CALIFORNIA JUSTICE UNDER DETERMINATE SENTENCING: A REVIEW AND AGENDA FOR RESEARCH

PREPARED FOR THE STATE OF CALIFORNIA, BOARD OF PRISON TERMS

ALBERT J. LIPSON AND MARK A. PETERSON

R-2497-CRB
JUNE 1980

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PREFACE

This report describes California's initial experience under the Uniform Determinate Sentencing Act (1976). Because of the preliminary quality of available information, the report does not analyze the effectiveness of the law in meeting the fundamental objectives of criminal sentencing. Rather, the report suggests an agenda for further research on the effects of the law. Despite its preliminary nature, the information documented here should aid California policymakers in assessing the success of the law and in considering appropriate changes to it. The report should also be useful to policymakers in other states and to others interested in sentencing reform and criminal justice research. Pursuit of research projects described in the report would provide substantial information about California's approach to determinate sentencing.

The research described here, completed in 1979, was funded by the California Community Release Board. The Board was renamed the Board of Prison Terms as of January 1, 1980.
SUMMARY

To remedy apparent injustices in criminal sentencing, a growing number of states have adopted determinate or other structured sentencing reforms. California's determinate sentencing law is unique among those in the degree to which the state legislature determines the details of sentencing decisions. Through the law the California legislature not only established general sentencing policy but also limited the variation in sentences, defined the principal bases for such variation, and established the specific lengths of prison terms. For most crimes, judges can still decide not to send convicted felons to prison. However, for those sentenced to prison, judges must calculate the length of prison terms by choosing among a narrow range of statutory options. Similarly, the law severely restricts the power of prison or parole officials to influence the length of prison terms: only by following elaborate due process procedures can they revoke limited amounts of good time.

This report reviews the background and objectives of the California determinate sentencing law and makes preliminary observations about its early impact drawn from interviews and analyses of criminal justice data. It then suggests a series of research projects designed to more fully examine some of its long-range effects.

There have been changes in the operation of the California criminal justice system since the July 1, 1977, effective date of the determinate sentencing law. However, it is difficult to ascribe many of these shifts to the new law per se, since it was adopted during a period of related changes both in California and nationally. Throughout the nation, a growing proportion of convicted felons were being incarcerated. Federal and state courts were extending the due process rights of prisoners. The California legislature passed laws imposing mandatory prison terms and modifying the Probation Subsidy Act; California voters overwhelmingly passed Proposition 7 increasing prison terms for homicide. California voters also passed Proposition 13 which drastically reduced local property tax revenues, leading some to predict that more felons would be sentenced to state rather than local incarceration.4 Taken together, these developments make it difficult to attribute changes in the criminal justice system to the determinate sentencing law or to these other events. However, we can describe operations of the California criminal justice system in the early period of determinate sentencing and point out possible effects of the determinate sentence law.

In general, we make the following observations:

- Under the determinate sentence law, both legislators and judges are more directly accountable to the public for sentencing decisions. It also extends felons greater procedural protection, both at the time of sentencing and while serving prison terms.
- The determinate sentence law has not disrupted the court process. Court personnel appear to have adjusted reasonably well to its complex provisions.

4The Rand Corporation is studying the impact of Proposition 13 on the California criminal justice system. The results of this study are forthcoming.
- Prison commitment rates have increased substantially under the new law. However, this continues a preexisting trend that began in 1972. Determinate sentencing may have extended this trend and stabilized it at a higher level than might otherwise have occurred.

- California faces a major problem of prison crowding. The new law's elimination of Adult Authority "safety valve" parole release powers may have exacerbated this problem.

- The average length of prison terms in the early determinate sentence period is slightly lower than under the old indeterminate system. This may reflect continuation of a trend that began in 1976. However, it is improper to conclude that felons are being sentenced more leniently, because many felons who previously would have served jail terms of at most one year are now serving prison terms. Moreover, recent legislation has increased prison terms.

- Since passing the new law, the California legislature has continued to increase imprisonment and the length of prison terms, all of which will further aggravate prison crowding.

- The determinate sentencing law appears to have contributed to more equitable sentencing by reducing variability in the length of prison terms for those convicted of similar crimes. However, amendments changing penalties have introduced temporal disparities, and the effect of prosecutorial discretion on sentencing variation has not yet been definitively measured.

- The new law's specification of prison terms has turned plea bargaining into more meaningful sentence bargaining and has probably facilitated earlier negotiated settlements of lesser felonies. This may have resulted in more efficient allocation of judicial time. The law may also have generally increased the discretion available to prosecutors to control dispositions and sentences causing some to warn of potential threats to achieving the law's purposes of just and equitable punishment.

- Even though the new law establishes punishment as the primary objective of imprisonment, funds to be expended for prison treatment programs have not been reduced.

- The administrative costs of implementing determinate sentencing do not appear high in light of the substantial costs associated with overall criminal justice administration—but the correctional costs resulting from increased commitments and penalty increases in the aftermath of the law are substantial.

- As anticipated, parole caseloads were substantially reduced during the period the law placed a one-year limit on parole supervision. But caseloads and costs have begun to climb with amending legislation that extended the parole period to three years.

- A small sample of interviewed inmates liked the certainty of sentences and term lengths set up by the original law, but disliked the penalty increase amendments. Inmates were disturbed by the process of retroactive application of the law which they saw as arbitrary.

Prison commitments per 100,000 California population rose from 32.4 in 1977 to 39.2 in 1978, the highest rate in the history of the Department of Corrections.
Early 1979 data indicate that the rate is continuing to grow so that it is likely to exceed 40 in 1979.

There are a number of factors that appear to have influenced the trend toward increased imprisonment. These include: a perception by judges and legislators that the public favors tougher penalties; contested judicial elections in which sentencing practices have been an issue; determinate sentencing law requirements making it easier to monitor judicial performance; and greater willingness of defendants and judges to accept short defined prison sentences for relatively nonserious crimes.

The continuing increase in prison population raises serious problems for the Department of Corrections and the California legislature. Population pressures have already required the double ceiling of inmates. Demographic projections suggest that even aging of the post-World-War II "baby boom" will not avoid future prison crowding because of migration to California of high-crime-prone young men. In turn, excessive prison population will likely contribute to greater prison violence and disciplinary problems. Moreover, crowded prisons invite judicial intervention, potential restrictions on new prison commitments, or the potential return to indeterminate sentencing procedures.

Critics of the California determinate sentence law have questioned the ability of the legislature to cope with its sentencing responsibility. The legislature's recent actions mandating imprisonment and increasing penalties will exacerbate the problem of prison crowding. This early experience suggests the legislature may accede to pressures for more penalty increases, despite their correctional costs.

By authorizing funds for planning prisons, acquiring new prison sites, and studying alternatives to prison construction, the legislature has begun to address the problem of prison crowding. However, even if new facilities are constructed they are unlikely to be available until 1986; interim measures to cope with crowding will be needed in the short term. To reduce prison crowding in the long term the legislature faces the options of (1) reducing prison terms and commitments, (2) increasing community release programs, or (3) increasing prison capacity—none of which appears to be politically attractive.

An agenda for further research proposed in this report is designed to aid the legislature in its related decisions about sentence lengths and prison construction. Four projects would examine sentence severity under the determinate sentence law and how well the law achieves its basic purposes of just punishment, equitable punishment, and public protection. The research would compare the achievement of these purposes under the determinate and indeterminate sentence laws, and could guide modifications to the law to better achieve these purposes within the constraints of reasonable prison costs and populations.

Additional, proposed research would examine effects of the determinate sentence law on prison programs and prison discipline to aid the Department of Corrections and the legislature in decisions about prison policies. Two studies would examine the exercise of prosecutorial discretion under the determinate sentence law and document how court practices under the law limit the legislature's intended changes in sentencing policies. These studies could aid the legislature in designing modifications to the determinate sentence law to assure that its basic objectives are realized.

In addition to guiding future policy decisions about the determinate sentence
law, all of these research projects would provide basic information needed to describe how California’s criminal justice system is functioning under the determinate sentence law. To complete this description, the report proposes a multiple-year study of the legislature’s actions affecting determine sentencing and prisons. Because of the central role of the legislature under the determinate sentence law, this project would serve as the important central focus of a description of the California experience.
ACKNOWLEDGMENTS

Our study has benefited from the assistance we received from other researchers and from many California state officials in both the executive and the legislative branches. We would particularly like to thank Howard Way, Chairman of the Community Release Board, Gary Macomber, the Executive Officer of the Board and its Chief Counsel, Brian Taugher along with other board staff for their cooperation and useful comments on earlier drafts of this report. Jiro Enomoto, Vida Ryan, Robert Lawson, and Ron Shinn of the Department of Corrections provided valuable data or comments that aided our research, as did Dave Halperin of the Judicial Council, Lowell Jensen, the District Attorney of Alameda County, and Michael Ullman of the Assembly Criminal Justice Committee.

Sheldon Messinger of the University of California at Berkeley also made valuable comments on an earlier draft. Rand colleagues Sorrel Wildhorn and Charles Hubay helped to improve the report by their constructive reviews.

We especially want to thank Belle Mosst and Ernestine Miller whose work, as always, was both excellent and essential in preparing this report.

Notwithstanding these acknowledgments, the authors bear full responsibility for the report's content.
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I. INTRODUCTION

This report presents observations about California’s initial experience under the Uniform Determinate Sentencing Act. It also identifies researchable issues and a research strategy that will help California policymakers and others assess the impact of the new law. Current research under way on the California DSL is also described.

The California DSL is part of a national trend in sentencing, moving away from reliance on a “medical model” in which the length of incarceration is based on individual “needs” and rehabilitation toward a system designed more to promote equity, procedural fairness, and just punishment. Presently, Indiana, Illinois, Arizona, Alaska, and North Carolina have adopted varying forms of determinate sentencing. The growing shift toward determinate sentencing has stimulated widespread national interest in the initial experience of these states. This report draws together existing information about what has happened in California since the DSL was adopted. It then presents a series of research proposals that are derived from our review of California’s early experience under the law.

BACKGROUND

California’s pioneering ISL, established in 1917, placed broad discretion in the hands of parole boards (i.e., the Adult Authority and the Women’s Board of Terms and Parole). The judge decided if a felon would get a suspended sentence, probation, or incarceration. A felon committed to state prison was sentenced by the judge to serve a period “prescribed by law,” a term within a statutorily defined range, e.g., from five years to life, one year to life, or six months to life. The Adult Authority or Women’s Board determined how long a term would be served, deciding when a prisoner would be released and the time he/she would remain on parole. The Boards based their decisions on their evaluation of the crime, assessments of the inmate’s institutional behavior (i.e., how well he/she “programmed” within the institution), and their judgment about his/her future danger to society. The inmate could be released on parole after serving a minimum term, but the Adult Authority or Women’s Board could revoke parole, returning the parolee to serve the maximum term. The ISL was criticized for a number of fundamental reasons:

1. Research cast doubt on the usefulness of coercive rehabilitation behind prison walls. For example, after reviewing the literature on treatment,
Martinson concluded that, in general, rehabilitation efforts had little impact on reducing future criminal behavior.\footnote{Martinson (1975).}  
2. Methods to predict individual post-release behavior could not be justified by scientific evidence.\footnote{Norval Morris concluded it was simply beyond our technical capability to predict dangerousness. Others pointed out that behavior within prisons has not correlated well with recidivism.}  
3. Prison terms varied widely for inmates committing similar offenses.\footnote{Prison terms varied widely for inmates committing similar offenses.}  
4. The uncertainty of prison terms permitted arbitrary actions by correctional officials.\footnote{The uncertainty of prison terms permitted arbitrary actions by correctional officials, fostered prison unrest, encouraged "gaming" to convince the parole board that release was warranted, and reputedly diminished the deterrent effect of a prison sentence.}  
5. Parole supervision was questioned as a means to rehabilitate parolees or to protect society. In general, parole agent/parolee contact was found to be too limited and superficial to produce either of these results.\footnote{Parole supervision was questioned as a means to rehabilitate parolees or to protect society. In general, parole agent/parolee contact was found to be too limited and superficial to produce either of these results. Research study results did not show conclusively that supervision successfully reduced recidivism or provided effective services.}  
6. Basic decisions about sentencing policy were being made by the courts in cases challenging Adult Authority actions.\footnote{Basic decisions about sentencing policy were being made by the courts in cases challenging Adult Authority actions. This determination of sentencing policy through judicial review of individual cases prevented development of comprehensive and consistent sentencing policies.}  

The mounting attacks on the basic assumptions of the ISL during the early 1970s paved the way for fundamental change. The legislature adopted new sentencing procedures based on very different philosophical premises. Sentencing responsibility was shifted from the broad discretionary power of appointed boards to highly structured and limited decisions by trial judges.

Under the new system of determinate sentencing, imprisonment has the explicitly stated objective of punishment under procedures designed to assure more just, uniform sentencing practices. The legislature has assumed direct control of sentencing, establishing definite terms for specified crimes. The legislation requires judges to determine the length of prison terms by selecting among defined ranges and to state reasons for selected sentences. The legislation eliminated the Adult Authority and Women's Board, replacing them with the Community Release Board\footnote{In re Lynch 8 C. 3d 410, 503 P. 2d 921, 105 Cal. Rptr. 217 (1972); In re Stanley 54 C. A. 3d 1050, 126 Cal. Rptr. 524 (1976); In re Rodriguez 14 C. 3d 639, 537 P. 2d 384, 122 Cal. Rptr. 552 (1975).} which has circumscribed sentencing discretion (i.e., term fixing for life sentences, decisions about good time, waiver of parole supervision) and a new responsibility to review sentencing disparity. Table 1 compares the major legal provisions of the indeterminate and determinate sentencing laws.

\footnote{See Mitford (1973).}
\footnote{Stanley (1976).}
\footnote{From Hirsch and Hanrahan (1978).}
\footnote{In re Lynch 8 C. 3d 410, 503 P. 2d 921, 105 Cal. Rptr. 217 (1972); In re Stanley 54 C. A. 3d 1050, 126 Cal. Rptr. 524 (1976); In re Rodriguez 14 C. 3d 639, 537 P. 2d 384, 122 Cal. Rptr. 552 (1975).}
\footnote{Johnson and Messinger (1977); Cassou and Taucher (1978).}
\footnote{The Community Release Board was renamed the Board of Prison Terms as of January 1, 1980. Throughout this report we will use the name that was applicable during the period reviewed in the report.}
<table>
<thead>
<tr>
<th>Item</th>
<th>ISL</th>
<th>DSL</th>
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<td>Primary purpose of imprisonment</td>
<td>Rehabilitation</td>
<td>Punishment</td>
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<td>Offenses included</td>
<td>All felonies</td>
<td>Excludes serious crimes resulting in life terms (principally first-degree murder).</td>
</tr>
<tr>
<td>Sentence determination</td>
<td>Courts decide whether to imprison.</td>
<td>Courts decide whether to imprison.</td>
</tr>
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<td></td>
<td>Legislation sets wide range of prison terms.</td>
<td>Legislation sets narrow range of prison terms and increments for aggravated cases.</td>
</tr>
<tr>
<td></td>
<td>Parole Boards set length of prison and parole terms.</td>
<td>Courts use legislated ranges and increments to set length of sentence.</td>
</tr>
<tr>
<td></td>
<td>No public statement of reasons for sentence decision.</td>
<td>Good time can reduce sentence by up to one-third.</td>
</tr>
<tr>
<td></td>
<td>Parole Boards determine sentencing policy within wide ranges set by the legislature.</td>
<td>Community Release Board sets length of sentence for lifers.</td>
</tr>
<tr>
<td>Sentence review</td>
<td>Appellate Court (cruel and unusual punishment)</td>
<td>Appellate Court (cruel and unusual punishment)</td>
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<td></td>
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<td>Parole Boards are Adult Authority and Women's Board of Terms and Paroles.</td>
<td>Parole Board is Community Release Board (now renamed Board of Prison Terms)</td>
</tr>
<tr>
<td></td>
<td>Parole Boards set length within ranges set by legislature.</td>
<td>Parole limited to one year (amended to three years).</td>
</tr>
<tr>
<td>Inmate's procedural rights</td>
<td>Corrections' policy subject to requirements of court decisions.</td>
<td>Legislatively established system of hearings and appeals with right to representation.</td>
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</tbody>
</table>

\(^{a}\)This table includes only major provisions and does not reflect changes in the behavior of criminal justice agencies (i.e., charging and plea bargaining by prosecutors and the "safety valve" role of the parole board in limiting prison population).
Overall Objectives

A rare coalition of liberal and conservative forces in the legislature passed the DSL. The ACLU of Northern California, the Prisoners Union, and other liberal groups supported the law because it provided inmates with certain release dates and equitable sentencing, and reduced institutional control over inmates. Law enforcement and conservatives were dissatisfied with judicial decisions that reformulated sentencing policy and Adult Authority actions they saw as prematurely releasing dangerous offenders. They favored legislative determination of penalties, believing this would result in more equitable sentencing and increased prison terms. While different interest groups supported the change for different reasons, the law embodied several primary objectives:

1. **Just Punishment** - Section 1170 of the Penal Code provides:
   The legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense.

2. **Sentencing Equity** - Persons who commit or at least are convicted of similar crimes should suffer similar penalties. The law provides specified sentences intended to reduce sentencing disparity and provide offenders with a known release date.

3. **Public Protection** - Decisions about the retroactive release of inmates serving ISL terms would be concerned principally with the protection of the public.

4. **Sentencing Accountability** - Basic policy affecting deprivation of liberty would be made by elected legislators. Sentencing decisions for specific cases would be made by elected judges in open court with judges providing publicly stated reasons for their decisions.

5. **Procedural Fairness** - The law provides public hearings for court sentencing and parole decisions by the Community Release Board; with notice, transcripts, and recorded reasons for actions by courts and the Board. It mandated development of sentencing rules by the Judicial Council to guide judges in exercising sentencing decisions; required the Community Release Board to review all prison sentences for disparity; established due process hearing to control denial of prisoner "good time."

6. **Sentence Severity** - The 1976 legislation initially was intended to be "neutral" on the issues of sentence severity, with the objective of approximating the median terms served under old Adult Authority procedures. Sentence severity later became a matter of contention. Some groups allegedly supported the DSL, anticipating that sentences would later be increased by the legislature and that judicial accountability would increase prison commitments. In fact, subsequent legislation, to be discussed below, made important changes increasing sentences over liberal opposition.

