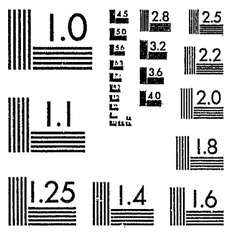

SENTENCING REFORM: POLICY CONSIDERATIONS

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SENTENCING REFORM: POLICY CONSIDERATIONS

INTRODUCTION

In recent years the United States has witnessed the development of what some consider to be a "get tough" attitude toward crime and criminals. 1/ The belief that prevailed during the first sixty or so years of the 20th century--that the purpose of imprisonment should be to "cure" or "rehabilitate" offenders--has given way to both utilitarian (crime control) and retributive (punishment) goals of imprisonment. With the demise of a "rehabilitative" or so called "medical" rationale for incarceration, the sentencing system that it supported came under attack. Indeterminate sentencing, which was used by most States and the Federal Government, allowed both the judge and the parole board wide discretion in determining the length of an offender's confinement in prison. According to this system the length of a sentence and the time of release were dependent on an offender's need for and responsiveness to correctional treatment programs. The legislature would determine the range of sentences for a particular crime--for example from 5 to 20 years; the judge can then select any sentence within that range; moreover the parole board could, at its discretion, release an offender at any time after some specified percentage of his sentence had been served, or it could require that the entire sentence be served.

1/ See for example Wilson, James Q. Thinking About Crime. New York, Basic Books, Inc., 1975 and Von Hirsch, Andrew. Doing Justice: The Choice of Punishment, a Report of the Committee for the Study of Incarceration. New York, Hill and Wang, 1976.

Indeterminate sentencing has been criticized from a variety of perspectives. Some argue that it contributes to a "revolving door" system of justice--that is, judicial authorities sentence offenders to particular terms of imprisonment, but parole boards often release them before full terms are served. Under this system, it is argued, too many serious violators serve little or no time in prison; as a result the limited punishment provides no deterrent effect and public confidence in the criminal justice system is undermined.

Others argue that indeterminate sentencing can be unfair to prisoners because it produces great disparities in punishment for the same crimes and it results in great uncertainty for prisoners. The uncertainty caused by parole is cited as one cause of prison violence.

Alternatives to Indeterminate Sentencing

Responding to public concern about crime, and to increasing criticism of indeterminate sentencing and of rehabilitation as a goal of imprisonment, many States as well as the Federal Government began looking at alternatives. Two sentencing options were favored by most policy-makers--determinate sentencing and mandatory minimum sentencing. While these policies differ substantially, both are designed to remove discretion from sentencing and to guarantee the certainty of punishment. Both focus on the crime rather than the individual criminal; establishing certain punishments for specified acts or categories of crime.

Determinate Sentencing

There is some disagreement over the definition of determinate sentencing, but generally it consists of two components. It has been characterized as a system "(1) with explicit and detailed standards specifying how much convicted offenders should (i.e., ordinarily) be punished, and, (2) to the extent that they

use imprisonment, with procedures designed to ensure that prisoners are informed early of their expected dates of release." 2/ In most cases, standards or guidelines set by a legislature or by a commission permit a judge some discretion within a range determined by the body that establishes them. Under this procedure a judge must sentence an offender to a term of imprisonment within that range unless there are aggravating or mitigating circumstances, and if that is the case, the judge must state in open court or put in writing his reasons for deviating from the sentencing guidelines. Virtually all sentencing guidelines have as their main purpose the reduction of sentencing disparity, but they may also be designed to serve differing goals of sentencing--deterrence, incapacitation or retribution. A system of determinate sentencing may also permit appellate review of sentences which do not conform to the guidelines. In addition, parole is often (but not always) eliminated under this system.

Determinate sentencing may or may not result harsher punishment for those convicted of crimes. The determinate sentencing statutes presently in existence reflect differences in constraints on judges regarding the decision about whether or not to sentence offenders to prison or jail, in the degree of discretion judges may exercise in imposing sentences, in the specificity of aggravating or mitigating circumstances, and in the range of penalties permitted by the statutes. 3/

2/ Von Hirsh, Andrew and Kathleen Hanrahan. Determinate Penalty Systems in America: An Overview. Crime and Delinquency. v. 27, July 1981. p. 294. This was the definition of determinacy used in the Project on Strategies for Determinate Sentencing.

3/ Lagoy, Stephen P., Frederick A. Hussey and John H. Kramer. A Comparative Assessment of Determinate Sentencing in the Four Pioneer States. Crime and Delinquency, v. 24, Oct. 1978. p. 385.

Mandatory Minimum Sentencing

Mandatory minimum sentencing, by contrast, allows a judges no discretion on the minimum time an offender must serve for certain types of crimes. Mandatory minimum proposals provide for a fixed sentence which must be served in its entirety for conviction of certain crimes without regard to the circumstances of the offense or offender. Longer sentences may be imposed under such a scheme.

Mandatory minimum sentencing, like a determinate procedure, is designed to reduce sentencing disparity, to minimize discretion by judges and parole boards, and to deter others from crime. Mandatory minimum sentencing seeks to guarantee a minimum sentence for all convicted offenders. Most mandatory minimum proposals limit the mandatory sentencing to certain crimes or categories of criminals. For example, use of a weapon--usually a gun--in the commission of certain felonies, draws a mandatory minimum penalty in some jurisdictions. Likewise, mandatory minimum sentences are required for repeat offenders in many States. Sometimes the mandatory minimum sentence is imposed after the second conviction, sometimes after the first, the third, or more. Early estimates suggested that mandatory minimum sentencing could reduce crime through incapacitation, but at the cost of increasing the prison population substantially. 4/

DETERMINATE AND MANDATORY SENTENCING IN SIX SELECTED STATES

According to a Bulletin published by the Bureau of Justice Statistics, as of January 1983 nine States had determinate sentencing systems, and mandatory prison term statutes existed in most States, and in the District of Columbia,

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4/ Petersilia, Joan, and Peter W. Greenwood. Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Sentences. Journal of Criminal Law and Criminology, v. 69, Winter 1978. p. 615.

and for certain Federal crimes. 5/ The Bulletin identified statutes pertaining to violent crime, habitual offenders, narcotics and drug law violations, and handgun and firearm laws as those most commonly carrying a mandatory prison term. 6/

Determinate and mandatory minimum sentencing were adopted in response to public outcries against crime, but in enacting such sentencing policies, some States may have exacerbated the problem of serious overcrowding in their prisons and jails. 7/

This report examines determinate sentencing statutes in three States, Minnesota, California, and Indiana, as well as mandatory sentencing laws in three other States, Florida, Massachusetts and New York, to assess their success in reducing disparities in sentencing and, in the case of mandatory minimums, in reducing the rates at which certain crimes are committed. It also looks at the impact of these procedures on the problem of prison overcrowding.

