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A REPORT ON
STRATEGIES OF DETERMINATE SENTENCING

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PREFACE

The following pages present abstracts of draft chapters from the final report on studies of "Strategies of Determinate Sentencing," sponsored by the National Institute of Justice. The manuscript as a whole, some 1,500 pages, will not be published. Redrafted versions of certain chapters have been published or are in press; their titles and locations are listed in an end-note. Certain other chapters are being redrafted for future publication.

The studies reported were conducted during late 1978, 1979 and early 1980, soon after the adoption of greater determinacy in California and Oregon, the states on which the studies focused. As a result, the studies necessarily report relatively early developments in the sentencing systems of these two states. We believe that they are of more than historical interest, however. It is clear as this is being written (December 1983) that many later developments were implicit, and sometimes clear, in the events of those years. One was very clear: in both states, the prisons were becoming "overcrowded" and further crowding was imminent.

Is there something about determinate sentencing systems that necessitates this development? The study team members think not: there appears to be nothing inherent in determinate sentencing systems leading its operators, inevitably, to increase the number of prisoners or the lengths of their terms. Indeed, we think that greater determinacy can mean greater, not less, control over these matters. But for such control to be exercised, determinate

systems must incorporate tools for coping with prison population flows, and those who operate these systems must grasp and use the tools they provide. In California and Oregon (as well as elsewhere), this lesson is only now being learned.

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Sheldon L. Messinger, Andrew von Hirsch, and Richard F. Sparks were co-principal investigators of these studies. Kathleen J. Hanrahan, Martin L. Forst, Carol Rauh, Elliot Studt, and Pamela J. Utz were senior staff members. James M. Brady conducted a special study; Richard Berk and Anthony J. Shih did the statistical analyses in conjunction with another study. Alexander Greer and Julia M. Mueller assisted in still other analyses.

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I. INTRODUCTION

1. THE MOVE TOWARD INCREASED DETERMINACY

As the phrase is frequently used, in "'determinate' sentencing systems" the length of prison terms is fixed by courts at the time offenders are sentenced to imprisonment. The implicit contrast is with "'indeterminate' sentencing systems." In indeterminate systems, the courts continue to impose sentences of imprisonment. But they do not fix the lengths of the terms offenders will serve, beyond specifying, directly or indirectly, their minimum and maximum limits. "Parole boards" later fix terms between these limits. They also permit many offenders to serve part of their "prison sentences" outside of prisons, "on parole," and fix the length of their parole terms.

During the nineteenth century, most sentencing systems in the United States were "determinate" in the sense indicated. During the twentieth, most became "indeterminate." Thus, as a depiction of the past, this contrast is roughly correct. It fails, however, to highlight a crucial feature of the determinate systems currently being proposed and adopted. This feature is their incorporation of explicit standards specifying how sentences and terms should vary for offenders whose crimes and records show particular characteristics. The relative absence of such standards characterized <u>both</u> "determine" and "indeterminate" sentencing systems in the past; their relative presence characterizes the determinate systems that are emerging.

It is well, however, to emphasize the term "relative." Past sentencing systems were not totally without explicit standards, although they typically left extremely broad discretion to

officials over whether and how long offenders should be imprisoned. The systems currently being proposed and adopted vary in the degrees to which they restrict official discretion in these matters, although, generally, all incorperate more explicit standards about one or both of them than previously. The newer systems also vary in the purposes that their designers and supporters seek to serve through them. And, different current determinate systems assign the development, application and monitoring of sentencing standards to different agencies and combination of agencies. For example, they do not necessarily confine the choice of a sentence of imprisonment and the fixing of its length to the court.

Put differently, sentencing systems moving toward greater determinacy differ in the scope and restrictiveness of their standards, in the balance of purposes they are designed to achieve, and in the ways they develop, impose and monitor standards to achieve their purposes. To learn how such variations affect the operations and the sentencing outcomes of these emerging systems was, broadly, the objective of the studies reported here. Given its resources, the study team decided to focus on but two, quite different systems. California's determinate system features standards designed, primarily, by the legislature, applied by the courts, and monitored by a reconstituted, renamed parole board. Parole-release is abolished for most prisoners, while a limited period of parole-supervision, as a separate sentence, is retained. Oregon's system employs parole-release "guidelines," partially designed by the parole

board and imposed by it. To the extent that the application of the guidelines is monitored, this is done by the parole board itself. Parole-release remains, as does a period of parole-supervision, as part of the "prison sentence." A briefer look was taken at the systems being proposed and adopted in other jurisdictions, with some special attention being given to Minnesota.

2. DETERMINATE SENTENCING STRATEGIES

Strategies for increasing the determinacy of sentencing systems vary. Information obtained from a national survey of proposed and enacted changes in sentencing systems--changes purported to increase determinacy--reveal the major elements of the strategies in use, and suggest some of their strengths and weaknesses.

Standard Setter

Penalty standards are being written by various rule making bodies: the legislature, the judiciary, the parole board, some combination of these bodies, or new rule making agencies such as sentencing commissions. Some rule making bodies are better suited for the task of writing standards than others. Because it is a complicated and time consuming task, having a rule making body that can devote time and effort to the careful drafting of guidelines is important. This body should be able to monitor the implementation of the standards evaluating, to revise them when

necessary. And it should be sufficiently insulated to assure some protection from law and order pressures to inflate penalties to unrealistic and unfair proportions. Generally, experience suggests that the legislature cannot meet these requirements nearly as well as other more specialized rule making bodies such as a sentencing commission or a parole board. The quality of the standards developed by such specialized bodies, however, still depends upon the skill of the participants involved.

Rationale

Penalty standards are being devised using one, or more, of several penal philosophies. Whatever rationale is chosen -- e.g., desert, modified desert, incapacitation -- it should determine the content of the standards. An explicit statement of purpose, which makes clear the order in which aims are to be considered (when more than one are being considered), is therefore useful as a guide to the rulemaker in drafting the standards. The survey of changes reveals that in some jurisdictions, e.g., California and Oregon, the purposes of the new standards are explicitly stated. In others, however, the statement is written so that there is no way to identify the primary aim being pursued. In still other systems, there is no statement at all.

Reach of the Standards

There are three major aspect of the sentencing decision that can be regulated by standards: the decision of whether to imprison an offender, the duration of confinement for sentences of imprisonment, and the severity of non-incarcerative sentences. Systematic control of discretion would require that each of these

decisions be regulated. Most standards, however, only address the duration of confinement. Standards regulating non-incarcerative sanctions are virtually non existent. The decision to impose imprisonment is controlled to a degree in some jurisdictions by mandatory provisions. These provisions, however, are generally reserved for particular types of offenses, thus leaving the court's discretion to impose imprisonment in many cases (especially for less serious offenses) unregulated. Only three states -- Minneosta, Utah, Pennsylvania and more recently, Washington -- have attempted to regulate this decision more systematically.

Features of the Standards

The standards themselves usually incorporate three factors that determine the recommended disposition: the seriousness of the offense, the criminal history of the offender, and in some jurisdictions, additional facts about the offender's background. How is offense seriousness determined? In most systems, by the felony class into which the offense falls. The use of the felony class as the determinant of seriousness is problematic, however, in that there is usually no way of determining what rationale was considered when these classes were originally created; and the classes tend to be rather broad, encompassing divergent behaviors. Another approach, which Minnesota, Oregon and Washington have used, is to have the rule making body develop its own ranking of seriousness. This approach allows explicit consideration of how serious offenses are, and permits subcategorization of offenses which include a broad range of

offense behavior. As a result, this approach is more likely to ensure that conduct of differing levels of seriousness carry correspondingly different presumptive terms.

When judging the seriousness of an offense in an individual case, most systems rely on the offense of conviction. There are sometimes provisions, however, which allow or instruct the decisionmaker to "read through" to the "real" offense, and vary the term accordingly. Because this practice allows a lower standard of proof to apply when determining the real offense, explicit standards should address the issue.

In most systems the role of criminal history is formalized: as the offender's prior record becomes lengthier, there is a corresponding increase in the severity of the applicable penalty. Little discretion is granted the decisionmaker concerning how the criminal hisotry should be used, e.g., what weight it should be given in determining the length of a term. A few jurisdictions, however, do not formalize the role of criminal history as such. In Indiana, for example, the prescribed penalty gradations do not reflect the criminal history, but judges are given wide leeway to consider it as an aggravating factor, or to use it as a grounds for imposing an extended sentence. The danger of leaving such an important component of the system unregulated is that the criminal history may be inappropriately applied, i.e., it may be used so as to not reflect the sentencing system's predominant rationale.

In some jurisdictions offender characteristics, e.g., age, drug addiction, and employment history, also play an explicit role in determining the penalty. The rationale that is adopted

for the system should determine whether such characteristics are employed. While age at first conviction, for example, is not related to an offender's deserts and thus should not be used in a system purporting a strict desert rationale, a more predictive oriented system might use this factor as an indicator of risk.

The Recommended Disposition

All penalty standards have normally called for dispositions for the different combinations of offense seriousness and criminal history. These presumptive dispositions come either in the form of a specific term, or of a range of terms within which the decisionmaker is to make his choice. More discretion is allotted with the latter scheme, the extent depending more or less on the width of the ranges. If the standards are to structure discretion to a significant extent, however, the ranges should be kept narrow.

The actual format used to set forth the presumptive disposition varies significantly by jurisdiction. Minnesota, for instance, uses a two dimensional matrix made up of ten offense seriousness rows and seven criminal history columns. Each cell of the matrix contains a presumptive range. California, on the other hand, assigns "base terms" to specific groups of offenses, and allows additional "enhancement" terms to be imposed for prior record and certain offense related factors. No design seems inherently superior for penalty standards, but the chosen format should make clear the relative contribution of the various features.

Variation in Termsetting

Every system also allows the decisionmaker to vary from the presumptive term on account of aggravating or mitigating circumstances. The extent to which rules governing aggravation and mitigation reintroduce discretion depends largely on (1) how strong the stated presumption is favoring the normally-applicable term, and (2) how much of a departure from the presumptive term or range is permitted. In some jurisdictions -- for instance, Oregon -- decisionmakers are bound by upper and lower limits when increasing or decreasing terms on account of aggravation or mitigation. In others, e.g., Minnesota, the decisionmaker is limited only by statutory requirements, but aggravation or mitigation may be invoked only in "substantial and compelling circumstances". In some jurisdictions the decisionmaker is given considerable discretion whether to vary from the presuptive term, but is given little choice as to the amount of the aggravating or mitigating term that can be imposed; California, for example, limits the choice to the specified terms on either side of the presumptive term. Oregon, on the other hand, offers a range of terms. The latter scheme offers the decisionmaker more discretion in determining the length of the offender's term.

Most systems have lists of factors regarded as aggravating and mitigating. The factors are usually offense related, though some pertain to offender characteristics as well. The lists are generally non-exhaustive, thus leaving room for non-listed factors to be considered. Some states, e.g., Minnesota and Alaska, have limits on what non-listed factors may be considered, however, in order to control their use.

Variation in terms setting can also occur with the imposition of "enhancements" or "extended terms" in some jurisdictions for certain types of criminal behavior, e.g., weapon use, or criminal history. Often the imposition of such terms is unregulated by the standards. Some of the additional penalties are quite severe, and there are no comparable provisions for reducing a term. Taken together, these features can distort the penalty structure by introducing wide discretion and unwarranted increases in severity.

Timing the Decision

The timing of the decision regarding duration of confinement varies according to the orientation of the standards. If the standards are designed for use at initial sentencing by the court, for example, then the decision regarding legth of imprisonment is made at this point in time. If they are parole-release standards, though, the duration of confinement can be determined at any time before release. Some parole release systems have provisions ensuring an early time fix, while others defer the decision until a later time. To the extent that the decison is deferred the degree of certainty regarding the actual length of confinement is less, and the system is in some sense less determinate

In every jurisdiction where the offender is informed early of his release date, the release date is subject to change on account of institutional misconduct. Where the sentencing judge sets the term of confinement, anywhere from a one fourth to a one half reduction in that term is normally possible through the

accumulation of good time credits. Institutional misconduct can result in the forfeiture of such credits, thus requiring adjustment of the ancipated release date. In many states, the forfeiture decision is to a large extent unregulated: any or all earned credits may be revoked for any infraction of the rules. Without provisions specifying the types of infractions that warrant adjustment in term and the appropriate amount of adjustment, the actual duration of imprisonment depends to a greater extent on the discretionary decisions of correctional officials, and the early time fix ceases to determine actual release. In some states however, such as Minnesota and California, there are limits on the amount of good time that may be taken away for any single infraction.

In parole -release systems which usually do not have good time provisions, institutional misconduct can result in the presumptive release date being extended by the parole board. Again, the decisionmaker in such cases is given a considerable amount of discretion as there are few rules governing the extension of terms.

Parole Supervision

While under some systems parole-release is abolished, most systems still retain a period of parole-supervision. Three features of parole-supervision require regulation if determinacy is to be achieved. First is the duration of the supervisory period. Some systems require a short period of supervision, e.g., nine months, while others allow the length of the supervisory period to extend to the end of the sentence. Often, a waiver of supervision is permitted, shortening the length of

the supervisory period, but in general, there is little regulation of the decision to terminate parole.

The decision to revoke parole is granted under each system. This is the least frequently regulated aspect of the criminal penalty, as there are few rules governing the appropriate conditions for revocation and reimprisonment. The potential for disparity is evident.

Standards governing the duration of reimprisonment vary. A number of states grant discretion to reimprison for the remainder of an offender's term. Others limit the length of reconfinement to a specific amount of time, e.g., six months in Colorado. Again, to the extent that decisions concerning the duration of reconfinement are not controlled, disparity and loss of predictability become greater risks; and an increase in the overall severity of the penalty structure can occur.

3. COMMENSURABILITY AND SOCIAL PROTECTION IN DETERMINATE SENTENCING

A major, stated aim of the changes being made in some sentencing systems is to achieve more proportionate, deserved punishment. To choose desert as a purpose raises several critical questions. What requirements must be met? How does one evaluate their achievement? How can one distinguish elements of desert from those of crime control in a sentencing system? How does the choice of rationale bear on decisionmaking discretion?

Requirements of Desert

The fundamental requirement of a desert-oriented system is that the severity of the punishment be commensurate with the seriousness of the offender's criminal conduct. The rationale for this requirement rests on the notions that punishment involves blame, and that the severity of the punishment connotes the amount of blame being placed on the offender. The amount of punishment ought therefore to comport, as a matter of justice, with the degree of blameworthiness -- that is, the seriousness -- of the offender's criminal conduct.

There are three requirements of a system of commensurate deserts. The first is that of parity: offenders whose conduct is equally blameworthy must be punished equally. The second requirement is that of ordinal proportionality: the ranking of the severity of penalties should correspond to the ranking of the seriousness of criminal conduct; and the spacing between penalties on the scale should reflect the degree of increment in blameworthiness from one level to the next. The third requirement refers to the anchoring points and absolute dimensions of the scale and is one of cardinal proportionality: a reasonable proportion should be maintained between absolute levels of punishment and the seriousness of the criminal conduct; the penalty scale should be neither too severe, nor too lenient, given the seriousness of the offenses involved.

There are several partially unresolved issues in desert theory.

(1) Grading offenses according to seriousness. What criteria should be used to rate offenses according to

seriousness? Some suggest that empirical studies of popular perceptions of offense gravity be used. To the extent that the public either overestimates or underestimates the injury done or risked by various criminal acts, however, the popular perceptions will fail to provide a sound basis for rating the gravity of crimes.

An alternative approach suggests that when grading offenses the harm element of seriousness should be associated with the actual consequences and risks of different types of criminal conduct. Such assessments of actual consequences and risks ideally would require extensive empirical research into the effects of various crimes, but little such research has yet been undertaken. In the absence of such research, however, we can an approximate idea of crimes'consequences can be developed by using the statutory description of the crime coupled with available common knowledge about those crimes' effects. Different crimes will affect different interests -- one may primarily affect a victim's safety, another his privacy or property -- and it will therefore be necessary to make moral judgments about the relative priority to be assigned these different interests, as well as to make moral judgments about offender culpability.