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13 For a discussion of the legislative history of the DSL, see Johnson and Messinger (1977) and Cassou and Taugher (1978).
DESCRIPTION OF THE LEGISLATION

The original DSL (SB 42) passed in 1976 was due to go into effect on July 1, 1977.\(^1\) Before that date, however, it was amended in several important ways by AB 476. It was again substantially amended in 1978 by SB 709 and SB 1057. The major DSL provisions, as amended, are summarized below.

The Legislature and Sentencing Policy

Rather than leave discretion to the Adult Authority for setting prison terms within wide ranges, the legislature has defined lower, middle, and upper prison terms for specified offenses (Table 2). Subsequent legislation (SB 709) substantially increased middle and upper terms for violent felonies (Table 2). The legislature also determines the lengths and conditions for imposing “enhancements” that lengthen terms.

Table 2

<table>
<thead>
<tr>
<th>Offense</th>
<th>ISL Term (before 7/1/76)</th>
<th>Original DSL Term(^a)</th>
<th>Term After SB 709(^a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Second degree murder</td>
<td>5-15</td>
<td>5,6,7</td>
<td>5,7,11(^b)</td>
</tr>
<tr>
<td>Voluntary manslaughter</td>
<td>6 mo-15</td>
<td>2,3,4</td>
<td>2,4,6</td>
</tr>
<tr>
<td>Rape</td>
<td>3-life</td>
<td>3,4,5</td>
<td>3,6,8</td>
</tr>
<tr>
<td>Robbery</td>
<td>5-life</td>
<td>2,3,4</td>
<td>2,3,5</td>
</tr>
<tr>
<td>Arson</td>
<td>2-20</td>
<td>2,3,4</td>
<td>2,4,6</td>
</tr>
<tr>
<td>Burglary, first degree</td>
<td>5-life</td>
<td>2,3,4</td>
<td>2,4,6</td>
</tr>
<tr>
<td>Burglary, second degree</td>
<td>1-15</td>
<td>16 mo,2,3</td>
<td>2,3,4</td>
</tr>
<tr>
<td>Assault with deadly weapon</td>
<td>6 mo-life</td>
<td>2,3,4</td>
<td>2,3,4(^c)</td>
</tr>
<tr>
<td>Vehicle theft</td>
<td>6 mo-10</td>
<td>16 mo,2,3</td>
<td>2,3,4</td>
</tr>
<tr>
<td>Forgery</td>
<td>1-14</td>
<td>2,3,4</td>
<td>2,3,4</td>
</tr>
<tr>
<td>Sale of narcotics</td>
<td>5-life</td>
<td>3,4,5</td>
<td>3,4,5</td>
</tr>
<tr>
<td>Possession of narcotics for sale</td>
<td>5-15</td>
<td>2,3,4</td>
<td>2,3,4</td>
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<tr>
<td>Possession of narcotics</td>
<td>2-10</td>
<td>16 mo,2,3</td>
<td>16 mo,2,3</td>
</tr>
</tbody>
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\(^a\)Numbers show lower, middle, and upper prison terms, respectively.
\(^b\)Changed to indeterminate sentence by state initiative.
\(^c\)SB 709 permits great bodily injury enhancement, unavailable under the original DSL.

Changes in Sentencing

The judge first chooses between a prison or probation sentence. If the judge decides on a prison sentence, the defendant must be sentenced to the middle term,

\(^1\)Legislation is described by the bill number, with AB indicating a bill first introduced in the Assembly and SB a bill first introduced in the Senate.
unless there are aggravating or mitigating circumstances justifying the upper or lower term.

Enhancements for a specific term of years may be added to the base term. Facts calling for enhancement may either relate to the specifics of the crime (e.g., use of weapon or firearm, great bodily injury) or to other crimes (e.g., prior prison terms or consecutive sentences). These facts must be pled and proved. There are specified limits on enhancements that constrain base term increases.\(^\text{15}\)

Sentences are imposed during a public sentencing in which the judge must consider factors pertinent to various sentencing decisions. Attorneys can offer arguments or testimony during those hearings. In imposing a sentence, the judge must apply the sentencing rules of the Judicial Council, which include general criteria to guide sentencing decisions, and the judge must state reasons for sentencing decisions.\(^\text{16}\)

All prison sentences are to be reviewed by the Community Release Board for disparity within one year. At any time either the Board or the Director of Corrections may recommend that a case be recalled and resentenced. The sentencing judge may refuse to recall and/or sentence. The Community Release Board sets the term for prisoners who are not sentenced determinately (i.e., lifers).

Changes in Parole

Initially, the DSL limited parole for almost all inmates to a maximum of one year, with violators subject to return to prison for a period up to six months. Life termers were subject to a three-year parole period. However, SB 1057 amended the DSL, increasing the maximum parole period for DSL sentenced offenders to three years and for life terms to five years and extending the revocation period to one year.

Continuation of DSL parole beyond a year and lifer parole beyond three years must be justified by a finding of "good cause" by the Community Release Board. Under the DSL, parole is not considered a continuation of the sentence but a period "tacked on" to the term. The new law defines the purposes of parole as (1) "supervision of and surveillance of parolees" and (2) the provision of services "to assist parolees in the transition between imprisonment and discharge."\(^\text{17}\)

"Good Time"

DSL prison terms may be reduced by a total of one-third for good time. Good time is automatic unless it is taken away in limited increments for misbehavior or failure to participate in work or programs.\(^\text{18}\) For a twelve-month period an inmate can lose a maximum of three months for misbehavior including assault, escape, inciting "successful" riots, falsifying records, possession of weapons and drugs.

\(^{15}\)For example, the total term cannot exceed double the base term unless there is a violent crime or other specified circumstances (Penal Code Section 1170.1 (f)).

\(^{16}\)California Rules of Court, Title 2, Div. 1A, rules 410, 414, 416.

\(^{17}\)Penal Code Section 3000.

\(^{18}\)Defined categories of misbehavior result in loss of credits of 45, 30, or 15 days for each activity, with losses up to 30 days for failure to participate.
During a twelve-month period an inmate can lose 30 days for nonparticipation. Good time that is not lost during a period becomes vested and cannot later be lost. Detailed due process and appeal procedures govern loss of good time.

**Retroactive Application**

A felon is sentenced under the DSL only if his conviction offense was committed on or after the effective date of the law, July 1, 1977. However, the law was applied retroactively, setting a maximum DSL date for all inmates serving indeterminate sentences. To determine the retroactive DSL date, the Community Release Board applied provisions of the DSL to facts that were proven during conviction.

Although the law sets out a mechanical method for estimating the term, the Board can hold an extended term hearing for dangerous offenders. The Board also sets an ISL release date, and felons are released on whichever is earlier—the ISL or DSL date.

**Other Institutional Changes**

The DSL sets up the nine-member Community Release Board which has jurisdiction to set terms for indeterminate sentences. The Board has responsibility for retroactive application of the law; for reviewing prison sentences for disparity; for determining parole revocation, discharge, and extension; and for hearing appeals to Department of Corrections’ denials of “good time.” The Adult Authority and Women’s Board of Terms and Parole were eliminated.

The Judicial Council was mandated to formulate sentencing rules, publish data, conduct sentencing institutes, and make recommendations to the legislature. Sentencing rules for the Superior Court were adopted effective July 1, 1977. These rules describe the objectives of sentencing, criteria for various sentencing decisions, and procedures for imposing sentences. The Judicial Council reviews data on determinate sentencing in California and other states in its *Sentencing Practices Quarterly*.

Overall, the new law makes important changes in forums of decisionmaking, shifting discretion away from the parole board to the legislature, the court, and the prosecutors.

**Exemptions**

The DSL has no specific effect on judges’ decisions to suspend sentence or to place a defendant on probation; it does not affect misdemeanants.

Felons sentenced to death or serving life sentences are exempt from provisions that affect parole hearings and the length of parole supervision. Prisoners receiving life sentences for homicide or other serious offenses are not covered by the DSL; their terms are fixed by the Community Release Board under ISL provisions.

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16*California Rules of Court, Title 2, Div. 1A.*
RESEARCH QUESTIONS AND METHODOLOGY

Research Questions

California adopted its DSL during a period of many changes in criminal justice that were occurring both in California and nationally. These include:

1. Increases in rates of imprisonment.
2. The use of explicit guidelines and standards to determine sentences.
3. Extensions of due process to decisions affecting prisoners.
4. The shift of decisions about personal liberty from administrative boards to courts.
5. Greater openness and public accountability for all government decisions.

These developments, which are continuing today, predated the enactment of the DSL. Indeed, the DSL can be regarded as a codification and institutionalization of these trends. It is frequently impossible to separate the effects of the DSL from the effects of developments that preceded the law and that continue to operate in conjunction with it. Rather, we will describe and propose research to examine changes in the criminal justice system that reflect both the impact of the DSL and the more fundamental long-term developments that predated it.

A number of legal changes have taken place in California coincident with the adoption of the DSL: for example, amendments to the Probation Subsidy Act, enactment of mandatory sentencing laws, and Proposition 13. Again their effects on the criminal justice system cannot be separated from the DSL’s effects.

Because the DSL affects most elements of the criminal justice system, any comprehensive assessment of its impact requires research on many fronts. In this report we suggest research opportunities of primary interest to California policymakers responsible for making the DSL work and to people in other states who want to know how California is coping with its problems in the post-DSL era. Thus this report does not attempt to survey all possible research opportunities provided by California’s shift in sentencing policy. Rather, it suggests policy-oriented research based on initial experience under the law.

Interviews with California policymakers indicate that they want to to know (1) how well the law is meeting its fundamental objectives of just punishment, sentencing equity, public protection, procedural fairness, sentencing accountability, and moderate sentence severity, and (2) the law’s impact on specific institutions or actors in the criminal justice system. We direct our review and suggestions to these issues, emphasizing ones that could benefit from research. Again we note that some of the research can only describe how the California criminal justice system is now operating, without separating the effects of the DSL from other concurrent events.

Methodology

Our review of the California criminal justice system under the DSL is based on interviews and data made available by state agencies. We interviewed persons in

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20In addition, a statewide initiative, Proposition 7, was passed in 1978 expanding the death penalty.
the criminal justice system who either actively participated in the development of the DSL or were affected by its implementation. Interviewees included legislators and legislative staff, judges, prosecutors, defense attorneys, state and local correctional officials, prison inmates, and the members and staff of the Community Release Board.

We examined data provided primarily by the Department of Corrections, the Department of Justice, the Judicial Council, and the Community Release Board. Because we base our review of the new law on limited data and on the impressions of a limited sample affected by it, we regard our early observations as preliminary. We use our review of the DSL to identify for further research continuing questions and issues of future policy interest.

ORGANIZATION OF REPORT

Section II of this report reviews operations of the California criminal justice system during the three years since adoption of the DSL. Legislative actions in adopting and amending the DSL are described, as well as court operations and sentences imposed under the law, the DSL's impacts on corrections, and the added cost throughout the criminal justice system. The implications of our findings for further research are also discussed.

Section III presents several research proposals designed to further describe the effects of the DSL and to provide California policymakers with information about the law to guide their decisions. One research project proposes to examine how the legislature would cope with problems in the post-DSL period. Three other projects would examine prison crowding, correctional rehabilitation programs, and discipline under the DSL. Four proposed projects would examine how court processes would affect sentence lengths and the DSL objectives of just punishment, sentence equity, and incapacitation. Two projects would examine prosecutorial discretion and the effects of legislative changes on court operations.
II. INITIAL EXPERIENCE UNDER THE DSL

The DSL caused a number of important changes in the sentencing process. The law explicitly restructured the role of the legislature, the judges, and the parole board in setting policy and determining the sentence for individual offenders. Changes under the DSL appear to substantially increase the role of prosecutors in determining sentences.

LEGISLATIVE RESPONSIBILITY FOR SENTENCING

An important aspect of the DSL was the legislature's assumption of responsibility for setting prison terms for specified offenses. Several interviewees who had participated in DSL negotiations stated that influential legislators restored this responsibility to the legislature primarily because of their dissatisfaction with Adult Authority actions.

One reason law enforcement and prosecutor groups supported this change was because they believed that the legislature would set higher penalties in response to public demands. The criminal defense bar and some liberal legislators opposed this expanded legislative sentencing role because they feared that public outrage about atypical, heinous crimes would result in penalties that were too high. However, inmate groups expressed their willingness to give the legislature direct control over sentencing policy in order to get rid of the Adult Authority.

On the other hand, people outside the California criminal justice community who were interested in determinate sentencing criticized this central role of the legislature, which they saw as too susceptible to popular passions and pressures. It was suggested that the legislature would consider the interests of the majority of their constituents who were concerned with public protection and demanded harsher penalties, rather than the rights of the unpopular minority directly affected by their actions. Furthermore, the legislature was seen as having little time or expertise to develop a rational sentencing system that would require continuing adjustments and fine tuning.

At this time, three years after the DSL was adopted, we have some limited experience to judge the sentencing responsibility exercised by the California legislature. Sentencing levels under the DSL were almost immediately amended twice. Even before the DSL became effective, AB 476 significantly increased "enhancements" and made important technical and other changes, and only one year later the legislature adopted SB 709, which increased penalties for violent crimes (Table

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23 Ibid.
2). These penalty increases were supported by law enforcement officials led by district attorneys.\textsuperscript{24}

Despite rapid increases in sentence levels, Senator Presley, who authored SB 709 and SB 1057, predicted that few further increases would affect a great number of crime categories because the DSL's major weaknesses were corrected. He favored giving the law a chance to work. While he foresaw the introduction of bills to increase penalties and the enactment of some in response to popular will, he believed the legislature would guard against "emotionalism" and would not pass unwise penalty increase bills.\textsuperscript{25}

Through our interviews we have looked at recent actions of the legislature to see if, as Presley suggested, the legislature would responsibly exercise its direct control over sentencing policy.

The legislature's actions on sentencing are affected by the actions and relative influence of interest groups that take positions on penalty legislation. In general, this legislation pits defense and civil libertarian groups—such as the American Civil Liberties Union, the California Attorneys for Criminal Justice, public defenders, the American Friends Service Committee, and groups representing prisoners—against law enforcement groups such as the California District Attorneys Association, the California Peace Officers Association, and the Attorney General. Judicial groups have been only slightly involved. The Association of Judges has generally not taken positions on penalty bills; the Judicial Council has taken positions only on matters affecting the structure of the judiciary, generally opposing bills like mandatory penalties that limit judicial discretion.

Legislative struggles between these interest groups have taken place primarily in the Senate Judiciary Committee and the Assembly Criminal Justice Committee. The actions of these committees are influenced not only by the positions of interest groups, but also by the ideology of committee members; the positions of legislative leaders, the Governor, the Attorney General, and other party leaders; committee members' perceptions of voter attitudes in their districts; and their relative immunity from political pressures (i.e., how "safe" is their district).

In general, the Senate Judiciary Committee is regarded as more responsive to law enforcement than the Assembly Criminal Justice Committee which for many years refused to pass most measures that would have increased penalties.\textsuperscript{26}

However, members and staff interviewed who have been involved in criminal justice matters believe that the legislature, in recent years, has become more supportive of "law and order" measures, making it more difficult for the Assembly Criminal Justice Committee to kill penalty increase measures. As one interviewee put it: "Politically it's never bad to increase penalties. With assumption of sentenc-
ing responsibility, it’s hard for the legislature to resist pressure to raise sentences. There is nothing to counteract the penalty spiral.” According to one state senator,

Public attitudes have gotten tougher over the last five years I have been in the Senate and the legislature that has responded to the get-tough view. The people are tired of violent crime and want the legislature to “do something” about it. The legislature doesn’t know what to do to solve the crime problem and is frustrated with unsuccessful efforts at rehabilitation. The only thing that we can do immediately is raise penalties. Some tough bills get votes now they would not have gotten several years ago.

Legislators’ perceptions of tougher public attitudes toward crime apparently predate the DSL, but greater sentencing responsibility and public accountability resulting from the DSL seem to make resistance to increased penalties more difficult. As a result, district attorneys and law enforcement have been successful in obtaining penalty increases under the DSL. The most recent and greatest increases in sentences have been directed more to higher punishment for violent offenders. Since SB 709, penalty increases have been restricted to specific crime types, e.g., arson, rape. A 1978 initiative increased penalties for murder.27

But not all legislative action in recent years has been directed toward penalty increases. In 1975 the legislature reduced penalties for possession of limited quantities of marijuana from a felony to a misdemeanor (SB 95, Moscone) and removed certain criminal penalties for sexual conduct by consenting adults in private (AB 489, Brown).

To a great degree, recent legislation increasing DSL penalties and requiring mandatory prison terms reflects the legislature’s changing perceptions of public attitudes about crime and also the positions taken by Governor Brown.

According to several interviewees, pressures on the Assembly Criminal Justice Committee to report out penalty increase measures increased in 1975 after Brown became governor. When Reagan was governor (1966-1974), it was apparently easier to kill many pro-law enforcement bills because majority Democrats were more willing to unite against Republican-sponsored measures. The different partisan control of the legislature and the governorship made it difficult to hold elected officials of either party publicly accountable.

As governor, Brown supported some bills backed by law enforcement groups (i.e., AB 476 and SB 709). Support for penalty increase measures by the Governor, when combined with greater member perception of tougher public attitudes toward crime, made it even harder for Assembly Criminal Justice Committee members to withstand pro-law enforcement pressures. Democrats on the Assembly Criminal Justice Committee became more visible and more accountable to the public and the Assembly as a whole for their actions on penalty bills.

Recent actions by the Assembly Criminal Justice Committee illustrate both its inability to block additional penalty increases and its role of moderating penalty bills. Soon after the legislature reconvened in 1979, the Chairman of the Assembly Criminal Justice Committee sought to hold action on further penalty increase bills

27The so-called Briggs initiative, Proposition 7, expanded capital punishment and also required a 16-year minimum sentence for non-capital first degree murder and a 15-year to life indeterminate sentence for second degree murder.
pending an in-depth study of how the DSL was working. However, the committee could not withstand the political pressure behind measures to hike penalties for mentally disordered violent offenders and sex offenders. To prevent more stringent legislation, the Criminal Justice Committee approved a bill (AB 29), authored by one of its own liberal members, Assemblyman John Knox (D-Richmond), that would have permitted prison authorities to keep apparently dangerous inmates indefinitely if the state could prove every two years that they could not be safely released.28

This bill was adopted rather than a tougher, Republican-backed measure that required life imprisonment without possibility of parole for 20 years for "three-time losers" convicted of violent crimes. (However, the Assembly had been only five votes shy of the majority necessary to discharge this tougher bill from the committee and send it directly to the floor.) After its passage, AB 29 was vetoed by Governor Brown as unworkable and too expensive.29

A more controversial bill (SB 13), sponsored by Senator H. L. Richardson (R-Arcadia), was signed by the Governor after threats to remove it from the Assembly Criminal Justice Committee resulted in a compromise leading to its eventual passage. The bill mandates that sex offenders serve full consecutive terms for each convicted offense and roughly doubles penalties. According to the Judicial Council the bill would make sentences twice the national average for rape, making California rape penalties the toughest in the nation.30 The measure also requires a mandatory prison term for child molestation and other forcible sexual acts. The bill had been turned down by the Assembly Criminal Justice Committee partly because it would distort the penalty structure by making the sentence for repeat rapists higher than for some first degree murderers and partly because they had enacted legislation requiring a mandatory prison term for rapists.31

When it became clear that a coalition of Republicans and Democrats might have enough votes to force the bill from the committee, it was given a second hearing, amended (leaving most of its major provisions intact), and sent to the floor.32 It later passed overwhelmingly.

