data gathered in pre- and post-OBTS years is "not advisable."

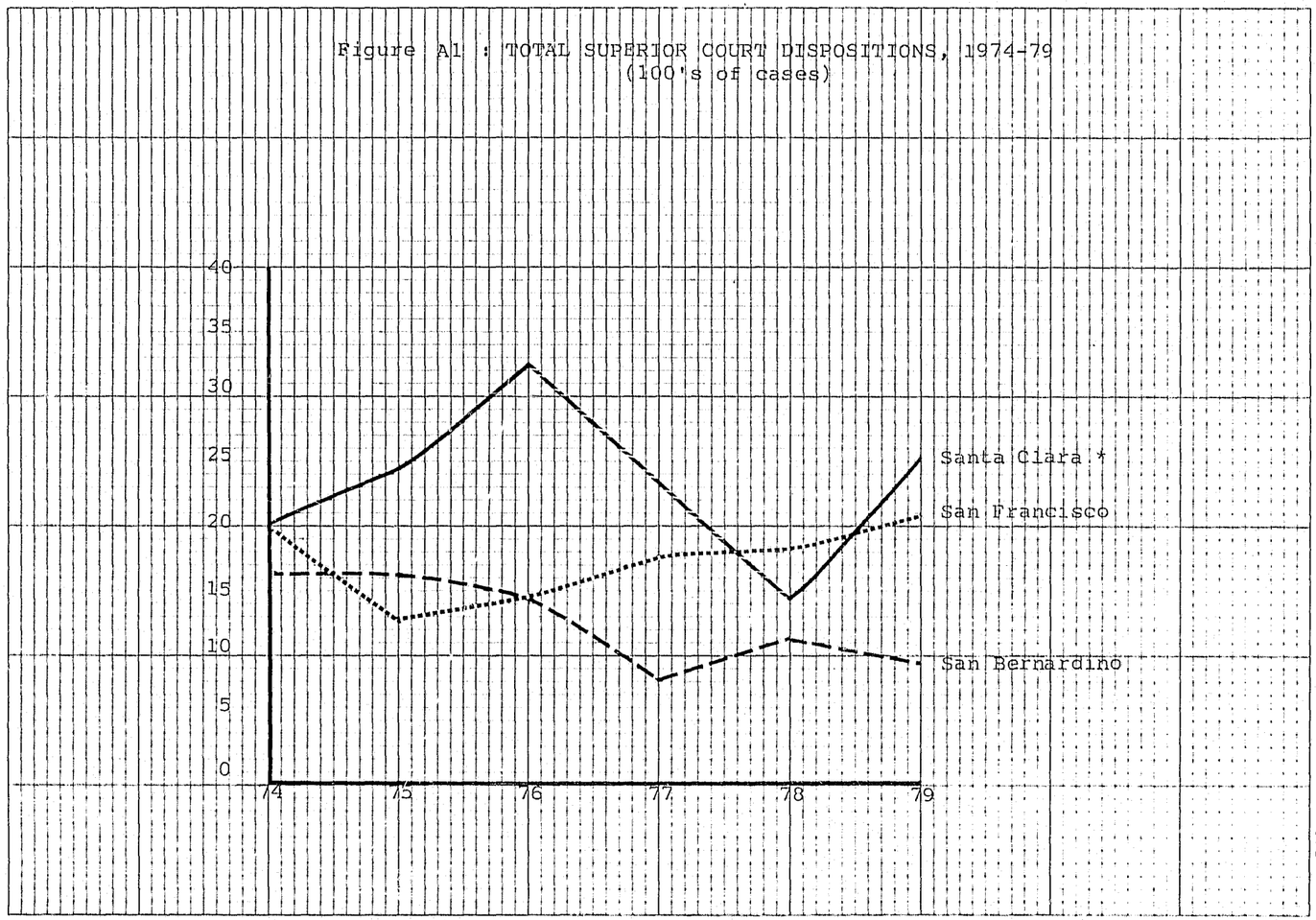
San Bernardino and San Francisco switched to the OBTS system in 1975. Thus, in our analysis of data over the 1974-78 period, the most comparable data deal with 1975-78. We had expected that switch-over from one system to the other might reduce the number of cases reported in the first years of the new system. Both unfamiliarity with new reporting procedures and the fact that system requires that a single form be passed along up to the point of disposition and then sent in to BCS might result in more "lost" cases at the Superior Court level because the further a case proceeded, the more opportunities for losing materials

would be made available. In Figure A1 we indicate the numbers of Superior Court dispositions for the three jurisdictions over the 1974-78 period. San Bernardino does not show the expected drop in 1975--their first year with OBTS--though San Francisco does. In sum, for these two counties, care ought to be exercised in evaluating the 1974 data vis-a-vis the remaining four years.