In assessing a formal penalty scale, one should determine to what extent there has been a conscientious effort to make such reasoned judgments about the gravity of offenses. To determine whether such an effort has been made, several matters should be considered. Has the system explicitly rated the seriousness of crimes? In grading offenses, has the rulemaking agency made its own conscientious judgment on the merits as to their seriousness?

Has the rulemaker given explicit reasons for its seriousness ratings?

(2) Criteria for judging punishments' severity. In order to link the seriousness of offenses to the severities of punishment, one also needs criteria for judging the severity or leniency of various punishments. Perhaps the best way to measure severity would be to try empirically to gauge the actual degree of deprivation or discomfort the punishments involve. In the absence of such data, two simplifying assumptions are appropriate when considering prison sanctions -- those most addressed by formal penalty structures: (1) imprisonment is more severethan alternative sanctions, and (2) the severity of different terms of imprisonment can be compared by comparing their durations.

(3) Relevance of prior record. Whether prior record should be considered when gauging an offender's deserts is another debated issue. Some argue that prior record is not relevant to an offender's deserts; others , that it is to a limited extent. Despite the difference, the two views share a common feature: they give primary emphasis to the gravity of the current offense, and restrict the role of prior criminal record. On either theory, a scheme that gives heavy emphasis to prior criminality does not comport with desert.

When evaluating a system in desert terms, the aim is to determine whether, and to what extent, the requirements of desert are satisfied formally and in practice.

Parity. In assessing a system's parity, one can first identify the factors that are used to determine the presumptive

disposition. Once one identifies such factors, one can examine whether and to what degree they relate to the seriousness of the criminal conduct. To the extent those factors are not so related, persons whose criminal offenses have the same gravity (holding criminal history constant) can receive unequal sentences. The same analysis can be performed on the aggravating and mitigating factors that warrant a departure from the normally-recommended sentence. To what extent do these concern the harm or culpability of the criminal conduct? To what extent do they relate instead to future criminal conduct or administrative concerns? The more those factors are desert-related, the more they help ensure that those whose conduct is equally blameworthy will receive equal punishments.

The breadth of offense categories can also be examined when assessing parity. The broader the categories, the more they may cover conduct that varies in its degree of seriousness.

In studies of the system in actual operation, some statistical measures are also possible. One method is to identify subgroups of offenders who have similar current offenses and similar criminal histories. Within such subgroups, one can then examine (1) to what extent offenders receive similar dispositions and (2) what factors best account for any differences. One would expect to find some differences of outcome within the subgroups. Much of the point of the research would be to examine those differences closely, to determine which features of the cases might account for them, and to analyze whether and to what extent those features are germane to desert. The latter analysis can be done qualitatively, by arguing the

pros and cons of whether a given item bears on harm or culpability.

Ordinal proportionality. In assessing a system's ordinal proportionality, one can begin by inspecting its penalty scale visually to determine whether any offenses appear to be "out of line", i.e., misplaced in the rank order, or too closely spaced to crimes that seem substantially more or less serious. Next, where a problem is identified, a closer look at the offenses in question can take place. An analysis and comparison of their respective harm and culpability components can help one determine whether the spacing or ranking decisions are in fact justified, or infringe upon the scale's ordinal proportionality.

Cardinal Proportionality. Several steps can be taken to assess whether a system meets the requirements of cardinal proportionality. First, judgments can be made about the absolute magnitude of penalties in the scale: to what extent do they deprive the offender of interests having critical importance in any human being's life? Next, one can make judgments about the magnitude of crimes: how much does the harm caused to the victim by such conduct intrude upon his vital interests? Finally, having made these judgments, one can identify the norm of proportion that exists between offenses and penalties on the scale -- whether, for instance, cardinally severe penalties are applied to offenses of moderate seriousness. The disclosure of this norm of proportion can provide the basis for judgments about whether cardinal proportionality requirements are satisfied.

Distinguishing Desert and Predictive Elements

No sentencing systems in America mete out penalties guided solely by desert criteria; every system employs some criteria that take crime control into account. Most if not all systems, for example, to some extent rely on predictions of future criminal conduct to determine whether, and for how long, offenders are to be confined. How can one distinguish the desert-oriented and predictively-oriented features of sentencing systems?

Sentencing systems may be classified according to the relative degree of importance they assign to achieving desert-oriented or predictively-oriented penalties. This analysis identifies four types of systems in line with this criterion: desert, modified desert, modified predictive, and predictive. Given these models, one can determine by examining the system's features where along the spectrum a particular system lies.

Assuming that one is dealing with a system employing the now-conventional "matrix" or "grid," what features should be examined? (Typically such a matrix has two dimensions. The horizontal axiscontains an offender score; the vertical axis, levels of offense seriousness. Each combination of offender score and offense seriousness shows a normally-recommended term or range of terms. Some matrixes also recommend non-imprisonment for some combinations.)

Non-crime factors. One indication of a predictive orientation is the extent of use of non-crime factors -- e.g., data concerning the defendant's personal or social history -- in determining the offender score, the horizontal axis of the grid. These factors are less concerned with the blameworthiness of the

offender's criminal conduct, and more with his chances of recidivating.

Manner of use of current offense. A desert rationale relies on the seriousness of the current offense. The offense score, the vertical axis of the grid, should thus grade offenses according to the rulemaker's judgment of their gravity. Prediction, on the other hand, permits consideration of features of the current offense that have no bearing on its seriousness. To the extent that research shows that certain types of crimes are associated with high recidivism rates, conviction for those types of crimes may be a predictor of future criminality. The use of the current offense in a manner that does not comport with its seriousness is, then, an indicator of predictive emphasis.

Criminal record. How great a relative contribution the prior record makes to the presumptive disposition also provides information about the role of desert and prediction. One way of determining this is to examine the line on the sentencing grid that divides the portion of the grid providing only prison sentences from the portion permitting non-prison dispositions; the slope of the line says a lot about the implicit rationale of the sentencing system. Under a desert rationale, for instance, the dispositional line would either be flat because the prior record should be given no effect or only slightly sloped because the record should be given only limited weight. Under a predictive rationale, by contrast, the prior criminal record would carry the preeminent weight due to its predictive significance. The dispositional line would therefore be quite

steep: those with more extensive records would receive "in" sentences, even if their current crimes were not serious, and those with no prior record, including serious first offenders, would not go to prison.

Desertand predictive schemes also differ in relying on distinctive features of prior convictions. A desert view considers the prior record as it relates to an offender's blameworthiness: the quality of the record, i.e., the gravity of past offenses, as well as the number of prior crimes, are considered. Under a predictive view, in contrast, aspects of the criminal record that have some predictive utility (i.e., have been found to be associated with recidivism), but have nothing to do with the degree of blameworthiness of the defendant's past choices, can be considered. An example is "age at first commitment".

Provisions for variation. Further distinctions can be made by examining provisions for aggravating and mitigating circumstances. In a desert scheme, departures from presumptive dispositions are permitted if the circumstances bear on the harm and culpability of the offender's criminal conduct. In a predictive scheme, on the other hand, any special circumstances could be relevant if they bear on the risk of future criminality posed by the offender. (For example: the mitigating circumstance of victim provocation bears on the offender's culpability and thus is related to desert; the circumstance of good community ties is predictive and it bears not on harm or culpability but on future likelihood of offending). Thus, one can go through each listed aggravating and mitigating circumstance and judge whether

it relates to the harm or culpability of the criminal conduct, or to the likelihood of future crime.

Parole supervision. Finally, provisions for parole-supervision provide information about the orientation of a system. Under a pure desert model, there could not be parole-supervision. Parole supervision with modest sanctions against parole violators would be permissible under a modified desert model, and supervision with onerous conditions or with potentially severe revocation sanctions could stand only under a predictive rationale.

Desert, Prediction, and Control of Discretion

Any theory-guided sentencing system needs standards to ensure that the desired aims are pursued. To implement a desert model for instance, standards are needed to ensure that judgments of seriousness of crimes, and of deserved severity of punishment, are made consistently. Likewise, standards are needed in a predictive model to ensure that dispositions considered appropriate for offenders posing different risks of future criminality are delivered in a consistent fashion.

How much constraint on discretion is called for under each model? Under a desert system, some flexibility to deviate from the normally recommended dispositions in unusual circumstances is necessary, as those circumstances may bear on the blameworthiness of the criminal conduct. Less flexibility is needed under a predictive model using a statistically derived forecasting instrument: if the offender's criminal history and other predictive factors indicate that he is in a high-risk category,

he would simply receive the designated term of confinement. This suggests that the logic of prediction points exactly in the opposite direction from the traditional view of predictive restraint. The traditional view was that wide discretion should be granted in order to allow decisionmakers to fit the disposition to the risk posed by the defendant. In fact, the contrary may be the case: predictive restraint might best be achieved by detailed, narrowly drawn -- indeed, rigid -- standards.

4. METHODOLOGICAL PROBLEMS IN THE STUDY OF DETERMINACY

Measures of variability and severity.

Sentence distributions show certain characteristics which should be taken into account when summary measures are selected. Such distributions are typically positively skewed, exhibiting a long, shallow "tail" toward higher values. They are often discontinuous, showing clusters of cases at certain values and none at others. They are often multi-modal, as well. They are seldom statistically "normal."

There are various ways of coping with these characteristics. Each has its benefits and costs. In general, "resistant" measures of central tendency should be sought, i.e., those least affected by cases with extreme values. Multiple measures should be used. Although single measures may be, in some sense, "accurate," they run the risk of missing features of the distributions that are theoretically important. Finally,

composite measures, like the coefficient of variation, especially, should be treated with care. They often mask feature of sentence distributions that are, or should be, of interest.

The "cohort" problem.

How can prison terms fixed under determinate sentencing schemes best be compared with those fixed under indeterminate schemes? Under determinate schemes, terms are ordinarily fixed before or shortly after admission to prison; thus, with some error, the terms of complete admission cohorts may be known. Under indeterminate schemes, on the other hand, terms are usually fixed at or shortly before release; until then, the terms of many members of given admission cohorts cannot be known with any certainty. If admission cohorts under the two schemes are compared, the terms of many members of recent indeterminate admission cohorts will not be know, distorting the sentence distributions of these cohorts. If determinate admission cohorts are compared with indeterminate release cohorts, the risk of comparing "unlike" cases is increased. The "cohort" problem is unavoidable for studies like the one reported here, for which determinate release cohorts do not exist (thus, release cohorts under the two schemes cannot be compared), and which have a special interest in indeterminate terms fixed for more recent admission cohorts, close to the date when determinacy was adopted. Some ways of coping with these difficulties are proposed.

Caveat.

The author of the chapter proposes that comparison of admission cohorts is the only proper comparison in the absence of determinate release cohorts. Whether or not this is the case (and some others in the research group disagree), discussion of the "cohort" problem serves to point up issues neglected in many studies of sentencing. Differences in admission and release cohorts under indeterminate and determinate sentencing schemes should be more carefully considered, both for how these differences affect the sentence patterns of each and for how they affect comparisons of these patterns.

II. DETERMINATE SENTENCING IN OREGON

5. HISTORICAL INTRODUCTION TO OREGON'S DETERMINATE SENTENCING SYSTEM

Three interrelated forces appear to have led to sentencing reform in Oregon. Although at work simultaneously, each will be discussed separately.

1. External criticism of the parole board. Oregon's parole board was the object of two heated criticisms during the mid-1970s. First, the board was criticized for issuing inequitable terms, which were felt to result from a lack of articulated term setting standards. Such criticisms arose primarily from liberal lawyers, the academic community, and a few prisoners. Second, the board drew criticism for being too soft on criminals, with the harshest attacks coming from the law enforcement community. Local district attorneys almost uniformly felt the board was too lenient in setting terms, particularly for serious and repeat offenders, and that the board's excessive leniency endangered the community. District attorneys were especially irritated because of the board's lack of accountability. Since board members were not elected,they could not be held directly responsible for their term setting practices.

2. Internal dissatisfaction with parold board practices. Much of the impetus for the determinate sentencing legislation came from within the parole board itself, when some members began to question the traditional approach to prison term setting. One board member, who became the driving force behind the determinate sentencing bill, took it upon himself in 1975 to investigate alternative models for structuring parole decision-making. He

soon developed an approach in which prisoners were classified by the severity of offense, without regard to risk factors. When the board member and some of his colleagues attended a series of National Parole Institute presentations, they became familiar with the reforms of the federal parole board and the board member's model evolved into a numerical model similar to the federal system's decisionmaking guidelines. This parole-release guideline system was instituted administratively by the parole board in 1976 without legislative authorization and later formed the core of Oregon's determinate sentencing system.

3. Other correctional reforms. Oregon's determinate sentencing law must be viewed in relation to other correctional reforms being considered at the same time. From the beginning to the mid-1970s, Oregon's crime rate increased and its prisons faced serious crowding. Both the executive and legislative branches of government decided to investigate these problems and search for solutions. In 1975, the Governor appointed a Task Force on Corrections to conduct a thorough study of the entire correctional system, charging its members to find "ways to reverse that shameful and counterproductive process that produces high rates of incarceration in the state correctional facilities." The governor's main concern in 1975 was not parole reform but avoiding expenditures for new prisons. After extensive study, both the legislative and executive commissions concluded that, in addition to other sweeping correctional reforms, the parole board's term setting policies needed drastic change.

All this set the stage for parole reform. In early 1976, one of the board members contacted the Counsel of the House Judiciary Committee and indicated that he was interested in legislation dealing with parole guidelines. The Counsel was intrigued by this idea. He wrote a draft bill and sent it to the board member, who in turn sent it to friends and associates. Based on their responses and suggestions, the board member made some revisions: for example, by making the bill approximate more closely a "modified just desert" model of sentencing. The board member returned the draft legislation to the Counsel, who in June 1976 submitted it to the Legislature's Interim Committee on the Judiciary.

The Committee approved the parole board's draft legislation, and in January 1977 it was automatically introduced into the full legislative session. Correctional and sentencing reform were politically "hot" topics in Oregon at that time; some type of sentencing reform was certain to be passed during the fifty-ninth legislative session. From the beginning it seemed clear that parole reform, as opposed to parole abolition and the introduction of flat-time sentencing, was most likely to succeed. The only thing needed was to work out the specific provisions of the bill. Numerous criminal justice agencies--district attorneys, judges, the parole board, and the correctional bureaucracy--had interests to protect, or promote. Negotiations continued through the spring of 1977, and a variety of amendments were made. The most noteworthy was the creation of a "Sentencing Council."

State judges had questioned the wisdom of giving the parole

board complete responsibility for devising the durational standards in the parole guidelines, as the original bill provided. They were specifically concerned that the board might make the durational ranges more lenient than community sentiments--and justice--demanded. They suggested that some other group or body either review the standards or help develop them. The Chairman of the Parole Board, in response to this suggestion, proposed the creation of a "Sentencing Council" composed of both judges and parole board members. The Sentencing Council would have the authority to determine the durational ranges, which the board would be legally bound to honor. The judges immediately embraced this proposal because it would give them greater control over the term setting policies and practices of the board, and the bill was so amended.

By the summer of 1977, the final version of the bill was noticeably different from the original. Several provisions were added to increase the likelihood that parole board term setting practices would more closely reflect the desires of the community. One provision granted the legislature the authority to oversee parole board policy--at least for one legislative session. Three others, included at the insistence of the state's trial court judges, gave the judiciary greater relative power in the term setting process.

Eventually, all parties came to believe that they had secured as much as they could hope for in the bill. It was passed in August of 1977 and became effective on October 4 of that same year.

6. OVERVIEW OF OREGON'S GUIDELINES

Oregon's guidelines are designed to affect prison terms primarily through parole-release decisions. Charging and plea negotiation are not covered by guideline standards. Neither is choice of sentence-type, e.g., probation, by the courts. Maximum prison terms are fixed by the courts within broad, statutory limits. Courts may also fix minimum sentences up to one-half the maximums; these may be overruled by a vote of four parole board members.