This bill was similar to one defeated in 1978 (SB 1840) when a motion to pull it from committee lost by only five votes. Some Democratic legislators saw the defeat of some of their colleagues during the intervening 1978 elections as resulting in part from a mail campaign by conservative groups against those who had voted against SB 1840, described as "the toughest rape bill in history."33

The increasing success of threatened motions to remove penalty bills from the Assembly Criminal Justice Committee suggests that the committee's traditional opposition to penalty increases is out of step with the sentiment of most legislators. An escalating campaign against the committee in political campaigns and also in newspaper editorials has helped weaken its capability to withstand pressure to

28Sacramento Bee, June 6, 1979.
29Additional legislation supported by law enforcement may be introduced in 1980 on this subject.
30San Jose Mercury News, August 30, 1979. The only major amendment was to eliminate the proposed expansion of the great bodily injury definition to include psychological as well as physical harm.
32Sacramento Bee, August 30, 1979.
report out "law and order" bills.\textsuperscript{34} When SB 13 was reported out by the committee the ACLU lobbyist called it the "demise" of the committee's "historical function of trying to impose some kind of rationality on criminal justice legislation."\textsuperscript{35} Senator Richardson said the vote represented a change in committee attitudes reflecting the changing mood of the people.\textsuperscript{36} Recent history suggests that the committee may come under increasing partisan attack, and growing pressure to report out more penalty increase bills may be difficult to withstand. Concern about the inability of the legislature to withstand political pressures affecting its sentencing decisions in the wake of its actions on SB 13 has prompted the Chairman of the Criminal Justice Committee to support a legislative study of the DSL that includes examination of the alternative of a Sentencing Commission.\textsuperscript{37}

The increasing prison population and the proposals to increase penalties have prompted the legislature to pay greater attention to correctional costs and needs. In a then highly unusual move, SB 709, which increased prison sentences, was re-referred from the Assembly Criminal Justice Committee to the Assembly Ways and Means Committee to permit consideration of its cost impact.\textsuperscript{38} This was after the Department of Corrections initially opposed the bill on cost grounds. The bill was significantly amended in the Ways and Means Committee. The nature of Ways and Means consideration of the bill is disputed. Most of our interviewees suggested that Ways and Means Committee members did not closely examine the cost-benefit of increased incarceration of offenders because experience under the DSL was too limited to yield data on its initial impact and because they were influenced by a desire to support "law and order." It was also suggested that, to the extent cost was considered at all, it was looked at as a bill that would not come due for several years, and envisioned as minor in the context of a $16 billion budget. Other interviewees commented that important changes to reduce penalties were, at least in part, a result of Department of Corrections estimates of SB 709's effect on prison population and associated costs. SB 13 was also opposed by the Department of Corrections on cost grounds, but was favorably considered by legislative fiscal committees.

Regardless of whether costs were an important factor in legislative deliberations on SB 709 or SB 13, the legislature has been willing to examine correctional needs and may have at least begun to cope with the problem of the increasing prison population. Early in 1978 the legislature contracted for an independent study of Department of Corrections population projections, facilities, and prison classification along with alternate modes of incarceration.\textsuperscript{39} After the passage of SB 709 in 1978, the legislature provided funds for planning and renovation to accommodate the increased prison population (SB 1342). SB 196 approved in 1979 provided the Department of Corrections with funds for new prison design and site acquisition earlier deleted by the Assembly Criminal Justice Committee and established a citizens commission to supervise and report on three studies

\textsuperscript{34}\textit{Sacramento Bee}, September 4, 1979.
\textsuperscript{36}Ibid.
\textsuperscript{37}SB 196 (1979) provides for a study evaluating and making recommendations on the desirability of a Sentencing Commission.
\textsuperscript{38}Reference of penalty increase bills to fiscal committees has since become more commonplace.
examining (1) population, capacities, and housing alternatives within the Department of Corrections, (2) alternatives to correctional placement for convicted felons, and (3) comparisons of ISL, DSL, and sentencing commissions in meeting criminal justice objectives. However, the legislature refused to provide the $100 million reserve fund for prison construction which officials claim is needed because of legislation increasing penalties.

With the passage of the DSL, the legislature took greater control over determining sentences and prison population. Its recent actions show a tendency to increase penalties in response to public and political pressures, and an apparent reluctance to explicitly consider cost as an important factor influencing its actions on penalty increases. Rather, it has chosen to deal with costs later and separately as a budgetary matter. Moreover, it appears that many of the politically active groups supporting penalty increases do not necessarily support new prison construction.

The central issue facing the legislature is how to cope with the problem of rising prison population and prison crowding which has resulted in part from its own sentencing decisions.

To reduce long term prison crowding the legislature has the options of either (1) reducing prison terms and commitments, (2) increasing community release programs, or (3) increasing prison capacity, none of which appear politically attractive.

Even if new prisons are constructed, additional beds are unlikely to be available until 1986. Thus, interim measures are needed to cope with short-term crowding. Driven by increases in population, the legislature has provided funds for correctional planning and site acquisition, but as yet has been unwilling to provide funds for new prison construction. How well the legislature is able to handle both its expanded sentencing responsibility under the DSL and the problem of prison crowding remains to be seen. Early experience suggests that the legislature may well have difficulty withstanding pressures for piecemeal changes in the penalty structure which in turn may raise questions about the rationality of its sentencing policies and may exacerbate the problem of prison crowding.

THE COURT PROCESS

The DSL substantially changed courtroom procedures for determining sentences and also set policy for the sentences to be imposed. The DSL imposes a more structured procedure for calculating sentences and greater formality for sentencing in open court. Under both the ISL and DSL, sentences are imposed during a separate sentence hearing, but this hearing is defined somewhat more formally under the DSL. In addition to permitting arguments, if either side has cited circumstances in support of an aggravated or mitigated sentence prior to the hearing, the court must receive evidence offered about such motions. The court must reach a decision for all pertinent sentencing choices under the DSL and must also state publicly the reasons for sentencing decisions. For felons sentenced to prison, judges must determine the sentence length by selecting one of three legislatively determined penalties for each conviction offense. If facts that require an enhancement
have been pled and proved, the judge must either strike the enhancement or impose the additional number of years appropriate for the enhancement.40

The Prosecutor

Although the DSL did not explicitly change other court procedures, the law probably did have a substantial impact on the roles of judges, prosecutors, defense attorneys, and defendants in the entire court process. Almost all judges and trial attorneys interviewed agreed that under the DSL, prosecutors have become even more important in controlling courtroom procedures and outcomes. They suggest that under the DSL, prosecutors' decisions about filing and attempting to prove charges and enhancements determine eventual sentences to a greater degree; that prosecutors have greater power in plea/sentence negotiations because of the availability of enhancements. Some interviewees also expressed concern about greater "charge inflation" under the DSL.

There is a general recognition among judges, prosecutors, and defense attorneys that prosecutors are more likely to file available charges dealing with weapon use and victim injury. On the other hand, there are differences about whether filings for prior records and multiple charges have increased or decreased.41

Interviewed trial judges and attorneys do not observe changes in the proportion of cases going to trial. However, some observers report that cases going to trial now are more likely to involve very serious or multiple charges, presumably because defendants in these cases believe they will get nothing from the bargain and therefore choose to go to trial. In contrast, some interviewed trial attorneys report that minor property or assault cases are quite easily settled, frequently with an agreement to sixteen months in prison. In part, this may reflect a defendant's willingness to take a short prison term to avoid the long probation term associated with a local jail sentence.42 Some defense attorneys believe they are able to negotiate easier settlements for these cases than they were in the past. Interviewed judges also report that these relatively minor criminal cases are usually easy for settlement.

Data for 1978 (Table 3) indicate an appreciable increase over the previous year in the percent of convictions based on guilty pleas at the time of arraignment and a decline in cases where a defendant changes from a not guilty to guilty plea after arraignment. Perhaps this reflects the greater certainty, under the DSL, of what a case is "worth," so that a bargain can be struck at the time of arraignment for minor cases or cases involving no serious questions about guilt.43

40The court can strike an enhancement that is called for by proven facts, but it cannot strike a finding that the facts are proved.
41Some interviewed prosecutors claim there is increased attention to filing available enhancements dealing with prior convictions; others indicate information about priors frequently is unavailable to the charging deputy, and filing of charges by the trial deputy may be somewhat inconsistent. Some prosecutors and judges believe the limited additional time that can be added for a consecutive sentence gives little incentive for pursuing multiple charges. While some interviewed prosecutors claim an attempt to file all available multiple charges, other prosecutors and some judges see no greater tendency to file multiple charges under the law. We review the frequency of filings under the DSL, but have no comparable data about the ISL.
42Typically, a jail term imposed as a condition of probation would be followed by three years probation, whereas DSL prison terms formerly had only a one-year parole period. Amendments to the DSL have increased the maximum period of parole to three years. If considerations of the length of post-incarceration supervision affect a defendant's willingness to accept a prison sentence, we should observe a decrease in the rate of bargained prison sentences.
43Unfortunately, we do not have data to show what types of cases now receive earlier guilty pleas.
Overall, there is a general recognition that the DSL makes the bargaining process easier and more meaningful. The parties can typically bargain over a set of alternative dispositions offering fairly fine differences in the level of punishment. Sentence bargains are apparently facilitated by this flexibility in choices, as well as by the certainty that the agreed upon sentence will in fact be carried out. In particular, defendants appear to be willing to agree to a bargained sentence if they know that the punishment cannot be increased. Data indicate that many cases are being disposed of more quickly. Attorneys and judges identify those more readily settled cases as those involving the least serious offenses. If so, this suggests that the DSL may have accomplished a more desirable use of courtroom resources—ready disposition of minor cases, permitting more thorough consideration of serious cases.

Table 3

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SOURCE: Bureau of Criminal Statistics.

Many interviewees observed that this power of prosecutors entails the greatest potential threat to equitable sentencing. Critics of determinate sentencing suggest that prosecutors' exercise of broadened discretions will make it impossible to achieve more equitable sentencing. They allege that expanded plea bargaining power (i.e., through decisions to charge enhancements or recommend mitigating circumstances) will permit prosecutors to obtain convictions on weak evidence; that prosecutors' willingness to bargain away charges or enhancements to avoid trials will formalize the disparity in sentencing between felons who plead guilty and those who go to trial; that variations in prosecutorial practices will produce greater disparity among felons convicted from different areas.

Some critics also suggest that prosecutors will be able to abuse their broadened discretion since, unlike judges, they are not required to publicly disclose reasons for their bargaining decisions. Moreover, recent legislation increasing penalty levels increases the bargaining strength of prosecutors. Judicial sentencing decisions are constrained by the DSL sentencing structure, the Sentencing Rules for Superior Courts, and the requirement to publicly state reasons for sentence choices. Judicial sentencing decisions are also constrained by prosecutorial decisions—judges can only select among sentencing options proved by prosecutors. However, prosecutori-

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44Alschuler (1978).
al decisions about filing or negotiating are substantially unconstrained by statutory or regulatory structures and need not be publicly justified. Unfortunately, at this time there is no available information about how prosecutors use their discretion or the effects of prosecutorial discretion on sentence equity.

The Judges

Some critics oppose the DSL because of its sentencing complexity and suggest that judges would find its provisions too difficult to implement. Trial court judges received training on the law through sentencing seminars. As a result, most judges apparently can work within the technical complexities of the law. Department of Corrections personnel report that while the first sentences under the law were often calculated improperly, now relatively few sentences have such problems.

Most dispositions are still determined by negotiations. Under the DSL, judges continue to differ in their involvement in the plea/sentence bargaining process. Some judges report becoming directly involved in sentence negotiations with the defense and prosecution.45 Other interviewed judges report they will not enter directly into negotiation processes.46 Frequently, the parties will negotiate only a guilty plea and agree that the case will result in a prison sentence, but they will leave the length of the sentence up to the judge. Bargains for a plea without a specified sentence seem to reflect both the increased power of the judge in actually determining the sentence independently of a bargain and the increased power of the prosecutor who can obtain an agreement to prison sentence without having to stipulate to the length of that sentence.

Because of the increased importance of the conviction offense in determining the sentence, judges may be rejecting more negotiated pleas. Without the Adult Authority to "look past" the conviction offense and base sentences on the real nature of the crime, the conviction offense now becomes more significant, determining the actual prison sentence. As a result, some prosecutors observed greater judicial scrutiny of negotiated settlements.

The DSL mandated the Judicial Council to develop sentencing rules and criteria about granting or denying probation; imposing lower or upper terms; imposing concurrent or consecutive sentences; and adding to sentence length for enhancement such as a prior prison term, carrying a deadly weapon, or inflicting great bodily injury. The resulting Judicial Council Rules provide guidance on factors to be considered in sentence determination, but they have been criticized as being "so broad and flexible that retention of total discretion in the judiciary is the clear effect."47

Some interviewees suggested that the reasons provided by judges for their sentencing decisions either are "boilerplate" or otherwise provide little informa-

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45These judges report mediating sentences between both parties, e.g., the judge may send a defendant charged with second degree murder to prison because of the prosecutorial interest in the case. However, the judge may accept a plea to manslaughter and sentence under the lower term in order to obtain the defense agreement to the sentence.

46With these judges, the prosecution and defense may enter into a negotiated sentence which the judge is free to reject. However, if the judge rejects the negotiated sentence, defendants can withdraw their offer to plead guilty.

47Smith and Newcomb (1977).
tion that would form the basis for systematic review of the true factors governing sentence determinations. As of now there has been no systematic analysis of judges' written sentencing reasons. However, appellate courts have reviewed reasons given for sentences, reversing cases where the reasons are inconsistent with the DSL or Sentencing Rules.

Probation Departments

Probation departments apparently have come to play a more important role in the sentencing process through their preparation of the presentence investigation (P&S) reports describing the results of their investigation of the circumstances and background of particular cases. There is a universal recognition that P&S reports have been changed substantially under the DSL because they are more pertinent to sentencing determination.

The role of the P&S report in the sentencing decision appears to vary between cases that have been tried and those that have not. Judges indicate that when they have tried a case they use relatively little information from P&S reports, drawing principally upon information about prior record. Some interviewed judges and prosecutors were critical of the quality of the P&S report, claiming the quality has deteriorated since the passage of Proposition 13. The content of P&S reports apparently has changed, with more emphasis on facts of the crime and a defendant's prior record and less emphasis on a defendant's background and social circumstances. Probation offices also frequently calculate suggested sentences and cite sentencing factors in the Judicial Council Regulations that pertain to the particular case. Defense attorneys indicated increased attempts to provide input for P&S reports, while prosecutors reported little involvement in the preparation of the reports. Because of the evidentiary nature of the P&S report, probation officers in some counties are being called more often to testify during sentencing hearings.

Sentence Hearings

Interviewees all agree that attorneys rarely use sentencing hearings to present evidence about sentence choices. As one judge said, the P&S report serves as a sentencing hearing. However, a few private attorneys are using it in an attempt to obtain more favorable sentences for their clients. This introduces the possibility that resources available to a defendant and his attorney may substantially influence the quality of sentencing hearings, and therefore the nature of the sentence. This could introduce economic bases of disparity in sentencing.

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48 When a referral from the court is received, the probation department looks into the facts of the case and develops pertinent factual, social, and psychological information.

49 Also, under AB 469, P&S reports must now contain statements by victims.

50 As a result, there has been some shift toward defining special court probation officers who testify in cases whether or not they prepared the presentence report. This reflects the conclusions on the part of some probation administrators that ordinary probation officers were "torn apart" during sentencing hearings. Although there apparently has been a substantial increase in the frequency of probation officers' testimony during sentencing hearings, such testimony still occurs in relatively few cases.
SENTENCING PRACTICES

Incarceration

Since the effective date of the DSL, more convicted defendants are being incarcerated in prison than previously. However, it is unclear whether the recent commitment increases can be attributed to effects of the DSL. Prison commitments began to rise before the DSL, and several data sets differ about whether the increase is greater since the DSL came into effect.

California Department of Corrections (CDC) data show a dramatic rise in the number of male felons received from the court after the effective date of the DSL. Male felon prison commitments per 100,000 California population rose from 32.4 in 1977 to 39.2 in 1978, the highest recorded rate in the history of the Department of Corrections (Fig. 1). The Corrections data show steady increases in commitment rates since 1972, but in 1978 there is a discontinuity in this steady pattern with the 1978 rate showing a substantially greater increase than for any previous year.

Fig. 1—Prison commitment rate per 100,000 population (CDC data)

The first year that commitments show the major effect of the DSL is 1978, since 62 percent of Department of Corrections commitments in this year were made under the new law. In 1977 there were relatively few DSL commitments, 13 percent after the July 1 effective date.
Data compiled by the Bureau of Criminal Statistics of the Department of Justice (BCS) shown in Fig. 2 substantiate the increase in state prison commitments since 1972, and also show the increase continuing through 1978. Unlike the Corrections data, however, BCS does not show a jump or unusual increase in the 1978 rate but a smaller rate of increase from 1977 to 1978 than between previous years.\textsuperscript{52}

Like the Corrections data, preliminary analysis by The Rand Corporation of dispositions of a sample of robbery cases in Alameda County also shows a substantially greater imprisonment rate for offenders who are charged with robbery and convicted of any crime. The Rand study shows that prison and Youth Authority commitments for similar offenders committing similar robberies rose from 38 under the ISL to 60 percent under the DSL.\textsuperscript{53} The size of this increase is so great that it is unlikely that it would have occurred in the absence of the DSL. As further evidence of changed sentencing practices, the study found a decrease in the average seriousness of cases resulting in prison commitment under the DSL.