Santa Clara presents a much more serious problem. Their switch to OBTS occurred later, actually becoming fully operational in 1978. Moreover, no county data are reported for 1977. The first full OBTS year in Santa Clara--1978-- is characterized by a precipitous drop in numbers of cases reported (on the order of 55 percent). This suggests that the problems encountered in implementing the new system resulted in a much greater than average loss of cases. We would expect that these losses would be disproportionate at the Superior Court level, because these are the cases that have advanced furthest. Since we are concerned in our analysis with dispositions in Superior Court only, the important issue in evaluating possible bias in our dependent variables is whether among those reported cases from Superior Court some types are over or under represented. Unfortunately, we have no way of knowing, and BCS could provide no basis for a conclusion. It is somewhat disconcerting to notice, however, that (as reported in Chapter 4) the overall prison commitment rate dropped so dramatically in the only post-law year available.

Although we do not have individual-level data for 1979, some published data does provide some basis for more confidence in the 1978 data. In 1979, the number of cases disposed of jumped markedly, suggesting that

Figure A1 : TOTAL SUPERIOR COURT DISPOSITIONS, 1974-79
(100's of cases)



* 1977 missing

the new reporting system was operating more efficiently. The prison rate, though, did not jump very markedly (moving up only about 2 percent). Since we lack individual-level data, we cannot evaluate the prison rate to see whether the defendant population had similar attributes. But published data controlling for offense suggests that prison rates did not change markedly for robbery or burglary cases. Thus, the evidence available suggests that after the new reporting system was working more efficiently, there is no indication that our post-disposition year was anomalous, at least in terms of prison rate.

To sum up, the Santa Clara data have to be treated with great caution. Not only is 1977 missing, but 1978 is based upon a relatively (compared to other years and other counties) small though inadvertent "sample" of cases. Whether this sample is biased in terms of our dependent variables, particularly prison rate, remains problematical. In terms of its behavior, it suggests an implausible drop in prison rate, but this drop does not disappear in the following year, when the reporting problems appear to have been substantially ameliorated. About all we can do is to exercise and suggest great caution in treatment of the Santa Clara data.

Superior Court Data. Because the BCS system does not collect very precise information on arrest or conviction charges, nor does it provide information about probation ineligibility and enhancement allegations, we mounted a very modest data collection effort in the three counties. We examined the Superior Court files for two twelve-month periods, calendar 1976 and July 1, 1978-June 30, 1979. Thus, we have data on selected cases during the last full year prior to implementation of the DSL (which went into effect on July 1, 1977) and a twelve-month period commencing a year

after the law had gone into effect. The case files in all three counties were arranged chronologically. We examined all cases that had been disposed of during the two periods, gathering data on all defendants for whom robbery was the most serious charge and every other defendant against whom burglary was the most serious charge. Thus, we have data on the universe of robbery defendants and a 50 percent sample of burglary defendants. The very few defendants in the post-law period who were facing charges under the ISL (that is, whose offenses had occurred before July 1, 1977) were excluded.

Our groups of robbery and burglary cases differ from the analogous groups for which we have BCS data in several respects. The time periods are somewhat different, in that BCS data goes by calendar year, while our post-law sample covers parts of two years. More importantly, burglary and robbery cases are defined in the BCS data by arrest charge; in our samples, we have identified cases in terms of most serious charge in Superior Court. This means that we sampled only cases in which the initial robbery or burglary charged survived to be resolved in Superior Court. In the BCS sample, although we examine only cases in which burglary or robbery was the most serious arrest charge and which were disposed of in Superior Court, these cases may have already been the subject of charge reductions by the time they got to Superior Court. As a result, our sample, taken as a whole, has marginally more serious cases than the BCS sample. Finally, we believe that although we inevitably may have "lost" some cases, we have lost very few, especially relative to the one-third typically not included in the BCS tapes.

We gathered data on the following variables: (1) the three most serious initial charges; (2) total number of initial charges; (3) allegation and disposition of any probation ineligibility characteristics; (4) allegation and disposition of any enhancements; (5) three most serious conviction charges, if any; (6) total number of conviction charges, if any; (7) mode of disposition (dismissal, plea, type of trial, diversion); (8) sentence, if any; (9) number of months of probation, jail, prison; (10) judges involved in plea and sentence.

As indicated in the tables in the text, offenses were coded in terms of a BCS system, and then converted to seriousness scores by summing the BCS seriousness score for arrest and conviction charges.