5/ U. S. Department of Justice. Bureau of Justice Statistics. Setting Prison Terms. Washington, August 1983. p. 2-3. The nine determinate sentencing States are California, Colorado, Minnesota, New Mexico, North Carolina, Connecticut, Illinois, Indiana, and Maine. Alaska's determinate sentencing law applies to second offenders. The following States have mandatory prison term statutes for certain types of crimes: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

6/ Ibid., p. 3.

7/ U. S. Department of Justice. Bureau of Justice Statistics. Prisoners in 1982. Washington, April 1983. See also Schoen, Kenneth. Overcrowded Time. Why Prisons Are So Crowded and What Can Be Done. New York, The Edna McConnell Clark Foundation, 1982. p. 8-9.

The States selected for inclusion are not necessarily representative of a particular determinate or mandatory sentencing model. They were chosen for illustrative purposes; variations exist and are presently in operation in other States.

Minnesota

Minnesota's sentencing guidelines became effective on May 1, 1980. Their purpose was to establish rational and consistent sentencing standards with a view to reducing sentencing disparity and to using scarce correctional resources in a rational manner. The Guidelines, developed by a Commission created by the Minnesota legislature, reportedly differed from earlier sentencing guidelines in the following ways:

> First, a prescriptive approach was used in the development of the Sentencing Guidelines rather than the more common descriptive approach. The sentencing policy embodied in the Guidelines differs significantly from past sentencing practices--more person offenders and fewer property offenders are recommended for imprisonment under Sentencing Guidelines.
>
> Second, various sentencing goals were discussed and considered during the development of the Sentencing Guidelines, and retribution was adopted as the primary sentencing goal of the Guidelines.
>
> Third, compared to prior sentencing guidelines projects, the Minnesota Sentencing Guidelines emphasize sentencing uniformity. 8/

Since Minnesota rejected the incorporation of incapacitation as a factor in sentencing, any crime reduction effects of the new Sentencing Guidelines were not considered in the early report.

8/ Knapp, Kay A. Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines. St. Paul, Minnesota Sentencing Guidelines Commission, July 1982. p. iii. Legislation creating the Sentencing Guidelines Commission was passed in 1978. Minn. Stat. Section 244, Laws, 1978.

The impact of Minnesota's Sentencing Guidelines was evaluated in a preliminary report issued in 1982. Basing their findings on the first 5,500 cases sentenced under the Guidelines in 1980-1981, and on baseline data of 4,369 cases disposed of in fiscal year 1978, the analysts determined that Minnesota's sentencing practices generally conformed to the stated goals of the Sentencing Guidelines--that is, criminals were punished on the basis of the severity of crimes, and sentencing disparities were reduced. 9/

The preliminary report said that the Sentencing Guidelines were bringing about the desired sentencing objectives:

> Sentencing practices have substantially conformed to the articulated sentencing policy. There has been a 73% increase in imprisonment of offenders convicted of high severity crimes with low criminal histories. There has been a 72% reduction in imprisonment for offenders convicted of low severity crimes with moderate to high criminal histories.
>
> Disparity in sentencing has decreased under the Sentencing Guidelines. The reduction in disparity is indicated by increased sentence uniformity and proportionality. Sentences are more uniform in terms of who goes to prison and in how long imprisoned offenders serve. Sentences are more proportional in that offenders convicted of more serious offenses receive more severe sanctions than prior to the Sentencing Guidelines.
>
> Prison populations remained within state correctional capacity during 1980 and 1981. Commitments were close to the level projected. 10/

It appears that the Minnesota Sentencing Guidelines, at least upon early examination, are achieving the goals for which they were intended. Prison population did not show an increase, above optimum prison capacity, and those who committed more serious crimes were receiving longer sentences. 11/ The

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9/ Ibid., p. iii.

10/ Ibid., p. iii-iv.

11/ The Minnesota Sentencing Commission adopted a policy that the Guidelines were to be written so that the projected prison population would not exceed the capabilities of prisons at the time the Guidelines took effect. Von Hirsh and Hanrahan, Determinate Penalty Systems, p. 298.

principle of retribution, the philosophy underlying incarceration according to the Minnesota Guidelines, was being realized. 12/ It appears that the Commission's Guidelines accurately reflected the legislature's intent and selected policy options to carry it out. The Commission, not under direct pressure from the electorate to get "tough on criminals," was able to strike a balance between too harsh and too lenient sentences, and was able to design Guidelines which resulted in greater punishment for serious crimes, as well as lesser punishment for less serious offenses. Minnesota expects to continue to monitor its Sentencing Guidelines and to evaluate the impact of the Guidelines on charging and plea negotiation practices at a later time. 13/

California

California's Uniform Determinate Sentencing Act became effective on July 1, 1977. The second State to pass a determinate sentencing law (Maine was the first in 1976), California repudiated its indeterminate sentencing law which had been in accord with the rehabilitative philosophy of corrections. Unlike the Minnesota statute, the California law established a legislatively prescribed system. 14/ Like Minnesota, however, California chose retribution as its philosophy of punishment, and it also abolished traditional parole discretion. The intent of the California sentencing reform was to do away with sentencing disparity. The California system set forth a specific punishment as the recommended sentence, but the judge could decide the specific duration of imprisonment, within limits, at the time he imposed the sentence (actual time

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12/ Knapp, Preliminary Report, p. iii.

13/ Ibid., p. iv.