Finally, the Judicial Council has published data showing that for most conviction offenses the prison commitment rate rose during the first year after the DSL became effective, but has continued at a steady level through the most recent quarters for which data are available (Table 4).

The increased proportion of Superior Court convictions resulting in both jail and probation rather than in straight probation (Fig. 2) is the result of changes in the cases reaching the Superior Court. Legislation adopted in 1969 authorized prosecutors to file either as a felony or misdemeanor certain complaints that had been previously treated as felonies (P.C.17b(4)). (Similarly, judges could sentence such cases as misdemeanors even if they were filed as felonies (P.C.17b(5)).

As a result, between 1971 and 1976, the less serious crimes remained in the Municipal Court and fewer felony arrests reached the Superior Court. The number of defendants sentenced by the Superior Court to prison or to both jail and probation remained fairly constant, but these represented a larger proportion of Superior Court sentences.

However, to some extent the growing substitution of combined jail and probation sentences for straight probation probably represents a trend toward increased incarceration. Even after 1976, when the effects of P.C.17b(4) should have stabilized, Superior Courts continued to increase the proportion of combined jail and probation terms while decreasing sentences to straight probation. Since 1975 the incarceration total has continued to climb. The Los Angeles County Sheriff's Department reports a substantial increase in the number of jail inmates serving terms of 30 or more days subsequent to the effective date of the DSL (Fig. 3), which may indicate that judges are placing in jail convicted felons who previously would have

\textsuperscript{52}Because of their different sources of data, prison commitment rates reported by BCS generally differ from those published by the CDC. The CDC counts the number of defendants received by institutions; BCS counts Superior Court commitments to institutions. The BCS reports that 10 to 15 percent of the felons are sentenced to prison more than once for crimes committed in more than one county. Although the felon would only be sent to prison once, he/she would be recorded by BCS for multiple prison commitments. However, the fact that BCS commitment counts are much lower than those of CDC suggests significant underreporting to BCS. Another factor accounting for differences in rates is that BCS calculates its rates for prison terms as a percent of all Superior Court convictions, including disposition of those arrested for felonies but convicted of misdemeanors under provisions of P.C.17b(4) and 17b(5).

\textsuperscript{53}The Rand study is being conducted by Charles Hubeck as part of Rand's Research Agreements Program funded by the National Institute of Law Enforcement and Criminal Justice, LEAA, U.S. Department of Justice, Grant No. 79-NI-AX-0055. A report on the study will be published in the near future.
Fig. 2—Sentences in the superior courts (BCS data)
<table>
<thead>
<tr>
<th>Item</th>
<th>9/30/77&lt;sup&gt;a&lt;/sup&gt;</th>
<th>12/31/77&lt;sup&gt;a&lt;/sup&gt;</th>
<th>3/31/78&lt;sup&gt;a&lt;/sup&gt;</th>
<th>6/30/78&lt;sup&gt;a&lt;/sup&gt;</th>
<th>9/30/78&lt;sup&gt;a&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>State total, all crimes</td>
<td>27</td>
<td>30</td>
<td>33</td>
<td>33</td>
<td>33</td>
</tr>
<tr>
<td>Selected crimes:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robbery</td>
<td>56</td>
<td>61</td>
<td>64</td>
<td>62</td>
<td>63</td>
</tr>
<tr>
<td>Assault with deadly weapon</td>
<td>25</td>
<td>30</td>
<td>26</td>
<td>34</td>
<td>24</td>
</tr>
<tr>
<td>Burglary, first degree</td>
<td>37</td>
<td>37</td>
<td>39</td>
<td>42</td>
<td>47</td>
</tr>
<tr>
<td>Burglary, second degree</td>
<td>26</td>
<td>30</td>
<td>31</td>
<td>32</td>
<td>34</td>
</tr>
<tr>
<td>Grand theft, amount over $200 and unspecified</td>
<td>20</td>
<td>21</td>
<td>20</td>
<td>23</td>
<td>26</td>
</tr>
<tr>
<td>Grand theft (auto) and vehicle theft</td>
<td>19</td>
<td>26</td>
<td>27</td>
<td>28</td>
<td>36</td>
</tr>
<tr>
<td>Forgery</td>
<td>28</td>
<td>33</td>
<td>37</td>
<td>33</td>
<td>37</td>
</tr>
<tr>
<td>Checks (NSP)</td>
<td>24</td>
<td>28</td>
<td>22</td>
<td>15</td>
<td>22</td>
</tr>
<tr>
<td>Receiving stolen property</td>
<td>21</td>
<td>22</td>
<td>23</td>
<td>24</td>
<td>20</td>
</tr>
<tr>
<td>Possession of narcotics</td>
<td>22</td>
<td>26</td>
<td>32</td>
<td>33</td>
<td>40</td>
</tr>
<tr>
<td>Possession of narcotics for sale</td>
<td>35</td>
<td>43</td>
<td>48</td>
<td>49</td>
<td>41</td>
</tr>
<tr>
<td>Sale of narcotics</td>
<td>22</td>
<td>29</td>
<td>31</td>
<td>31</td>
<td>32</td>
</tr>
<tr>
<td>All drug law violations</td>
<td>17</td>
<td>21</td>
<td>24</td>
<td>24</td>
<td>96</td>
</tr>
</tbody>
</table>


<sup>a</sup>For quarter ending this data.
Fig. 3—Prison population and sentences (sheriff's department data)
received straight probation terms. Increases in local jail terms, along with short DSL prison sentences, apparently reflect a general increase in the severity of sentences for less serious crimes.

In short, all of these data suggest that the incarceration rate in California has increased since 1972 and continues to increase under the DSL. These trends indicate that the DSL must be seen as part of a continuing pattern in California of sending more and more convicted felons to prison and to jail. This pattern might have continued past July 1, 1977 even without the DSL. On the other hand, the DSL may have extended this trend and stabilized it at a higher level than would otherwise have occurred.

There are a number of possible reasons for the toughening of sentencing practices. During the 1970s public support for tougher "law and order" was demonstrated by the passage of statewide initiatives on the death penalty. Also, a number of incumbent Superior Court judges have lost elections after campaigns attacking their "lenient" sentencing practices. The legislature reacted to this public mood by adopting several mandatory prison sentencing laws and by modifying the Probation Subsidy Act, removing incentives to utilize probation and local jail for certain offenses. Even when prison is not mandated, judges are aware of the public and legislative interest in punishing convicted felons with incarceration.

Several features of the DSL may have magnified the effect of this trend toward tougher sentencing. The DSL requires judges to provide reasons for their decisions. This greater public accessibility under the DSL makes it easier for the media and interested citizens to monitor judicial sentences, thereby increasing the political risks from lenient sentencing. Also, under the DSL, judges can set a limited prison term for felons convicted of relatively non-serious crimes without the possibility that a parole board will inappropriately extend their terms. Finally, limiting parole length to one year under the initial law apparently encouraged defendants to accept short prison terms rather than go to the county jail or the California Rehabilitation Center (for civilly committed drug addicts) which carried longer probation or parole terms.64

Sentence Lengths

While there is a clear increase in the number of felons being sentenced to prison at this time, comparisons of the length of time served in prison under ISL and DSL are difficult to make and interpret. First, sentence lengths under ISL have varied from year to year, depending on Adult Authority policies (Table 5). Second, the length of a DSL sentence depends on the amount of good time credit received by an inmate. While most inmates appear to be earning most of their credits, the Department of Corrections does not yet have hard evidence about good time. Moreover, Department of Corrections and Community Release Board policies on good time could change sharply, affecting the overall lengths of terms. Recognizing these limitations, we examine current terms and then estimate the effects of SB 709, which increased penalties for serious offenders.

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64 Parole has now been lengthened to a possible three years. If parole considerations were important explanations of the increased prison rate, we would expect to see a drop in the prison rate.
Data provided by the Department of Corrections suggest that at least initially under the DSL (i.e., before AB 709 had an impact) prison terms were shorter than terms served under the ISL. Table 5 lists the median term served for inmates released to parole from 1970 to 1977, as well as the median length of terms imposed by courts through June 30, 1979, under the DSL.

The imposed DSL sentences are slightly longer than previous ISL terms. However, to be comparable to data on lengths of prison terms under the ISL, those DSL sentences must be reduced to reflect credit for time served in local jails (a median of three months) and credit for good time, which can be up to one-third of the imposed sentence. As Table 5 reflects, the median time served in prison for inmates receiving DSL sentences during the first years of the law will be between 21 and 33 months. Since the Department of Corrections reports that most inmates are

<table>
<thead>
<tr>
<th>Year</th>
<th>Median ISL Prison Term</th>
<th>Number Released to First Parole</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>36</td>
<td>5007</td>
</tr>
<tr>
<td>1971</td>
<td>36</td>
<td>6261</td>
</tr>
<tr>
<td>1972</td>
<td>32</td>
<td>4914</td>
</tr>
<tr>
<td>1973</td>
<td>30</td>
<td>2939</td>
</tr>
<tr>
<td>1974</td>
<td>35</td>
<td>2694</td>
</tr>
<tr>
<td>1975</td>
<td>39</td>
<td>6918</td>
</tr>
<tr>
<td>1976</td>
<td>34</td>
<td>5430</td>
</tr>
<tr>
<td>1977</td>
<td>30</td>
<td>6734</td>
</tr>
<tr>
<td>1978</td>
<td>26</td>
<td>6726</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Imposed Sentence (Median)</th>
<th>Actual Term (Median)</th>
<th>Number Sentenced</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977-78</td>
<td>36</td>
<td>21-33</td>
<td>2227</td>
</tr>
<tr>
<td>1978-79</td>
<td>36</td>
<td>21-33</td>
<td>6590</td>
</tr>
</tbody>
</table>


- a1978 releases include 205 inmates serving DSL sentences and 43 serving both ISL and DSL sentences.
- aMedian length of prison sentence imposed by the court.
- bRange of prison term that could actually be served. Minimum reflects credit for time in jail before delivery to prison (3 months) and one-third reduction for good time; maximum reflects no good time credit.
receiving most of their good time, the median will be closer to the low end of this range.

Thus the DSL appears to have reduced the average length of California prison terms from their levels of the past nine years, but the significance of this is clouded. Shorter prison terms under the DSL may reflect only the increased rate of incarceration. Under the DSL a larger proportion of felons sentenced to prison have been convicted of property crimes that carry shorter sentences. Their greater numbers would bring down the average, even if term lengths stayed the same for each conviction offense.

If the DSL did shorten the lengths of terms, we should see a reduction for specific conviction offenses. Other Department of Corrections data can be used in comparing ISL and DSL terms for inmates convicted of robbery (Table 6), burglary (Table 7), and assault (Table 8). Again assuming that inmates receive most of their good time, these data show a substantial reduction in the length of prison terms for burglary. However, the data suggest only a slight reduction in the initial DSL sentences for violent crimes. Initial DSL prison terms for robbery were slightly shorter than ISL terms of inmates released in 1977, and they were about the same as ISL terms for 1978 releasees. Initial DSL term lengths for inmates convicted of

---

Table 6

**Comparison of ISL and DSL Median Length Terms for Robbery**

(In Months)

<table>
<thead>
<tr>
<th>Year</th>
<th>ISL: 1st Degree Robbery with Firearm</th>
<th>DSL: 2nd Degree Robbery</th>
<th>All Robbery</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>--</td>
<td>38 (365)</td>
<td>--</td>
</tr>
<tr>
<td>1976</td>
<td>--</td>
<td>30 (417)</td>
<td>--</td>
</tr>
<tr>
<td>1977</td>
<td>48.5 (190)</td>
<td>29 (111)</td>
<td>29-44 (756)</td>
</tr>
<tr>
<td>1978</td>
<td>45 (220)</td>
<td>27 (380)</td>
<td>29-45 (1524)</td>
</tr>
</tbody>
</table>


---

\[a\] Length of term served for inmates released that year.

\[b\] Range of prison term that could actually be served for inmates sentenced that year. Minimum reflects credit for time in jail before delivery to prison (3 months) and one-third reduction for good time; maximum reflects no good time credit.

\[c\] Number of inmates released or sentenced indicated in parentheses.
Table 7

**COMPARISON OF ISL AND DSL MEDIAN LENGTH TERMS FOR BURGLARY**
(In Months)

<table>
<thead>
<tr>
<th>Year</th>
<th>1st Degree</th>
<th>2nd Degree</th>
<th>All Burglary</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>43 (213)</td>
<td>31 (961)</td>
<td>--</td>
</tr>
<tr>
<td>1976</td>
<td>34 (175)</td>
<td>24 (782)</td>
<td>--</td>
</tr>
<tr>
<td>1977</td>
<td>31 (243)</td>
<td>22 (1002)</td>
<td>13-21 (597)</td>
</tr>
<tr>
<td>1978</td>
<td>29 (260)</td>
<td>19 (1249)</td>
<td>13-21 (1283)</td>
</tr>
</tbody>
</table>

**SOURCES:** See Table 6.

a. Length of term served for inmates released that year.

b. Range of prison term that could actually be served for inmates sentenced that year. Minimum reflects credit for time in jail before delivery to prison (3 months) and one-third reduction for good time; maximum reflects no good time credit.

c. Number of inmates released or sentenced indicated in parentheses.

Table 8

**COMPARISON OF ISL AND DSL MEDIAN LENGTH TERMS FOR ASSAULT**
(In Months)

<table>
<thead>
<tr>
<th>Year</th>
<th>Assault With Firearm</th>
<th>Assault Without Firearm</th>
<th>All ADW's</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>--</td>
<td>41 (455)</td>
<td>--</td>
</tr>
<tr>
<td>1976</td>
<td>--</td>
<td>34 (324)</td>
<td>--</td>
</tr>
<tr>
<td>1977</td>
<td>40 (35)</td>
<td>33 (367)</td>
<td>21-33 (312)</td>
</tr>
<tr>
<td>1978</td>
<td>37 (52)</td>
<td>29 (376)</td>
<td>29-45 (683)</td>
</tr>
</tbody>
</table>

**SOURCES:** See Table 6.

a. Length of term served for inmates released that year.

b. Range of prison term that could actually be served for inmates sentenced that year. Minimum reflects credit for time in jail before delivery to prison (3 months) and one-third reduction for good time; maximum reflects no good time credit.

c. Number of inmates released or sentenced indicated in parentheses.
assault increased even during the first two years of the law.\textsuperscript{55} Median DSL terms for inmates who were sentenced for assault during 1977 were less than ISL terms, but DSL terms for inmates sentenced during 1978 were slightly higher than ISL terms.

In short, available data suggest that the DSL somewhat reduced the length of prison terms. This reduction reflects, at least in part, the greater number of short prison terms given inmates whose relatively minor conviction offenses would likely have resulted in a jail term during the most recent years under the ISL.

Again, it is difficult to separate the effect of the DSL on term lengths from the effects of other concurrent events.

Between 1968 and 1976, median prison terms were well above even the longest lengths of terms during the prior 23 years (Fig. 4). Moreover, term lengths were unstable, fluctuating markedly from year to year as Adult Authority policy changed.\textsuperscript{56}

The data in Tables 6, 7, and 8, however, show that between 1975 and 1978 there was a decline in ISL terms for robbery, burglary, and assault.\textsuperscript{57} Thus, the DSL may have only extended an already present trend toward shorter terms. Perhaps, even without the DSL, California would have returned to a more stable pattern of somewhat shorter terms.

To summarize, it is improper to conclude that felons are being sentenced more leniently now than under the ISL. First, ISL sentences varied considerably during the last nine years. DSL sentences appear comparable to the shorter ISL sentences in 1977 and 1978 and to the historic length of California prison terms. Second, more felons are serving prison terms than before. Many of these persons would previously have served less than a year in county jail and are now serving prison terms of a year or more. The inclusion of the greater number of short prison terms decreases the average term among all prisoners. However, because the prison terms generally exceed the jail terms previously served by some felons, it is likely that, on the whole, more time is being served by felons than previously under the ISL.

Senate Bill 709 substantially increased middle and upper terms for violent felonies committed after January 1, 1979. As yet, few defendants have been sentenced under these provisions. Using data provided by the Jucicial Council, it is possible to estimate the maximum effects of SB 709 on sentences and to compare sentencing after the effect of SB 709 with ISL prison terms for inmates released during 1977. Our method of estimating is likely to overestimate the probable future term length.\textsuperscript{58}

\textsuperscript{55}This may reflect effects of plea bargaining of 1977 cases: Less serious assaults were bargained and sentenced in 1977; more serious assaults took longer to reach a bargain or verdict and were sentenced in 1978.

\textsuperscript{56}The Adult Authority alternated between releasing many inmates and releasing few (Fig. 5). Of course, more inmates remained in prison during years of few releases. When many inmates were released in a subsequent year, they tended to have served longer sentences.

\textsuperscript{57}Retroactive application of the DSL may partially account for reductions in median term lengths in 1977 and 1978, since many inmates who received lower retroactive DSL terms were released before the end of their ISL terms.

\textsuperscript{58}In estimating the effects of SB 709 we have assumed that the sentencing practices of judges would remain unchanged. We assume that if a judge had sentenced a defendant convicted of robbery to the upper term prior to SB 709, he would also have sentenced that defendant to the upper term after the effect of SB 709. With this assumption, we add the appropriate increments in base terms for defendants receiving upper and middle terms. Of course, this assumption is unrealistic. Particularly in cases where the upper terms have been increased substantially—as for rape—the substantially more severe upper term will probably change judicial sentencing practices. Some judges will become less willing to impose
Fig. 4—Length of terms for California prisoners released between 1945 and 1978
SB 709 will mean longer sentences for many felons sentenced after January 1, 1979. By our estimates, one-third of the convicted robbers will serve at least eight months longer than robbers with DSL sentences before SB 709. Almost two-thirds of the convicted burglars will serve an extra eight months, and another quarter will serve an extra sixteen months. Half of the rapists will serve an extra sixteen months, with another third serving at least 24 months longer.

The resulting median sentences will be greater than DSL sentences before SB 709, but they will not be appreciably different from the ISL terms of inmates released in 1977 (Table 9). If felons earn all of their good time, median sentences for robbery and burglary will still be less after SB 709 than 1977 ISL terms. The median sentences for rape, with the greatest increase under SB 709, would be one-half year longer than 1977 ISL terms even if a convicted rapist earned all of his good time.