Observational and Interview Data. In addition to the gathering and analysis of statistical data, we spent several months during 1978 and 1979 visiting the three jurisdictions in order to get a feel for how cases were resolved and to interview court participants. The observational phase of the research involved both following prosecutors and defense attorneys around and observing their interactions with one another, as well as sitting in on pre-trial conferences in judges' chambers. For the latter, we attempted to prepare rough transcripts of remarks by the various participants, from which the quotes in the texts are derived. Although we observed between 50 and 150 cases in each jurisdiction, we obtained fewer transcripts of completed conferences. The content analysis of factors discussed presented in Chapter 4 is based upon such completed transcripts.

In addition to observation and extensive conversations with court personnel over the times we visited the three counties, we conducted

formal interviews (of about an hour's duration) with twenty-six members of the courtroom workgroups (seven judges, eight defense attorneys, eleven district attorneys). The interview schedule is reproduced in Appendix IV. The respondents were not selected randomly, but rather because they were experienced with the workings of the court system, and we attempted to focus upon those who had experience with both the ISL and the DSL in Superior Court.

APPENDIX II: TABULAR PRESENTATION OF MARGINAL FREQUENCIES

In the text, we have presented our data primarily in terms of graphs depicting trends over time. For those who prefer to examine data in table form, we present here the marginal frequencies for our variables in such a form. All of the data presented here comes from BCS. In addition to permitting inspection of our data in a somewhat different form, these tables also support the conclusion that in terms of available defendant characteristics, there do not appear to have been substantial changes during the 1974-78 period.

The following are coding categories used:

Criminal Record

None = no arrest record
Some, but no prison = arrest; or prior conviction but no prior prison terms imposed
Prison = served prior prison term

Mode of Disposition

Plea cases include those in which the case was submitted on a transcript (SOT) and a finding of guilt was made. They are very infrequent in these three cities, but constitute so-called "slow pleas of guilty"
Trial cases combine bench and jury trials. Bench trials were not typically "slow pleas."

Sentence

Prison combines prison and California Youth Authority sentences.
Jail includes any case in which a jail term was imposed, typically in addition to some subsequent time on probation.
Probation includes only straight probation cases.
Other includes fines and, primarily, commitments of drug addicts to the California Rehabilitation Center (CRC).

San Bernardino, Superior Court Dispositions, 1974-78

	Robbery Cases					Burglary Cases				
	1974	1975	1976	1977	1978	1974	1975	1976	1977	1978
Age ($\bar{X}$ years)	24.9	23.7	24.9	24.7	25.5	24.6	24.2	25.5	25.6	25.1
	(130)	(171)	(128)	(86)	(139)	(245)	(365)	(357)	(217)	(247)
Criminal Record										
None	18.9%	21.7%	17.8%	19.5%	21.3%	18.1%	20.2%	17.3%	18.1%	15.5%
Some but no prison	59.8	57.2	57.6	51.2	47.8	64.3	62.2	59.0	59.3	51.4
Prison	21.3	21.1	24.6	29.3	30.9	17.6	17.6	23.7	27.6	33.0
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	99.9
	(127)	(166)	(118)	(82)	(136)	(238)	(345)	(300)	(210)	(244)
Race/ Ethnicity										
White	48.8%	47.1%	42.0%	48.1%	53.8%	67.5%	61.1%	57.0%	53.7%	51.9%
Black	33.1	31.2	34.0	24.9	19.2	14.2	16.5	21.7	17.7	23.5
Chicano	17.3	20.0	24.0	26.7	26.9	18.3	21.6	21.0	28.6	24.7
Other	.8	1.8	-	1.2	-	-	.8	.3	-	-
	100.0	100.1	100.0	99.9	99.9	100.0	100.0	100.0	100.0	100.1
	(127)	(170)	(100)	(81)	(130)	(240)	(362)	(353)	(203)	(243)
Sex										
Male	96.9%	96.5%	96.8%	97.6%	93.5%	96.3%	93.9%	90.9%	93.9%	91.8%
Female	3.1	3.5	3.2	2.4	4.5	3.8	6.1	9.1	6.1	8.2
	100.0	100.0	100.0	100.0	100.0	100.1	100.0	100.0	100.0	100.0
	(127)	(171)	(126)	(83)	(133)	(240)	(362)	(353)	(213)	(243)
Mode of Disposition (convicted)										
Plea	84.7%	86.1%	75.2%	82.7%	81.2%	92.2%	94.7%	86.7%	90.7%	89.0%
Trial	15.3	14.8	24.8	16.3	18.8	7.9	5.2	13.3	9.4	11.0
	100.0	99.9	100.0	100.0	100.0	100.1	99.9	100.0	100.1	100.0
	(118)	(144)	(109)	(62)	(117)	(217)	(303)	(294)	(172)	(210)
Sentence (convicted)										
Prison	60.2%	50.7%	64.9%	62.4%	63.1%	23.1%	17.3%	31.4%	33.7%	34.4%
Jail	28.5	33.3	22.8	23.4	23.8	44.6	48.8	39.5	44.7	51.7
Probation	7.3	12.0	7.9	11.7	9.0	25.3	25.8	21.3	12.1	4.3
Other	4.1	4.0	4.4	2.6	4.1	6.9	7.9	7.8	9.5	9.5
	100.1	100.0	100.0	100.1	100.0	100.0	100.1	100.0	100.0	99.9
	(123)	(150)	(109)	(77)	(122)	(233)	(330)	(328)	(190)	(232)