14/ Von Hirsh and Hanrahan, Determinate Penalty Systems, p. 295.

to be served minus an adjustment for good behavior). 15/ For example, most crimes would fall into one of four penalty clusters prescribed by the California legislature:

> 16 months, 2 years, 3 years (e.g., second degree burglary, forgery, theft);
>
> 2, 3, or 4, years (e.g., robbery, first degree burglary, sale of controlled substance, arson, assault with intent to kill);
>
> 3, 4, or 5 years (e.g., kidnapping, rape, transportation of controlled substance);
>
> 5, 6, or 7 years (e.g., crimes punishable by life [imprisonment] or death, second degree murder). 16/

The judge was expected to sentence in the middle range unless aggravating or mitigating circumstances were found. 17/

Within a year after California's sentencing reform went into effect it was amended twice, invoking harsher penalties in both cases. Such amendments might have a substantial effect on the prison population. 18/

An impact evaluation of California's Uniform Determinate Sentencing Law was based on only one year's experience with the new act. The researcher sought to determine whether or not the law resulted in harsher punishments, and its effect, if any, on reducing sentencing disparity. 19/

15/ Ibid., p. 294-297.

16/ U.S. Department of Justice. National Institute of Justice. American Prisons and Jails. Vol. IV: Supplemental Report, Case Studies of New Legislation Governing Sentencing and Release. By Richard Ku. Washington, U.S. Govt. Print. Off., 1980. p. 57.

17/ Ibid.

18/ Ibid., p. 73.

19/ Ibid., p. 59.

Early evidence indicated that judges might be selecting prison sentences (given conviction) rather than other penalties--e.g., probation. A Rand Corporation report based on a sample drawn from Alameda County reached the tentative conclusion that judges in that county were imposing more severe penalties in sentencing for robbery than they did previously under an indeterminate sentencing system. Likewise, quarterly statistics published by the California Judicial Council indicated that judges might be less reluctant to impose prison sentences under the determinate sentencing law. 20/

To the extent that California's determinate sentencing law was designed to reduce disparity and to promote uniformity in sentencing, it appears to have achieved some success. Empirical evidence based on the State's first year's experience with the new sentencing law suggests that variations in prison terms were narrowed. 21/

Interestingly enough, the probability of a prison commitment appeared to be the most pronounced consequence of the determinate sentencing law. However, it is not clear whether this increase was brought about in part by factors other than the new law--for example, changes in the convicted population, variations in sentencing practices, or something else. 22/

In amending the penalties upward, California escalated the punishment for certain crimes. Whether or not this action, by itself, resulted in prison overcrowding in California, is not clear. However, an early evaluation revealed that California's institutional capacity would be inadequate by the end of 1981 if current projections were accurate:

20/ Ibid., p. 61.

21/ Ibid., p. 71.

22/ Ibid., p. 72.

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

It may be that the California legislature, unlike the Minnesota Sentencing Commission, is subject more to "law and order" pressures which might help explain the legislature's reasons for amending the statute to include longer or harsher penalties. In addition, as noted above, Minnesota's Sentencing Commission adhered strictly to a policy that the Guidelines would be written to prevent prison populations from rising beyond the capacity of the institutions at the time the Guidelines tok effect. Perhaps the degree of insulation from electorate pressure enjoyed by an appointed Sentencing Commission, unlike a State legislature, afforded the former the luxury of adapting such a policy. It seem plausible to suggest that even if California had not enacted a determinate sentencing law, the legislature might have increased penalties under the then existing law in response to increasing public concern about crime. 24/

Indiana

Indiana became the third State to adopt a determinate sentencing system when its new penal code became effective on October 1, 1977. The new legislation not only reformed sentencing laws, it restructured the substantive features of Indiana criminal law which had not received a major revision since 1905. The

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23/ Ibid.

24/ Von Hirsh and Hanrahan, Determinate Penalty Systems, p. 302.

new Indiana Penal Code was expected to "increase deterrence, increase humaneness, decrease discretion, increase prison populations, make penalties more appropriate to the offense, equalize penalties, reduce arbitrariness, increase public protection, increase system efficiency, reduce harshness, and reduce leniency." 25/

While the new law will not be assessed in terms of its achieving each of its stated goals, its success in approximating those designed to decrease discretion and to increase prison populations (believing that such a move would deter others from commiting crime) will be examined.

The Indiana legislature specified a presumptive incarceration sentence for all the five classes of felonies, while permitting substantial deviations in cases where the trial court found aggravating or mitigating circumstances. These circumstances were enumerated in the Indiana Code but were not made binding on the court. 26/

The following table illustrates the sentencing ranges in the new Indiana Penal Code:

25/ Clear Todd R., John D. Hewitt and Robert M. Regoli. Discretion and the Determinate Sentence: Its Distribution, Control, and Effect on Time Served. Crime and Delinquency, v. 24, Oct. 1978. p. 429.

26/ Lagoy, Stephen p., Frederick A. Hussey and John H. Kramer. A Comparative Assessment of Determinate Sentencing in the Four Pioneer States. Crime and Delinquency, v. 24, Oct. 1978. p. 391.

Sentencing Ranges in the New Indiana Penal Code

Class of offense	Terms of imprisonment	Enhancement for aggravation	Reduction for mitigation
Murder	40 years (or death)	1-20 years	1-10 years
Class A felony	30 years	1-20 years	1-10 years
Class B felony	10 years	1-10 years	1-4 years
Class C felony	5 years	1-3 years	1-3 years
Class D felony	2 years	1-2 years	NA
Class A misdemeanor	0-1 year	NA	NA
Class B misdemeanor	0-6 months	NA	NA

Source. Clear, Hewitt and Regoli, Discretion and the Determinate Sentence, p. 433.