These comparisons of medians do not show the biggest effects of SB 709: increases in the lengths of extreme terms, felons who receive particularly long prison sentences. As evidence about extreme cases, Table 9 indicates the mean of sentences under present sentencing practices and our estimates of the mean sentences under SB 709. The greater increase in means than medians under SB 709 shows that the amendment will have a substantial impact on the longest sentences.

**Sentence Decisions**

Table 10 indicates judicial decisions to sentence on the lower, middle, or upper base term for a variety of conviction offenses and groups of offenses. The table, derived from data reported by the Judicial Council for the period from July 1, 1977 to September 30, 1978, indicates that across all sentences judges are most likely to impose the middle term. Failing this, judges are substantially more likely to impose the upper rather than the lower term. The use of upper terms is particularly strong for crimes against persons, where judges are twice as likely to sentence defendants under the upper than the lower term. For sex offenses judges are almost four times as likely to choose the upper rather than the lower term; for robbery cases the upper term is almost three times as likely to be chosen. Among property and drug offenses judges are more likely to select the middle term. For theft and drug offenses they use the upper and lower term about equally often.

In contrast, the Judicial Council's sentencing practice data reflect narrower use of the DSL provisions for adding enhancements to sentences and for imposing consecutive sentences. As Table 11 indicates, the only enhancements that are used frequently are those dealing with arming and weapon use. Prosecutors and judges appear to be making thorough use of weapon enhancements for robbery. For 60 percent of robbery cases the prosecution pled and proved either an arming allegation (P.C. 12022) or use allegation (P.C. 12022.5). Together, weapon enhancements under one of these provisions are imposed in 50 percent of the robbery cases. For these more severe upper terms. As a result there will be fewer upper term sentences, and our estimates of increased sentences under SB 709 will be somewhat overstated. Thus, we probably overestimate the mean and perhaps the median sentences after SB 709.

*Medians do not fully reflect the greatest increases in SB 709 sentences for upper terms since they show changes only for inmates at the middle of the distribution.*

<table>
<thead>
<tr>
<th>Item</th>
<th>Median</th>
<th>Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary manslaughter</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ISL 1977^a</td>
<td>3.0</td>
<td>n.a.</td>
</tr>
<tr>
<td>DSL Pre-SB 709^b</td>
<td>2.4-3.7</td>
<td>2.3-3.6</td>
</tr>
<tr>
<td>DSL Under SB 709^b,c</td>
<td>3.0-4.7</td>
<td>3.0-4.7</td>
</tr>
<tr>
<td>Forcible rape^d</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ISL 1977^a</td>
<td>3.9</td>
<td>n.a.</td>
</tr>
<tr>
<td>DSL Pre-SB 709^b</td>
<td>3.0-4.7</td>
<td>3.2-4.9</td>
</tr>
<tr>
<td>DSL Under SB 709^b,c</td>
<td>4.4-6.7</td>
<td>4.7-7.2</td>
</tr>
<tr>
<td>Robbery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ISL 1977^a</td>
<td>3.1</td>
<td>n.a.</td>
</tr>
<tr>
<td>DSL Pre-SB 709^b</td>
<td>2.4-3.7</td>
<td>2.7-4.2</td>
</tr>
<tr>
<td>DSL Under SB 709^b,c</td>
<td>2.4-3.7</td>
<td>3.0-4.6</td>
</tr>
<tr>
<td>Burglary, First degree</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ISL 1977^a</td>
<td>2.6</td>
<td>n.a.</td>
</tr>
<tr>
<td>DSL Pre-SB 709^b</td>
<td>1.7-2.7</td>
<td>2.3-3.6</td>
</tr>
<tr>
<td>DSL Under SB 709^b,c</td>
<td>1.7-2.7</td>
<td>3.0-4.7</td>
</tr>
</tbody>
</table>


^aLength of term served for inmates released that year.

^bRange of prison term that could actually be served for inmates sentenced that year. Minimum reflects credit for time in jail before delivery to prison (3 months) and one-third reduction for good time; maximum reflects no good time credit.

^cSB 709 effects were established from sentencing practices as reported by the Judicial Council. Estimates assume that decisions to impose upper, middle or lower term will remain unchanged after SB 709.

^dPenalties were subsequently increased by SB 13.

Personal crimes other than robbery, arming, or weapon use, enhancements are pled and proved in about one-third of the cases and imposed in 27 percent of the cases.

Enhancements for prior prison terms are used much less frequently than they could be. Fewer than 10 percent of inmates receive an enhancement for a prior prison term, although between 30 and 40 percent of California prison inmates have one or more prior prison terms. Across all crimes, an allegation of any prior prison term defined by P.C. 667.5b is pled and proved in only 8 percent of the cases. A one-year enhancement for this allegation is added to a sentence in only 6 percent of the cases.

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Table 10

JUDICIAL SENTENCING DECISIONS AND IMPOSITION OF BASE TERMS

<table>
<thead>
<tr>
<th>Offense</th>
<th>Percentage of Sentences in</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Lower Term</td>
</tr>
<tr>
<td>All personal crimes</td>
<td></td>
</tr>
<tr>
<td>Homicide</td>
<td></td>
</tr>
<tr>
<td>Assault</td>
<td></td>
</tr>
<tr>
<td>Sex crimes</td>
<td></td>
</tr>
<tr>
<td>Robbery</td>
<td></td>
</tr>
<tr>
<td>All property crimes</td>
<td></td>
</tr>
<tr>
<td>Burglary</td>
<td></td>
</tr>
<tr>
<td>Theft</td>
<td></td>
</tr>
<tr>
<td>Drug crimes</td>
<td></td>
</tr>
<tr>
<td>All crimes</td>
<td></td>
</tr>
</tbody>
</table>


The more severe enhancement for a prior prison term for a violent crime under P.C. 667.5a is rarely pled and proven, although the Judicial Council data for this enhancement cannot be interpreted precisely. There appear to be no substantial differences between personal and property crimes in the imposition of enhancements for priors.62

There is relatively little use of the great bodily injury (GBI) enhancement. Overall it has been imposed in only about 2 percent of the determinate sentence cases.

Finally, approximately 25 percent of all determinate sentence cases involve sentencing for multiple counts. Consecutive sentences are imposed in 40 percent of multiple count cases or in 10 percent of all cases. The imposition of consecutive sentences is somewhat higher in personal crimes; consecutive sentences were imposed in 14 percent of all personal crimes and in 16 percent of the personal crime of robbery.

Our interviews with participants in the criminal justice system suggest that plea bargaining practices may be an important factor influencing the infrequent imposition of enhancements. Almost all participants in the judicial process indicate that defendants now appear to be more willing to accept a prison term as part of the sentence bargain. As part of the bargain for a prison term, prosecutors will frequently drop an enhancement for a prior record.

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62 There may be several reasons for the minimal use of prior record to enhance prison sentences. Prosecutors report that prior record is "hard to prove." Documentation of prior record is often absent; prosecutors may learn of priors only during the course of a case—long after filing. Prosecutorial practices may also discourage use of prior enhancements. The establishment of a prior requires a search for and introduction of evidence that is unlike evidence usually found in criminal cases. Instead of physical evidence or witness testimony, the enhancement for a prior requires the search for and establishment of a "business record," evidentiary procedures on which prosecutors may have little experience or interest. Perhaps for these reasons, enhancements for priors may be the charge most likely to be negotiated away to obtain a defendant's plea.
<table>
<thead>
<tr>
<th>Principal Offense</th>
<th>Total Cases</th>
<th>Arming (12022)</th>
<th>Use (12022.5)</th>
<th>Great Bodily Injury (12022.7)</th>
<th>Prior Prison (667.5b)</th>
<th>Multiple Charges</th>
<th>Consecutive</th>
<th>Concurrent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robbery</td>
<td>1743</td>
<td>24%</td>
<td>19%</td>
<td>36%</td>
<td>31%</td>
<td>5%</td>
<td>42%</td>
<td>10%</td>
</tr>
<tr>
<td>Personal, other than robbery</td>
<td>1638</td>
<td>11%</td>
<td>8%</td>
<td>23%</td>
<td>19%</td>
<td>3%</td>
<td>31%</td>
<td>7%</td>
</tr>
<tr>
<td>Personal, including robbery</td>
<td>3381</td>
<td>18%</td>
<td>14%</td>
<td>30%</td>
<td>25%</td>
<td>4%</td>
<td>3%</td>
<td>9%</td>
</tr>
<tr>
<td>Property</td>
<td>3151</td>
<td>1%</td>
<td>1%</td>
<td>.5%</td>
<td>.5%</td>
<td>.5%</td>
<td>10%</td>
<td>7%</td>
</tr>
<tr>
<td>All cases</td>
<td>7787</td>
<td>9%</td>
<td>7%</td>
<td>13%</td>
<td>11%</td>
<td>2%</td>
<td>2%</td>
<td>8%</td>
</tr>
</tbody>
</table>

Disparity in Sentencing

Equitable sentencing was a principal goal of the DSL. The law sought to avoid the previously great differences in sentences for defendants who committed similar crimes. The elaborate sentencing structure established by the DSL attempts to prevent great variation in sentences. Also, the DSL added a new review procedure, the disparate sentence review, to monitor and reduce unwarranted variability in judicial sentencing practices. Under that procedure the California Community Release Board is to review all prison sentences within one year of their commencement to discover sentences that are disparate. Judges will be notified of cases that received shorter or longer sentences than comparable cases, or cases that received prison terms when comparable cases rarely received such terms. Sentences that are found to be more severe than similar cases will be returned to the sentencing judge with a motion for a recall and resentencing.

The disparate sentence review, by an administrative board reviewing judicial sentencing practices, is a unique procedure for providing equitable sentencing. The Community Release Board plans empirically based simulations of each of the sentencing decisions made by judges for choices such as selection of base terms, enhancements, and probation versus prison. The review process has not been fully implemented at the time of this report. Rather, the Board has conducted a series of limited "interim" reviews. For the first 725 cases received between July and December 1977, the Board found no sentences that were disparately long.

An Abt Associates study suggests that the DSL has reduced the overall variability in the lengths of prison terms. The range for the middle 50 percent of all DSL prison terms is 1.5 years compared to 2 years for the ISL years from 1968 to 1975. For burglary, the middle 50 percent range is one-half that of the ISL years.

Before the DSL, disparity in the rate of prison commitments per 100,000 population varied between geographical areas of California, with less populated areas sending a greater proportion of convicted felons to prison than more populated areas (see Table 12). Recent data indicated that this geographic variability in prison commitment rates continues but that highly populated areas of the state now have commitment rates more comparable to those of lower population areas. Commitment rates have gone up in most areas of the state, but this increase is greater in the most populous counties. Among the many factors that may account for geographical differences in commitment rates are population differences, differences in arrest and prosecutorial policies, differential impacts of mandatory sentencing, and changes in state policies, including fiscal limitation (Proposition 13) and modification of the local reimbursement formula in the Probation Subsidy Act.

A striking change in imprisonment rates between the pre- and post-DSL periods was the atypically rapid increase in rates for San Francisco and Alameda counties. While the commitment rate per 100,000 population increased from 30 to 39 statewide, the rate for San Francisco went up from 50 to 84 and for Alameda from 25 to 46.

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6See Gelman et al. (1977). For each prison case and a sample of probation cases, the Board has collected information bearing on matters involved in the Judicial Council's Sentencing Rules. Information is coded from the abstract of judgment, charging documents, Bureau of Identification "rap sheet," probation officers' reports, the reporter's transcript of proceedings at the time of sentencing, and any other documents submitted for use in sentencing. Data will be collected for over 10,000 cases per year.

6Ku (1979).
Table 12

**CALIFORNIA PRISON RATE PER 100,000 RESIDENTS, BY COUNTIES**

<table>
<thead>
<tr>
<th>Counties</th>
<th>1976</th>
<th>1978</th>
</tr>
</thead>
<tbody>
<tr>
<td>So. California</td>
<td>25.08</td>
<td>37.59</td>
</tr>
<tr>
<td>Los Angeles County</td>
<td>27.87</td>
<td>39.05</td>
</tr>
<tr>
<td>9 others</td>
<td>22.47</td>
<td>35.94</td>
</tr>
<tr>
<td>San Francisco Bay</td>
<td>29.34</td>
<td>39.41</td>
</tr>
<tr>
<td>Alameda</td>
<td>24.95</td>
<td>46.01</td>
</tr>
<tr>
<td>San Francisco</td>
<td>50.22</td>
<td>83.65</td>
</tr>
<tr>
<td>7 others</td>
<td>26.48</td>
<td>28.11</td>
</tr>
<tr>
<td>Balance of state</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 Sacramento Valley Counties</td>
<td>40.94</td>
<td>43.79</td>
</tr>
<tr>
<td>7 San Joaquin Valley Counties</td>
<td>37.45</td>
<td>51.43</td>
</tr>
<tr>
<td>22 others</td>
<td>34.25</td>
<td>37.05</td>
</tr>
<tr>
<td>State total</td>
<td>30.03</td>
<td>39.26</td>
</tr>
</tbody>
</table>

**SOURCE:** California Department of Corrections.

*Per 100,000 residents.*

Finally, the DSL and its several amendments have created the basis for systematic differences in sentences among defendants who committed their crimes at different times. Provisions for retroactive application of determinate sentences attempted to eliminate the temporal disparity between offenders who committed crimes prior to the July 1, 1977 effective date of the DSL and those who committed crimes after that date. However, amendments to the DSL only apply to offenders who committed the act after the effective dates of the amending legislation. Thus, the amendments have created the basis for temporal disparities in sentences.

**CORRECTIONAL PROCESS**

Although the DSL was directed primarily at the sentencing process, the law has also had important effects on the correctional process. The law modified the term of parole and the length of parole revocation and made a number of changes in prison disciplinary procedures. The law also created “good time,” a procedure that was unnecessary with indeterminate sentences. The greatest impacts of the DSL, however, have certainly been indirect, resulting from changes in the sentencing process. Of these, the most important has been the change in prison population.

**Prison Population**

As noted earlier, there has been a sharp increase in the commitment rate to prison. The immediate effect on prison population was mitigated both by the sur-
plus of bed spaces within the Department of Corrections and by the release of many inmates under the retroactive provisions of the DSL.

Between December 31, 1977 and December 31, 1978, there was a 12 percent increase in the felon population in prison.65 Both the Department of Corrections and outside analysts66 predict that the population of inmates within the Department of Corrections will continue to increase during the next decade. Although the predictions were questioned in a study by Approach Associates (1978), recent Department of Corrections predictions have been more accurate than those offered by Approach Associates.67

In short, the DSL’s greatest impact on corrections has been to aggravate the problem of prison crowding. This is for two reasons: (1) the law eliminates the “relief valve” formerly provided by the Adult Authority for reducing prison population; (2) the law may have encouraged and institutionalized increased judicial imposition of prison sentences.

Figure 5 illustrates both of these phenomena. It shows the California men’s prison population between 1958 and 1978, and the impact of the courts and the Adult Authority.68 Prison population grew steadily between 1958 and 1968, followed by sharp fluctuations in the population during the next decade. Between 1958 and 1968, both the courts and the Adult Authority seemed to maintain relatively stable policies with regard to their respective functions. Although both the sentencing and release functions were stable, they were creating a crisis for the prison system. Because the courts were sending more men to prison than the Adult Authority was releasing, the prison population increased at an average rate of 500 inmates per year. This resulted in substantial crowding of the California prison system, reaching a peak in 1968.

This crisis in prison population led to attempts both to reduce the intake and to increase the discharge of prison inmates. One attempt—probation subsidies—may have slightly lowered the number of men sent to prison between 1968 and 1972.69 In contrast, the Adult Authority was a major instrument in reducing the prison population. During the decade from 1968 to 1977 the Adult Authority went through successive waves of releasing high percentages of prison inmates, followed by periods of limited release of inmates. Figure 5 indicates that the prison population cycles were caused exclusively by policy changes in the Adult Authority, rather than the courts.

Questions can be raised about the Adult Authority’s exercise of its parole

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67In fact, the DSL facilitates accurate prediction of future prison populations. Population predictions under the ISL were difficult, because of the sharp changes in Adult Authority policies. Now population predictions will be based primarily on sentencing practices of California judges which have been remarkably stable over time. The gradual changes in judicial sentencing practices should permit reasonable future extrapolations (Fig. 5). Population predictions are also facilitated by the sentencing structure imposed by the DSL, which permits reasonable estimates of sentence lengths for inmates who are serving prison terms (Nagin, 1979).
68Figure 5 shows the number of male felons who were newly sentenced to prison each year and the net effects of the Adult Authority during each of the years, i.e., the number of male inmates paroled or discharged minus the number of parolees returned to prison during that year. Table A.1 in the Appendix reports the data from which Fig. 5 was derived.
69Probation subsidies probably had a stronger impact on court policy, reducing the prison commitment rate per 100,000 population between 1968 and 1972 (Fig. 1). However, because of increasing state population the actual number of new prison inmates remained constant (Fig. 5).
release powers between 1968 and 1977, and concerns about it policy were certainly instrumental in the adoption of the DSL. However, the DSL virtually eliminated the use of parole releases to reduce prison population. There simply is no relief valve for reducing overcrowded prison conditions.

Figure 5 also indicates why California prisons will continue to face a problem of growing population. As we have considered, in contrast to the stable pattern in judicial sentencing practices for the previous 15 years, the rate of prison sentences has grown steadily from 1972 through 1978. The number of male felons sent to prison per year doubled during this period. Now, the DSL appears to have contributed to the substantially greater, apparently stable increase of prison sentences. This increase, together with the elimination of the relief valve provided by the

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20Should prison release decisions have been made on the basis of prison population constraints rather than on a consideration of the effects of released inmates on the free population? Did alternating periods of liberal and constricted parole release create intolerable disparities between inmates entering prison at different times?  
21With determinate sentencing, the Community Release Board now has only limited power to release prison inmates, i.e., the 15 to 20 percent of prison inmates serving life sentences.  
22Increasing judicial use of imprisonment as a sentence for felons predated adoption of the DSL. Nevertheless, the DSL and the numerous mandatory sentencing laws adopted in recent years have contributed to the growth in prison sentences and have probably institutionalized those practices at a relatively stable pattern in which prison sentences may be double the rate of previous years.
Adult Authority, will produce continued and substantial growth in the California prison population. The Department of Corrections faces a problem of crowding and necessary double ceiling. Depending on one's assumptions, they either face the problem now or will face it in the near future.23

The Department has projected that its male felon population will grow to exceed the single cell capacity of its institutions by 9,000 in 1988.24 It has proposed a building program to house 4,000 male and 400 female inmates in new institutions not exceeding 450 in capacity. The cost of construction is estimated at $250 million, with operating expenses over the first 10 years anticipated at $850 million. While the legislature has approved planning, design, and site acquisition funds for the new institutions, it has not yet provided construction money.