San Francisco, Superior Court Dispositions, 1974-78

	Robbery Cases					Burglary Cases				
	1974	1975	1976	1977	1978	1974	1975	1976	1977	1978
Age ($\bar{X}$ years)	28.8	25.8	26.5	26.7	26.7	28.8	27.0	29.7	27.3	27.9
	(228)	(221)	(256)	(281)	(303)	(341)	(257)	(391)	(371)	(403)
Criminal Record										
None	19.4%	26.3%	14.4%	13.8%	11.9%	9.3%	10.7%	8.4%	9.9%	7.7%
Some but no prison	60.7	52.5	58.9	62.0	58.7	60.2	59.5	61.6	55.4	52.4
Prison	19.9	21.2	26.7	24.3	29.4	30.6	29.8	30.0	34.7	39.9
	100.0	100.0	100.1	100.0	99.9	100.1	100.0	100.0	100.0	100.0
	(216)	(217)	(236)	(276)	(303)	(324)	(252)	(370)	(363)	(401)
Race/ Ethnicity										
White	33.6%	29.2%	25.9%	30.7%	33.4%	44.9%	44.9%	41.9%	42.4%	40.4%
Black	56.2	64.4	71.4	66.8	63.2	48.6	51.2	55.4	56.8	56.6
Chicano	5.1	2.7	.4	.7	.7	3.7	2.3	1.5	.5	1.0
Other	5.1	3.7	2.4	1.8	2.6	2.8	3.7	2.1	.3	2.0
	100.0	100.0	100.1	100.0	99.9	100.0	100.1	100.0	100.0	100.0
	(217)	(219)	(255)	(280)	(302)	(325)	(256)	(390)	(368)	(403)
Sex										
Male	92.6%	91.9%	89.6%	91.1%	88.1%	98.5%	95.7%	93.3%	94.0%	96.5%
Female	7.4	8.1	10.4	8.9	11.9	1.5	4.3	6.7	6.0	3.5
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
	(217)	(221)	(250)	(280)	(302)	(325)	(257)	(388)	(369)	(403)
Mode of Disposition (convicted)										
Plea	87.8%	87.6%	83.2%	82.7%	83.9%	95.2%	94.4%	89.1%	92.1%	92.6%
Trial	12.2	12.3	16.8	17.4	16.1	4.8	5.4	10.9	7.8	7.3
	100.0	99.9	100.0	100.1	100.0	100.0	99.8	100.0	99.9	99.9
	(189)	(177)	(214)	(249)	(230)	(271)	(180)	(348)	(330)	(326)
Sentence (convicted)										
Prison	38.5%	33.0%	44.0%	46.2%	49.4%	18.2%	12.6%	21.5%	30.5%	34.2%
Jail	49.5	58.1	50.5	50.2	45.1	60.8	62.4	63.4	61.2	56.8
Probation	6.5	1.6	4.6	3.6	2.5	6.0	6.3	11.0	6.9	3.5
Other	5.5	7.3	.9	-	2.9	15.0	18.6	4.1	1.2	5.5
	100.0	100.0	100.0	100.0	99.9	100.0	99.9	100.0	100.0	100.0
	(200)	(191)	(216)	(249)	(237)	(319)	(221)	(363)	(334)	(345)