A five-person parole board, appointed by the governor to four year, staggered terms, helps develop standards and procedures--guidelines--for parole-release through an "Advisory Commission on Prison Terms and Parole Standards," that includes judicial members. The parole board then decides which standards and procedures to modify and adopt. (The legislature may alter or reject the board's decisions.) From day to day, the board fixes prison terms by setting or declining to set presumptive parole dates in light of its standards and procedures.

Parole-release Standards

A two dimensional matrix is used to assist in the determination of parole-release dates. The vertical axis of the matrix classifies offenses from "1," least, to "7," most serious. (Some offenses have been subdivided to span more than one seriousness class.) The horizontal axis divides offenders

into four classes, from "excellent" through "poor," on the basis of "criminal history/risk" scores. Each combination of seriousness and history/risk provides a "normal" or presumptive range of prison terms, stated in months or years.

A presumptive range is assigned to each prisoner on the basis of conviction offense and criminal history. Concurrently sentenced prisoners are assigned the range of the most serious conviction offense. Ranges are combined for consecutively sentenced prisoners, with guidelines limiting the portion of the combined range that normally may be used.

Prison terms are ordinarily to be fixed within the presumptive range. No rule existed in 1979, however, for selection of a term within a range--and some ranges were quite wide. Further, the board can depart from the normal range if it finds, by a preponderence of the evidence, that there are mitigating or aggravating circumstances. Such circumstances are partially defined by the guidelines. Permissible variations from the presumptive range are also defined by the guidelines, with larger variations requiring the votes of more parole board members.

Procedures

"Prison term hearings" to determine presumptive parole dates are to be conducted within six months of admission. A "parole analyst's report," prepared by Corrections Division employees, is the main document on which the board bases its decision. Most cases are heard, and their presumptive dates fixed, by two-member panels. Panels may go above or below the normal range within defined limits, or may seek a third vote for still greater

variations. If panel members cannot agree on a term, there is a de novo hearing before another panel and three votes are needed (i.e., both new panel members must concur with one member of the old panel) to fix the term. Certain cases are referred to hearings before the entire board, e.g., "lifers" imprisoned for a crime involving a death, those involving overrule of a judicially-fixed minimum term, and those where denial of parole in recommended.

Most prisoners do not see the board again until about a month before their presumptive release dates. However, a recommendation from the Corrections Division for recision of a presumptive parole date will result in a rehearing; the guidelines roughly limit term-extensions in these cases. Cases may also be reopened upon the request of a prisoner or board members, e.g., when new information or statutory changes would affect the board's parole-release decision. Long-term prisoners are also periodically reheard to learn "if anything exceptional has occurred that would warrant a reduction in the prison term."

A "parole-release hearing" is scheduled about a month before the presumptive parole date to review parole plans, psychiatric reports (if any), and conduct records. The guidelines specify the postponements that may be incurred for inadequate plans, concern over emotional disturbances, and conduct difficulties.

Parole Supervision and Revocation

The board establishes parole conditions and the duration of supervision, and it revokes parole and decides on the penalties attached to revocation. The board has authority to discharge

parolees before the expiration of their maximum sentences. Rules with respect to these matters are embodied in the guidelines. (They are outlined more fully in Chapters 7 and 10.)

7. A JURISPRUDENTIAL ANALYSIS OF OREGON'S GUIDELINES

What rationale do Oregon's parole release guidelines appear to embody? If implemented as written, to what extent might they constrain and guide discretion? To what extent do the guidelines satisfy principles of commensurability?

Decisionmaking Framework

Oregon's guidelines are designed to regulate the duration of confinement for offenders receiving sentences of imprisonment; they do not address the "in/out" decision of whether to imprison offenders. The guidelines were initially drafted by the parole board on its own initiative. The parole board was also instrumental in drafting the parole reform statute, which incorporated many of the original guidelines' features. The Advisory Commission -- a body made up of five Board members and five trial judges -- has since been made responsible for making changes in the rules.

The choice of decisionmakers, and the decision to address certain issues, have important implications in Oregon.

Role of parole board. The agency extensively involved in drafting the guidelines -- the parole board -- is also the body that applies them in practice. This choice has some potential strengths. When the legislature or a sentencing commission

writes the standards, the body responsible for applying them in individual cases, e.g., the judiciary, can prove quite resistant. Some judges may dislike any effort to regulate their discretion; others may be out of sympathy with the guidelines' particular sentencing philosophy; others may regard them as unduly severe or lenient; still others may simply fail to understand their content. To the extent these reactions occur, there will be difficulties getting the rules implemented -- for the rule maker has no direct authority over individual case decision. This problem may have been reduced in Oregon, as the board members have had important input into the writing of the standards, and have supported the idea of structuring their own decisions through rules.

Dual time retained. Oregon has retained a system of "dual time", because the actual length of confinement is shorter than the judicially imposed sentence. Oregon thus has not adopted "real time" sentencing, where the judicially determined sentence would denote actual durations. While Oregon has not felt sustained pressures for raising penalties, however, it is difficult to say to what extent this is attributable to the decision to retain dual time, or to other characteristics of Oregon's parole system and political make up.

No "in/out" standards. Parole guidelines, of course, cannot address the "in/out" decision. Hence they cannot solve the disparity that results when similar cases receive prison and non-prison sanctions respectively. The standards are aimed only at making decisions about duration of confinement more consistent.

Rationale

The rationale applied in Oregon is rather explicitly stated in its enabling statute, which requires that the guidelines be designed to achieve "punishment which is commensurate with the seriousness of the prisoner's conduct," but permits the pursuit of additional aims to the extent that they "are not inconsistent with the requirements of commensurability." This rationale is manifested in the format of the standards. The matrix contains seven levels of offense seriousness, and an eleven point "criminal history/risk assessment" score. The combination of these two elements produces a scheme which gives primary emphasis to the seriousness of crimes, but gives considerable weight to risk of recidivism.

Grading of Offenses

The guidelines have explicitly graded the seriousness of offenses: crimes are rated from one to seven in gravity. The board based these ratings on its own assessment of offense seriousness rather than relying on statutory classifications. It also refined the offense grading system by subcategorizing offenses that are broadly defined by statute and assigning different degrees of seriousness to each sub-category. Conduct having distinct degrees of harm or culpability are fairly well distinguished, and offense categories are not overbroad.

The ranking system is based on the conviction offense. The board may, however, "read through" to the "real" offense if a case has been plea bargained, and it finds the alleged actual conduct to be more serious than the conviction offense suggests. In such cases, the board can adjust the term as much as the range

provided for aggravating circumstances allows. This type of practice is designed to allow the board to combat disparities in outcome based on divergent bargains. But at the same time, it dilutes to some degree the requirement of proof beyond a reasonable doubt because the board considers supposed actual conduct for which the offender was not convicted when adjusting the term. Oregon has tried to strike a balance between these competing considerations in its rule: one begins with the conviction offense, and can depart from it only within the limits permitted by the applicable aggravation-range.

The Guidelines Matrix

Unlike California where the presumptive disposition comes in the form of a specific term, Oregon's two dimensional matrix contains a range of terms in each cell, within which the decision-maker is to make his choice. The width of these ranges varies: in most cells, it is less than 12 months, but where more serious crimes have been committed by offenders with longer records (cells in the lower right-hand corner of the matrix) it is considerably greater -- up to two years. The board is given wide discretion in choosing a term in these rather wide ranges, as there are no further rules governing selection. While even the wide ranges in the matrix have reduced the board's leeway compared to the pre-guidelines siutation, the breadth of the ranges has disturbed the Advisory Commission itself. Consequently, the board has more recently adopted somewhat narrower ranges; and it has considered rules to further guide the termsetting decision. During the observation period, the latter rules had not been adopted.

How well has the guideline matrix satisfied the requirements of commensurability?

Parity. The guidelines are designed to insure greater parity in disposition among those convicted of different crimes. However, the guideline ranges are (as noted above) very wide for the most serious offenses. Since no guidance has been provided specifying where within those ranges the disposition should be, similar cases can receive quite different dispositions. Second, some non-desert related factors such as "alcohol or drug use" and "age at first commitment" are included in a history-risk score, and thus affect the offender's placement in the matrix. This feature allows a distinction to be made between equally deserving offenders on ground unrelated to their deserts.

Ordinal Proportionality The requirements of ordinal proportionality appear to be satisfied. The seemingly more serious crimes are assigned the more severe penalties; and the spacing between levels is adequate, i.e. there is no "bunching" of penalties for crimes of markedly differeing apparent seriousness.

Prior Record. The history risk score considers the quantity of prior offenses, but not their quality (i.e., seriousness), thus giving this feature of the guidelines a utilitarian flavor: an offender with a long history of less serious crimes can be penalized more than an offender with a shorter history of more serious crimes.

The guidelines matrix as a whole gives less than one-third of its total weight to the consideration of prior record (as it

is reflected in the history/risk score; current offense seriousness received the heaviest emphasis. This scheme seems to suggest a mixed rationale: that is, a primarily desert-oriented system, but with significant predictive elements.

Variation in Term Setting

Most of the aggravating and mitigating factors reflect a desert orientation, as they relate to issues of harm and culpability of the offense. There tends to be a lack of definiteness among the listed factors, however, which affords the board considerable leeway in the decision of whether to apply them in individual cases. The board's discretion is further enhanced because the list purports to represent usual, but not exclusive factors.

When aggravating or mitigating circumstnces are found to exist, the decisionmaker can depart from the normal range, but must stay within the bounds of the variation-range provided. While the amount of permissible deviation is limited by upper and lower bounds, there are no rules governing the selection of a point in the considerably wider variation-ranges.

Time Extensions and Reductions

After the initial release date is set in Oregon, it may be adjusted, i.e., postponed, on account of "serious misconduct" on the part of the offender. The guidelines create four major categories of serious misconduct for which (some quite lengthy) extensions are permitted. The definitions of such conduct are very vague: behavior which consitutes a "hazard to life or health" for instance is not not defined, but can result in an

offender's term being doubled. The guidelines do, however, provide important safeguards: they limit the use of extensions to extraordinary cases, and mandate a three tiered system of review to determine if an extension is warranted.

Oregon also has a special provision for shortening the terms of long-term offenders (those serving in excess of five years) by up to 20 percent for rehabilitative efforts on their part.

Supervision and Revocation

The guidelines regulate the duration of parole supervision. For offenders convicted of the least serious offenses who have better history-risk score, the period of supervision is one year; for those convicted of more serious offenses, it is equal to the length of time spent in confinement.

Conditions of supervision are not regulated significantly by the guidelines. Nor do the guidelines provide standards for when parole revocation is the appropriate response, thus leaving that decision unregulated. The duration of reconfinement permitted for parole revocation is regulated, however. The guidelines permit from four to eight months of reconfinement for technical violations, and between eight and 12 months for a finding of criminal activity. These limits on the duration of reconfinement for parole violators are important safeguards. Parolees cannot be reconfined for long periods for technical violations that do not constitute criminal behavior, as such severe sanctions would be disproportionate. Parolees also cannot be reconfined for such long periods simply on the basis of allegations of new criminal activity, and without the benefit of formal adjudication.

CONCLUSION

The positive features of the guidelines can be summed up as follows: the guidelines apply a consistent rationale throughout, which gives primary emphasis to the notion of commensurability; they represent a serious effort to structure discretion; there has not been a tendency drastically to escalate penalties; and the board drafted the guidelines with some care.

Problems with the guidelines include: the breadth of the ranges for offenders convicted of serious offenses who have "poor" history/risk scores; the failure of the history/risk score to consider the gravity of prior offenses; the absence of real standards on prison discipline; and the absence of standards on the decision to revoke parole.

8. THE STRUCTURE OF THE OREGON PAROLE GUIDELINES

Statistical and numerical techniques are used to highlight features of Oregon's guidelines that may influence how parole board decisions are made and assessed. Similar techniques can be used to analyze other determinate sentencing schemes and to facilitate comparisons between them.

Offense and Offender "Effects"

Determinate sentencing schemes, including Oregon's, typically prescribe a range of prison terms to be imposed on each

offender, classified by offense and seriousness and offender score (mainly prior record), absent mitigating or aggravating circumstances. Using the mid-points of such ranges, numerical "models" can be developed to determine the relative importance given to offense seriousness and the offender score in the determination of prescribed terms. Simple forms of two models are used in this analysis. The "additive" model assumes that the increment for a given level of criminal record is the same for all levels of crime seriousness--or, alternatively, that the increment for a given level of crime seriousness is the same for all levels of criminal record. The "multiplicative" model assumes that the increment for criminal record differs according to offense level--or that the "effect" of offense seriousness differs for those with different offender scores.

Oregon's matrix is better described by the multiplicative than the additive model. Generally it shows that, although offense levels have larger "effects" than prior record on the mid-points of the ranges, prior record weighs more heavily for those with "better" prior records.

Another approach uses regression techniques. This shows, for Oregon, that offense cateogy and offender score, together, account for most of the variation in the mid-points of the ranges, with offense seriousness having about three times the explanatory power of offender score.

Comparison with Federal Parole Guidelines

The matrix used by the Federal Parole Commission shows a similar ("multiplicative") structure. The overall median is higher in the federal matrix. The offender score has more

influence on the pattern of mid-ranges in Oregon's matrix. In both matrixes, but especially in Oregon's, the more serious offenses call for much more severe penalties than those that are ranked as but slightly less serious.

"Normal" Range Widths.

Both the absolute widths of matrix penalty ranges, and their widths relative to their own mid-points, are of interest. In both Oregon and the federal system, wider variation relative to the mid-point is provided in the matrix cells prescribing ranges for those convicted of the least serious offenses, with the "best" offender scores--and not the reverse, as suggested by absolute widths. Obversely, in relative terms, the matrixes prescribe greater constraints over "normal" variations in terms for "worse" offenders convicted of more serious offenses. Comparatively, the Oregon matrix is less contraining than the federal matrix. Both are less contraining than the guidelines developed in Minnesota and Pennsylvania, but more constraining than those developed by the Superior Court in Massachusetts.

Oregon's 1980 Changes

Matrix changes adopted in 1980 reduced some of the larger ranges, and some of the longer mid-ranges, generally by rather small amounts. No fundamental alteration in the basic matrix structure occurred; it is still best described by a multiplicative model.

The Actual Distribution of Cases

The preceding analyses assumed that cases were equally distributed in each matrix cell. Looking at the actual

distribution of cases further clarifies the possible "effects" of the matrix structure and changes in it. Analysis of 1976 and 1978 admissions suggests, among other things, that matrix changes introduced in 1978, which widened a number of ranges, may have had limited effects on prisoners' terms because they affected cells containing few cases. It also suggests that one consequence--if not purpose--of widening cell ranges is to include more cases within the "normal" ranges. This may in no way affect the actual terms given to offenders falling in those ranges, but it will affect assessment of the frequency with which the board "deviates" from the "normal" ranges. Finally, certain likely consequences of changes in rules about the classification of cases are explored.

Conclusions

These techniques facilitate comparisons; they also help in formulating questions about the ways in which guidelines are designed and changed. Thus: What is the justification for weighing criminal history more heavily for those convicted of less serious offenses? Why, if this is desirable, is it not done consistently across all offense levels? Might not the much more severe penalties for more serious offenses suggest the possibility, and wisdom, of finer discriminations among them? Much more generally, how can the similarities--which are striking--and differences--which are also striking--among the guidelines proposed and use in widely separated jurisdictions be explained, and justified?

9. SETTING PRISON TERMS IN OREGON

Process

Records. Much emphasis was placed on getting straight those facts affecting crime seriousness and "history/risk" rankings, and the many circumstances that might move members to mitigate or aggravate terms within and beyond the guideline's presumptive ranges. A special corps of Corrections Division personnel, the "parole analysts," checked and elaborated the information supplied by pre-sentence reports, searching official records, and interviewing the involved prisoners and, sometimes, others. A "parole analyst's report," incorperating the results of these inquiries, was prepared for each prisoner to provide a major basis for term-setting decisions.