The new Indiana Penal Code authorizes the exercise of "multiple discretion" by various participants in the system--prosecutors, judges, and correctional administrators. For example, the new law provides that certain offenses carried nonsuspendable penalties. However, it provides also that the charge for these crimes could be reduced to "attempted" offenses (except for murder); although the penalty for these is the same as for the actual offenses, the penalty for an "attempted" crime is suspendable. According to one critique of the Indiana Penal Code, "The new clause has the dual effect of giving the prosecutor flexibility to bargain while silently exerting pressure on the defendant to cooperate, since the elements of proof surrounding an 'attempted' offense are much less rigorous than the regular criminal statutes." 27/ In addition, the

27/ Ibid., p. 435.

code permits the prosecutor to agree to ignore aggravating circumstances or to emphasize a mitigating circumstance in exchange for a guilty plea at the sentencing hearing. In fact, some have described Indiana's Penal Code as a "prosecutor's law." 28/

The discretion permitted a trial judge is obvious from the sentencing range established by the legislature. Given the broad range of sentences available to a trial judge, in addition to the aggravating or mitigating circumstances he or she may consider, judges are empowered to sentence defendants to widely disparate penalties for the same offense. 29/

Finally, the correctional administrator retains discretion over actual time served through the "credit time" mechanism contained in the new law. Designed to give correctional administrators power to maintain discipline, the new law allows inmates to be placed into three classes for purposes of accruing "credit time". Class I is a 50 percent reduction, Class II, a 33 percent reduction, and Class III, no reduction. All inmates are originally placed in Class I, and reassignment may occur as a result of a violation of a department of corrections rule or regulation. According to one evaluation of Indiana's determinate sentencing law the "credit time" provision vests extensive discretion in the correctional administrator:

> Clearly, the commissioner looks forward to a liberal exercise of sentencing discretion under the code's credit time provisions. Thus, the discretion available to the correctional administrators is, at least technically, extensive: The department controls up to fifteen years for most class A offenses, five years for class B, up to two and one-half years for class C, and up to one year for D felonies. This probably reflects discretionary power over about as much prison time as was formerly affected by parole decisions.

28/ Ibid.

29/ Ibid., p. 437.

> Ironically, the proponents of reform often argued that one problem of parole was its tendency to be too responsive to the needs of correctional administrators. Now the parole boards that were responsible only to the governor have been replaced by correctional department staff appointed by the commissioner. 30/

It does not appear that Indiana's new code has succeeded in eliminating sentencing discretion. In addition, available information indicates that the determinate sentencing system in Indiana, as structured, probably will not reduce disparity in sentencing.

An early study conducted to determine the effects of the new law on time served for felonies projected that certain offenders would have served 47.4 percent more prison time had they been sentenced under the new code. 31/ That figure was particularly striking because the sample included only first offenders who would earn the maximum "credit time" available.

If Indiana's determinate sentencing system resulted in some offenders serving longer prison sentences, would there not be a sizeable increase in the prison population in that State? Although it appears that there would be a need for additional prison space, early evaluators suggested that prison populations likely would be controlled by negotiations between judges, prosecutors and defense attorneys in Indiana. Indeed, the same researchers suggested that while there might be a modest increase under the determinate sentencing system, it would not be as great as the 47.4 percent figuree would indicate. 32/

Nevertheless, subsequent to the enactment of the new code, Indiana experienced a problem of severe overcrowding in its prisons. It is not certain whether this was caused by the severity of sentences under the new code or

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30/ Ibid., p. 438-439.

31/ Ibid., p. 443.

32/ Ibid., p. 443.

by other factors, such as the increased number of cases entering the criminal justice system.

Florida

The Florida legislature enacted a mandatory minimum sentencing statute in 1975. It provided that a person possessing a handgun while committing or attempting to commit murder, sexual battery, robbery, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, and aircraft piracy, should be sentenced to mandatory imprisonment for a minimum period of three years.

According to one of the co-sponsors of the firearm legislation, the mandatory minimum term was expected to serve as a deterrent to crime. Accordingly, a campaign to inform the public--especially those who might be more prone to crime--was launched in Florida. Subsequent surveys revealed that the publicity had not been effective in informing or deterring the target group--persons between the ages of 14 and 25--about the new mandatory minimum firearm law. In fact, surveys indicated that known offenders who were incarcerated were familiar with the law, but that it would have little deterrent effect on this group:

> A study conducted by D. E. S. Burr of the Florida Technological University interviewed inmates at five correctional facilities. The study found that among incarcerated offenders, knowledge of the law was common: 83 percent were aware of the law. The study went a bit further and asked if, upon release, the inmates would cease to carry guns. Among first offenders, 69 percent said they would continue to carry guns. Among multiple-felony offenders, 76 percent indicated that they would continue to carry a handgun. Social pressure and perceived need for protection were given as reasons for continuing to carry a gun. The deterrent effect of the law was of little significance in comparison with these factors. The prospect of three years incarceration was viewed as less risky than being without a gun. 33/

33/ D. E. S. Burr. Handgun Regulation. Final Report. Bureau of Criminal Justice Planning and Assistance, December 1977. p. 23-24, cited in U.S. Department of Justice, v. IV. Case Studies of New Legislation, p. 42.

Other surveys indicated that between 80 to 90 percent of the youthful population in Florida were unaware of the mandatory minimum sentencing law, suggesting further that its deterrent effect might be negligible. 34/

Early data on the Florida mandatory minimum sentencing statute indicated that it might not have had its anticipated effect--that of increasing prison admissions and deterring crime. Although one might expect prison admissions for armed robbery relative to burglary to increase substantially under a mandatory minimium firearm law, this did not occur. Instead, a steady downward trend in the armed robbery/burglary admission ratio was observed. 35/ In 1976, 274 offenders were convicted and sentenced under the law, and in the first six months of 1977, the total was 217, out of an approximate total of 8,500 annual admissions to Florida state prisons. 36/

Interview findings disclosed that the new law apparently provided prosecutors with some additional leverage for plea bargaining:

> Interviews with members of both the State Attorneys' and Public Defenders' Offices in Dade County revealed that approximately 85-90 percent of all felony cases are settled by plea and that the majority of those pleas are arrived at by negotiation. Members of the Public Defender's Office were unanimous in their opposition to mandatory terms on the arguments that mandatory terms theoretically enhance the power of the prosecutor, and that "clearly inappropriate" cases fall under the language of the statute. While the three-year term was cited as a factor in the negotiations, members of both the defender's and prosecutor's office felt that the law had little actual impact on the result. Both also felt that in cases where the offense was serious, the statute is frequently charged and

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34/ U. S. Department of Justice, v. IV. Case Studies of New Legislation, p. 42.