New prison construction has been opposed by a coalition of civil libertarian and church groups.25 They offer a number of arguments about why new construction is unnecessary:

First, California prison sentences are too high compared to the national average and other countries—they should be reduced.

Second, as a related argument, increasing the prison population does not reduce crime. Despite both of these contentions, however, the legislature has already increased the length of sentences.

Third, critics of prison construction argue that the prison population will decline by the time new prisons are open, in part because of a national decline in the population of high-crime prone young men. But projections over the next 20 years do not suggest that demographic trends will produce a substantial reduction in California prison populations. Because of the steady immigration to California, demographers project that any decrease in the number of young men will be slight and delayed in California. Persons between the ages of 18 and 29 constitute the largest group of migrants into California. As a result, state population projections for 18- to 35-year-old men show an increase of 15 percent between 1975 and 1985, at the same time that the passing of the 1950s “baby boom” will decrease the number of men in this age group in most other states.26 The number of 18- to 35-year-old men in these years will likely have a larger proportion of Mexican-Americans and blacks who have higher rates of imprisonment than whites.27

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23At the present time, there may be some uncertainty about whether the California prison population exceeds its capacity. The Department of Corrections has space available in minimum security facilities; it has deactivated a large facility at San Luis Obispo and several camps. The Department accounts for all of these restrictions on bed space: High security risk inmates cannot be placed in minimum facilities and also inmates attempt to avoid the California Correctional Center at Susanville, a minimum facility; the deactivated facility at San Luis Obispo is a severe fire hazard, according to fire inspectors. Several camps were given to and are now productively used by other state agencies and, even if they were available, their minimum security status would not help the Department's present need.


25Groups opposing added prison construction include the American Friends Service Committee, the Unitarian Universalist Service Committee, the American Civil Liberties Union, and California Attorneys for Criminal Justice.

26The 18-35 age population is projected to decline 6 percent between 1985 and 1995, and decline by less than 1 percent between 1995 and 2000. See Population Projections for California Counties 1975-2000, Series E-150, Department of Finance, December 1977, Sacramento, California. Recent discussions with state officials responsible for population projections suggest that immigration of persons between 18 and 35 years of age is understated in their 1977 report.

27Our rejection of these arguments does not mean that we agree with present sentencing policies or that we accept that minority young men should be imprisoned at higher rates. However, reasonable
Fourth, critics of new prisons argue that many nonviolent criminals now sent to prison under the DSL do not need to be there. Judicial Council records indicate that under the DSL twice as many California inmates enter prison with burglary convictions than with robbery convictions, in sharp contrast to all of the years under the ISL since 1969. Critics argue further that many of these inmates convicted of nonviolent crimes could be placed in existing minimum security facilities. The California Department of Corrections is currently studying the use of community placement and other programs as alternatives to placing convicted felons in prison. Corrections is also studying its classification procedures to determine whether a greater proportion of inmates can be placed in less secure facilities.

Even if some inmates are shifted among security levels within existing institutions, this alone will not avoid the substantial crowding projected by the Department of Corrections. Further, given the present political climate, it appears unlikely that there will be a reduction in the proportion of prison terms or the lengths of prison sentences. Thus the state will face the long term problem of major prison crowding unless some new prison facilities are constructed or the state makes a substantial commitment to placing thousands of felons in community programs.

**Discipline**

Disciplinary incidents in California prisons have increased sharply since the beginning of this decade. The extent of this problem is illustrated in Fig. 6, which displays the rate of several types of disciplinary incidents per 100 California prison inmates.

The overall rate of incidents has gone up *sevenfold* since the beginning of this decade. By far the greatest increase has occurred for possession of narcotics, with a rate in 1978 seventeen times greater than that in 1970. Other incidents have also increased greatly; all non-drug incidents increased fivefold within eight years. Officials in the Department of Corrections attribute much of the disciplinary problem to the increased use of narcotics in the institutions, an interpretation supported by the data in Fig. 6. A major increase in the incidents of narcotics possession occurred between 1975 and 1976. This was followed a year later by a substantial increase in all other incidents.

Although California prisons clearly have major disciplinary problems, it is not clear how this problem has been affected by the DSL. Advocates of that law claimed that the DSL would substantially reduce prison disciplinary problems, because prison inmates who know when they are to be released would have better morale. On the other hand, critics of the law argued that the disciplinary problems would become substantially worse, because inmates no longer had the threat of an extended term by the Adult Authority and because the DSL imposed strict due process considerations that make it difficult to discipline inmates by removing good time.

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78 *Sentencing Practices Quarterly*, Judicial Council of California, No. 4, Table 1, cited in Ku (1979).
Perhaps of greater importance, the substantial growth in prison population engendered by the DSL may substantially aggravate problems of prison discipline.

Figure 6 does not show any clear effects of the DSL on prison discipline. In 1978, under the DSL, the incidence of disciplinary events has increased over the level of 1977; however, this increase is less than has occurred in the previous two years. Informal discussions with prison officials, again, provides ambiguous information. Some officials believe that the loss of the Adult Authority "stick" and greater due process protection have given prison inmates substantially more independence, aggravating disciplinary problems. Other observers, both inside and outside of the Department of Corrections, question whether the parole-release power of the Adult Authority was ever an effective device for controlling inmates.79

Provisions for good time were added at the request of the Department of Corrections because of fear that loss of Adult Authority powers would make it harder to control inmate behavior. Corrections first reported relatively light use of the provisions of the DSL permitting loss of good time. The procedures for remov-

79They suggest that both before and after the DSL, the Department of Corrections used a range of informal punishments to control inmate behavior. Prison officials can impose light punishments, such as weekend or holiday lockup, short-term loss of privileges, or extra work for minor rule violations. For serious rule violations, officials generally use segregation, custody-status change, isolation, or transfer to less desirable institutions.
ing good time are cumbersome, and Corrections personnel were still interpreting ambiguous language used in the DSL to authorize loss of time. Recent comments indicate that the denial of good time is increasing. Inmates we interviewed generally perceive denial of good time as a potent sanction. Although denial of good time might currently be used sparingly, it is another among many threats that can be used by prison authorities to impose discipline.

Some Department of Corrections staff and some inmates wonder whether the DSL's elaborate due process provisions for removing good time have created greater distance between inmates and Correctional staff and eliminated informal procedures for resolving inmate disputes. For example, in the past some fights between inmates were resolved by having inmates confront each other under supervision of prison staff. Now, with hearings, witnesses, and so on, these informal procedures have been forgone and antagonisms that lead to fights may be hardened rather than resolved.

**Prison Treatment Programs**

Some interviewees said they believed that the DSL specification of punishment as the purpose of imprisonment and the elimination of Adult Authority incentives and direction would cause many treatment programs to be curtailed or eliminated. However, in the view of Corrections officials the legislature did not intend to eliminate these programs. The legislature has, in fact, increased amounts budgeted for various treatment and education programs (see Table 13). This annual budget increase, together with the DSL provision of good time for program participation, may indicate that the legislature continues to recognize the potential value of treatment programs.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Psychiatric services</td>
<td>5.5</td>
<td>5.5</td>
<td>7.0</td>
</tr>
<tr>
<td>Counseling services</td>
<td>10.7</td>
<td>9.9</td>
<td>12.2</td>
</tr>
<tr>
<td>Academic education</td>
<td>5.0</td>
<td>5.4</td>
<td>5.7</td>
</tr>
<tr>
<td>Vocational education</td>
<td>5.6</td>
<td>5.7</td>
<td>5.7</td>
</tr>
<tr>
<td>Leisure time</td>
<td>1.0</td>
<td>1.0</td>
<td>1.1</td>
</tr>
<tr>
<td>Religion</td>
<td>0.9</td>
<td>0.9</td>
<td>1.0</td>
</tr>
<tr>
<td>Treatment total&lt;sup&gt;a&lt;/sup&gt;</td>
<td>28.7</td>
<td>28.2</td>
<td>34.8</td>
</tr>
</tbody>
</table>

**Table 13**

**Department of Corrections Expenditures and Budget for Institutional Treatment Programs, 1977-78 to 1979-80**

(in $ million)

<sup>a</sup> Totals do not add due to rounding.
The DSL has also had surprisingly slight effect on inmate participation in various prison treatment programs. Department of Corrections staff report that the level of participation in education and other treatment programs declined slightly after the effective date of the statute, but has subsequently returned to the previous level. Participation in vocational education programs remained at 13 percent of the inmate population for the year beginning July 1, 1977, the same rate as the prior fiscal year. We do not have comparative figures for academic education, but 28.6 percent of the inmate population participated in academic programs during the second quarter of 1978.

The DSL probably affected inmates’ attitudes and reasons for participation in programs. Instructors in education programs report that inmates are more motivated to take courses when they see them as benefiting themselves on release, not just satisfying the suggestions or expectations of the Adult Authority. As a result, the education program has shifted away from basic high school education toward skills programs to aid inmates in coping after their release. Some correctional staff report observing that inmates are likely to plan their time constructively. Others suggest that inmates generally do little to plan their time on a long-range basis and only begin seriously considering their options for the future as their release date nears. This suggests that an early time fix has particular benefits for short-termers.

**Retroactive Application of the DSL**

The DSL required the Community Release Board to set a release date calculated under provision of the DSL for all inmates serving ISL sentences. This DSL release date could be extended by the Board, if the inmate’s conviction offense or criminal history met one of five conditions set out in the DSL. A retroactive DSL sentence could only be extended after an extended term hearing. Inmates were given notice of such hearings and were represented by counsel.

The Board screened about 18,000 cases for potential extended term hearings between August 5, 1977 and September 12, 1978. Approximately 15,000 cases were given the retroactive DSL date calculated under the mechanical formula specified in the statute without an extended term hearing. Cases identified as potentially appropriate for extended terms were scheduled for hearings upon agreement of two members of the Board. Extended term hearings were scheduled for 3043 inmates. Of cases scheduled for extended term hearings, 2057 or 68 percent of the scheduled cases received extended terms. "Average" term extensions ranged between two and three years for different offenses. Maximum extensions greatly exceeded these averages. Table 14 indicates the average and maximum term extension for seven conviction offenses.

Interviewed Community Release Board members and staff involved in retroactive application of the law said they would have preferred either that the law had not been retroactively applied or that the Community Release Board had been given general guidelines rather than "mechanistic" rules to calculate terms. Most

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40The method for calculating this date is specified in the DSL and is based on the longest middle term among an inmate’s conviction offenses, plus applicable enhancements, if any.
41Data were obtained from internal Community Release Board memoranda dated March 2, 1978; June 12, 1978; and October 20, 1978.
other interviewed observers concluded that the Board administered a difficult task as well as could be expected. However, interviewed inmates were highly critical of the Board's extended term hearings.84

Among those inmates released under retroactive provisions were about 100 offenders transferred from state prisons to Atascadero State Hospital because they were found to be mentally ill. These inmates had served an average 3.8 years beyond the discharge date computed by the Community Release Board under the DSL. Many had been convicted of serious crimes including murder, manslaughter, first degree robbery, assault, rape, or kidnapping. These inmates were released either on parole or directly to the community.

The Community Release Board followed the behavior of those released for several months and concluded that their arrest and recommitment experience was no greater than that of other offenders with similar records released from institutions, although some had exhibited "bizarre" behavior. Preliminary review of data supplied by the Department of Justice, which followed up on those released for one year, suggests that their post-release behavior may not be significantly different from that of other paroled prisoners. Forty-six percent had no subsequent criminal history during a one-year follow-up period compared to between 40 to 46 percent of parolees not designated mentally disordered violent offenders who remained "clean" in the years 1973 through 1977.85

A similar DOJ follow-up of mentally violent offenders released from the De-

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84Inmate objections were probably intensified by the Board's policy of notification about retroactive sentences. The Board first notified all inmates of their release date mechanically calculated under provisions of the DSL. Inmates scheduled for extended term hearings were notified of the hearings after receiving this mechanically determined date. Thus, many inmates felt that the Board had been two-faced in first "giving," then extending the retroactive DSL date.

85Forty-three of 91 offenders released from Atascadero had no arrests or parole violations. Data were not provided for six additional released prisoners who died after release, several of whom committed suicide. If all the deaths are considered as resulting from subsequent criminal activity, then 42 percent rather than 46 percent had no subsequent criminal history. For data on parole outcomes, see Outcome for Male Felons Released to California Parole from 1973 through 1977, Sacramento Research Office of California Department of Corrections, October 31, 1978.
partment of Corrections California Medical Facility at Vacaville indicated that 40 percent (30 of 74) had no reported subsequent criminal history after one year. A more extensive study of the pre-release behavior and subsequent criminal history of these offenders would be necessary to determine whether their post-release criminal behavior varied from that of other offenders with similar criminal histories.

Inmate Attitudes about DSL

Interviews with a small sample of inmates suggest they view an early time fix as the major benefit of the DSL, that it produces a positive general effect on inmate morale. The DSL reduced some of the anger and depression resulting from what many considered arbitrary denial of parole. It permitted inmates to take responsibility and plan for their time. It reduced the pressure to “program” just to please the Adult Authority and made participation in programs more voluntary.

Inmates interviewed generally supported SB 42 and were pleased when it passed, but they felt betrayed by subsequent passage of AB 476 and SB 709. They believed SB 42 should have been given a chance to work before it was substantially amended to add enhancements and increase terms. The passage of subsequent legislation soured many on the DSL and negatively affected morale. Also, many inmates were suspicious of the Community Release Board and regarded its conduct of the extended term hearings to be at least as arbitrary as Adult Authority action.

Parole Surveillance

The effectiveness of post-release parole supervision has been questioned by many commentators.66 The drafters of SB 42 would have preferred to eliminate a parole term altogether, but it was not politically feasible to do so.67 At the same time that the role and function of parole were being questioned, the Department of Corrections and the California Probation, Parole and Correctional Association separately attempted to define a new role for parole and defended the value of parole supervision.68

Under the ISL a parolee could be returned to prison to serve up to his maximum term for violating conditions of parole. This created great power for parole authori-

66See Stanley (1976) and von Hirsch and Hanrahan (1978). These authors raise the following issues: (1) no research findings support the value of parole supervision; (2) supervision causes internal psychological stress to those subject to it, and conditions of parole that do not constitute crimes unfairly become the basis for technical parole violations and deprivation of liberty; (3) limited services are provided by parole agents and their “helping role” conflicts with surveillance for purposes of crime control; and (4) parole constitutes an extension of punishment incompatible with fundamental principles of determinate sentencing (i.e., it adds indeterminacy to the term and provides for increased terms for technical violations).

67Parnas and Salerno (1978).

68Parole and Community Services Division of the Department of Corrections, Parole in California: A Three Year Evaluation and Development of a New Model, September 1978; The Future of Parole: A Report of the CPPCA Committee on “The Future of Parole,” Sacramento, California, October 1978. These reports cite recent studies made to indicate the usefulness of parole in reducing criminal behavior. The Department has reorganized parole services to implement a new parole model that emphasizes risk assessment, high level supervision of serious risks, more specialization of parole agent activities, and minimal supervision of non-serious risks.
ties and the Adult Authority who determined parole returns. The length of the parole period had been decreasing prior to the DSL; in 1975, the median pre-DSL time on parole for male felons was twenty-five months.

Initially, the DSL placed a one-year limitation on the period of parole supervision and permitted the Community Release Board to waive parole for good cause. The one-year limitation on parole was justified on the grounds that (1) 70 percent of parole violations occurred during the first year; (2) 80 percent of parole violations are detected by police and could be the basis for an independent criminal prosecution; and (3) the one-year limitation would permit closer supervision during the critical first year. The initial DSL also limited to six months the time that a parolee could serve in prison under revocation.

Under these initial DSL limits on parole, the number of parolees was substantially reduced. Between August 1, 1977, and December 31, 1978, the felon parole population dropped 31.3 percent, from 14,557 to 9,997. During the first year of the DSL the morale of parole officers is said to have declined. Parole caseloads remained the same because of staff reductions due to attrition. Interviews suggest that parole officers considered the one-year parole period and six months reconfine-ment unworkable. Especially as the end of the maximum parole period neared, it was difficult to maintain parolee discipline, because it appeared impractical to utilize time-consuming revocation procedures that would result in recommitment for a short period.

In 1978, the legislature passed SB 1057 defining the purpose of parole and extending to three years the parole period for those determinately sentenced. Since the new law went into effect in January 1979, the parole population has steadily increased (i.e., from 9,997 in December 1978 to 11,647 in August 1979, a 16.5 percent hike).

To examine the effectiveness of parole supervision, the Community Release Board has established an experiment through exercise of its authority to directly discharge offenders. Approximately 200 prisoners approved for discharge were divided randomly into direct discharge (about 100) and parole release groups (about 100). The two groups will be compared after six months and one year based on their arrest record and new prison commitments. Through this study the Board intends to test the validity of criteria used in the discharge review and to determine whether direct discharge should be more extensively employed in the future.

**DSL COSTS**

The DSL resulted in modest increases in administrative expenses. The changeover to the new sentencing structure created estimated one-time expenses for the Judicial Council and the Department of Corrections of $1.5 million for development of sentencing rules and modifying correctional records and counseling practices.\(^\textit{a}\) Retroactive application of the DSL and the related extended term hearings also created one-time costs estimated at $2.5 million.\(^\textit{b}\) Actual expenditures for the

\(^a\)The Judicial Council reports expenses of $300,000; Department of Corrections, $1,200,000.

\(^b\)The Community Release Board reports expenses of $875,000; Department of Corrections, $1,574,000.
Community Release Board during its first full year of operation (1977-1978) totaled $2 million more than for the Adult Authority and Women’s Board of Terms and Paroles in 1976-1977. However, more than half of the expenditure increase was for retroactive application of the law and the new function of disparity review.

Continuing administrative expenses for all state and local agencies probably range upward of $5 million per year. New continuing expenses of the Community Release Board above those of the Adult Authority and Women’s Board of Terms and Paroles appear to range between $500,000 and $1 million.\(^9\) The DSL imposes additional administrative costs on counties for court processes involving increased Public Defender and District Attorney costs for hearings, probation costs for more elaborate P&S reports, and court costs for calculating sentencing and sentencing hearings.

State law provides that these costs are reimbursable to the counties, but to date only Orange County has filed a claim for reimbursement. Extrapolation of Orange County’s claim for reimbursable expenses to other counties establishes statewide court-related costs at around $4 million.\(^9\) These additional administrative expenses are modest in comparison with annual court, prosecutor, and related expenses of $450 million to $500 million.