Hearings. Each prisoner appeared at a "term-set hearing" within six months of admission. Most were assigned to, and had their terms set by, two-member panels. Others were assigned to have their terms set by the full board, including prisoners on whose terms panel members disagreed. Most prisoners received "firm" parole-release dates at these hearings. A few received dates conditional on a later favorable psychiatric report. A few were denied parole and ordered to serve the full, judicially-fixed sentence, less good time, in prison.

At the hearings, board members conducted further inquiry into the facts. Prisoners were quizzed about those alleged in the parole analysts' reports, and an effort made to resolve any

discrepancies. Additional information was sought from prisoners, particularly about the "real" offense underlying the conviction, unrecorded and unprosecuted crimes, and other circumstances that could serve to aggravate or, less often, mitigate terms.

After the interview, the prisoner was asked to leave the room and the members tried to agree on a term. If agreement was reached--and it usually was--the prisoner was recalled, informed of the term, and dismissed. Most would see the board again only for a "parole-release interview." Disagreements resulted in new hearings before other panels or the full board.

Pressures

During 1979, about 70 percent of terms were set within the presumptive ranges. Of the 30 percent set outside, six in ten were above, and the other four below, the ranges. What moved the board to adhere to, or deviate from, the presumptive ranges?

Certain pressures were internal to the board:

Principles. Members varied in their commitment to the principles of the "modified just deserts" model that undergirded the guidelines, but all preferred to set terms within the presumptive ranges. These ranges, largely fixed by the members and often quite wide, ordinarily encompassed terms that most found commensurate with the seriousness of offenders' crimes and records. Staying within their bounds also helped assure term parity, which membersvalued. Public protection was also of concern to members and, by and large, terms in the presumptive ranges seemed to them to provide adequately for it, too.

Commitment to "just" terms led to deviations, as well. There was no rule governing the placement of terms within the presumptive ranges. Judgments about the varying seriousness of cases falling in the same presumptive ranges often led members to agree on terms deviating from the ranges' mid-points both within and outside the ranges; differing judgments about seriousness sometimes led to virorous disagreement about appropriate terms. Commitment to public protection similarly led to agreement that terms should vary, and to disagreement over how and how much.

Rules. Two-members panels, according to the rules, could set terms only within the presumptive ranges, or make limited departures from them. A third vote was needed to make greater, but still limited departures. Further departues required a full board hearing and four affirmative votes. Third votes were often sought and procured, but full board hearings appeared to be avoided when possible (abot 10 percent of the hearings in 1979 were by the full board). This both saved time and reduced occasions for open expression of continuing disagreement about appropriate terms. In any case, the rules, which the members followed by design made terms deviating from the presumptive ranges more difficult to achieve.

Additional pressures came from outside the board:

Courts. Judicially-fixed sentences usually did not interfere with term-sets within the presumptive ranges. Even so, they appeared to be taken into account when the board set terms both within and outside of the ranges. So, too, were recommendations for terms made by prosecutors, judges and defense

attorneys, although explicit recommendation (beyond "see the pre-sentence report") were infrequent, epecially from judges and defense attorneys.

Some sentences restricted what panels or the full board could do, or do without extra effort. Some sentences, less good time, resulted in terms below the presumptive ranges. The board, preferring to place prisoners under parole-supervision, typically set "early" parole dates when confronted with such sentences. Consecutive sentences, by law, resulted in presumptive ranges that summed those for the separate sentences. By rule (unknown to many court personnel), the board limited the presumptive range in such cases to its bottom half, hoping, perhaps, both to take cognizance of the sentences and to limit the length of, and variations in, resulting terms.

Judicially-fixed minimum sentences had to be enforced by the board, unless there were four votes to overrule them. When such minimums, if enforced, resulted in terms deviating widely from the presumptive ranges (as they often did), they occasioned considerable dispute. Members wanting less severe terms often had to increase their term-antes to win three other votes to overturn the minimums.

Prisons. Prison administrators were concerned over the possibility that terms sets would interfere with prison discipline and exacerbate the increasing congestion of the institutions. They pressed for and won an agreement with the board to re-set terms, for disciplinary reasons, only upon request of the Corrections Division. In the face of increasingly

crowded conditions, such requests were few. Further, prison administrators moved the board to consider reductions in terms for long-term prisoners after five years in custody, to give such prisoners "hope." The grounds for such reductions were to be, essentially, good conduct and rehabilitative progress. Some members felt that both arrangements interfered with setting appropriate terms. But through 1979, at least, they abided by the arrangements.

More generally, prison administrators urged the board to set as many "short" terms as possible to help relieve institutional congestion. Members were conflicted about the morality and wisdom of taking such urgings into account, although some thought it both moral and wise. During the observation period, the administrators were preparing to go beyond diffuse recommendations to encourage the board to revise the criteria for placement of cases in presumptive ranges, revisions, that would reduce the ranges for many prisoners. Under a later court order to reduce the prison population, changes in criteria that had this effect were made.

Prospects

Term-setting under the guidelines was hardly as "mechanical" as many of its critics alleged. (The same critics also alleged that board members failed to adhere to the guidelines.) Changes in board membership could easily shift the balance of commitments that underlay the board's rough adherence to the guidelines in 1979; such changes, as well as external pressures, could also lead to shifts in the presumptive ranges and in the rules for deviating from them. Oregon's guidelines eliminate neither the

internal nor external pressures for conformance, deviation or change.

10. PAROLE SUPERVISION AND REVOCATION UNDER OREGON'S DETERMINATE SENTENCING SYSTEM

Under Oregon's old law, the parole board could freely choose not to parole prisoners; fix parole-supervision periods of any length within the judicially-imposed sentence; revoke parole for any cause; and reimprison parole violators for any period up to sentence expiration. Parole was granted selectively, although in the several years before 1977 it was progressively being granted more widely. Such uniformity as existed in supervision periods, revocation causes or violation sanctions was the product of informal and largely unarticulated standards.

The new law mandated but a single change: the board was to develop standards for the length of reimprisonment imposed for parole violation. Such standards, like those for the intial term, were to give precedence to proportionality, but to take public protection into account. Standards were quickly developed and used. Parolees reimprisoned on new charges would be subject to the general guidelines; the new offense and parole violation would affect a recomputed "history/risk" score. Violators not convicted of a new charge, but "found" (by "a preponderence of the evidence") by the board to have committed a new felony, would normally be kept for eight to twelve months; others, recommitted for rule violations only, for four to eight months. Partially

articulated "factors" could justify limited mitigation or aggravation of these penalties. And if four board members found it justified, the additional term could be further reduced or extended to the sentence limit.

These standards fulfilled the legislative mandate. They did not, however, end the process of articulating standards for parole-supervision and revocation that followed in the waake of the new law.

Supervision

Within six months of the effective date of the new law, the board adopted standards for the length of parole-supervision periods. In doing so, it appears mainly to have been moved by a concern for fairness in the distribution of this "penalty." In accord with their general guidelines classifications, prisoners convicted of less serious offenses, with certain acceptable "history/risk" score, would be discharged from supervision after one year. Others would be supervised for periods equivalent to their prison terms. Multiple convictions and prison good-time forfeits could add specific periods of supervision. And normally, all but the most serious offenders would be discharged after four years of supervision; the most serious, after ten years.

If conscientiously imposed, one result would be more definite parole periods; another, more uniform periods for prisoners similarly classified by the guidelines. Observations suggested that, by and large, these were the results. But there was resistance to closely following the guidelines by some parole officers. Discharge from supverivison was not automatic; it

required a recommendation from the parole officer. Some officers simply failed to forward a recommendation in selected cases--and the prisoners continued on parole.

The parole organization--a part of the Corrections Division not administered by the board--also moved to formalize standards for parole-supervision about a year after adoption of the new law. Its standards regulated the intensity of supervision, and seem to have expressed a concern to be, and appear to be, more effective, as well as efficient, in the distribution of its scarce surveillance and service resources. Generally, the longer the period of supervision, the more serious the commitment crime, and the lower ("worse") the "history/risk" score, the greater the intensity of supervision. Seemingly focused on the past, levels could be "aggravated" or "mitigated" in light of three broad criteria that emphasized the current risk that a parolee would become a public nuisance or danger. And six month reviews could change supervision levels.

During the observation period, these standards, which left much room for "interpretation" and "exceptions," were only slowly coming into use. We cannot say, thus, what difference they made in the actual distribution of supervision, much less its costs or effects. Their very presence can serve to remind us, however, that "increased determinacy," in the form of articulated, formal standards, may serve other ends than those of "justice."

Revocation

Near the end of the observation period the board developed, and began tentatively to apply, guidelines embodying standards

for parole-revocation itself, as well as the revocation sanction. Set out, Oregon style, in the form of a "matrix," the guidelines cross-classified three levels of parole violation (minor and major rule violations; new felony finding) and three levels of parole performance (including, curiously, the conviction offense). Two of the resulting nine "boxes" recommended non-reimprisonment only; two offered it as an option. The other five "boxes" specified terms ranging from four to six, to ten to fourteen, months. We were unable to document responses to these guidelines, except to note that they were not quickly approved by all board members. That they were proposed and tried may, however, tell us something about the impetus of standard-setting once it's put in motion.

So, too, may the standard-of-sorts adopted by the parole organization with respect to revocation. In 1980, faced with crowded prisons and under court order to reduce the population, the Corrections Division directed its parole officers not to file revocation recommendations unless parolees had been indicted for or convicted of new felony charges.

Comment

When determinate sentencing was debated in Oregon, parole-supervision and revocation were scarcely considered. Only one post-release board function was affected by the new law--fixing prison terms for parole violators, the function most analogous to initial term-fixing. Surviving documents and interviews suggest that the minds of the debaters was on "punishment"--and for most parole-supervision periods was, and is, something other than "punishment."

Clearly this view is widespread among parole personnel. It accounts, in part, for the resistance of some parole officers to terminating parole-supervision in accord with board standards. They found these standards, largely apportioning parole-supervison periods like initial prison terms, to the gravity of the past record, inappropriate. What is wanted, they said, is individual assessment by professionals of the risk of future misconduct; this is what parole-supervision is all about. Such a view also reflects the reluctance of those who would claim "professional" status to being supervised themselves.

Will such reluctance and resistance ward-off the development ofmore formal standards in this field? We doubt it. Once in motion, such development may be hard to resist, as the Oregon experience may suggest. Although the board seemed propelled mainly by a concern that all "penalties" be proportional to past offenses, and equitably distributed, the parole organization's efforts make it obvious that standards need not be oriented to past offenses, and that "proportionality" and "equity" can look to balancing "risks" and "needs," on the one hand, with the use of available resources, on the other hand. In fashioning such standards, parole supervision, even revocation, need not be conceived as a "penalty." It can be conceived, as parole personnel insist, as surveillance and service to promote a safe community. Such formal standards may facilitate greater community safety. They will permit more efficient and effective supervision of parole personnel. It is this certainty that will sustain a move toward "greater determinacy" in parole-supervision

as parole organizations continue to increase in scale and complexity.

Conclusion

Has greater determinacy made parole-supervision more "just" in Oregon? To some extent it has. Parole terms become more definite and, usually, more uniform; endless parole became quite rare, partly because of the spirit promoted by the new law. Some officials, particularly parole board members, were moved to consider the criteria that should affect such matters as length of supervision periods, conditions imposed, revocation, and revocation sanctions. They were also confronted by the view that parole-supervision and revocation are not properly considered as "punishment." Although working out the conflicting implications of these views remains work for the future, surely a first step is becoming aware that the views exist, and that both are deeply embedded in current practices.

Postscript

During the last weeks of our observation period, serious conflict developed between the state's trial judges and the correctional bureaucracy, including the parole board, over the proper length of parole-supervision periods. The judges wanted longer periods, particularly for prisoners with long sentences. The bureaucracy, faced with budget cutbacks, staff shortages and crowded prisons wanted substantially to decrease the duration of supervision. Based on analysis of their revocation statistics, correctional administrators maintained that for mamy paroleessix months supervison was sufficient, and that for most supervision after a year was a waste of resources. Each side threatened to

take its case to the legislature. In 1981, there was a showdown. Faced with a depressed economy, budget deficits and civil suits over crowded prisons, the legislature limited parole-supervisions to six months for minor offenders, and to one year for serious offenders. Presumably exceptions could be made.

Our guess--and it only that--is that these limits will prove temporary.

11. SOME STATEWIDE STATISTICAL RESULTS IN OREGON

Did the severity and variability of prison terms in Oregon change when the guidelines came into effect? Data on prisoners paroled in 1974, before the guidelines were adopted, and on those whose parole-release dates were fixed in 1976 and the first half of 1978, are analyzed to provide some tentative answers. The main comparisons involve males convicted of a single offense, or of multiple offenses with concurrent sentences. The "seriousness" and "history/risk" criteria specified by the 1978 guidelines were used to classify cases for cmparison.

Severity

It appears that most prisoners whose parole-release dates were intially fixed in 1976 and 1978, under the guidelines, will serve longer terms than those paroled in 1974, before the guidelines were adopted. Increases were particularly notable for prisoners convicted of serious crimes, who had relatively low (poorer) history/risk scores. About a fifth of the prisoners--mainly convicted of less serious crimes, with relatively high

(better) history/risk scores--will serve slightly shorter terms. These changes were particularly marked between 1974 and 1976. In 1978, by contrast, changes were much less marked.

Variability

The variability of terms for most prisoners similarly classified was decreased--often dramatically--in 1978 as compared with 1974; 1976 seemed to be a year of transition to this outcome. Several measures confirm this finding.

Terms Falling Outside the Matrix Ranges.

In 1978, about 61 percent of prisoners' terms were fixed within the matrix ranges in which the prisoners were classified. About 24 percent of the prisoners received "mitigated" terms outside the normal ranges, and about 14 percent received "aggravated" terms. Were these terms appropriately meted out, given guidelines rules?

It was impossible to tell with the available data, which often lacked information on aggravating and mitigating factors (although such information was supposed to be recorded by the parole board). With available information, mitigated and aggravated cases could not be distinguished from each other statisically, although a large number of "factors" were considered. Much less could such cases be distinguished from those receiving terms within the normal ranges.

Parole Violators

Parole violators returned with new convictions were grouped with newly committed prisoners for the main analyses. The numbers of parole violators returned without new convictions in

the 1976 and 1978 samples were too few to permit detailed comparisons with those in the 1974 group. Generally it appears, however, that the "technical" parole violators whose terms were fixed under the guidelines in 1976 and 1978 will serve shorter terms for their violations than those paroled in 1974. The spread of terms for prisoners similarly classified also appears to be less in 1976 and 1978 than it was in 1974.

Females

There were too few females in the 1974 and 1978 samples to permitanything but a gross comparison of their termswith those of males (females were not sampled in 1976). Generally, in 1974 females served less time than males similarly classified by 1978 guideline criteria. In 1978, their terms were much more similar to those fixed for similarly classified males.

Conclusions

On average, prison terms appear to have become slightly more severe in Oregon under the guidlines; they appear to have become considerably less variable, controlling for seriousness of offense and offenders' criminal histories. Did the guidelines "cause" these changes? These data, alone, do not give an answer to this question, if, indeed, it can be answered. They are consistent with the view that parole-release guidelines can assist decision makers in achieving certain more or less consistent results--in this case, differentiation of terms for prisoners convicted of more or less serious offenses considered to be greater and lesser risks.

Caveats. All members of the research group have a variety

of reservations about the data used and analyses reported in this chapter:

. The 1978 sample contains cases from the first half of the year primarily. The reason for this samplying anomaly remains basically unknown. It seems likely, but is not certain, that the cases are representative of this period. On the other hand, there is some reason to believe that parole board term-setting practices changed in the latter half of 1978 in ways that would have affected the results.

. Cases paroled in 1974 were compared with 1976 and 1978 cases, some of whom, eventually will not be paroled. (Their parole dates will be rescinded, and they will be discharged when their sentences expire.) If there is a relationship between a lengthy term and eventual discharge, this will bias the results by making the terms of 1976 and 1978 cases that will actually achieve parole-release appear longer than they will turn out to be.

. The analysis of terms falling outside the normal ranges was unable to consider the possible effects of court sentences.

