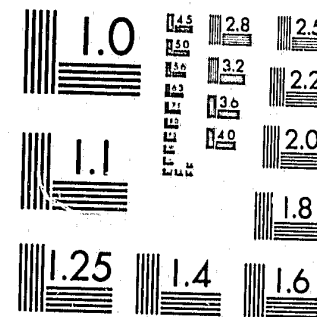


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Changing the System through Changing Laws: Myth or Reality?

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### Changing the System through Changing Laws: Myth or Reality?

In keeping with the theme of myths and realities in criminal justice, this paper will discuss a potential myth concerning laws, policy, and change. After describing the factors which keep the myth from becoming a reality, an example will be described, as well as a program of research being undertaken to empirically explore its processes.

One major mode of change in the criminal justice systems is the enactment of legislation to change laws governing the system's operation. In most cases, the change in law is not the end in itself. Instead, the enactment of the law is intended to change some practice which will in turn result in improved functioning of the system. For instance, reducing judicial discretion is accomplished through the enactment of mandatory sentencing. Reducing crime is accomplished through having increased penalties for habitual offenders. Reducing the backlog of cases is accomplished through allowing more plea bargaining. This transference process, whereby a practice is altered to affect another change, is related to the weakness of statute enactment as a change mode, in a manner to be explained later.

The possible failure of enacted statutes or policies to produce change is also the result of the complexity of the criminal justice system. The system encompasses a variety of actors (police, prosecutors, judges, probation officers, wardens, state level bureaucrats, etc.) who represent a number of organizations and institutions (police departments, prosecutors offices, courts, jails and prisons, state offices, etc.) and carry out different processes (arrest, arraignment, prosecution, sentencing, incarceration) at different jurisdictional levels (city, county, and state). Each set of actors, organizations, and processes act under its own rules and motivations which are designed to reach different goals. In this way, the complexity of the criminal justice system can be differentiated

from that of other social-governmental systems, such as the education system. Although the education system has a variety of actors (teachers, principals, superintendents, boards of education), they are all related hierarchically in one large organization.

This complexity is emphasized by the interrelationships of the system components. Numbers and types of arrests can be affected by policies and practices of the prosecutors office. For example, police may be less likely to arrest individuals on minor charges if they know that the chances of prosecution are poor. The reverse is also true. Frequency of plea bargaining is, in turn, affected by case load, or the numbers of people who have been arrested. Other factors influence the sentencing practices of the judges such as the availability of space in prisons, jails, or community placements or programs. Parole board decisions also involve these types of space considerations.

Any system in which the functioning of individual components is dependent upon the behavior and circumstances present in other components operates in a state of ecological balance. Practices and behavior in all subsystems act in response to other subsystems. An overload in one component, which in turn threatens the functioning of the entire system, leads to a proportional amount of adjusting and compensating in order to maintain or maximize overall harmony.

This "balancing act" has important implications for those interested in changing the system. Most importantly, it must be recognized that any change in one component of the system is going to cause a reaction in other components of the system, again compensatory to preserve balance. This degree of inter-relatedness is not unlike the physical ecological system, in which the chain of predators and the symbiotic relationships of organisms act to maintain a liveable environment for all living things. As a matter of survival, most systems act to maintain the status quo. Thus, changes in the criminal justice system typically face resistance. This resistance does not always take the form of

purposeful subversion. In fact, responses to intended change may not be made with any conscious intention to influence this change, but are often done as a means of system maintenance. Therefore, attempted changes in the criminal justice system which only interface at one point in the system need to consider and confront the reaction of the entire system.

In contrast, changes in law are typically narrow in focus for at least three reasons. First, laws need to be very specific and the process of specification tends to narrow their focus. Second, changes in law must be politically feasible; thus they can target only those small intersections of change areas mutually acceptable to a majority of the voting body. Third, few voting bodies are willing to confront the complexity and pervasiveness of a change which takes into consideration the entire system. To do so would require an antiestablishment viewpoint that few legislatures feel comfortable with.