The major element of additional DSL cost arises from increasing prison populations. SB 42 would probably have slightly reduced prison population and expense,\(^9\) a potential savings wiped out by the lengthened terms under AB 476 and SB 709. Additional operating expenses for the increased prison population under SB 709 were projected at almost $150 million between 1981 and 1987 (Table 15). The Department of Corrections also projected a need for capital construction of $150 million.\(^9\)

As we discussed above, prison population was increasing even without the DSL. Therefore, the additional cost of the DSL and its amendments must be considered to be substantially less than the figure of $300 million estimated by Corrections to accommodate its increasing population. However, subsequent legislation increasing penalties will further increase correctional costs.

Initial cost savings projected for the reduced parole services under SB 42 have been overwhelmed by the larger prison populations and larger parole supervision under SB 1057. The Department of Corrections estimates increased parole expenses of $3 million annually.

IMPLICATIONS FOR FURTHER RESEARCH

The related issues of prison conditions and legislative determination of sentencing policy are central to our proposals for research. Further research can continue

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\(^9\) $600,000 of this is for the disparate sentence review for fiscal year 1979-80.

\(^9\) Orange County filed a claim for $420,000 of which $256,000 was found by the Board of Control to be within its guidelines.

\(^9\) The Department of Corrections estimated a $27.4 million savings over eight years, based on 7500 new prisoners per year. Since new prisoners are substantially exceeding this level, the savings would be reduced or eliminated.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Added Population&lt;sup&gt;a&lt;/sup&gt;</th>
<th>Revised Projection&lt;sup&gt;a&lt;/sup&gt;</th>
<th>100% Capacity</th>
<th>95% Capacity</th>
<th>Capital Costs (in $ millions)&lt;sup&gt;c&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Under Existing Law</td>
<td>Under SB 709</td>
<td>Operating Costs&lt;sup&gt;b&lt;/sup&gt; (in $ millions)</td>
</tr>
<tr>
<td>1978</td>
<td>0</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>0</td>
</tr>
<tr>
<td>1979</td>
<td>0</td>
<td>-</td>
<td>-</td>
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<td>0</td>
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<tr>
<td>1980</td>
<td>0</td>
<td>-</td>
<td>-193</td>
<td>-</td>
<td>-1,100</td>
</tr>
<tr>
<td>1981</td>
<td>790</td>
<td>23,055</td>
<td>-1,418</td>
<td>-2,208</td>
<td>-2,390</td>
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<td></td>
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<td></td>
<td>2,390</td>
<td>3,421</td>
<td>$ 1.6</td>
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<tr>
<td>1982</td>
<td>1,687</td>
<td>24,962</td>
<td>-2,428</td>
<td>-4,115</td>
<td>-3,653</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>2,428</td>
<td>5,429</td>
<td>15.9</td>
</tr>
<tr>
<td>1983</td>
<td>2,337</td>
<td>26,392</td>
<td>-3,208</td>
<td>-5,545</td>
<td>-4,474</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>3,208</td>
<td>6,934</td>
<td>22.3</td>
</tr>
<tr>
<td>1984</td>
<td>2,542</td>
<td>27,292</td>
<td>-3,903</td>
<td>-6,445</td>
<td>-5,206</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>3,903</td>
<td>7,881</td>
<td>24.5</td>
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<tr>
<td>1985</td>
<td>2,707</td>
<td>27,992</td>
<td>-4,638</td>
<td>-7,135</td>
<td>-5,769</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>4,638</td>
<td>8,618</td>
<td>26.2</td>
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<tr>
<td>1986</td>
<td>2,862</td>
<td>28,412</td>
<td>-4,703</td>
<td>-7,565</td>
<td>-6,048</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>4,703</td>
<td>9,060</td>
<td>27.8</td>
</tr>
<tr>
<td>1987</td>
<td>2,923</td>
<td>28,883</td>
<td>-8,036</td>
<td>-9,556</td>
<td>28.4</td>
</tr>
</tbody>
</table>

<sup>a</sup>Average daily prison population.

<sup>b</sup>Based on $9,745 average operating cost in 1981 after added population is more than 1,000. Total is reduced by parole savings estimated at $710 per capita.

<sup>c</sup>Includes $4.8 million for site acquisition (i.e., 8 sites) and $135.5 million reserve for construction, based on population increase of 2,923 assuming 95 percent occupancy and construction costs of $50,000 per bed.
to monitor the legislature’s actions in adjusting sentencing policies or prison capacity. In addition, research can be undertaken to provide information the legislature can use in developing rational sentencing policies to achieve the multiple purposes of criminal sentencing within the real constraints of prison capacity.

To effect a rational sentencing policy, the legislature needs information about the present DSL’s implementation, in particular, about the exercise of prosecutorial discretion under the DSL. Our review suggests that under the present law, prosecutors have wide discretion over sentencing decisions and are subject to slight public accountability. This raises the possibility that prosecutors could exercise their discretion in ways that frustrate the fundamental purposes of the DSL. Evidence from our review of the infrequent use of prior record enhancements suggests that prosecutorial practices do not meet the legislative interest in more severe punishment of recidivists. Also, although we cannot evaluate their concerns, some people we interviewed felt that differences in prosecutorial practices can possibly produce inequitable differences in the treatment of cases—a situation that cannot be remedied by judicial sentencing or the disparate sentence review.

Finally, research should more systematically examine the conditions and operations of California prisons. Through passage of the DSL, the California legislature evidenced its concern about humane treatment of prisoners. Continuing attempts to deal with the impact of the DSL on prisons may provide opportunities for new approaches to long-term problems of prison safety, the development of useful prison programs, and the effective use of inmate time. On the other hand, failure to deal with these problems will certainly be raised in inevitable court challenges to prison crowding.
III. PROPOSALS FOR RESEARCH

Our review of the California Criminal Justice System under the DSL identifies several continuing issues that are critical to the success of the law:

- The legislature's decisions about sentencing policy and responses to increasing prison crowding and costs.
- Prison conditions under the DSL.
- Prosecutors' use of their extensive discretion under the DSL.

Research in these issues is central to describing the initial effects of the DSL and to examining how California copes with major problems of the post-DSL period. Research should be directed toward helping California policymakers cope with these major problems and determining how well the law achieves its major objectives.

The remainder of this report describes existing research and our proposals for further research, which includes studies of the central role of the legislature in criminal sentencing; correctional programs and security; court implementation of sentencing policy; and the effects of prosecutorial discretion.

In addition to these specific policy issues, many persons are interested in descriptions of criminal justice operations under the DSL. Particularly, policymakers in other states would benefit from a thorough description of how California criminal justice agencies are adapting to determinate sentencing and to the specific elements of California's DSL.

DESCRIPTION OF COURT AND CORRECTIONAL PRACTICES

Two research projects currently under way to study court and correctional practices under the DSL are being directed by Jay Casper at Stanford University and Sheldon Messinger at the University of California, Berkeley.6

Both studies are examining court processes under the DSL through interviews with participants in selected jurisdictions and through direct observation of court and negotiating practices in those jurisdictions. Together, the two studies should provide somewhat independent descriptions of how judges, attorneys, and defendants perceive the available sentencing options, how they engage in plea and/or sentencing bargaining, and how participants otherwise use the elements of the new law.

Messinger also plans to describe operations of the California prison system under the DSL, basing his descriptions on interviews and observations carried out in greater scope than those considered in the present report. That study should provide more detailed consideration of the implementation of the DSL, the appar-

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6Messinger’s research is part of a multi-state examination of determinate sentencing. Andrew von Hirsch and Richard Sparks of Rutgers University are responsible for other aspects of this project.
ently increased crowding, and the beginning effects of both on institutional order and procedures. As part of the same research project, Elliot Studt will examine operations of the Parole and Community Services Division of the Department of Corrections and actions of the Community Release Board affecting parole supervision and revocation.

Similar descriptive research should thoroughly examine the legislature's actions affecting sentencing and prison capacity and operations. An appropriate study of legislative action affecting the DSL cannot be conducted within the financial or time constraints of either the present study or the Berkeley-Rutgers study.

PROJECT I: RESEARCH ON THE ROLE OF THE LEGISLATURE IN CRIMINAL SENTENCING

Critics have raised many questions about the appropriateness and implications of selecting a legislature as the sentence-determining body. They have suggested that the legislature will inevitably raise penalties in response to political pressures and will be unable to maintain a reasonable balance between specified crimes and punishments for them, or penalties for greater and lesser offenses. There is no dispute that the legislature has ultimate responsibility for establishing a legal framework for determining criminal penalties. This issue is related to the amount of discretion that should be retained by the legislature or delegated to administrative agencies or the courts to decide penalties for specified crimes. While assertions have been made about the implications of a greater legislative sentencing role, little empirical research has been undertaken to examine in detail the actual behavior of a legislature with determinate sentence responsibility. California offers a natural experiment for examining the general issues of legislative determination of detailed sentencing policy.

A study of the California legislature is also important in understanding and evaluating the state's DSL. Our review indicates that future legislative action in adjusting sentences and dealing with prison costs and capacity are central to the future of the DSL. Both of these research purposes suggest a study investigating legislative decisionmaking about penalty measures, related budgetary issues, and other measures affecting prison population.

The role of the legislature in sentencing should be studied over a period of years, including the years before passage of the DSL, through the period of amendment and implementation of the law. This would provide a historic perspective to the current legislative actions dealing with sentencing. The research period should continue for at least several future years, during the critical period in which the legislature must decide about prison construction while it continues to face pressure for increased penalty levels. During this time, it is likely that the legislature will either have to provide funds for prison construction, modify sentencing policy to reduce prison intake, establish an administrative agency to set prison times, reintroduce indeterminacy, or establish a substantial program of non-prison alternatives for felons. If the legislature does not make effective choices using these alternatives, basic decisions will then be made by intervening courts.

For each year during the studied period, the research should identify the major criminal justice issues and proposed legislation. The study should
1. Examine the positions of governmental and political leaders, such as the governor, attorney general, legislative leaders, and others.
2. Describe the political composition of decisionmaking bodies, i.e., the two houses of the legislature and committees acting on criminal justice matters.
3. Document legislative decisions dealing with sentencing and corrections and the influence on decisions of key factors such as public opinion, lobbying by interest groups, impact of technical inputs.
4. Consider statements and projections about the impact of legislation on offenders, prison populations, costs and the competing interest groups. Where possible, the actual impacts should be followed up.
5. Focus, in particular, on the interactions between the legislature and both the courts and the Department of Corrections.

The increased role of the legislature in sentencing has had major impacts both on courts and on Corrections. Presumably both courts and Corrections must work through the legislature to obtain modifications in sentencing and criminal procedures that will permit them to continue to function effectively. To provide such feedback about courts, the legislature has delegated to the Judicial Council the role of monitoring sentencing practices in California and other states. However, no agency has been given the task of monitoring the impacts on Corrections or of examining the DSL’s effects across all branches of government. Feedback from Corrections to the legislature is particularly essential, since only the legislature can modify statutory sentencing provisions to develop an equilibrium between sentencing policy and prison population.

The research should examine how information about the courts and Corrections is presented to the legislature, and the lobbying function of the Department of Corrections, the courts, the Judicial Council, the Community Release Board, and various groups interested in criminal justice issues. The output of the study should be an analysis of the major factors influencing the legislature’s penalty and related cost decisions in the post-DSL and Proposition 13 period and how well the legislature is able to exercise its sentencing responsibility.

PROJECTS II-IV: RESEARCH ON CORRECTIONS AFTER THE DSL

Our review indicates that the DSL has resulted in a critical period for the Department of Corrections. Prison population is beginning to climb toward the previous 1968 peak. The population peak a decade ago produced its own crisis of crowding, followed by fluctuating Adult Authority policies that led eventually to the DSL. The present crisis is likely to be worse than the last. Institutions are ten years older. The inmate population is younger, more violent, more racially mixed, and harder to manage. Drug and gang problems that were minor ten years ago now create serious threats to managing prisons.\(^6\)

\(^6\)Perhaps the only gain for Corrections during the last ten years is whatever prisoner goodwill may have been created by the reforms of the DSL itself.
To provide the legislature and other policymakers with information for informed decisions, we recommend long-term research on the effects of crowding of California prisons. We also propose two studies on (1) rehabilitation programs and (2) prison safety and discipline under the DSL. Because of the difficulty of separating the effects of the many recent changes in the California criminal justice system, this research would not be an attempt to attribute changes in Corrections to the DSL. Rather, it would attempt to describe the current status of Corrections whatever the source.

Research on Prison Crowding

The Department of Corrections has adopted a schedule for assigning prisoners in excess of the design capacity for its seventeen male felon facilities. By this plan, slight crowding was initially restricted to four institutions (Fig. 7). In successive years, additional institutions will exceed their capacity and the degree of crowding will increase within each institution.\(^7\) This gradual introduction of overcapacities to institutions forms a natural quasi-experiment that could be used to study the effects of crowding on inmate idleness, prison safety and discipline, prison programs, and stress on inmates and staff.\(^8\)

This schedule is useful for research because it permits comparisons (1) across all institutions at their various levels of crowding, (2) within one institution as crowding increases over time, and (3) across all institutions, comparing how each is affected over time with different levels of crowding. By looking at the individual institutions as crowding increases, the research would avoid problems of the non-comparability of different institutions. By comparing changes in different institutions that receive different crowding, the research lessens the possibility that observed effects result from factors unrelated to increased crowding. In short, each comparison helps account for different factors that might confound the relationship between crowding and prison conditions. This quasi-experimental study of the effects of prison crowding should also collect and attempt to adjust for information about other matters that might account for differences between institutions or that might explain changes over time, i.e., differences in the custody levels of institutions, and changes in policies or populations.

A number of possible effects of crowding can be studied by examining changes in various correctional records that coincide with increases in populations over capacity. The effects of crowding on prison safety and discipline can be examined by tracking records about the number and type of disciplinary incidents in the respective institutions. Effects on prison programs can be studied through examination of records about the number and types of programs within each institution, and the level of inmate participation and institutional resources devoted to those programs. Some information about inmate and staff stress can be gained by examining records of medical complaints, inmate and staff claims for disability, amount of staff sick leave, and the inmates’ utilization of psychiatric counseling.

\(^7\) The Department of Corrections schedule is only a projected plan that will be modified to reflect variance from predicted populations and possible new bed space.

\(^8\) Measures of these effects would have to be developed with care, and perhaps only with the assistance of the Department of Corrections in recording critical information.
<table>
<thead>
<tr>
<th>Institution</th>
<th>78</th>
<th>79</th>
<th>80</th>
<th>81</th>
<th>82</th>
<th>83</th>
<th>84</th>
<th>85</th>
<th>86</th>
<th>87</th>
<th>1987 population as percent of current capacity</th>
</tr>
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<tbody>
<tr>
<td>CTF North (Soledad)</td>
<td>100%</td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>CIM Recp. Central (Chino)</td>
<td>100%</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>CMC (San Luis Obispo)</td>
<td>100%</td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>CCI North (Tehachapi)</td>
<td>111%</td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>CIM East (Chino)</td>
<td>143%</td>
<td></td>
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<tr>
<td>CCC (Susanville)</td>
<td>112%</td>
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<tr>
<td>CIM Recp. West (Chino)</td>
<td>150%</td>
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<tr>
<td>CMF (Vacaville)</td>
<td>119%</td>
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<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Folsom</td>
<td>142%</td>
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<tr>
<td>SCC Inst. (Sierra)</td>
<td>112%</td>
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<tr>
<td>CIM Minimum (Chino)</td>
<td>120%</td>
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<tr>
<td>CTF South (Soledad)</td>
<td>144%</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>CTF Central (Soledad)</td>
<td>141%</td>
<td></td>
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<tr>
<td>DVI (Dueul)</td>
<td>140%</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SCC Camp (Sierra)</td>
<td>130%</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CCI Medium (Tehachapi)</td>
<td>137%</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>San Quentin</td>
<td>156%</td>
<td></td>
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<td></td>
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Fig. 7—Planned overcapacity for prisons
Examination of correctional records could be supplemented with periodic surveys of inmates and staff about the incidents of disciplinary problems, their perception of stress and institutional difficulties, the inmates’ reports about their participation in work or programs, and the amount and use of idle time. These surveys could also be used in the studies we propose of prison programs and discipline under the DSL.

Research on Rehabilitation

Although the DSL redefined the purpose of prison to be punishment rather than rehabilitation, California prisons continue to have a variety of counseling, educational, and voluntary programs intended in part to help rehabilitate inmates. Our interviews with correctional staff and inmates suggest that the nature of some programs has changed under the DSL and that the reasons for and nature of inmates’ participation in programs have also changed. Of particular interest, both inmates and staff indicate that rehabilitation programs may be more valuable now that rehabilitation is no longer a purpose for imprisonment, and participation is more voluntary.

Given the change in purposes of the California prison system, the Department of Corrections should have basic information with which to reassess the nature and value of programs that it will continue to offer. Research should explore the utility of continuing programs both as assessed by inmates and as aids to reintegration of inmates into society after prison.

Research should explicitly consider the cost of various programs. Counseling, education, and voluntary programs involve considerable expense for the Department of Corrections. With growing prison populations there will be both demands for expansion of programs and greater difficulty in finding the space and money to support them. Review of the costs and apparent benefits of programs could guide plans to continue, expand, or reduce particular programs.

First, the research should catalog each of the programs available at each institution both before and after the DSL. The catalog should list and describe the programs, indicate the number and frequency of inmate participation, and estimate the demands that programs place on funds, prison space, and prison staff.

The research should survey both inmates and staff about programs, observations about changes since the DSL, and evaluations of the programs’ utility. For some programs the survey of inmates might be able to draw on data collected by The Rand Corporation as part of its 1978 survey of California prison inmates. The Rand survey obtained inmates’ reasons for participating or avoiding specific programs and their assessment of them.

Research should also explore the value that programs might have in aiding inmates’ adjustment after prison. This could be done by follow-up studies of pro-

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99The offender survey was directed by Mark Peterson and examined self-reports of criminal behavior before incarceration and correlates of criminal behavior. A study of correctional programs was conducted by Joan Peterslia in conjunction with the offender survey. A report of the results of the study of correctional programs is in preparation.
gram participants, examining, for example, recidivism or post-institutional con-
tinuation in education programs.\textsuperscript{100}

\section*{Research on Prison Safety and Discipline}

We have pointed out that California prisons have a substantial and growing
problem of disciplinary incidents, particularly those involving violence, weapons,
and drug trafficking.