. Comparison of prisoners released in 1974 was those admitted in 1976 and 1978 may, according to one group member, be an improper comparison, biasing the results in unknown ways.

In all, these results must be regarded with considerable reservation.

12. NOTE ON THE MATRIX AND LOCAL COURTS IN OREGON

Oregon's parole-release guidelines linkedthe lengths of prison terms more clearly to conviction offenses, mitigating and aggravating circumstances in the record, and judicial reasons for sentences than had been the case under indeterminate sentencing. Further, the implications of judicial sentences for prison and

parole terms were clearer. Were the sentencing practices of local prosecutors, defense attorneys and judges affected by such differences?

The data available to answer this question are few. Statewide data on sentencing practices were not available. Nor did the study team have the resources to make any but the briefest forays into the Oregon courts. The team decided to focus on the criminal courts of Multnomah County, Oregon's largest, accounting for about one-quarter of prison commitments. One team member spent three weeks there, conducting observations, interviews and analyses of official records; another interviewed selected court personnel in several other counties.

Proseutors and Defense Attorneys.

Generally, the practices of prosecutors and defense attorneys appeared to be marginally affected, at most, by the guidelines. This may have been due, in part, to the widespread incomprehension of the guideline provisions evident in mid-1978, and only slightly reduced by mid-1979. Additionally, many prosecutors and defense attorneys believed that the board persistently disregarded the guidelines.

In any case, the implications of the guidelines for prison terms seldom seemed to affect prosecutors' charging and bargaining practices, their readiness explicitly to negotiate sentences, the frequency or character of their sentence recommendations, or their efforts to assure an adequate record of the facts and reasons justifying judicial sentences. Practices in these matters varied between counties, and the practices in

each county seemed more closely related to office policies stemming from local considerations than to the guidelines. The practices of defense attorneys also seemed marginally affected, for the same reasons.

One implication of the guidelines was, however, a subject of comment by many prosecutors and defense attorneys: the relatively "short" presumptive ranges for the least serious offenders. Prosecutors said that these ranges often made a jail/probation alternative preferable because it assured both a longer term in custody and a longer term under supervision and, at the same time, permitted "building" (increasing) offenders' history/risk scores to assure a "less lenient" term next time around. Defense attorneys said that local terms were often preferred by their clients, who were determined to avoid a "next time." Available data were insufficiently detailed to show whether the implied shift of minor cases from prison to jail/probation had occurred.

Judges

Judges were routinely informed of likely guidelines ranges by pre-sentence reports. Some, as a matter of principle, believed that this information should not influence their sentencing decisions. But most were aware of the implications of their sentences for the parole board's capacity to implement the guidelines ranges, and most appeared to take account of these implications when they imposed sentences. Thus, most judges issued sentences that were some multiple of the top of the likely guideline ranges. This assured that legally mandated good time deductions would not prevent the board from implementing the ranges, and it helped assure that the board would be able

successfully to encourage prisoners to accept parole-supervision. At the same time, most judges said that their sentences were becoming more "realistic," i.e., closer to the actual prison and parole terms that would be served than had been the case in the past, when maximum permitted sentences (e.g., 20 years for Class A offenses) were often imposed.

This is not to suggest that judges were entirely happy with the guideline system. Generally, they found the ranges acceptable, but they found the board's implementation of them wanting--and discontent was increasing over time. They were particularly concerned about the terms fixed in "serious" cases, and an increasing number felt that the imposition of minimum terms and consecutive sentences were their only "weapons" for resisting the board's "leniency." The same judges who were most vocal about this situation also tended to overestimate the extent to which the board failed to take their recommendations into account, or overturned them. But as the view that the board was lenient and resistant to judicial opinions became more widespread, an increasing number of judges appeared to be becoming more reluctant to communicate their opinions to the board, except in very unusual cases. Never communicated routinely, this meant that the guidelines system was failing to improve the quality of the sentencing process, at least to the degree its proponents had hoped.

III. DETERMINATE SENTENCING IN CALIFORNIA

13. HISTORICAL INTRODUCTION TO CALIFORNIA'S DETERMINATE SENTENCING SYSTEM

Under California's determinate sentencing system, courts committed felons to prison for "the term prescribed by law," e.g., five years to life for such common crimes as second degree murder, and first degree robbery or burglary. When it decided that the prisoner was "ready for release," an "Adult Authority" fixed the overall time to be served before absolute discharge within these limits. It also fixed the period, if any, to be served on parole. The Authority could refix both parole and overall terms "for cause". (A similar, separate board fixed terms for women prisoners in the same ways.)

During the 1960's, the Authority's use of its wide discretion was increasingly attacked, particularly, at first, by groups cncerned with prisoners' rights and civil liberties. They found Authority term-fixing "capricious," "arbitrary," and often "politically motivated"; terms, frequently, "disparate" and "excessive." Supporters of harsher handling of prisoners also occasionally criticized the Authority, echoing the same charges but decrying the Authority's failure sufficiently "to protect the community." Prison officials, too, found many Authority decisions troublesome, particularly objecting to prolonged delays in fixing terms for many prisoners.

By 1974, a Senate committee found that dissatisfaction with indeterminate sentencing was widespread, perhaps sufficiently to necessitate change. In early 1975, it introduced a draft determinate sentencing law designed to revamp the system. Although supported in principle by many, at first the bill was

stalled by dissension over penalty provisions. But by early 1976, two judicial opinions challenging aspects of the old system, as well as administrative changes made to counter criticism, helped convince some that change was necessary and others to compromise their differences.

The governor's office moved to mediate between contending forces to construct a passable bill. Law enforcement groups, particularly district attorneys, stopped pressing for across-the-board penalty increase and settled for possible longer terms for selected "violent" offenders than originally proposed. Correctional executives settled for less discretion over "good time," and for shorter parole terms, than they wanted. Prison reform groups agreed to accept a bill with longer possible terms and more official discretion than they wanted, but a bill which, in the opinions of most, embodied needed changes, would reduce terms for many and help curb official discretion, and was the best that one could hope for under existing circumstances.

The complex changes that were passed in August 1976 (more fully outlines in Chapter 14) included:

- abolishment of term-fixing through parole-release for most prisoners, specifying how the court, instead, would fix sentences according to statutory standards and Judicial Council guidelines;

- establishment of a new body to fix the prison terms of persons sentenced to life, according to standards to be established by that body;

- a change in the legal status of parole from a part of the prison term to a separate, defined period of supervision served after completion of the prison term;

- provisions for retroactive fixing of the prison and parole terms of persons in prison or on parole when the new law became effective; and

- a new definition of the purpose of imprisonment as "punishment" best served by proportionate and uniform sentences, as well as a mechanism designed to help assure that the system carried out this purpose.

It should also be noted that the changes did not attempt to control charging or plea bargaining practices, nor did they directly restrict the choice of type of sentence statutorily open to judges.

The changes were to be effective on July 1, 1977. In June 1977--before they went into effect--further changes were made. Some law enforcement groups renewed their efforts to increase penalties for most common crimes. The effort was not effective, butvarious limits on the aggregate penalties that could be imposed on "violent" offenders, those with prior prison terms, and offenders convicted of multiple offenses were loosened or lifted. Judges, inactive in shaping the original legislation, pressed for and won discretion to aggravate and mitigate terms without motions from counsel, to widen the range of sources they could use to justify their actions, and they also won changes that simplified sentencing procedures in the interest of speedy disposition of cases. Correctional executives, in effect, got slightly longer possible parole terms: in the bill's "final" version the limit changed from 12 months to 18 for prisoners without life terms reimprisoned for parole violations, and their years to four for "lifers." Penal reform groups shifted to the defensive--fighting across-the-board penalty increases (which did not pass), resisting the removal of term length limits (some remained), fighting efforts still further to increase possible parole terms, challenging a move to loosen restrictions on the

retroactive terms that could be issued (a partially won battle), managing to fend off a move to enlarge discretion over revocation of "good time"--and helping kill a provision to empower authorities to extend the prison terms of "mentally disordered violent offenders. "

The changes made in the brief period between the initial passageof California's "Uniform Determinate Sentencing Act of 1976" and its effective date (as well as those made in the route to passage of the Act ifself) provide a useful guide to the forces at work shaping sentencing laws, and a strong hint about future changes to be made (those upthrough early 1980 are outlined in Chapter 23).

14. OVERVIEW OF CALIFORNIA'S DETERMINATE SENTENCING SYSTEM

This overview takes into account major changes in California's determinate sentencing law ("DSL") through 1978, portraying the law and system as it existed through 1979. (Further changes are discussed in Chapter 23.)

Court-fixed Prison Terms.

With some exceptions, convicts' prison terms are fixed by the court at the time of sentencing. The DSL specifies a series of three-part ranges of "base term" for most felony offenses, e.g., 2-3-5 years for robbery. The sentencing judge is to select the middleterm, unless certain facts are found true at a sentencing hearing or trial. The judge may then impose the mitigated (lower) or aggravated (upper) term. In imposing the

lower or upper terms, the sentencing judge is to follow the rules of the Judicial Council which outline the sources that may be consulted to establish the facts, the kinds of facts to be considered, how the facts are to be weighed, and the strength of evidence needed. The facts and reasons for mitigation or aggravation must be stated for the record.

Other "enhancing" facts, if pleaded and proved, will result in an additional term or terms to run consecutively to the base term, unless the sentencing judge finds mitigating circumstances and states them for the record. Enhancing facts include being armed while committing or attempting to commit a felony,using a firearm, intentional infliction of great bodily injury, and taking, damaging or destroying property above certain values. Charged and proved convictions for prior felonies that resulted in state prison terms may also add to the base term. The length of the addition depends upon the number of prior terms served and the conviction offense. Persons convicted of multiple charges may receive concurrent or consecutive terms for those charges. Judicial Council rules list criteria to be consulted when deciding whether to impose consecutive sentences.

The DSL contains a number of provisions limiting the total prison term that may be imposed by the court. Some are: the same fact may not be used to aggravate and enhance a base term; usually an element of the offense cannot be used to enhance a base term; the total term of imprisonment may not exceed twice the base term, with some exceptions. The "exceptions" in these and other term-limiting provisions have tended to enlargement since

passage fo the founding legislation.

Good Time

Court-fixed terms are to be reduced by one-third unless a prisoner forfeits good time credits. Under the DSL, each eight months served in prison will result in four months credit toward service of the term, unless credit is denied. Three of these months are for refraining from certain acts (e.g., escape, assault) specified in the DSL; one month is for participating in prison programs. After a certain period, good time earned "vests," i.e., cannot be taken away. The DSL outlines how and when prisoners are to be informed about prison rules and possible credit forfeits; which activities are prohibited and the maximum credit losses that each prohibited activity may bring; and procedural rules for disciplinary hearings and credit forfeits.

Board-Fixed Prison Terms.

Under the DSL, the court continues not to fix the terms of certain felons committed to prison, e.g., persons convicted of kidnapping for ransom without harm to the victim. Such prisoners must serve seven years in custody before they can be paroled or discharged. Murder, second degree carries a term of fifteen years to life; murder, first degree, twenty-five years to life. Prisoners with these sentences may accrue good time on their minimum terms. Such terms may be "stacked," i.e., made to run consecutively, increasing the minimum terms.

The actual terms to be served by life prisoners are fixed by the Board of Prison Terms. The DSL mandates a number of procedures, time requirements, and prisoners' rights for hearings held to fix, postpone, or rescind parole-release dates for such

prisoners. It also requires the Board of Prison Terms to establish criteria for fixing parole dates that consider the number of victims and other factors in aggravationor mitigation.

Parole Supervision

For those with court-fixed terms, parole is automatic when service of the prison term fixed by the court, less credits, has been completed, unless the Board of Prison Terms waives supervision. For those with Board-fixed terms, parole remains problematic until it is granted. However, these prisoners, too, will have completed service of the prison sentence upon a grant of parole.

Those with court-fixed terms must be discharged from sentence within thirty days of the expiration of a year of continuous "clean" conduct on parole, unless the Board of Prison Terms finds good cause to extend the term to three years. Reimprisonment for any violation of parole conditions may be for up to a year. Total time from release on parole to discharge can be four years. Time spent "at large" as an absconder does not count toward service of the parole time. Time in custody as a parole violator does not count toward the year of continuous clean conduct needed for discharge. "Lifers" with board-fixed terms serve a three year parole term; it may be extended to five for good cause. Time while absconding is "dead." Three years of continuous clean time is required for discharge. Seven years from release to discharge--absent "dead" time--is the maximum period of jurisdiction before mandatory discharge from sentence.

Retroactivity

The DSL required the Board of Prison Terms to apply its terms retroactively to the prison and parole terms of persons sentenced under the indeterminate sentence law ("ISL"). The term so calculated became the effective term unless an earlier parole date had been fixed under the ISL.

Several aspects of a prisoner's case could lead to a decision to fix a term longer than that reached by straightforward applicatioan of the DSL, e.g., the number of convictions current or past, being armed. Cases with these features could be given a "serious offender hearing" by the board to impose a term "guided by, but not limited to, the term which reasonable could be imposed.under the DSL." The purpose of such extraordinary terms is "to protect the public from repetition of extraordinary crimes of violence against the person..."

Charging, Pleas and Sentencing Choices.

DSL does not address prosecutorial charging practices. Facts not charged under DSL, however, can have only a limited effect on prison terms under DSL; this was not so under the ISL. Nor does DSL address plea negotiations, although under it, unlike ISL, prosecutors can reach agreement with the defense about a prison term of definite length.

DSL does not directly attempt to structure or limit the choice of judges about type of sentence; under the DSL, as under the ISL, alternatives to prison commitment remain open. The DSL requires the Judicial Council--a constitutionally established body of state judges--to establish guidelines for a denial or grant of probation. The Council has done so, but the rules do not firmly structure the decision. Nor does the DSL, or the

rules, firmly structure decisions about the length of terms of probation, or the conditions attached to them.

Purposes

The DSL was a response to dissatisfaction with the term-fixing proclivities of parole boards under the ISL, and, in part, to the rationale for the ISL, "rehabilitation." Its purposes are to find new ways of sentencing that are more satisfactory, and its explicit rational, for imprisonment at least, is "punishment." This is best assured, according to the DSL, by prison terms proportionate to the seriousness of the offense, terms which are equal for prisoners committing the same offense under similar circumstances. Parole-supervision, although a part of the sentence issued by the court, is separate and designed to serve different purposes: supervision, surveillance, and assistance designed to enhance public safety.

To what extent and how the DSL realizes its purposes is the subject of other chapters. Here it is noted that the DSL does not redefine the purposes of sentencing generally, even for felons who might be committed to prison. It does not bar pursuit of other purposes in sentencing. Indeed, its provisions and the Judicial Council rules it mandated, directly provide for considerations of community protection to enter considerations of choice of sentence and even prison terms themselves.

California's DSL is examined much the same way in this chapter as Oregon's parole guidelines were in chapter seven, i.e., they were implemented as written. What is the purported rationale? How is the discretion controlled? How well is the principle of commensurability addressed?

Decisionmaking Framework

Two rule making bodies were chosen to write California's DSL; the legislature was responsible for developing standards for the duration of sentence, and the Judicial Council, for standards regarding the decision to imprison as well as aggravating and mitigating circumstances. These choices have not proven wholly successful. The legislature prescribed sanctions without systematically grading offense seriousness, and has over the years inflated penalties for particular crimes without consideringthe effect that it would have on the rank ordering of offenses. The Judicial Council drew up standards which are so vague as to almost be uselessss, especially with regard to the crucial "in/out" decision.

Rationale

California's legislation has an explicit statement of purpose; that is, to achieve a policy of "punishment" by imposing "terms proportionate to the seriousness of the offense". The statute does not address the aims of non-incarcerative dispositions.nor Thus, while the rationale relating to the duration of confinement is one emphasizing commensurate deserts, other aims, e.g. incapacitation, may be pursued at other points under DSL.

Control of Discretion

How well do the features of DSL control discretion? It is clear that without rules systematically to regulate the decision to imprison, the judge's choice of whether to imprison an offender remains largely discretionary.