Santa Clara, Superior Court Dispositions, 1974-78

	Robbery Cases					Burglary Cases				
	1974	1975	1976	1977 (not avail.)	1978	1974	1975	1976	1977 (not avail.)	1978
Age ($\bar{X}$ years)	24.1	25.8	24.9		24.8	24.2	27.0	25.0		25.3
	(166)	(221)	(308)		(84)	(498)	(657)	(791)		(312)
Criminal Record										
None	17.8%	20.2%	16.9%		16.7%	18.4%	21.5%	18.5%		21.2%
Some but no prison	65.0	62.7	57.4		67.9	62.1	59.0	60.0		61.5
Prison	17.2	17.1	25.7		15.5	19.5	19.5	21.5		17.3
	100.0	100.0	100.0		100.1	100.0	100.0	100.0		100.0
	(163)	(193)	(296)		(84)	(488)	(614)	(755)		(312)
Race/ Ethnicity										
White	51.5	50.5%	50.0%		44.0%	55.5%	56.5%	53.5%		46.9%
Black	23.0	22.7	27.2		21.4	15.5	18.2	22.1		22.7
Chicano	23.6	25.8	21.8		31.0	27.3	24.3	22.5		29.8
Other	1.8	1.0	1.0		3.6	1.6	1.0	1.9		.6
	99.9	100.0	100.0		100.0	99.9	100.0	100.0		100.0
	(165)	(194)	(298)		(84)	(490)	(614)	(755)		(309)
Sex										
Male	90.3%	93.3%	93.3%		94.0%	94.1%	90.9%	92.2%		92.5%
Female	9.7	6.7	6.7		6.0	5.9	9.1	7.8		7.1
	100.0	100.0	100.0		100.0	100.0	100.0	100.0		100.0
	(165)	(194)	(298)		(84)	(490)	(614)	(755)		(312)
Mode of Disposition (convicted)										
Plea	86.7%	83.9%	93.9%		91.4%	95.3%	93.1%	85.1%		96.4%
Trial	13.2	16.1	16.0		8.6	4.6	6.9	15.0		3.6
	99.9	100.0	99.9		100.0	99.9	100.0	100.1		100.0
	(143)	(161)	(274)		(70)	(425)	(524)	(672)		(256)
Sentence (convicted)										
Prison	57.8%	53.0%	59.9%		56.7%	18.1%	18.8%	23.0%		20.2%
Jail	37.4	38.0	31.5		35.1	63.0	58.1	53.8		59.4
Probation	2.0	6.0	2.4		2.7	10.3	15.1	13.9		10.8
Other	2.8	3.0	6.2		5.4	8.6	8.1	9.3		9.8
	100.0	100.0	100.0		99.9	100.0	100.0	100.0		100.2
	(147)	(166)	(292)		(74)	(465)	(570)	(741)		(278)

Examination of the defendant attributes suggests that the only one that appears to have changed over time is the only variable which is consistently related to prison commitment rates--the defendant's past record. With the exception of Santa Clara, defendants in the post-law years tend to have somewhat more often previous prison commitments. Since such defendants are more likely to receive prison terms for a current offense, it is worth controlling for past record to see if the trends in prison commitment rates are affected. The results are presented below. Basically, the results are similar to those presented in Chapter 4, in which prison commitment rates were discussed without introducing a control for past record. There do not appear to be very strong upward trends in commitment rates in any of the counties, though San Francisco shows the most upward movement. Thus, the introduction of this control does not alter the basic arguments made previously.

Prison Commitment Rates, Controlling for Past Record, Superior Court Convictions, 1974-78*

				DSL	
	1974	1975	1976	1977	1978
San Bernardino					
Robbery Cases					
No prison record	60.0 (90)	45.5 (112)	54.7 (75)	55.7 (52)	53.8 (78)
Prison record	72.0 (25)	80.0 (30)	96.3 (27)	70.0 (20)	94.4 (36)
Burglary Cases					
No prison record	21.1 (175)	11.9 (244)	25.6 (191)	20.4 (132)	30.3 (142)
Prison record	47.2 (36)	58.7 (46)	62.1 (58)	68.9 (45)	61.5 (65)
San Francisco					
Robbery Cases					
No prison record	37.3 (142)	33.1 (136)	40.4 (146)	40.3 (188)	42.4 (158)
Prison record	61.5 (39)	47.4 (38)	56.0 (50)	63.8 (58)	69.4 (72)
Burglary Cases					
No prison record	15.4 (188)	7.3 (124)	17.3 (231)	17.3 (214)	24.2 (207)
Prison record	96.2 (26)	34.0 (53)	33.0 (100)	55.0 (111)	57.3 (117)
Santa Clara					
Robbery Cases					
No prison record	52.2 (115)	50.4 (129)	57.4 (195)	(na)	55.1 (58)
Prison record	96.0 (38)	76.7 (30)	81.2 (69)	(na)	83.3 (42)
Burglary Cases					
No prison record	13.7 (335)	15.8 (419)	18.6 (509)	(na)	17.1 (216)
Prison record	56.1 (82)	40.2 (102)	52.6 (137)	(na)	54.3 (35)

*Cell entry comprises % of convicted defendants receiving prison terms.