The narrow focus of laws and the potential for unpredicted secondary reactions by the system have implications for the model of change as a process of indirect effects outlined earlier. As stated above, many changes in law envision an ultimate effect which is operationalized by changing one practice or parameter to produce the desired impact (Y). The responsiveness and interrelatedness of system components can act in two ways to keep this model of change a myth. First, general system resistance to change and the tendency to maintain the status quo may lead to adjustments which prevent even X from being implemented. Second, the complexity of the system allows many other components and parameters of the system to impact on Y. Thus, any effect which X has on Y can be compensated for by other components, resulting in no net effect on Y.

In summary, changes in laws concerning the criminal justice system are typically narrow in focus, designed to impact on only one component of the entire system. On the other hand, the criminal justice system is complex with a high degree of interrelatedness between components. The system's tendency to maintain an overall balance activates all the components of the system to act to

negate either the direct adoption of the law or its intended consequence.

An Example: Proposal B

An example of a change in law intended to impact on one component of a system in order to ultimately affect another part of the system will now be described. In November, 1978, the voters of the State of Michigan approved a constitutional amendment, "Proposal B" which states that convicted felony offenders are required to serve at least his/her minimum prison sentence without reduction by "good time." This law applies to most felonies; approximately two-thirds of all inmates now sentenced are affected by the new law. Previously, most inmates were eligible for parole before the minimum sentence was served on the basis of "good time" earned for good behavior in prison. The basic argument used by proponents of Proposal B was that its passage would result in a lower crime rate by keeping criminals away from the public. Using our framework, the immediate impact of the law is to keep people in prison for a longer period of time. The ultimate intended effect of the law is to reduce the crime rate.

Without going into a great deal of detail, a number of potential responses of the criminal justice system to this change in prison strategy can be enumerated.

For example, stiffer sentences may discourage guilty pleas. The prospect of an expensive trial, the possibility of acquittal, and the chance of a reversal upon appeal may prompt judges and prosecutors to accept even more plea bargaining. In other words, harsher penalties may increase the likelihood that the accused will be charged with a lesser offense and consequently given a shorter sentence. This would lead to the same net result as the original policy. Stronger penalties may also render conviction more difficult. Police are less likely to apprehend, prosecutors are less willing to prosecute, and judges and juries are more hesitant to convict knowing that a strong penalty awaits the offender (Andenaes, 1974). As an example, when Connecticut increased its penalties for speeding, many police officers simply reduced the enforcement of the law

(Campbell & Ross, 1966). In short, fewer convictions with harsher sentences have the same net incarceration effect as more convictions with lighter sentences.

If plea bargaining is not increased, certainly fewer people will be willing to plead guilty when facing a stiffer and/or mandatory sentence. The result of this may be more trials and an increase in the backlog already facing the courts. Will such a strategy lead to increased imprisonment? In 1973, New York enacted a series of stiff mandatory punishments for the selling of hard drugs. In New York City drug arrests remained stable, but the decrease in guilty pleas, the resulting increased backlog of trial cases and plea bargaining offset the harsher penalties resulting in no net effects in the rate of imprisonment.

Even if more people are sent to prison, longer minimum or mandatory sentences may not actually affect the average time spent in prison. Under an indeterminate system, parole boards released some inmates early while keeping others to near their maximum sentence. If a mandatory sentence means more people must be incarcerated, or if minimum sentencing without "good time" means that everyone must stay at least a certain length of time, parole boards may react by letting everyone out after the minimum sentence. The mean length served will stay the same, while the variability and discretion of parole boards is considerably reduced.

Even if X is accomplished (i.e., people are incarcerated for a longer period of time) there are a number of other factors which need to be considered when predicting its effect on Y, the crime rate. First, imprisonment may prevent crimes that would be committed by otherwise free inmates. However, the prison experience may contribute to offenders' crime rate. It may in part increase an individual's propensity to crime upon release (Robison & Smith, 1971; Levin, 1972; Beattie & Bridges, 1970). Furthermore, as van den Haag (1975) pointed out, some criminals will be replaced by others who will fill the vacancies left by the incarcerated. This is true in organized crime or in any market-based crime such as drug dealing, car theft, etc. Crimes that are committed by groups

will most likely be continued if only one of the group is imprisoned. Finally, incarceration may not prevent crime, but move it from the streets to inside the prison. The 1973 incapacitation effect on homicides in California was reduced by 42% when homicides inside the prisons were considered (Greenberg, 1975). The fact that Proposal B removes good time can only exacerbate this phenomenon. Because it is a major motivator for good behavior in prison, removal of good time is likely to be accompanied by an increase in crime within the prison itself.