This feature of California's system limits the extent to which it can ensure proportionate dispositions. The system cannot prevent the disparity that results when some felons are imprisoned while others with similar crimes and criminal histories are given non-incarcerative penalties. Nor can it prevent the disproportionality that results when either lesser offenders are incarcerated, or offenders convicted of serious crimes receive a non-prison sentence. Although the legislature has mandated imprisonment for some offenses, it has done so largely on a piecemeal basis.

Tighter limits are placed on the decision about duration of confinement. Unlike the Oregon guidelines, which allow the decision-makertoselect a penalty from a fairly wide range of terms, DSL specifies a single presumptive disposition for each offense, thus limiting the judge in his choice of sentence.

When aggravation or mitigation are found, the judge is similarly restricted: he must select the specified upper or lower term located on either side of the presumptive middle term. But while the choice of a term is limited in such cases, the decison whether to depart from the normally-recommended term remains, to a large extent, discretionary. The list of aggravating and mitigating circumstances is non-exhaustive and there is no

provision stating what non-listed factors are appropriate for consideration. The decision-maker can then, without limitation, consider any non-listed factors in his decision to invoke the upper or lower term. In addition, California does not have a statement of how strong the presumption is in favor of the middle term. These omissions, coupled with imprecise wording of the list of factors, mean that judges have wide discretion to invoke aggravation or migigation when they see fit. Because of the decentralized nature of decisionmaking, it is not likely that informal norms among judges will develop in this area. Given that the amount of deviation from the presumptive term permitted on account of aggravation or mitigation is quite large -- especially since amendments increased the distance between the middle and upper terms for many offenses -- this creates a substantial area of discretion within the penalty structure.

The use of enhancement (e.g., arming, weapons use, serious bodily injury, large property loss, and prior record) to increase the length of an offender's term is another area where the decision-maker is afforded a good deal of leeway. The decison to allege enhancements is left up to the prosecutor; aside from the requirement that they be pleaded and proved, there are no rules to suggest when enhancements should be alleged. Additionally, if they are pleaded and proved, the court can easily strike enhancement if it finds any mitigating circumstances.

Commensurability

How well do the various feature of DSL ensure punishments which are commensurate to the seriousness of the offender's criminal conduct?

Parity. In the desert sense, parity means treating equally those whose criminal conduct is equally serious, and distinguishing among those whose criminal conduct diverges in its seriousness. With the introduction of DSL, California kept the existing statutory definitions for most crimes, which for some offenses, e.g., robbery and burglary, were quite broad. No attempt was made when assigning penalties to distinguish the degrees of offense gravity within these broad categories through subcategorization or reclassification. Thus, an offense such as robbery (any forcible taking of property) is given a single middle base term, irrespective of the manifest variability in seriousness within this category.

Enhancements can be added to base terms in order to allow some "within-category" distinctions to be made. A robber who is armed, for instance, can have an additional year tacked on to his sentence. Enhancement factors specific to the conviction offense only address three features (arming, serious bodily injury, and property loss), however, and thus do not allow other distinctions (.g. amount of drugs sold in cases of narcotic sales) to be made. In addition, they only allow one to introduce distinctions to make the conduct more serious, not distinctions that make it less so.

Ordinal proportionality. Before the legislature amended the law, penalties under DSL were for the most part ranked to correspond toa common-sense notion of the relative seriousness of crimes. Amendmentshave introduced several anomalies into this scheme, however, by sharply increasing the penalties for

some offenses while leaving others of apparently comparable seriousness unchanged. The result is that unarmed burglary now calls for more punishment than strongarm robbery. Distortions like this can be attributed to the fact that the legislature neither graded offenses according to any criteria of seriousness, nor when increasing penalties, considered the effect that it would have on the existing penalty structure.

Prior record. How is prior record treated under DSL? When an offender has previously been imprisoned for a felony, he is to receive a year enhancement of his sentence for each such prior imprisonment (so long as a "cap" of twice the base term is not exceeded). When the felony and the current crime are violent crimes, then he is to receive three additional years for each such prior felony. (More recently, rules allowing a five year addition to the sentence for each prior conviction, have been enacted.) In both instances, the prior felony commitments do not call for any kind of proportionate increase in sentences; instead, they call for absolute increases that remain constant irrespective of the gravity of the current offense.

It seems to us implausible to assert that such prior-offense adjustments-- having so little to do with the seriousness of the current crimes -- are concerned with the offender's deserts. The operating rationale seems to be one of dangerousness. A prior felony commitment increases the risk posed by the defendant by a specified extent, and therefore warrants keeping him out of circulation for a specified additiona period; violent felony convictions increase that risk -- or are believed to do so by the drafters -- and therefore warrant keeping the person out of

circulation longer.

Good Time

Good time provisions allows the offender's term to be reduced by one-third. Provisions of this type, if left largely discretionary, can distort the penalty structure: they can reduce the predictability of the release date, and introduce problems of commensurability with repect both to the original offense and the infraction. California has developed safeguards to prevent this by providing that credits vest and that penalties for infractions remain low; and by establishing a review process when infractions are alleged, and time is taken away. (Recent ammendments of California's good time provisions increase good time allowances while diluting thoese safeguards.)

16. THE STRUCTURE OF THE DSL; A QUANTITATIVE ASSESSMENT

Like other determinate sentencing laws, California's permits (and in some cases, mandates) variations in sentences. How are such variations to be achieved? What proportions of the total permitted variation in sentences are allocated by the law to different sentences for different crimes, to aggravating and mitigating circumstances, to "enhancing" facts, to multiple convictions? And, of the total variation found in fact, how much is due to these various elements? This chapter illustrates an approach to answering these kinds of questions.

The Basic Structure

The first analysis considers the allowable penalties for offense types, aggravating and mitigating circumstances, and enhancing facts. Offenses are grouped into 13 types. It is assumed that only six enhancement can be imposed, none more than once. Cases are assumed to be distributed equally among the various combinations of offenses, choices of lower, middle or upper base terms, and enhancements. The limit on enhancements to twice the base term for non-violent offenses is disregarded. So, too, is the possibility of consecutive sentences for multiple convictions.

If California's DSL operated in this fashion, almost 97 percent of observed sentence variation would be due to enhancements; just over three percent to choice of the lower, middle or upper base term; and almost none would be due to offense type. Although this result is partly a function of the assumptions made in the analysis, it points up certain important features of California's DSL, at least as originally effected in July 1977. Many offenses carried the same base terms, e.g., second degree burglary, vehicle theft, grand theft, "other" thefts, forgery, fraud and embezzlement, receiving stolen property and possession of narcotics all called for 16 months, two or three years. Similarly, the differences between the lower, middle and upper base terms were not very great. Enhancements, on the other hand, could add much time to sentences, whatever the base term.

The Enhancement Limit for Non-violent Crimes.

Two ways of taking the limit into account statistically are illustrated. Although they lead to somehwat different results, bothshow that the limit on enhancements functions to reduce the proportion of the total variation in sentences that may be imposed through enhancements under the law. In what may be the more realistic of the results, the proportion was reduced from 97 to 71 percent. Choice of base term accounts for 22 percent of the total variation; offense type, seven percent. Enhancements remained an important potential source of variatiaon, even with the limit.

The Structure in Action.

In practice, cases were not distributed equally among the various possible combinations. About halfof those imprisoned during 1978 and 1979 were convicted of property offenses, a third of offenses against persons (including robbery), the rest of drug and other offenses. Somewhat more than half the cases received the middle term, and about a quarter, each, the upper or lower terms. There was little use of enhancements relative to what was assumed in the preceding analyses. And there was a correlation between choice of base term and the use of enhancements.

Using 1977 and 1978 data, it is shown that about 44 percent of the actual variation in prison sentences was due to offense type, and roughly 28 percent due to choice of base term and enhancements, respectively. This result reflects the limited use of enhancements in practice, and the distribution of actual cases among offense types. Further, the analytic model used probably

somewhat underestimates the proportion of the actual variation due to offense types and choices among base terms.

Enhancements

None of the enhancements has been used extensively, and some have been used hardly at all (e.g., the enhancement for taking large amounts of money). Of over 10,000 prison sentences under the DSL in 1979, about 35 percent had enhancements charged and proved, and fewer than three-quarters of these had them imposed. Said differently, fewer than 25 percent of those sentenced received enhanced sentences. About a sixth of the enhancements charged and proved were striken by judges, perhaps because of mitigating circumstances; another sixth were stayed to avoid illegally long sentences. Among the "specific" enhancements (for possession and use of weapons, great bodily injury, great taking or destruction of property), the most frequently used provided two years for use of a firearm; about 11 percent of the cases had thisenhancement imposed. By contrast, the great bodily harm provision was used to enhance terms in about two percent of the cases. About nine percent received the "general" enhancement for a year for prior imprisonment; fewer than one percent received three years.

Other 1978 and 1979 data show that prosecutors did not charge specific enhancements in the great majority of cases in which it appears they could have done so. A minority of enhancements pleaded and proved were striken or stayed. A very rough estimate is that about three quarters of those sentenced could have received the general enhancements. But, again, they

were imposed in fewer than half these cases.

Base Terms, Enhancements and Consecutive Sentences.

The use of enhancements is positively correlated with the choice of higher base terms. For example, ten percent of burglars received enhanced sentences. Of those given the lower base term, two percent received an enhancement, compared with 10 and 17 percent, respectively, of those getting the middle or upper terms. The association was even stronger for those convicted of robbery. Enhancements, in practice, had a fairly substantial effect on the severity and variability of prison sentences, if less effect than theoretically possible under the law. One effect was to move some cases up to the equivalent of a higher base term. The biggest effect was to add a "tail" containing about five percent of the cases to the upper end of sentence distributions for particular crimes. And some of the terms in the "tail" were very long,much above the middle term for that crime.

About a quarter of the cases through 1979 involved multiple counts. Some 45 percent of these received concurrent sentences, about 35 percent, consecutive ones. The balance were stayed under the DSL limits. These proportions were reversed for those convicted of crimes against persons, which generally provided longer base terms. For multiple count cases of that kind, the majority received consecutive sentences.

Conclusions

California's DSL is often described as a law providing a "narrow range of penalties." In one sense, this is true: conviction of a single offense, and only that, drastically limits

the sentence that may be imposed compared with the old law, the ISL, for most crimes. Such a description, however, fails to take account of the provisions in the DSL for enhancements and consecutive sentences; it also fails to take account of the observed tendency of both to be positively correlated with the use of longer and upper base terms. These spread the range of sentences that may be, and sometimes are imposed far upwards. In a downward direction, however, there is only the lower base term, unless the decision is not to imprison at all.

A largeshare of the permissible and actual variation in prison sentences under the DSL is controlled, primarily, by prosecutors, who may choose, with few legal restraints, to charge, or not to charge, enhancements and multiple offenses. Judgeshave less control over variations, although they may and appaarently do act as a moderating influence in some instances, finding reasons not to impose enhancements or consecutive sentences. Laterchanges in the law (discussed elsewhere) have allocated a greater share of the permissible, and perhaps actual, variation to offense types--a matter controlled by the legislature. Other changes have given some (back) to the parole board (the Board of Prison Terms) through a public referendum which made the penalties for murder in the first and second degrees once agains indeterminate once sizeable minimum terms are served.

17. DETERMINATE SENTENCING IN TWO CALIFORNIA COURTS

When there is dissatisfaction with criminal justice, legislation beckons as a corrective. How California's determinate sentencing law (DSL) was received in two courts, with different patterns of professional cooperation and traditional ways of doing business, illustrates some of the "limits of legislation" in such an effort.

1. In Alameda County, the district attorney's office, with a strong public defender organization and under the supervision of the bench, had evolved a shared professional ethic emphasizing the logic and value of "plea" negotiation. Determinate sentencing enabled prosecution and defense in the county to extend this already highly elaborated way of doing buisiness to the decison on length of prison term. In contrast to Alameda, DSL arrived among Sacramento court officials still wary of plea bargaining. The Sacramento style had been contricted by the institutionalized mistrust characteristic of the adversary system, and it continued to be so under the new law. Negotiating parties were partisans expected to wield the weapons at their disposal, and judges stood above the fray. Sacramento largely rejected the opportunity to make prison terms the object of negotiation.

Analysis of random samples of burglary defendants in the two counties, charged during the periods that the indeterminate sentencing law (ISL) and DSL, respectively, were in effect, showed some of the ways these different patterns affected the

implementation of the DSL. (The total sample included 967 individuals.) Nearly 78 percent of "prison-eligible" defendants in Alameda had prison terms specified in their plea agreements, compared to fewer than nine percent in Sacramento. Observations showed that exact sentence bargaining in Alameda had become the instrument for an increase in the county's prison commitment rate among sample burglars from 18 percent under the ISL to 43 percent under the DSL. In Sacramento, on the other hand, no shift in the prison commitment rate for sample burglars emerged; it hovered around 22 percent under both laws.

Plea bargaining is often condemned as a tool for "leniency." Paradoxically, the further development of plea negotiation in Alameda county to include exact bargains over prison terms may have enhanced prosecutors' ability to imprison serious offenders, like gun-users. And, some evidence suggests, it may have enabled them to do so more effectively than the comparison county, which did not further develop a negotiating style. Under the DSL, Alameda increased the rate of imprisonment for defendants who had weapons during the offense, and its rate for such defendants was markedly higher than Sacramento's.

2. The expansion of the role of prosecution and defense in sentencing under the DSL may be conceived as the "advance line" in a long, unlegislated "revolution in sentencing" that began with plea bargaining. Observations in Alameda suggest that this development may diminish one source of pathology in negotiation while introducing another. In the past, uncertainty over the sentence--the underlying objectof negotiation--had promoted exaggerated claims, posturing and distrust. Under the new law,

which reduced uncertainty, candor and trust in the discussion of competing claims seemed to be fostered. Yet, new opportunities for injustice arose as the parties found it less necessary to consult the judge, undermining an important support for discipline in the parties' deliberations. Increased delay in resolving cases became more common even as agreements came to be easier to reach.

Although it strains against received notions of the proper role of the judge as passive, reticent and uninvolved, judicial mediation in sentence negotiation may be an effective way of reclaiming judges' authority, which plea bargaining has gradually chipped away. Alameda suggests, however, than an active role for judges may be difficult to institutionalize, particularly (if ironically) as the negotiating parties are better enabled tor each agreement. In Alameda support exists for judicial mediation, but often lacking are judges with the training, experience, knowledge, competence, authority and respect to perform the role. In Sacramento there is widespread resistance to reconceiving the judicial role--even to save it. With the further development of plea bargaining, it may be critical to reconceive and learn how best to institutionalize such a role.

3. Legislative prescriptions for sentences are neverself-enforcing; they inevitably face the test of locally-evolved standards and norms of caseworth. Although the corollary is that sentencesfor similar offenders may and are even likely to vary from county to county, the variation need not be fatal to the ideal of "equal justice." Under determinate sentencing,

differences in severity between the Alameda and Sacramento court systems, while not large, persisted. For example, burglary sample Sacramento offenders received a term 3.5 months longer than the "same" offender in Alameda county. However, within each court system, tariffs for typical factual configurations acted as a bulwark of continuity and uniformity, since they could be invoked when a party believed it was not receiving fair treatment. These local standards of appropriateness are adaptive to new legislation, yet they exert their own pressure against extreme or politically expedient prescriptions from above. That implicit authority makes customary practice a tool of equal justice <u>within</u> counties, which, as proxies for communities, may be a better unit than the state in which to assess justice. The argument is all the more strong if disparity <u>between</u> counties can be limited in magnitude, as it was found to be in the comparison of Alameda and Sacramento.

<u>Concluding Note</u>

Sometimes the consequences of new legislation are consistent with intent in unexpected ways. In the case of California's DSL, one reading of legislative intent might be: "Consider state prison as an appropriate penalty for a wide range of criminal conduct; remove draconian penalties (such as a potential 50 year sentence for rape) that are invitations to arbitrary and unequal justice, but maintain the ability to treat serious offenders with the severity they deserve." As to the latter end, many critics predicted that the substantial narrowing of statutory terms, and restrictions on enhancements and consecutive sentences, doomed the first version of the DSL to failure. (Hence the immediate

clamor for increased penalties.) Many supporters, while disputing the conclusion that offenders would be treated too lightly, expected some shortening of terms. Predictions that determinate sentencing would enhance the system's capacity to make distinctions among offenders, and to increase terms for serious offenders, were not prevalent.