APPENDIX III: TRENDS IN INCARCERATION RATES IN BURGLARY AND ROBBERY CASES, 1974-78

In Chapter 4 we argued that the theoretically best measure of the effects of DSL on prison commitment rates was the proportion of all incarcerated defendants who received prison terms. This measure taps the most commonly-asserted process by which DSL might increase prison rates--the movement of marginal defendants from jail to short prison terms. In the text we presented data on this measure for all Superior Court convictions which suggested that it did not move upward in the post-law period, except in San Francisco. Figures A2 and A3 present data on the measure controlling for offense by examining robbery and burglary cases. Again, only in San Francisco is there evidence of the hypothesized upward shift in the post-DSL years. Moreover, the informal effects hypothesis would suggest that there should be substantially more movement upwards in burglary than robbery cases, for these are more likely to involve "marginal" defendants bumped up from a long county jail term to a short prison term. Again the expected trend does not emerge in two of the three counties.

FIGURE A2: PRISON COMMITMENTS AS A PROPORTION OF ALL INCARCERATIONS, SUPERIOR COURT CONVICTIONS, 1974-78, ROBBERY CASES

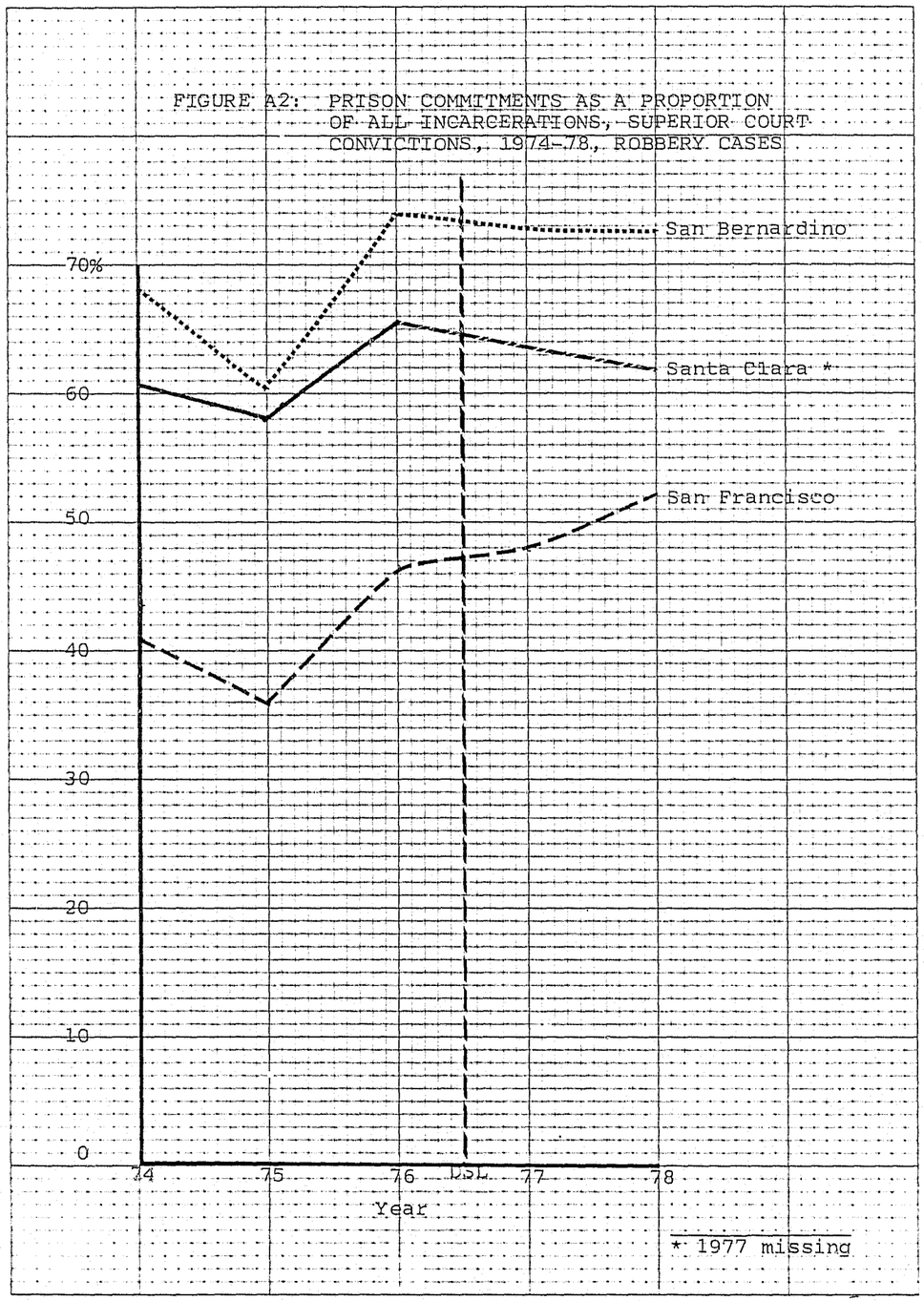
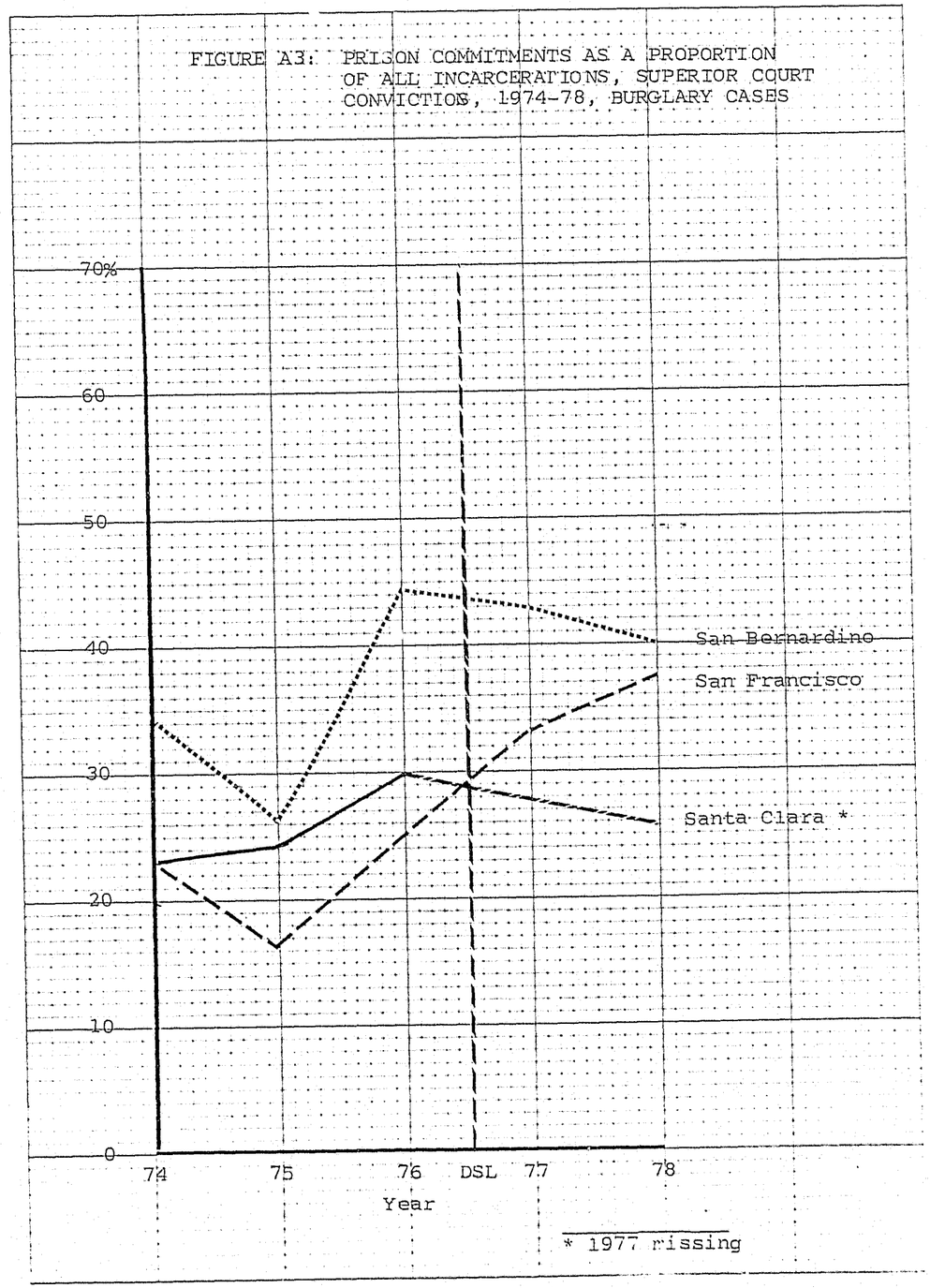


FIGURE A3: PRISON COMMITMENTS AS A PROPORTION OF ALL INCARCERATIONS, SUPERIOR COURT CONVICTIONS, 1974-78, BURGLARY CASES



APPENDIX IV: INTERVIEW SCHEDULE FOR COURTROOM PARTICIPANTS

First, I'd just like to get a little information about how long you've been working as a (judge) (prosecutor) (public defender). How long have you held your current position, working in Superior Court?

(If they came to position after July 1, 1977), What was your previous position?

I'd like to ask you some questions about what you see as the purpose of the new law, then some about how the law is operating in practice, and, finally, a few about any suggestions you might have for modification in the law.