Whether or not change can be accomplished through the enactment of Proposal B is strictly an empirical matter. While the above arguments and hypotheses concerning system response to the change are logical, the actual outcome of the change in sentencing law is yet to be determined. This points out the necessity of incorporating research into any attempted change in the criminal justice system. "Important changes in the law or legal practice should always be correlated with the program of research designed to examine the effects on crimes as a whole" (Andenaes, 1974). While the setting does not allow the experimental methodology advocated by Gibbs (1979) or Campbell (1969), the quasi-experimental design (Campbell & Stanley, 1966) used will yield meaningful conclusions.

This line of research also follows the growing interest in incapacitation theory and the quantification of the effect of incapacitation on the overall crime rate. Cohen (1978) has reviewed a variety of efforts measuring this incapacitative effect. Most efforts suffer from untested assumptions about parameters in the models developed. Other researchers (Van Dine, Conrad & Dinitz, 1977, for example) estimate the incapacitative effect by retrospectively analyzing the effect of hypothetical sentencing policies on later crime rates. This method makes no allowance for any other reaction in the system as a response to the change in sentencing policy. The enactment of Proposal B, however, allows an empirical study of the actual effects of an increased imprisonment strategy on the system and on the crime rate.

### Research Methodology

The National Institute of Law Enforcement and Criminal Justice awarded a grant to study the effects of Proposal B on the Michigan criminal justice system and crime rates. Research began in October 1979 and will continue until October 1981. The major goals of the research are to answer the following questions:

(1) What is the response of the criminal justice system to the new policy?

If the average term of imprisonment is longer, does that affect the rate of conviction and/or the rate of imprisonment? If the average length of imprisonment does not change, what homeostatic system mechanisms are operating? What is the effect on sentencing patterns and procedures of key criminal justice personnel including judges, prosecutors and probation officers? How do they alter their practices as a result of this change?

(2) What is the effect of the new policy on the prison population?

Specifically, how are the size, characteristics, rates of entry, rates of release, and average length of stay affected by the policy? In other words, this question is designed to address whether the first phase of the process of reduced crime through increased imprisonment actually occurs.

(3) Does such a policy reduce the crime rate and increase the incapacitation affect in accordance with the models of incapacitation reported in the literature. The incapacitation effect before the new policy will be estimated, as well as anticipated changes in the average length of imprisonment. The elasticity of the prison population and crime rate will be predicted using the new sanctioning levels instituted. The actual crime rates and incapacitation effects after the policy has been implemented for four years will then be examined to note any pre/post changes in the degree of accuracy of the predictions from the models.

(4) Is there any possibility of a deterrent effect? Are the general population and the more criminally active inmate population even aware of this change?

(5) How does the specific method of increased incapacitation affect the behavior of prison inmates? Does the removal of the reward for good behavior

increase negative behavior in the prison?

### Data Collection

Given the variety of potential outcomes from the enactment of Proposal B, a broad approach is being employed in the collection of data. This exploratory style is designed to provide a wide angle lens for observing any possible results of the change in sentencing law. As stated earlier, those who are interested in implementing change should not take a narrow viewpoint of how that change is likely to occur. Similarly, research efforts should monitor not only the intended outcomes of a change in policy, but a variety of secondary responses of the criminal justice system.

Crime rates. Numbers of crimes reported will be collected from the Michigan State Police and data will be disaggregated by felony. Data will be collected separately for the seven largest jurisdictions in the State of Michigan as well as by state totals. Reported numbers of crimes will be divided by population figures for the jurisdictions to obtain crime rates per population. These jurisdictions will be matched with control jurisdictions from other states. Data will be collected for the years 1972 through 1981.