35/ Ibid., p. 46. The ratio of armed robbery admissions to those for burglary, which often increased dramatically between fiscal 74 and 75, declined steadily from fiscal 76 through 78.

36/ Glick, Henry R. Mandatory Sentencing: The Politics of the New Criminal Justice. Federal Probation, v. 43, March 1979. p. 6.

> rarely negotiable. They noted that since these cases had traditionally received lengthy prison sentences, the minimum term of three years was relatively unimportant and that in less serious cases, with few exceptions, the felony-firearm law is rarely at issue because it is not charged. There was general agreement that charges would be reduced in these cases to offenses that yield probation, jail terms, or some combination of jail and probation. 37/

Interviews with judges and with representatives of the Dade County Corrections system however supported the view that the new law had little impact on sentencing practices by courts. 38/

It appears that the number of offenders sentenced statewide under the mandatory minimum law was a small portion of the total number of criminals arrested. As a result of prosecutorial, defense, and judicial discretion, charges often (approximately 85-95 percent of all felony cases) were bargained down to lesser offenses to avoid the three year minimum carried by the statute. One writer suggested that "if this is the case, mandatory sentencing laws simply will become new and additional bargaining chips that prosecutors, in particular, can use to obtain convictions." 39/

Finally, although the deterrent effect of any law is difficult to appraise, the lack of awareness of the new law, even after a publicity campaign, suggests that it has not been effective in deterring persons from committing crimes while carrying handguns. Although it appears that mandatory minimum sentencing in Florida was of little consequence, this conclusion is based on rather limited statistical evidence. It is possible that additional research might reveal different findings.

37/ U.S. Department of Justice, v. IV. Case Studies of New Legislation, p. 47.

38/ Ibid., p. 48-49.

39/ Glick, Mandatory Sentencing, p. 6.

Massachusetts

In 1974 the Massachusetts legislature passed an amendment to its gun control laws which made the unlicensed carrying of a firearm an offense with a mandatory prison sentence of one year. Known as the Bartley-Fox Amendment, this prohibited judges from granting probation or suspending sentences, and also precluded any form of parole release, furlough, or early release for good behavior. The amendment did permit prosecutors to reduce charges. Its passage had been accompanied by several months of publicity before it became effective in April 1975.

The obvious purpose of the amendment was that of decreasing the number of gun-related crimes, and the attendant publicity was for the purpose of deterring people from carrying unlicensed firearms. 40/ Critics of the law contended, however, that police, prosecutors and judges would react negatively to any restriction on their discretion and that for this reason, the law would have no impact. 41/

An early study was undertaken to determine whether or not the court system, including police, prosecutors and judges, would use evasion tactics to restore the discretion that had been removed through the imposition of mandatory

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40/ There was some misunderstanding about its purpose because some of the publicity stressed possession as well as carrying firearms. But the law applied only to the carrying of unlicensed firearms and not to their unlicensed possession. See U.S. Department of Justice. National Institute of Justice. Weapons, Crime, and Violence in America. A Literature Review and Research Agenda. By James D. Wright, Peter H. Rossi, Kathleen Daly and Eleanor Weber-Burdin. Washington, U. S. Govt. Print. Off., 1981. p. 527-546.

41/ Beha, James A. "And Nobody Can Get You Out": The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston--Part II. Boston University Law Review, v. 57, March 1977. p. 290.

sentencing. Research conducted on the Suffolk County courts (Boston) found that judges were applying the law as it was intended:

> . . . The Boston lower court judges, although very much opposed to the mandatory sentence, nonetheless imposed it. There have been cases in which judges appear to have acquitted defendants rather than be forced to sentence them, but these instances were neither frequent nor predictable. When default cases are set to one side, 62% of the Bartley-Fox defendants were convicted or bound over to the superior court. As a result, the law has significantly altered the lower court system's handling both of firearm assault cases and of those cases in which the carrying violation was the most serious charge.
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> The last group represents, of course, those prosecutions that most severely test the court system. In 1974, only 28% of those defendants whose most serious charge was a carrying violation received any prison sentence from the lower court or were bound over, while 34% received suspended sentences or lesser penalties upon conviction. In 1975, almost half were sentenced to at least one year, bound over, or indicted. Perhaps more to the point, of the twenty prison sentences imposed on individuals in the 1974 sample group, thirteen were appealed and very few of those defendants appealing received an equivalent sentence. In fact, then, only 9% of these 1974 defendants were sentenced to prison--and fewer than half of them were effectively sentenced to a year or more. Our rough estimate is that a prison sentence will be imposed more than five times as frequently for similarly situated 1975 defendants. Whatever the eventual results before superior court judges and juries, the lower court judges by and large have applied the law as required, even when they saw the results as pernicious. 42/

However, a later study found that the Bartley-Fox amendment affected both police behavior and the strategies followed by defendants. Police interviewed in Massachusetts reported that they were more selective about whom to search because they "didn't want to risk involving otherwise innocent people." 43/

42/ Beha, James A., II. "And Nobody Can Get You Out": The Impact of a Mandatory Prison Sentence for the Illegal Carrying of Firearms and on the Administration of Criminal Justice in Boston--Part I. Boston University Law Review, v. 57, Jan. 1977. p. 145-146.

43/ U.S. Department of Justice. National Institute of Justice. Policy Briefs. Mandatory Sentencing: The Experience of Two States. By Kenneth Carlson. Washington, National Institute of Justice, May 1982. p. 6.

Defendants became less cooperative, opting to default rather than to face trial, and judges appeared to become more lenient, evidenced by the number of not guilty verdicts rising from 16 percent the year before the gun law went into effect to 40 percent and 33 percent, respectively, in the two years following it.