1. Could you tell me what you see as the major purpose of the new law? More specifically, how, if any, do its goals differ from those of the old indeterminate sentence law?

   A. Do you think that the legislature intended that under the new law more or fewer people would be sentenced to prison?

   B. Do you think that the law intended that it would change the types of people who were sent to prison?

2. After passage of the law in 1976-77, how did you begin to learn how it was to be applied? Were there formal channels? Memoranda? Seminars? Was it talked much about around the office? Who did you talk to about it?

3. Did you find it difficult to learn to apply the new law, or was it a relatively straightforward matter? What were the major problems?

4. What was the general reaction of other (prosecutors) (judges) (PDs) to the new law? Did they support it?

5. Were others (prosecutors/judges/PDs/private lawyers) relatively well prepared to deal with the new law? Did any have an especially difficult time?

Now, I'd like to ask you some questions about how the law is being applied in practice.

6a. (To District Attorneys) First, have any office policies been established about how to treat enhancements? Whether they should always be alleged and under what conditions they might be dropped? What about provisions dealing with probation ineligibility? If such policies were established, what mechanisms exist for supervision? If you decide to strike a prior or drop an enhancement, is one of your superiors likely to find out or to ask your reason for doing so?

In general, if there is an office policy, do you think deputies are expected to follow it? Are they following it?

6b. (For Judges) Does the prosecutor's office appear to have a policy about how to treat enhancements? About whether they should always be alleged and under what circumstances they should be dropped?

6c. (Judges) Do you have a policy about enhancements? About when you will or won't stay execution of the sentence? Or do you proceed in a case-by-case fashion? Did the judges who hear criminal cases ever get together to discuss such matters?

7. How about the relationship of the new law to the plea negotiation process? Do you think it has affected the willingness of defendants to plead guilty or their inclination to have trials? In what ways? Why?

8. Has it changed the terms of bargaining significantly? When it is initiated? Has it increased the amount of sentence bargaining? In prison cases in particular?

9. Has it affected the influence of the participants in the process? Are judges more or less involved in settling cases than under the old law? (If respondent had no experience under old law--ask what they've heard it was like in comparison to new law.)

10. Are enhancements or probation ineligibility characteristics being bargained over frequently?

11. If you think about two separate decisions: (1) whether to send a defendant to prison at all; (2) how long defendants spend in prison. Do you think the law has affected either? How do you account for its effect?

12. One of the features of the new law, as contrasted to the old indeterminate sentence law, is that in prison cases, the plea negotiation can center about the actual length of sentence, something you couldn't do before. When the new law went into effect, or you came into Superior Court, how did you and other participants learn what a case was worth? That is, in a complicated case--multiple counts, enhancements, or both--a lot of different sentences could be imposed. How did you and others come to decide what the appropriate sentence in a case?

13. In our study, we are particularly interested in burglary and robbery cases. I'd like you to think about two decisions that are made in such cases: first, whether the defendant will get a prison sentence or a local disposition; second, if he is to be sent to prison, how long the sentence will be.

13a. In the typical burglary case, what factors seem most important in determining whether the defendant gets a local sentence? (possible probes: type of burglary; past record; age; complexity of crime; amount taken).

Most burglars don't get sent to prison here. What are the circumstances in which prison is seriously considered?

13b. Does it often happen that a defendant in a burglary case has two priors but is not generally thought to deserve prison? Do the priors then get dropped?

13c. If a person charged with burglary is to be sent to prison and there are multiple counts and thus some ambiguity about the sentence he might get, what kinds of factors affect the choice of the actual sentence? What would you say is the going rate for the typical burglar here, in terms of amount of jail time and probation.

13d. Thinking about the decision about whether to send burglars to prison or not, do you think the DSL has had any particular affect upon the decision in these cases? What? Why?

13e. Now, let's turn to robbery cases. In the typical robbery case, what factors seem most important in determining whether the defendant gets a prison sentence? (possible probes: type of robbery; past record; age; weapon; amount taken; injury).

13f. Many robbers get sent to prison here. What are the circumstances in which a local sentence is seriously considered?

13g. If a person is going to be sent to prison in a robbery case, there's often either multiple counts or enhancements involved, so there's a fair degree of flexibility about what the actual sentence might be. What kinds of factors affect the choice of the actual sentence? What would you say was the going rate for the "typical" robber here, in terms of years in prison?

13h. Do you think the DSL has had an effect on the numbers of robbers sent to prison or on the terms they serve? What? Why?

Finally, just a couple of questions about the future of the determinate sentence law.

14. First, do you think the new law is preferable to the old indeterminate sentence law?

15. Is the law serving the purposes for which you think it was passed?

16. Would you favor modification of the law? If so, in what ways?

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