Arrest rates. Data on arrests will also be obtained from the Michigan State Police for the years 1972 through 1981. Arrests will be recorded by crime and can be disaggregated into the seven largest jurisdictions in the State of Michigan from the state totals. Data can be further disaggregated by offender characteristics including sex, race, and age of offender. Arrests for each crime will be divided by the number of reported crimes to yield an arrest rate for that crime. Arrest data for the seven largest jurisdictions and for the state as a whole will be compared to matched controlled jurisdictions from other states.

Offender plea alternatives. Percentages of offenders who plea bargain, plead guilty to the original charge, or demand a trial will be recorded. This information is only available at the county level. A sample of three county courts will be

examined representing a large densely populated metropolitan area, a county with both a mid-size city (130,000) and a rural component, and a predominantly rural area. Within each court a sample of 30 cases per month will be examined over a three year pre-B period and a three year post-B period. Data collected from the county court and prosecutors' files will include the original charge, the plea alternative chosen (guilty plea to the original charge, plea bargaining, or demand for a trial), final charge, and the dispositions.

Conviction rate. Data on all convictions in all circuit courts throughout the state are available through the Department of Corrections. This data will be collected for the years 1971 through 1981. Information available includes the offense, the county, maximum term of sentence possible, the sex of the offender, the day of the disposition, the judge, the status of the offender (relation to the criminal justice system), the recommended disposition, the actual term of sentence, the age of the offender, and the race of the offender.

Length of sentence. The average minimum and average maximum sentence per conviction can be obtained from the Department of Corrections. This will be recorded for the years 1972 through 1981 and disaggregated by the variables listed with the conviction rate.

Prison population. Rates of entrance, population size and characteristics, rates of release, and average time served will be calculated from Department of Corrections records. This data is available for the years 1968 through 1981.

Judicial decision-making. A random sample of 800 pre and 800 post B offenders has been chosen in order to develop a model of the decision-making process used in determining the sentence given. Pre-sentence reports are being examined to determine the critical variables and their relative importance in contributing to the length of sentence. 347 variables are being coded for each case. Items will be combined into scales on the basis of rational and empirical methods (Jackson, 1971). Regression analyses will be used to construct a model of

judicial decision-making to identify the crucial variables and their relative importance to the decision process. In order to test for the effect of Proposal B on judicial decision-making, separate pre and post models will be developed for comparison. The beta weights of the variables in these two models will be statistically compared.

Critical incidents. Critical incident reports are filed for every major disruption in Michigan prisons. Incidents considered critical and requiring a report include homicide, suicide, assaults, staff use of force, riot, use of mace or gas, escape, discharge of a firearm, theft over \$50, accidents, fires, damage over \$50, substance abuse, extortion, smuggling of contraband, and refusing an order. Data will be gathered on all critical incidents for 1977 through 1982. Details of the incident will be recorded including the identity of the victim, identity of the initiator, location of the incident, institution, actions taken by staff, disposition and causes or contributing factors.

Other variables. The above variables are all being collected as part of the current research effort. In addition, a second proposal has been submitted proposing additional data collection. This additional data collection consists of interviews of criminal justice personnel, the general population, and the inmate population.

Interviews of criminal justice personnel are being proposed as an additional method of obtaining information concerning system response to the change in sentencing law. Judges, prosecutors, and probation officers will all be assessed as to their attitudinal and behavioral reaction of Proposal B.

The general population and the inmate population will be interviewed as a means of assessing the possibility of a deterrent effect of Proposal B. The public will be questioned concerning their understanding of good time off for good behavior in prisons, its use in the State of Michigan, and any changes which have occurred in its use in the past few years. If they are unaware of Proposal B,



its meaning will be explained to them and their opinion of the policy in terms of deterrence and incapacitation will be assessed. Interviews will also be done of a random sample of inmates. They will be asked of their awareness of Proposal B at the time they committed their crimes. They also will be asked if they were aware of the good time concept at the time they committed the offense and whether or not they were aware of the change in good time policy. Other questions will be designed to assess a more general deterrent effect, focusing on the inmate's perceived probability of punishment, celerity of punishment, and perceived (before incarceration) versus actual severity of punishment received.