> The net result of this process was that while 109 defendants (41 percent of the total Boston sample) were sentenced for gun carrying in 1974, only 50 (25 percent) were sentenced in 1975, and 26 (17 percent) in 1976. 44/

Other studies examined impact of the law on gun-related and non-gun-related crimes. The new law apparently had an effect on armed assaults. While it resulted in a decrease in the incidence of gun assault, non-gun-armed assaults increased. Likewise, gun robberies decreased, while non-gun armed robberies increased. 45/

Interestingly, the deterrent effects of the Bartley-Fox amendment appeared to have an impact even before the law became effective. This suggests that offenders were responding to the advertising campaign mounted preceding the law's taking effect, rather than to the sanctions it imposed. The decline in gun-related crimes seemed to have been the result of the "announcement effect" --the publicity about the law--rather than from the traditional deterrent effect which is related to the penalties actually meted out. 46/

It is difficult to draw any firm conclusions about the deterrent impact of the Bartley-Fox amendment in Massachusetts. Although gun assaults, robberies,

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44/ Ibid., p. 7-8.

45/ Pierce, Glenn L. and William Bowers. The Bartley-Fox Gun Law's Short-Term Impact on Crime in Boston. The Annals, v. 455, May 1981. p. 137.

46/ Ibid.

and homicides declined during the first six months that the law was in effect, this decline began prior to the law's taking effect. The early decrease may have resulted more from publicity about the new law than from the effects of the law itself.

Although the rates of reported gun-armed crime did drop at about the time the law became effective, some have advanced other reasons for this lessening of gun-related offenses. It has been suggested that firearm-related crimes peaked in Massachusetts prior to the enactment of the law, and that in fact, the Massachusetts gun law was amended in 1974 in response to the rising number of gun-related crimes. 47/

The experience of Massachusetts with mandatory sentencing, makes it difficult to support the claim that mandatory sentencing as such will deter crime. The decrease of gun crimes in that state, which began before the law became effective, may have resulted from the publicity surrounding the Bartley-Fox amendment, or it may have been the result of a leveling back to the "normal" number of firearm related crimes. As one report concluded, the statistical results of the studies thus far indicate that they "should be a source of caution to those who promise that mandatory sentencing will deliver more certain punishment, harsher penalties, and reductions in crime. In view of the uncertain consequences of mandatory sentencing provisions, such promises can only be based on faith, not fact." 48/

New York

Deterrence was the main goal of New York's strict mandatory drug law, first passed in 1973 and amended twice between then and 1980. Then Governor Nelson

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47/ U.S. Department of Justice, Mandatory Sentencing: The Experience of Two States, p. 11.

48/ Ibid., p. 16.

Rockefeller, in introducing the anti-crime package, focused on the stiff criminal sentences designed to 'deter the pusher and the violent addict and isolate for life those who will not be deterred." 49/

The original legislation provided for mandatory sentences for the sale and possession of illegal drugs. It subdivided class A felonies into three categories, each carrying a maximum penalty of life imprisonment and mandatory minimums of 15 years for an A-I felony, 6 years for an A-II, and 1 year for an A-III offense. The law prohibited the reduction of any class-A felony charge below the A-III level, thus effectively creating a mandatory sentence of from one year to life for all convicted class A felons. 50/ The law prohibited plea bargaining from class A to class B felonies, but permitted it within class A offenses. Thus a serious class A-I felony could be reduced to an A-II or A-III, but the less serious A-III could not be reduced to a B-I charge.

A study designed to document the effects of the new law on drug abuse, crime, and the criminal justice system was funded by the National Institute of Justice. The report of this study, which was proposed by the Association of the Bar of the City of New York, presented preliminary findings which indicated that New York City police were not enthusiastic about the law. Data on numbers of drug arrests did not show a clear trend toward more persons being taken in custody. The perception of penalties to be imposed appeared to have little influence on either the increases or decreases in the arrest rate. 51/

49/ Governor Nelson Rockefeller, quoted in the New York Times, Jan. 26, 1973, p. 1.

50/ Zimring, Franklin E. Policy Experiments in General Deterrence: 1970-1975. In Blumstein, Alfred, Jacqueline Cohen, and Daniel Nagin, eds. Deterrence and Incapacitation: Estimating the Effects of the Criminal Sanctions on Crime Rates. Washington, National Academy of Sciences, 1978. p. 157.

51/ U.S. Department of Justice, Mandatory Sentencing: The Experience of Two States, p. 7.

More dramatic effects of the statutory change were in evidence at the trial stage. New York defendants, facing longer sentences, stepped up their efforts to avoid or postpone sentencing:

> Persons charged with certain felonies could not plead guilty to lesser offenses, and hence had no incentive to plea bargain; this change increased the total proportion of cases proceeding to trial by nearly a factor of three, from 6 percent in 1973 to 17 percent in the first half of 1976. This restriction on plea bargaining was removed in 1976, with an immediate decrease in the demand for trials.
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> More motions were filed. By 1974, the number of court appearances under the new law was twice as high as for non-drug cases (21 vs. 11) per disposition.
>
> Median time to disposition rose from 173 days in 1973 to 340 days in 1976, when the restriction on plea bargaining was relaxed and the backlog of cases began to be disposed. By 1978, the delay had fallen to 245 days--still well above its former level. 52/

In New York the numbers of offenders affected by the law was much smaller than expected. One explanation for this is that the mandatory minimum created a great backlog in the courts, particularly in New York City. That, combined with defense maneuvering, postponed the effects of the new law, almost to the point of rendering it ineffective.

The New York drug law has been referred to by one critic as "a study in apparent irony." He analyzed its effectiveness as follows:

> Other than showing increased delay, the impact of the 1973 laws on the criminal justice system is a study in apparent irony. The laws were intended to increase rates on imprisonment and the length of prison sentences given to class-A defendants. Imprisonment rates for drug charges within the city of New York have not increased, if only because the backlog of cases has postponed class-A felony commitments to the adult correctional system past the period of available documentation. The rate of jail incarceration has, most probably, increased. And what about sentence severity? The effect of the provision

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52/ Ibid., p. 7.