In fact, officials in Alameda and Sacramento counties used the new codes resourcefully and with sensitivity to the issue of seriousness. Analysis of the prison terms of burglary sample defendants revealed that the more serious the offense, after a certain threshhold of seriousness, the more severely a defendant was sentenced under the DSL compared to the ISL. The burglar who raped got a longer term under determinate, not indeterminate, sentencing--and this before the increases in "base terms" that took effect in 1979. Shorter terms were realized at the other end of the spectrum, for less serious offenders. On the average, a car thief under the DSL was likely to serve six months less than his counterpart under the ISL, according to analysis of the sample defendants. In Alameda County, the authority of officials to arrange short sentences--conferred by the moderation of DSL's low and mid-base terms for each offense--played an important part in that county's ability to increase its use of imprisonment.

18. PAROLE SUPERVISION IN CALIFORNIA

California's determinate sentencing law (the "DSL"), in mid 1977:

- abolished parole-release for most non-life prisoners;
- made parole-supervision universal, unless specifically waived by the Community Release Board, when the prison term was completed; and
- limited the parole term to one year for non-life prisoners not violating parole; three years for life prisoners. Single violations could result in up to six months reimprisonment, extending parole terms to 18 months and four years, respectively.

These changes were effective retroactively. Eighteen months later, the DSL was amended. One and three year parole terms became presumptive; they could be extended by the board to three and five years for "good cause." Single violations could result in a year's reimprisonment, extending parole terms to four and seven years. Discharge from parole and sentence had to be preceded by one or three year's "clean time."

The shift from indeterminacy to the DSL was seen by many parole personnel as a threat to their agency's survival. The least expected was greatly lower parolee populations and a reduction in personnel; many expected the imminent abolition of parole-supervision. The anxieties induced by these expectations may have been somewhat reduced by the changes made after eighteen months, changes sought by the parole agency. At the same time, conflicting interpretations of how to implement the changes introduced considerable confusion.

Confusion was reinforced,and discontent generated, by the implementation in mid-1979 of a plan to reorganize the agency's operations. The plan was developed independently of the DSL, but the expected results of the changes it proposed were felt to be more urgently needed in light of the DSL, with its implicit

emphasis on "results." The plan called for:

- classification of parolees by "need" and "risk," and their allocation to caseloads accordingly;
- caseload, thus agent, specialization by "service" and "control" function; and
- reorganization of parole units and offices to reflect redistributed caseload and functions.

The consequences of the introduction of the reorganization plan were difficult to disentangle from those due to the DSL; the changes overlapped and both appeared to move the agency and parole-supervision in the same direction. Clearly, the agency and parole-supervision in the same direction. Clearly, the agency and parole-supervision changed under the influence of the DSL and the reorganization. Among the major changes were:

- a shift from heavy emphasis on "service" to parolees to heavy emphasis on "control" of them;
- encouragement of professionalizationof parole agents, innovation, decentralization of decisions, and participant management was reduced, and there was increasing insistence on the need for greater centralization, specialization, and routinization. Depersonalized relationships multiplied. In a world, an already bureaucratized agency became even more bureaucratic;
- ironically, emphasis on"contol" within an increasingly bureaucratized agency may have led to a decrease in the capacity of parole agents to influence parolees--the opposite of one end sought through these changes. The separation of "service" from "control" reduced the means available to most agents for influencing parolee conduct, in part by severley limiting the information about parolees available to them.

The study suggests, among other things, that a "desert" philosophy is not easily accepted by personnel as appropriate for parole-supervision. Past offenses, the focus of the philosphy, are seen, at most, to justify supervison; they do not indicate to personnel what they should do to protect the community from

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present or future offenses by parolees, their central task as they see it. Nor does the philosophy convince personnel that limited periods of reimprisonment, proportional to the gravity of particular parole violations, are sufficient, or even proper, "tools" for dealing with recalcitrant parolees.

Parolees under the DSL seemed, initially, to have experienced some relief from the uncertainties associated with indeterminate parole terms. They also seem to have experienced greater freedom from intrusion. But by early 1980, less than three years after the DSL was introduced, there was evidence that measures for intensifying intrusion were being devised and increasingly used.

19. SENTENCING BEFORE AND AFTER DSL: SOME STATISTICAL FINDINGS

Having sentencing patterns changed since the DSL came into effect? Several sets of official data are examined to provide some answers about pattersn through mid-1979.

The Decision to Incarcerate

Although the DSL was not designed to affect the incarceration decision, it may have done so indirectly.

- The proportion of felons imprisoned rose sharply between 1979 and 1978 for both males and females. Overall the chances of imprisonment rose from less than one in six to more than one in three. There is no reason to think that this was due to factors other than a change in court sentencing practices.

- The rise was greatest for those convicted of less serious offenses. One effect has been to narrow the differential chances of imprisonment for persons convicted of minor and major offenses.

- Similarly, the rise was greater for those with prior jail or juvenile commitments but no prior imprisonment, and those with only one prior imprisonment, than for those with two or three prior imprisonments. Although the increase was less marked for those with no prior incarcerations at all, one general result has been to decreasethedifferencesin the chances of imprisonment for those with different prior records.

- The rise in imprisonment was greater, too, for persons not under comitment at time of sentencing, than for those on probation or parole, although the chances of each group remained quite different. Still, differences narrowed.

Through 1978, then, the increased use of imprisonment accompanying the DSL increased disproportionately the numbers of persons imprisoned who had been convicted of <u>less</u> serious offenses, and who had the <u>less</u> serious prior records. It remains unclear, however, that these changes were the result of the DSL: all of the changes started well before the DSL became effective.

Other changes under the DSL included:

- An increased chance that a blackorMexican-American male felon, compared to a white male felon, would be imprisoned. In 1975, there was little difference between the groups. But by 1978, white felons had a one in five chance of imprisonment, but the other groups over one in four. The somewhat more serious prior records of blacks may help explain the difference for them, but the same explanation does not apply to Mexican-Americans.

- An increased chance that defendants would make an initial guilty plea. The proportions of initial pleas of guilty rose from 23 percent in 1975 to 37 percent in 1978. Trials dropped slightly, and changes of plea from not guilty to guilty dropped from 67 to 50 percent. The chance of imprisonment for those pleading guilty doubled.

- A sharply reduced chance that a convicted felon would be placed on probation. The imposition of non-incarcerative penalties dropped by roughly half, from 20 to 12 percent of felony sentences. This is consistent with the view that felons who would have been placed on probation in 1975 were being imprisoned in 1978. It is also consistent with the view of a more

general "upwards" displacement--with those formerly given probation ow jailed, those jailed now imprisoned.

Variations Between Counties.

The DSL shifted discretion to fix prison terms from a centralized parole board to county courts. How did this affect variations in sentencing patters between counties?

- After the DSL, there was at least as much variation in the use of imprisonment as a penalty for felons, between counties, as there had been before the law took effect--which is to say, quite a lot (counties imprisoned from 13 to 45 percent of convicted felons in 1978).

This is perhaps unsurprising; after all, the DSL was not designed to affect the decision about type of penalty. Still, it should be remembered that if the DSL affects penalties at all, it will affect the penalties of a much larger proportion of felons in some counties than others. No factors available for analysis served to explain the variations in imprisonment that obtained between the counties from 1975 through 1978.

- There was relatively little variation between counties in the lengths of prison terms imposed under the DSL. One data set showed that of 36 counties with 20 or more commitments in 1978, 28 imposed median terms of 24 months (after deducting full "good time"), and four each imposed somewhat higher or lower median terms. Other data sets, and other statistics, confirmed this relative lack of variation.

This appears to have been due, in part, to the restricted range of possibile terms under the DSL, in comparison to those available and used by the parole board under the ISL.

Time Served Under the ISL

Thetimes served to first parole by prisoners admitted 1969 through 1974 were reasonably stable. Typical terms for prisoners convicted of particular offenses did not vary much during the

period: it was an even-money bet that their terms would lie within a range of 18 months orless around the median. In general, the worse an offender's prior record, the longer his term. Still, for reasons that remain unclear in the available data, a smallproportion of these cohorts received very much longer terms than the bulk of their contemporaries. There is some evidence that this "upper tail" of cases was shrinking slowly but steadily, at least up to 1974.

In short, a case can be made for saying that prison terms in California were becoming slightly less severe and somewhat less variable for those admitted up to 1974. There is also some evidence of a continued decline in severity in the years after 1974,since the proportions paroled in the first and later years after admission was increasing.

Estimated Terms Under the DSL

How do the severity and variability of prison terms under the DSL compare with those under the ISL? Estimated terms to release (less full "good time") of those imprisoned during 1978 and the first half of 1979 are compared to the terms served by those imprisoned under the ISL in 1974.

- The average severity of sentences--as measured by the median time to be served in prison, allowing full "good time"--declined markedly for those convicted of property offenses and assaults, less markedly for those convicted of robbery and sexual offenses other than rape, and not at all for those convicted of homicide and rape. For all offenses combined, the median fell from 32 to 24 months.

In assessing this finding, it should be recalled that perhaps as many as one-quarter of those sent to prison in 1978-1979 might not have been imprisoned earlier. Further, changes in the DSL

taking effect after mid-1979 have almost certainly lengthened terms. Too, not everyone will be allowed full "good time," as assumed. And, finally, there is some evidence, already noted, that terms were being reduced before the DSL. Terms may not have been reduced as sharply over the slightly longer run.

The question of variability is even more complex.

- Among those who received less than the median sentence, there was less variability in terms in the post-DSL years, for most offenses. This was due, primarily, to an increase in the minimum times spent in prison, which was about 11 months for most offenses.

- Among those with greater than median sentences, there was less variability for those convicted of property offenses, but not for those convicted of violent offenses such as homicide, robbery and rape. Some of the latter groups received sentences involving longer terms in 1978-1979 than any recorded for prisoners admitted in 1974.

Conclusions: Determinacy, Disparity and Desert

Disparity--unjustified variation--was not assessed because the data sets would not permit confident matching of offenders' situations, and there is no agreement about the criteria for assessing their situations. For agreement to obtain about such criteria a prior decision needs to be made about the purpose of classification; it is not clear that the California DSL supplies that purpose.

Still, some assessment can be made from a desert perspective.

- Is greater "parity" achieved under the DSL? There was less variation in the prison terms for persons convicted of property offenses during 1978-1979 than earlier. But there was more variation in termsfor those convicted of violent offenses (including robbery), mostly upwards variation. This was due, apparently, to the imposition of aggravated and "enhanced" sentences. But these were both charged and imposed in but a small proportion of the cases in which

the facts apparently would have sustained them. Variations in the "base terms" were associated with a variety of factors consistent with a desert perspective, and did not vary with many factors (like race) inconsistent with one in any systematic way. On balance, seriousness of conviction offense and prior record appear to play a greater part in influencing lengths of prison terms under the DSL than earlier.

- Is there greater "proportionality" under the DSL? Results seem to be mixed. Base terms for those convicted of a variety of arguably more and less serious property offenses are the same under the DSL (or were, under the first version of the law); there are only three base terms for each; and judges must choose one or the other of often quite different terms. This may mean someinability adequately to reflect "ordinal" differences. Further, increases in the sanctions for some crimes effective in 1979 and 1980 may have violated the principle of "cardinal proportionality." The increase in the proportions of offenders imprisoned may also be violating this principle.

Caveats

First, available data limited both the scope and depth of analysis; potential explanatory variables, especially, were meagre. Second, only the early years under the DSLcould be examined. It is quite clear that changes were in process even as the analyses were being conducted, changes that would affect the results outlined above. Third, some of the question of greatest interest were too complex to permit definitive answers with available resources, e.g., did the DSL "cause" the reduction in prison terms. To complexity must be added unresolved differences over proper analytic strategies with the available data. The author of this chapter argues that comparison of pre-DSL release cohorts with DSL admission cohorts would produce misleading results, limiting what could be said with confidence about sentencing trends in the years immediately preceding the DSL. Others inthe group differed with this conclusion.

20. A NOTE ON DISPARITY REVIEW IN CALIFORNIA

With the adoption of the determinate sentencing law, California's legislature sought to reduce sentencing disparity by specifically defining judicial discretion in sentencing. The high maximum penalties of the indeterminate system were slashed and the extremely wide ranges were replaced by a limited set of narrow, tripartite ranges. Despite these extensive revisions, important sentencing choices remained discretionary: sentencing judges retained the authority to grant or deny probation (with some exceptions), to impose the lower, middle, or upper term, to strike or stay the additional penalty for an enhancement, and to impose concurrent or consecutive sentences.

To decrease the possibility of sentencing disparity, the legislature required the Judicial Council to develop rules to guide judges in their sentencing decisions. In addition, the legislature ordered the Community Release Board, later renamed the Board of Prison Terms (a centralized, statewide agency), to review the cases of all persons determinately sentenced to state prison "so as to eliminate disparity of sentences and to promote uniformity of sentencing." The Board's review is separate and distinct from normal appellate review, and must be completed within one year of the prisoner's reception in state prison. If the Board finds a prisoner's sentence to be disparate, it is required to recommend by motion to the sentencing court that it recall the sentence and resentence the defendant. The Board is

required to check for disparity in various exercises of judicial discretion, including the decision to deny probation. However, the Attorney General has advised the Board that a court is not authorized to increase a sentence found to be "too low." The sentencing court has the authority to grant or deny the Board's motion. If the motion is denied, the prisoner must seek relief from the Court of Appeals, because the prisoner is, according to the Board, the real party in interest.

How the Board--and specifically the Board's staff--decided to define and conceptualize "disparity" was the primary focus of the present study. Defining disparity proved to be a major problem for the Board's staff when the new law went into effect. The statute required the Board to identify disparate sentences, but it did not offer even the most general definition of "disparate" or "disparity." An Attorney General's opinion, requested by the Board, stated a sentence is disparate if a "substantial difference exists between the subject sentence and the sentences imposed on other offenders committing the same offense under similar circumstances." This definition provided little guidance to the Board's staff and left many obvious questions unanswered.

The central problem facing the Board (and all disparity researchers) is that "disparity" is a normative phenomenon; where it is found depends on the standards used to locate it. The Board's staff found the emergence of general patterns when analyzing judges' sentences; they also found variation, sometimes great, from those patterns. The difficulty is deciding where

legitimate variation ends and disparity begins, and the fine line dividing the two is necessarily a matter of decision which, in the absence of fully articulated standards (which may, in principle, not be achievable), involves a certain arbitrary quality. The Board and its staff have grappled with theseand other difficult questions to the present time.

How to conceptualize disparity has also posed a substantial problem for the Board and its staff. Although disparity can be considered in various ways, all conceptualizations seem to share a common premise--that the essence of disparity is variation, however defined, from some norm or standard. Conceptualizations of disparity differ only in the choice of norm or standard from which variation is measured. Understanding the ways in which disparity is conceived is important for both theoretical and practical reasons. Conceptions guide the development of measurement techniques, which in turn dictate the number and type of cases labelled disparate. How the Board views disparity is particularly important because of potential conflicts with the courts' conceptions of disparity.

In the early months, staff members formulated a traditional conception of disparity. The staff found, as have many researchers in the past, that sentences in different offense groupings generally form patterns and that some sentences vary, to a greater or lesser extent, from those patterns. The staff believe that mere variation form a statistical norm did not <u>per se</u> constitute disparity. A sentence was disparate, the staff believed, only if the variation from the norm was unjustified or unreasonable.

This conceptualization, however, proved difficult for the Board to put into practice. The Board was required by law to refer to the Judicial Council's rules for sentencing. Because of the general, open-ended nature of the Judicial Council's rules, the staff had an extremely difficult time finding sentences that were obviously unjustified. At least <u>some</u> justification could be found for <u>every</u> variant case. The staff then faced a dilemma. If the sentencewas legal (i.e., technically correct) and justified by reference to the Judicial Council's rules, the sentence would not, by this definition, be disparate. The staff was forced to devise a new conception of disparity.