#### Analyses

The data collected will be used in several ways. Each variable will be used as a separate measure of the functioning of part of the criminal justice system. Primary measures of the policy's effects will be the changes in the prison population and crime rates over time. Other system variables such as conviction rates and sentencing patterns will be examined individually over time to explore any secondary reactions by the system. In addition to these individual measurements, the variables will be considered in relation to each other to determine the nature of these relationships and study their fit with the models of incapacitation. The primary statistical technique to be used is multiple time series analyses.

#### Conclusions

The findings of this project will greatly enhance the present knowledge of the effects of incapacitation. Without discounting the value of theoretical formulations or the examination of the effects of hypothetical policies, the true value of incapacitation and deterrent strategies can be more realistically obtained when such a policy is actually implemented and the effects on crime, the system, and their interaction are examined. More specifically, the following information can be expected:

(1) A better understanding will be gained of the system's adaptation mechanisms in response to policy changes.

(2) Empirical knowledge will be obtained of the relationships between the variables within the criminal justice system as well as the relationships between the criminal justice system and the crime itself.

(3) By measuring and estimating the relevant parameters before the implementation of B, an estimate of the pre-B effect of incapacitation on crime will be calculated.

(4) The effectiveness of the strategy of changing the man-years served in prison per crime and the prison population through the manipulation of sentence laws will be examined.

(5) The model's predictions of the effect of changing the average mean years served per crime on the prison population, the crime rate, and the incapacitation effect will be tested.

(6) The amount of awareness of the change in policy on the part of the general population and inmate population will provide an upper bound for the potential deterrent effect of this change in policy.

(7) Additional understanding of the system's response will be gained through the interviewing of key criminal justice system personnel. Information obtained in this manner can be compared to system response as measured through archival data.

(8) Empirical knowledge will be gained concerning inmates' behavior and their reaction to this method of increased incapacitation.

While the research will further the state of knowledge concerning the "myth" or "reality" of the enactment of laws as an effective change mode, the question of generalization must be addressed. At a reasonable minimum, the conclusions can be generalized to other attempts at change designed to eliminate "good time" off for good behavior as a means of increasing incapacitation. This generalization assumes that other components of the criminal justice system are

relatively comparable to the Michigan system. Beyond this, it would seem appropriate to generalize to all attempts at incapacitation that do so by approaching only one component of the system. Any attempt at increased incapacitation that does not consider the capacity of the criminal justice system to adjust and balance is likely to fall short of its goals. The degree to which this downfall occurs is dependent upon the degree of tolerance of the component being changed. In this case, the most critical variable would seem to be the availability of prison beds and/or the capacity to build new facilities. Given the present reluctance to raise taxes and the growing support for the development of alternatives to institutionalization, the building of new prisons is not likely to be economically, politically or socially feasible on a wide scale basis. Beyond this, it appears that there is a narrow range of the rate of imprisonment that society is willing to tolerate. This rate has remained relatively constant in the United States over a forty year period, indicating a limit to the acceptable number of people to be incarcerated (Blumstein & Nagin, 1976).

Moving out on the limb of generalization, we approach the overall issue of changes in laws as a mode of change in the criminal justice system. Again, the critical variable in estimating the validity of the generalization is the extent to which intended change addresses the system as a whole and not just one of its individual components. Any isolated change which does not consider the potential system responses will likely meet a fate similar to that awaiting Proposal B.

Is it a myth that effective change in the criminal justice system can be produced through the changing of laws? The answer to this question is strongly related to the notion of first and second order change (Watzlawick, Weakland & Fisch, 1974). First order change refers to changes which accept the basic assumptions and functioning of the system in which the change occurs. The change occurs within the system, and while the system itself may react to the change, it does so to compensate for (and in many cases circumvent the intent of) the

change. The system can absorb or swallow first order change without any major repercussions. Changes which focus on the basic modes of system functioning (such as a change in the relationship between its components) are known as second order change. Laws enacting incapacitation strategies are likely to remain first order changes. While there is no intrinsic reasons why law cannot affect second order change, political realities and the resulting narrow focus of most laws as described earlier generally result in first order change. This is not to solely advocate either first or second order change, as first order change may be sufficient for some problems. However, those interested in making changes should be aware of the difference. Large scale changes in the system itself must be brought about through second order change. If the notion of substantial change through laws is to become a reality, it will be through the enactment of second order change which encompasses the entire criminal justice system.





**END**