> that allows class-A felonies to be bargained down to the A-III level but no further is to postpone for years any decision about the impact of the laws on severity of sentences actually served. If the A-III felony becomes a primary mechanism for disposition in New York City's criminal courts, it will result in the class-A felony defendants being given a sentence that amounts to an indeterminate term from 1 year to life and makes the actual length of sentence dependent on the performance of the parole board. 53/

The mandatory minimum sentencing statute in New York appears to have been seriously flawed by its attempt to restrict the prosecutor's discretion to reduce charges. As originally drafted, the mandatory drug law prohibited plea bargaining from class A to class B felonies, but, as noted before, allowed it within class A felonies. The result of this was that those charged with class A-III felonies had no reason to plead guilty (since the charge could not be bargained down); instead, they opted to stand trial for their alleged transgression. This of course, added to an already serious backlog in the courts, especially in New York City where drug offenses were more prevalent than in the rest of the State. Statistics indicate that the law resulted in relatively minor offenders receiving harsher sentences because judges lacked the flexibility to sentence first offenders more leniently. 54/

New York's mandatory sentencing law apparently fell short of its expectation. The reported effects of the law, that sentences for drug offenders would go up and that crime would go down, were not borne out in fact.

Policy Considerations

Determinate and mandatory minimum sentencing systems have as their goals punishment (retribution), elimination of disparity in sentences, and crime

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53/ Zimring, Experiments in General Deterrence, p. 158.

54/ U.S. Department of Justice, Mandatory Sentencing: The Experience of Two States, p. 15.

reduction through deterrence. The extent to which these measures can realize their goals will vary. Moreover, with respect to determinate sentencing, although it might result in more certain punishment, its cost might be too great to justify the benefits. That is, the overcrowding and attendant problems resulting from more severe punishment could offset to some extent any benefit gained by imposing long prison terms on those who commit serious offenses.

Minnesota, at the time the evaluation cited in this report was written, did not have a problem of serious overcrowding in its prisons. This condition might be attributed to the Minnesota Sentencing Commission's adopting a policy that the guidelines were to be written so that at the projected prison population would not rise above the capacities of prisons at the time the guidelines became effective. 55/

In California rape and burglary were singled out for particularly harsh punishment. 56/ Although the "law and order" pressures that resulted in increased terms of imprisonment for these crimes may not result in massive overcrowding in California prisons, they may bring about inequitable sentencing. That is, those incarcerated for rape and burglary may serve longer sentences than those imprisoned for other, but equally serious, crimes. 57/ In addition, apart from the incapacitative effects of incarceration, there is little to suggest that it results in crime reduction. 58/ Unlike those in Minnesota, California's penalties are determined by the legislature, which may be more readily influenced by public

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55/ Von Hirsh and Hanrahan, Determinate Penalty Systems, p. 298.

56/ Ibid., p. 301.

57/ Ibid.

58/ National Research Council. Panel on Research on Deterrent and Incapacitative Effects. Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates. Washington, National Academy of Sciences, 1978. p. 62-63.

pressure to "get tough on criminals" than an appointed sentencing commission would be.

The Indiana determinate sentencing system embraced more rigorous punishment for criminals and established significantly longer sentences for most crimes. Intended to reduce disparity in sentencing, it allowed discretion at virtually every step in the judicial process--by prosecutors, by judges, and by corrections officials--and did not place firm limits on such discretion. However, Indiana's sentencing standards, as established by the legislature, increased considerably the penalties for criminal offenses. As has been pointed out, subsequent to the adoption of the new code in Indiana, that State experienced a problem of serious overcrowding in its prisons.

It might be noted that the Indiana legislature hoped to deter criminal activity by establishing harsher penalties. As in the case of California, Indiana's elected officials may have been influenced by "law and order" pressures from constituents; but Indiana did not appear to take into consideration the problem of prison overcrowding when it established its criminal penalties. Evaluations of Indiana's determinate sentencing system suggested that it might have created more ills than it remedied, and that at best it constituted a point of departure for a more rational reform of Indiana's sentencing structure. Policy-makers may debate this in the future. 59/

Mandatory minimum sentencing statutes appear to have fallen short of their expected goal of deterring crime in at least two of the three States examined here. In Massachusetts, where mandatory minimum sentencing may have had a

59/ Clear, Hewitt and Regoli, Discretion and the Determinate Sentence, p. 444.

deterrent effect, the decline in gun assaults was attributed to the "announcement" effect--the publicity given the statute, rather than to its actual deterrent effect. Whatever the reason for this decline, the results were the same. Thus, at least in the short run, Massachusetts's mandatory minimum firearm statute seems to have had some positive impact in informing people of the certainty of punishment if convicted of carrying a firearm illegally.

On the other hand, Florida's mandatory minimum firearm statute appears to have little deterrent effect; even after an advertising campaign, few in the target group appeared to be aware of its existence. Moreover of those who knew about the new law--inmates at five correctional facilities in Florida who were interviewed for a study--a large percent indicated that they would continue to carry handguns in the future. Florida's mandatory minimum law perhaps had a greater impact on prosecutors, who could use the statute in plea bargaining, than it did on potential offenders.

New York's experience with a mandatory minimum sentencing law restricting prosecutorial discretion resulted in massive backlogs in the court system. Lacking the ability to bargain pleas downward, defendants, in many cases, chose to plead not guilty and stand trial rather than to plead guilty to a lesser offense arranged through bargaining. One effect of this was that many accused of class A drug felonies either waited for court disposition in local jails or were released and were back on the streets, while awaiting trial. The New York act, combined with its indeterminate sentencing system, could have resulted in a vast number of defendants being released on parole for the rest of this century or being held in prison for life.

These examples seem to indicate that lengthier prison sentences, whether compelled either by determinate sentencing or mandatory minimum statutes, have not been proven to be successful in deterring crime. It should be noted however,

that the effects of deterrence are difficult to measure. A special panel of the National Academy of Sciences, which reviewed evidence regarding effects of deterrence, concluded that the magnitude of the deterrence effect of punishment could not be determined from existing literature. That is not to say that deterrence does not result from punishment.

Sentencing objectives however, need not be limited to deterrence. Retribution figured prominently in the sentencing policy of the three States that adopted determinate sentencing, and it appears that punishment as a goal was realized in at least one State, Minnesota, and possibly in another, California, where the penalty for certain crimes was lengthy periods of imprisonment.