TheBoard's current conception of disparity isnew and unique, at least in the eyes of the law. Disparity is now conceived simply as substantial variation from a statistical norm. In its motion to recall and resentence, the Board is only contending that for the type of case in question, a pattern of sentencing has been formed by judges throughout the state and that the subject sentence does not fit that pattern.

This conception of disparity makes the board's disparity review process different from traditional sentence review, as is reflected in the Board's pleadings. The board is not challenging thelegality of the sentence; it acknowledges that the judge imposed a sentence within the statutory framework of the law. Nor is the Board claiming that the Judge abused his or her discretion. As the pleadings state, "The disparate sentence review recognizes the reasonableness of the sentence." And, finally, the Board is not contending that the sentence

constitutescruel or unusual punishment or that it is not proportionate to the seriousness of the criminal conduct.

In a state that adopted a "justice" (or modified just desert) model of sentencing, it at first seems ironic that the Board, as the centralized reviewing agency, is not primarily concerned with the substantive justice of a sentence. But it becomes clear, as it did to the Board's staff, that there are at least two dimensions to "justice" under California's determinate sentencing statute: proportionality (or commensurability) and uniformity. The Board, in its desire to follow its statutory mandate, is only concerned with uniformity. It encourages courts to correct disparate sentences simply so they will be uniform--that is, conform to the established statistical norms.

IV. DETERMINACY AND THE PRISONS

21. THE EFFECTS OF DETERMINATE SENTENCING ON PRISON DISCIPLINARY PROCEDURES AND INMATE MISCONDUCT

Much scholarly debate surrounding the adoption of determinate sentencing has been philosophical in nature. Advocates of determinacy want a sentencing system based on "justice" or "just deserts"--i.e., one that treats people facing the criminal sanction equitably and fairly. But in addition to the philosophical and jurisprudential issues, the move toward determinate sentencing has practical implications. A major concern among corrections officials is the effect determinate sentencing will have on their ability to use various disciplinary sanctions to control the inmate population, as well as its effect on the behavior (or misbehavior) of prisoners. Proponents of determinate sentencing claim that increased determinacy will reduce prisoner misconduct, on the theory that if prisoners know exactly when they will be released, they will face fewer tensions and anxieties which in turn will result in fewer disciplianary problems. Opponents of determinate sentencing, on the other hand, maintain that determinacy will erode correctional officials' control over prisoners and thereby increase prison rule violations. Our research project attempted to assess this issue by interviewing correctional officials and collecting statistical data in California and Oregon on the rates of prison rule violations before and after the determinate sentencing laws were implemented.

Correctional administrators in California were hopeful that a move toward determinacy would reduce prisoners' frustrations with parole decisions, causing a reduction in violence and prison

turmoil. contrary to expectations, determinate sentencing has not been the answer to prison unrest. Abundant data exist which show that serious rule violations of all types have continued to rise since the determinate sentencing law was passed. For example, during the eleven years from 1970 through 1980, the rate of serious disciplinary incidents per 100 average institutional population (for all twelve institutions) increased dramatically--from 1.36 to 12.17. From 1976, the year the determinate sentencing law was passed, to 1980, the rate of incidents per 100 average institutional population almost doubled--from 6.4 to 12.17.

The data from Oregon are more difficult to interpret, particularly since they are incomplete. As a result of a U.S. District court order, specific portions of the records of all disciplinary matters during the period of our study were expunged. We were therefore only able to collect aggregate data on all rule violations, including minor infractions. The data show fluctuations in the rates of rule violations during the two and one half year period following the legislative enactment of the determinate sentencing scheme. That is, some of the time the rate is higher than it was under the indeterminate sentencing system, and sometimes it is lower. It is not clear from the data or from our interviews what caused these fluctuations. Based on the available evidence, however,we cannot discern any clear relationship between prisoner misconduct (as measured by the rate of disciplinary infractions) and the change from an indeterminate to a determinate sentencing system.

During our interviews with prison officials in Oregon and California, we heard many explanations for the continuing prison unrest: increased activities of prison gangs, racial hatred, dealings over drugs and sex, increased political sophistication of prisoners, "outside" agitation, lack of professional prison administration, and crowding in prison. Although the explanations were many and varied, there did seem to be emerging agreement on one thing--that prison violence and unrest have a dynamics of their own and, whatever the causes, they are not directly related to the type of sentencing structure.

Correctional administrators in both California and Oregon suggest one possible <u>indirect</u> effect of determinacy on prison misconduct--that determinate sentencing may contribute to prison crowding which in turn contributes to misconduct. In California, for example, the proportion of convicted felons committed to state prison has almost doubled since the determinate sentencing law was passed (from 18 percent in 1976 to 33 percent in 1978). The prison population continues to increase and several institutions have been forced to double-cell prisoners. Matters are likely to get worse. Oregon faces similar problems. Initially, the prison population decreased after the parole board instituted its guideline system, because minor offenders received shorter terms then they had under the board's previous term-setting policies. However, prison officials are now concerned about the rising prison population, because as the board metes out longer terms for serious offenders, the "long-termers" will "stack up," contributing to prison crowding.

Correctional administrators in both states believe that

crowding in prison leads to misconduct. It is not simply that more inmates mean more incidents. Prison officials believe that the tensions and frustration resulting from double-celling, increased competition for scarce resources, and less living space for inmates leads to disproportionately more misconduct. There appears to be mounting empirical evidence to support this position.

Confronted with continued prison unrest as well as crowded prisons, correctional officials appear to be relying less on sanctions that affect the <u>quantity</u> of time a prisoner will be incarcerated (<u>e.g.</u>, the forfeiture of good time or the recision and extension of parole release dates). Instead, correctionals are relying to an increasing extent on sanctions that affect the <u>quality</u> of a prisoner's time in the institution. These sanctions range from loss of privileges to time spent in isolation or segregation. In some prisonsin California, for example, prisoners who exhibit serious forms of misbehavior are placed in unitswithin the prison which give them little freedom of movement. Many prison officials prefer these types of sanctions because they do not increase the length of incarceration (and thereby do not exacerbate the already crowded prison conditions), and because they have an immediate and direct impact on the prisoner's daily routine. The prisoner is fully aware that his current situation is the direct result of his misconduct. Increased sophisticaation in custody classification--<u>i.e.</u>, the isolation oftroublesome prisoners from the general prison population is likely to be a continuing trend in correctional

administration.

22. DETERMINATE SENTENCING AND PRISON PROGRAMS IN CALIFORNIA AND OREGON

Under indeterminate sentencing systems, prisoners were placed under pressure to participate in prison rehabilitation programs. Most prisoners reasoned that, although it provided no guarantee, evidence of program participation would increase their chances of being released on parole. Parole authorities, and prison staff, did nothing to contradict this questionable belief.

A broad range of rehabilitation programs developed in prisons under indeterminacy. Three of the most commonly available are classified here as (1) skill development--any program designed to improve vocational education, or social skills; (2) individual and group therapy--programs designed to change behavior in both individual psychiatric and group settings; and (3) partial physical custody--work release or halfway houses, designed to provide a transition from prison to the community.

All of these types of programs--and more--were readily available in both the California and Oregon correctional systems under the indeterminate sentence. California has long been acknowledged as a leader in providing opportunities for rehabilitation in the vocational, educational, and partial custody areas. Oregon correctional administrators, too, prided themselves on the variety and quality of programs they offered prisoners at all three of their institutions.

At the end of the 1960s and beginning of the 1970s, many prisoners, particularly in California, voiced strong displeasure with the rehabilitative ideal--and particularly of making program participation a requirement for parole release. Prisoners wanted to "pay their debt to society" and not have psychologists of counselors "mess with their minds." Prison officials, however, were concerned that if the time prisoners were to spend in the institution were based largely on the seriousness of the commitment offense (i.e., just deserts), and not on efforts toward rehabilitation, program participation would drastically decrease and many programs would become obsolete.

To begin to address this issue, we visted all three of Oregon's institutions (Oregon State Penitentiary, Salem; Oregon State Women's facility, Salem) and three institutions in California (San Quentin StatePrison, San Rafael; California Correctional Center, Susanville; and Deuel Vocational Institution, Tracy). At each institution, interviews were conducted with administrators, staff, and inmates, most of whom were directly involved in one or more educational, vocational, or therapeutic programs. In general, respondents were asked about theprograms available and program participation before and after the determinate sentencing laws were implemented.

Our preliminary enquiry suggests the following conclusions about rehabilitation program in California and Oregon:

- educational program are over-subscribed and remain popular with prisoners;
- vocational programs are full, but waiting lists suggest some possible declining interestin certain programs. Motivation and attitudes of prisoners are cited as

a problem more often in vocational programs than in educational programs;

- psychologists, psychistrists, and counselors continue to give every appearance of being overworked and overloaded. The majority report sizable increases in numbers of clients and the difficulty of their emotional problems in the past five years. Crowding is the most often cited source of incidents in Oregon, but in California "the difficulty of the type of convict we receive" is the most often cited source;

- work-release centers are closing in Oregon: the state seems to be phasing out this type of program. California, on the other hand, is seriously considering expanding its community release programs;

- both California and Oregon continut to fund group and milieu treatment programs;

- traditional prison program involving sports, clubs, or games have changed little in either prison system except as inmate participation has been interrupted by behavioral problems.

Overall, inmate participation in prison rehabilitation programs in both California and Oregon remains about the same as it was before each state's determinate sentencing system began. It is important to point out, however, that this may be due in large partto the prison over-crowding each state has experienced. We have no way of knowing whether the levels of program participation would be lower if the prisons were functioning at design capacity.

Finally, although prison programs in California and Oregon are staffed by professionals and are operating at capacity, most of the prisoners are <u>not</u> participating in programs except in some casual manner. In some institutions, there are more inmates on permanent lockdown than in any of the programs, and in most institutions the "unemployed" and the institutional work force far outnumber those inmates who are doing any full-

timeprogramming. As knowledge grows among prisoners that programs do not affect release dates (it takes time for that important history to develop), many appear to gravitate toward more "yard time." Idleness, high social density, large prison populations, andtoday's violent prison population will at some point cause problems for any prison system. The answers to this dilemma are much more likely to be produced in the are of behavior management and control than in the area of behavior change and rehabilitation. Until the behavior problems are under control, rehabilitation will not be an easy product to see in today's prisons.

V. CHANGE

23. CHANGES IN OREGON'S AND CALIFORIA'S DETERMINATE SENTENCING SYSTEMS

Duringthe three years that followed the implementation of the determinate sentencing schemes in Oregon and California (the period of time covered by this research project), each state faced political, economic, and administrative pressures to modify their new laws. The pressures for change, which were remarkably similar in each state, have, for purposes of analysis, been placed into three general categories.

First, each state has experienced enormous pressures for greater public protection. The calls to get tough on criminals have not abated with the passage of the determinate sentencing laws in either state. Law enforcement officials, district attorneys, citizen's groups and some legislators continue to urge measures to put more criminals in prison for longer periods of time. Both states--but particularly California--have succumbed to these pressures and have attempted to enhance public protection by increasing the length of presumptive sentences (especially for serious crimes), returning to indeterminacy for special categories of offenders (i.e., emotionally disturbed), and lengthening the duration of parole supervision.

Second, due to limited criminal justice resources, there have been countervailing pressures to lower presumptive sentences. Crowded prisons provide the most obvious example. Prison populations have increased substantially in each state since the deterinate sentencing laws were implemented, and population projections paint a bleak picture. Civil suits against the prison systems and increased management problems have led

correctional officials in each state to advocate a variety of policies or programs designed to decrease prison populations.

Third, there have been pressures for change due to what may be termed "administrative convenience." In each state the policies and practices brought about by the determinate sentencing laws had a direct impact on other criminal justice agencies, frequently making it difficult for agency officials to administer their programs. These criminal justice agencies have, as a consequence, sought modifications to the determinate sentencing laws to suite their administrative needs. In Oregon, for example, the firmly fixed parole release dates set by the parole board originally had negative ramifications for prison administrators. Because parole release dates, once set, were inflexible, forfeiting aprisoner's "good time" failed to increase the duration of the prisoner's incarceration (the lost time was added to the parole-supervision period). Prison officials, believing their ability to control inmates was being eroded, convinced the parole board to allow extensions of parole release dates for specified prison rule violations.

For the most part, as mentioned, the strains or pressures for change were basically the same in each state. Often the pressures were conflicting. For example, there was at the same time pressure to put more criminals in prison for longer periods of time and a pressure to reduce already crowded penal institutions. But although the pressure for change were largely the same in each state, the reaction to those pressures or strains were somewhat different, due in part to the differing

structure of the determinate sentencing systems.

California has been more susceptible to pressure for change than has Oregon. Now that California's legislators are responsible for term-setting policy, crime and sentencing have become important political issues every year. Dozens of bills are introduced annually, the majority of which propose to increase the presumptive sentence for one or more crimes. Due to the high visibility of the legislative process and the enormous political pressures put on state legislators,these attempts to increase penalties have been largely successful.

Most of the disadvantages of California's legislative approach to setting durational standards are avoided with Oregn's sentencing commission and parole board. The Oregon legislature in a stroke of political wisdom, delegated the bulk of the standards setting authority to the newly created sentencing commission and thereby avoided much of the partisan political battles and endless lobbying by law and order groups that have been so prevalent in California. This is not to say that Oregon's legislature is not faced each session with bills to modify criminal penalties. Given the current policy-making structure, however, the legislators are better able to table troublesome bils and avoid public political confrontations on the theory that another body, the sentencing commission, is best able to determine the appropriate sanctions for criminal offenders. As a result of this sentencing structure, Oregon's overall term-setting system appears to have, over the past three years, remained more rational and internally consistent than California's.

The formulation of sentencing policy is a dynamic process. The adoption of a new sentencing scheme creates strains in the criminal justice system--on interest groups and on the criminal justice agencies that must administer the new law. These strains are often accommodated in some fashion, frequently in legislation modifying the original version of the sentencing scheme. These modifications in turn create new tensions in the system for which new accommodations are made. The formluation of sentencing policy, should not be viewed in static terms, but as an on-going, accommodative process. And the manner in which a state reacts to or accommodates pressure for change is directly related to the structure of the sentencing system.

END NOTE

Published articles, based on draft chapters or working papers written for the project are listed below. Others are being prepared.

Kathleen J. Hanrahan and Alexander Greer, "Criminal Code Revision and the Issue of Disparity," in Martin L. Forst, ed., Sentencing Reform: Experiements in Reducing Disparity (Beverly Hills, CA: Sage Publications, 1982), pp. 35-58, draws on draft chapter 2.

Andrew von Hirsch, "Commensurability and Crime Prevention: Evaluating Formal Sentencing Structure and Their Rationale," 74 Journal of Criminal Laaw and Criminology 209-248 (1983), draws on draft chapter 3.

Andrew von Hirsch and Julia Mueller, "California's Determinate Sentencing Law: An Analysis of Its Structure" will be published in 18 San Francisco Law Review during 1984. It draws on draft chapter 15.

Martin L. Forst, ed., Sentencing Reform: Experiments in Reducing Disparity (Beverly Hills, CA: Sage Publications, 1982) draws on draft chapter 20.

Martin L. Forst and James M. Brady, "The Effects of Determinate Sentencing on Inmate misconduct in Prison," 63 The Prison Journal 100-113 (1983) draws on draft chapter 21.

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Andrew von Hirsch, "Desert and Previous Convictions in Sentencing," 65 Minnesota Law Review 591-634 (1981).

Andrew von Hirsch and Kathleen J. Hanrahan, "Determinate Penalty Systems in America: An Overview," 27 (Crime and Delinquency) 289-316 (1981).

Andrew von Hirsch, "Constructing Guidelines for Sentencing: The Critical Choices fo rthe Minnesota Sentencing Guidelines Commission," 5 Hamline Law Review 164-215 (1982).

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