The retributive principle of sentencing means that the severity of the punishment should be in proportion to the seriousness of the crime. This principle has been influential in sentencing practices in most States. However, to the extent that crime control is an objective of sentencing policy, this principle might conflict with these other considerations. For example burglars and robbers are usually given shorter sentences than murderers, although the former are more likely to become recidivists. It can be argued that retribution is correct to the extent that we would not wish murderers to go unpunished, even if we were certain that they would never commit another crime. However, after weighing varying considerations in determining sentencing--deterrence, justice, lesson teaching, respect for life and property--there may still be room for crime-control objectives in sentencing.

Studies of the incapacitative effect of incarceration have been conducted and others are presently ongoing. Research on selective incapacitation--identifying high rate offenders, and sentencing them to longer periods of

incarceration--as a crime reduction strategy, has produced promising results. 60/ Policy-makers may wish to look at the finding of such research when considering sentence lengths and the effects of the certainty of punishment. Mandatory minimum sentencing for those identified as career criminals or for those subject to habitual offender programs might have some utility, and may be worthy of serious consideration.

Likewise, the effects of the certainty rather than the severity of punishment on crime commission should be evaluated. Shorter, but certain punishment, and even such alternatives to incarceration as fines, probation, restitution, and community service, might be considered with a view to reducing crime by reserving scarce prison space for violent criminals, while still punishing those convicted of less serious offenses.

Finally, if legislators choose a determinate sentencing system, some attention might be given to the nature of the body that establishes sentencing guidelines. Recent studies cited in this report have compared and evaluated guidelines created by legislatures and by commissions. Policy makers may wish to review these findings when considering sentencing systems.

60/ See Greenwood, Peter W. Selective Incapacitation. R-2817-NIJ, April 1982. Santa Monica, The Rand Corporation, 1982, and Forst, Brian, William Rhodes, James Dimm, Arthur Gelman, and Barbara Mullin. Targeting Federal Resources on Recidivists: Final Report of the Federal Career Criminal Research Project. April 1982. Washington, INSLAW, Inc., 1982.

BIBLIOGRAPHY

American prisons and jails. Washington, U.S. Dept. of Justice, National Institute of Justice. Washington, Govt. Print. Off., 1980. 5 v.

Beha, James A., II. "And nobody can get you out": the impact of a mandatory prison sentence for the illegal carrying of a firearm on the use of firearms and on the administration of criminal justice in Boston. Boston University law review, v. 57, Jan. 1977: 96-146; Mar. 289: 325.

Clear, Todd R., John D. Hewitt, and Robert M. Regoli. Discretion and the determinate sentence: its distribution, control, and effect on time served. Crime and Delinquency, v. 24, Oct. 1978: 428-445.

Crime and public policy. ed. by James Q. Wilson. San Francisco, ICS Press, 1983. 334 p.

Glick, Henry R. Mandatory sentencing: the politics of the new criminal justice. Federal probation, v. 43, mar. 1979: 3-9.

Greenwood, Peter W. Selective incapactation. Santa Monica, Calif., Rand Corp., 1982. 124 p.

Griswold, David B., and Michael D. Wiatrowski. The mergence of determinate sentencing. Federal probation, v. 46, June 1983: 28-35.

Knapp, Kay A. Preliminary report the development and impact of the Minnesota sentencing guidelines. St. Paul, Minnesota Sentencing Guidelines Commission, 1982. 70 p.

Krajil, Kevin, and Steve Gettinger. Overcrowded time. New York, Edna McConnell Clark Foundation, 1982. 48 p.

Lagoy, Stephen P., Frederick A. Hussey, and John H. Kramer. A comparative assessment of determinate sentencing in the four pioneer states. Crime and delinquency, v. 24, Oct. 1978: 385-400.

Mandatory sentencing: the experience of two states. Washington, U.S. National Institute of Justice, 1982. 25 p.

National Research Council. Panel on Research on Deterrent and Incapactiative Effects. Deterrence and incapacitation: estimating the effects of criminal sanctions on crime rates. Washington, National Academy of Sciences, 1978. 431 p.

----- Panel on Sentencing Research. Research on sentencing: the search for reform. v. 1. Washington, National Academy Press, 1983. 315 p.

Petersilia, Joan, and Peter W. Greenwood. Mandatory prison sentences: their projected effects on crime and prison populations. Journal of criminal law and criminology, v. 69, winter 1978: 604-615.

Pierce, Glenn L., and William Bowers. The Bartley-Fox gun law's short-term impact on crime in Boston. In Gun Control. Philadelphia, American Academy of Political and Social Science, 1981. (Annals, v. 455, May 1981) p. 120-137.

Prisoners in 1982. Washington, U.S. Bureau of Justice Statistics, 1983. 5 p.

Setting Prison Terms. Washington, U.S. Bureau of Justice Statistics, 1983. 5 p.

Singer, Richard. In favor of "presumptive sentences" set by a sentencing commission. Crime and delinquency, v. 24, Oct. 1978: 401-427.

Targeting Federal resources on recidivists: final report of the Federal Career Criminal Research Project. Washington, INSLAW, Inc., 1982. 31 p.

U.S. Congress. Senate. Committee on the Judiciary. Comprehensive Crime Control Act of 1983. Washington, U.S. Govt. Print. Off., 1983. 797 p. (98th Congress, 1st Session, Report no. 98-225)

----- Sentencing Reform Act of 1983. Washington, U.S. Govt. Print. Off., 1983. 315 p. (98th Congress, 1st Session, Report no. 98-223)

Von Hirsh, Andrew, and Kathleen Hanrahan. Determinate penalty systems in America: an overview. Crime and delinquency, v. 27, July 1981: 289-317.

Von Hirsh, Andrew. Doing justice: the choice of punishments. Report of the Committee for the Study of Incarceration. New York, Hill and Wang, 1976. 179 p.

Weapons, crime, and violence in America: a literature review and research agenda. Washington, National Institute of Justice, 1981. 592 p.

Wilson, James Q. Thinking about crime. New York, Basic Books, Inc., 1975. 231 p.

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