The DSL introduced a number of changes that may affect institutional safety
and discipline, including inmates' early knowledge of release dates, extension of
procedural protections, elimination of the Adult Authority, and introduction of
good time. Research on the effects of these DSL changes on prison safety and
discipline is important for policymakers in other states who are considering deter-
minate sentence laws and might also contribute to the development of disciplinary
procedures to improve the safety of California prisons.

Research should compare for each institution the number and type of incidents
occurring before and after the DSL. Case studies of current incidents should be
included, based on interviews with inmates and staff involved in the incidents and
observations of resulting hearings, the effectiveness of good time loss as deterren-
ts, and the possibility that formal hearings destroy other opportunities for informal
resolution of disciplinary problems. Inmates who have not been involved in disci-
plinary hearings should also be interviewed.\textsuperscript{101}

Finally, research should compare filings of criminal charges for crimes commit-
ted in custody, before and after the DSL. Because of the limited punishment avail-
able through loss of good time, disciplinary matters may be referred more
frequently to district attorneys. The study should examine changes in district attor-
neys' actions in filing and prosecuting such cases.

\section*{PROJECTS V-VIII: SENTENCING POLICY RESEARCH}

To make rational decisions about sentencing and corrections, the legislature
must have information about the effects of sentencing practices on the basic objec-
tives of the DSL. We propose three separate projects to determine how well current
sentencing practices achieve the legislatively determined purposes of (1) just pun-
ishment, (2) equitable sentencing, and (3) public protection, and how sentencing
practices may be modified to better achieve these purposes.

Each study would also compare sentencing practices under the ISL and the
DSL. These comparisons would indicate the degree to which statutory changes of
the DSL produce actual changes in outcomes of court sentencing practices. A fourth
proposed study would compare the severity of sentences under the ISL and DSL
and provide data necessary for the other policy studies.

\textsuperscript{100}Because participation in programs has rarely been determined by experimental or random assign-
ment, follow-up studies would need to match or control for inmate characteristics likely to be associated
with the studied follow-up behavior, i.e., recidivism or continuing education. For this reason, other
studies might survey parolees to obtain their assessment of the value of prison programs for post-prison
adjustment.

\textsuperscript{101}The effectiveness of deterrence cannot be studied unless persons who did not become involved in
incidents are also examined. There is the possibility that they may have been deterred.
Research on the Effects of the DSL on Sentence Severity

Since the legislature approved the DSL, there has been great interest in how the law has affected the severity of sentences. We noted previously that available information is not adequate to document the effects of the new law on sentencing outcomes. Now we consider what data are available about the effects of the DSL on sentence severity, and then describe the data collection and analysis that would be required to fully document these effects.

Meaningful comparisons of ISL and DSL sentences could be made if the Community Release Board’s disparate sentence review were supplemented with information about a set of ISL cases sentenced prior to August 1976. This data set is also essential for research we propose on sentencing policy, and on prosecutorial discretion.\textsuperscript{102}

Figure 8 indicates the two groups of cases needed for comparison of sentencing levels under ISL and DSL; first, ISL cases sentenced prior to August 1976, and second, DSL cases for crimes that were committed after July 1, 1977.\textsuperscript{103}

Five types of information are needed for studying DSL sentencing: Three of these deal with penalties: the prison rate,\textsuperscript{104} the length of prison sentences, and the length of jail sentences.\textsuperscript{106} The two other types of information are the background details for prisoners (i.e., the conviction offense, prior record, and personal characteristics) and the background details for felons receiving non-prison sentences. This detailed information is particularly important for exploring sentencing policy and prosecutorial discretion. However, analysis of these detailed data is also necessary to determine if differences in sentences under the DSL indicate changes in policies rather than changes in the cases now being sentenced. Furthermore, analysis of these detailed data will provide thorough descriptions of the types of cases that are now being sentenced differently under the DSL.

Table 16 lists existing sets of criminal justice data that contain some of the types of information suggested above. Rand’s data and the Berkeley-Rutgers data set are similar and the most useful for examining sentence severity. Both provide information needed to study the prison rate for ISL and DSL cases, to identify types of cases

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\textsuperscript{102}Current court practices could be examined using only data now being collected by the Community Release Board. However, the supplemental collection of data for ISL cases is essential for studying the effects of the DSL on sentencing policies.

\textsuperscript{103}Meaningful comparisons require recognition of two other transition groups. The first transition group covers those cases sentenced under the indeterminate law after the DSL had been passed but before it was effective—between August 1976 and July 1, 1977. These cases do not serve as an adequate basis for comparisons with DSL since judges may have been influenced by the structure of the new law, and most anticipated the retroactive application of a DSL term to the indeterminate cases they were then sentencing. The second transition group includes indeterminate cases sentenced after the DSL was effective, i.e., sentencing that occurred after July 1, 1977 for crimes committed before that date. If we are to adequately understand operations under DSL and compare DSL and ISL sentencing, these post-July 1 ISL cases cannot be combined with true DSL cases. Since the most interesting comparisons are between ISL cases sentenced before August 1976 and DSL cases, these transition groups do not have to be studied. However, transition cases must either be excluded or separately considered in comparing ISL and DSL cases and in studying DSL sentencing policy.

\textsuperscript{104}The proportion of convicted felons sentenced to prison.

\textsuperscript{106}Comparisons of sentence lengths require information about the length of jail terms. The apparently greater number of short prison terms under DSL may actually reflect little change in sentence severity—those short sentences might be comparable to “bullets” (i.e., year in county jail) served previously under ISL. If these new DSL prison terms are regarded as similar to old ISL period jail terms, only the remaining DSL prison cases would be like cases that would have received a prison term under the ISL. The length of prison terms for cases that would have resulted in prison under both the ISL and DSL might be unchanged, or greater under DSL.
that received different disposition under each sentencing system, and to establish
the length of DSL sentences and case features that account for differences in
sentence length. The Rand and Berkeley-Rutgers data are the only existing data
that can be used to compare the proportion of prison cases under ISL and DSL. No
other data separate DSL cases from ISL cases sentenced after July 1, 1977. However,
both the Rand and Berkeley-Rutgers data sets lack the length of terms for
prisoners under ISL and thus provide no basis for comparing the length of prison
sentences under ISL and DSL.\textsuperscript{106}

The third and fourth sets shown in Table 16 are the OBTS\textsuperscript{107} data maintained
by the Department of Justice and the Judicial Council data on sentencing practices.
The OBTS data indicate the prison rate under ISL\textsuperscript{108} and the first transition period
from August 1976 to July 1, 1977. However, neither of these data sets provides
other information needed to compare ISL and DSL sentence lengths.

Department of Corrections data, the fifth source shown, provide the only basis
for determining the actual length of prison terms. Good time and predelivery
credits must be subtracted from imposed sentences to compare the true length of
DSL terms with ISL terms. Judicial Council data indicate preprison credits, but
only the Corrections data indicate good time credits.

The sixth source is data currently collected by the Community Release Board
as part of its disparate sentence review. The Board collects all of the information

\textsuperscript{106}This parameter might be estimated from CDC data.
\textsuperscript{107}Offender-based transaction system.
\textsuperscript{108}OBTS data also indicate the prison rate for the period from August 1976 to July 1, 1977.
Table 16

**INFORMATION ABOUT SENTENCE LENGTHS FROM EXISTING DATA SETS**

<table>
<thead>
<tr>
<th></th>
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<tr>
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<td>X</td>
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<td>X</td>
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<td>X</td>
<td>Combined</td>
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<td></td>
<td></td>
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<td>X</td>
<td>X</td>
<td>Prior record demographic</td>
<td>All counties(^b)</td>
</tr>
<tr>
<td>Judicial Council(^c)</td>
<td>Combined</td>
<td>X</td>
<td>Combined</td>
<td></td>
<td></td>
<td>All counties</td>
</tr>
<tr>
<td>Community Release Board</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>All felonies Prison-all counties Nonprison-3 counties</td>
</tr>
<tr>
<td>Supplemental CRS</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

\(^a\)Offender-based transaction system maintained by the Department of Justice.

\(^b\)Excludes Alameda and Santa Clara counties during some years.

\(^c\)Data on sentencing practices.
needed to study sentence lengths, but they obtain the data only for DSL cases.\footnote{109} The Board’s present data could be supplemented with the same information for a sample of felony convictions sentenced prior to August 1976 to compare sentence severity under the ISL and DSL.\footnote{109} This would provide the only basis for comparing sentence lengths. The information could also be used to study the effects of current sentencing practices on just punishment, sentencing equity and public protection, and changes in these effects from the ISL. Further, the data would provide the most thorough basis for studying prosecutorial discretion.

**Research on Just Punishment**

To study the effects of court practices on the legislative policy of just punishment, research should consider whether sentences actually imposed by courts reflect the legislature’s determination of the seriousness of offenses. Simple comparisons are provided by the means and ranges of sentences for various offenses published in the Judicial Council’s *Sentencing Practices Quarterly*. Figure 9 shows the means and ranges imposed during the third quarter of 1978 for offenses in four different DSL penalty categories. The figure shows that imposed sentences generally reflect the legislature’s differentiation in the seriousness of offenses.

Unfortunately, because the comparisons published by the Judicial Council do not take into account the effects of enhancements, they do not permit meaningful consideration of whether the length of imposed sentences is proportionate to the seriousness of crimes, as established by the DSL. The data represented in Fig. 9 suggest, for example, that robbery is being treated as a more serious crime than others in the 2, 3, 4 year sentence group. However, the extended range and high mean for robbery probably reflect the greater imposition of enhancements for that crime. A simple robbery with no enhancements might be punished on the average no more seriously than other crimes in the same penalty group.

To see whether imposed sentences reflect the legislature’s determination of the seriousness of crimes, research could compare the length of prison sentences for cases grouped together in terms of the sentence lengths available through adding the base term, proven enhancements, and multiple charges.\footnote{111} Since the number of

\footnote{109} The Community Release Board data also provide the most powerful basis for examining current operations under DSL. For every DSL prison case the Board codes detailed information about the conviction offense, criminal history, personal characteristics, and criminal justice treatment for the present case. The quantity of information greatly exceeds the Rand and Berkeley-Rutgers studies, the only other existing data sets that code necessary details. The Board is coding the same data for a sample of convicted felons in three counties who receive non-prison sentences. The Board’s data set is substantially richer than the other two: it contains all DSL cases, it applies to all felonies, and it is drawn from three counties.

\footnote{109} These supplemental data should be coded from court or prosecutors’ files in the same counties for which the Board is coding non-prison cases. The actual forms currently being used by the Community Release Board would be used and ideally would be coded by the same Board personnel. Data would be recorded both for defendants sentenced to prison and those receiving local sentences. The length of prison terms would have to be obtained from Adult Authority or Corrections records. To permit meaningful comparison for a number of conviction offenses, the supplemental data should be obtained for a substantial number of cases, perhaps at least 500 in each county. Use of already trained Board personnel to code the data would minimize costs. Since these data would be combined with an existing data set, the additional cost for the supplemented data set would be reasonable.

\footnote{111} For example, under the DSL, simple robbery involving no weapon, victim injury, or other possible enhancement is as serious as other 2, 3, 4 year term offenses that involve no enhancements. However, an armed robbery that involved possession of a weapon could bring an enhancement under P.C. 12022
<table>
<thead>
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<th>Sentence level</th>
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<td>Murder, second degree</td>
</tr>
<tr>
<td>3 - 4 - 5</td>
<td>Forcible rape</td>
</tr>
<tr>
<td></td>
<td>Narcotics sales</td>
</tr>
<tr>
<td>2 - 3 - 4</td>
<td>Robbery</td>
</tr>
<tr>
<td></td>
<td>Voluntary manslaughter</td>
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<tr>
<td></td>
<td>Burglary, first degree</td>
</tr>
<tr>
<td></td>
<td>Assault with deadly weapon</td>
</tr>
<tr>
<td></td>
<td>Narcotics, possession for sale</td>
</tr>
<tr>
<td>16 mo - 2 - 3</td>
<td>Burglary, second degree</td>
</tr>
<tr>
<td></td>
<td>Narcotics, possession</td>
</tr>
</tbody>
</table>

**Imposed sentence in years**


Fig. 9—Comparison of statutory and actual sentences, showing the mean and range of prison sentences during quarter ending September 20, 1978
such possible groupings is very large, multivariate statistical analyses would
provide a more efficient means for exploring whether imposed sentences
correspond to legislative determinations of seriousness. These analyses could
compare the lengths of sentences imposed for different crimes, controlling for the
presence of enhancements. Similarly, the analyses could indicate whether cases in
which enhancements are present are treated more seriously, controlling for the
conviction offense.\footnote{112}

The Community Release Board provides the best data for these multivariate
analyses. The data include information about official court actions and the underly-
ing facts in each case.\footnote{113} The data can be analyzed to see if the length of prison terms
varies proportionately with the true seriousness of cases, indicated by facts,
whether or not proven in court, that would call for longer sentences under the
DSL.\footnote{114} Analyses of the Community Release Board data could also establish
whether disproportionality in punishment was created either by filing, bargaining
practices, or by judicial action. The identification of the source of the problem would
aid the legislature in modifying the DSL sentencing structure.

Research on Sentence Equity

Equitable sentencing is a central goal of the California DSL. Because of the
importance that the DSL assigned to equitable sentencing, the legislature should
have information to monitor and possibly adjust DSL provisions that affect senten-
cing equity. Continued attention to this issue is particularly important since recent
amendments extending the use of enhancements may increase sentencing inequi-
ties. Research can contribute to legislative and other attempts to promote equitable
sentencing by providing information about court practices under the DSL and the
effects of the Community Release Board’s disparate sentence review on sentence
equity.

It is generally recognized that criminal sentences must differ, both with regard
to the “in-out” decision of prison or probation and the length of prison terms,
reflecting differences in the seriousness of crimes and, perhaps, an offender’s back-
ground and danger to the public. Only the other, illegitimate differences in sen-
tences can be described as inequitable. The DSL provides some limited specification
of proper bases for differences in sentences, e.g., weapon use, prior prison record.
The Judicial Council’s Sentencing Rules for the Superior Court\footnote{115} substantially
extend the list of factors that can serve as legitimate bases for sentencing
differences.

of one year and therefore should be considered to be as serious as 3, 4, 5 year term offenses that involve
no enhancement.
\footnote{112} This analysis would have to be designed carefully to account for the statutory provisions that some
enhancements cannot be imposed for particular conviction offenses (e.g., a great bodily injury enhance-
ment cannot be added to a homicide conviction).
\footnote{113} The Board codes detailed information about the conviction offense from pre-sentence reports, and
about prior criminal record from rap sheets.
\footnote{114} Of course, it will be impossible to verify the truth of factual statements in pre-sentence reports from
which the Board obtains most of its data. This problem is reduced somewhat by the opportunity for both
defense and prosecuting attorneys to present information contrary to the P&S report during the sentenc-
ing hearing. The Board also codes factual statements from such hearings.
\footnote{115} These rules were mandated by the DSL.
Given these specifications of legitimate sentencing differences, empirical research tasks can distinguish between sentencing variation that results from legitimate reasons and variation that does not. Substantial sentencing differences that are not based on legitimate factors are sentencing inequities.

In conducting its disparate sentence review, the Community Release Board must account for this distinction between sentencing inequities and legitimate sentencing variation. To make these distinctions the Board is currently developing simulation and multivariate statistical procedures to identify potentially disparate sentences.

The Board’s review provides the first step in research on sentence equity by identifying disparately sentenced cases. Further research with these data could then identify court processes (i.e., filing, plea bargaining, attempts at proof, sentencing decisions) that are responsible for these inequities.

Research should also examine overall variability in sentencing, since at some point sentencing differences might be seen as too great, even though based on legitimate factors in the DSL or Sentencing Rules. Because of both legislative and public interest, research should document sentencing variation (both for the “in-out” decision and length of terms) that arises from such sensitive matters as the defendants’ or the victims’ age, race, or sex. Similarly, research can explore how sentences are affected by the involvement of drugs, alcohol, or weapons for the conviction offense. Analyses should also identify sentencing decisions that create great variability in the length of prison terms, e.g., selection of base terms, decisions about enhancements, and the choice of consecutive or concurrent sentences.

If the Community Release Board data are supplemented by data collection for a set of ISL cases, all of these analyses could be performed on ISL cases to compare sentencing equity and variability under ISL and DSL. The analyses could also examine whether geographic disparity is greater under DSL than ISL.

In addition to studying the effects of court practices, research should examine the effect of the Community Release Board on sentencing equity. Research on the Board is important not only because sentencing equity is a central purpose of the DSL, but also because the disparate sentence review is a novel approach to achieving equitable sentencing. Norval Morris (1974) has observed that a principal contribution of determinate sentence systems may be their development of a “common law of sentencing.” The Board’s disparate sentence review and its publication of data about sentencing practices might play an important role in this development in California, a role that should be studied thoroughly.106

Research in the disparate sentence review should include interviews, observations, and analyses of a sample of Board records. This research should include a critical assessment of the disparate sentence review project examining the Board’s data collection, sampling, and simulation and statistical procedures. As part of this research, outside analysts might use the Board’s data to perform alternative analyses for identifying potentially disparate cases. This secondary analysis is not only likely to produce additional information about sentencing practices, but it could provide the Board with additional analytic procedures for its review. Research should closely examine the procedures for the Board’s administrative review of

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106The disparate sentence review is also important as an advance in the use of analytic and empirical methods for judicial procedures.
cases identified as potentially disparate. Interaction between the Board and the judiciary should also be studied. Research can examine the procedures for returning cases to sentencing judges and the judicial reaction to the disparate sentence review project, including documentation of the number of times that the judges follow the Board's suggestions to re-sentence, the actual changes made in sentences, and the reasons that judges give for refusing to re-sentence.

**Research on Incapacitation**

Incarceration reduces crime, among other ways, by isolating criminals so that they cannot continue to commit crimes affecting the public. At least some active criminals who would have continued to commit crimes had they not been incarcerated will be prevented from committing crime by their incarceration. Crime reduction gained by isolating criminals is described as the incapacitation effect of incapacitation. Measures of this incapacitation effect can only be hypothetical estimates—there is no way to ascertain how many crimes a person who is locked up would have committed if he had been free. However, estimates of the incapacitation effect can be made by measuring the number of crimes that offenders committed prior to incarceration and assuming that offenders who are locked up would have continued to commit crimes at the same rate or at some function of that rate.

Advanced research on incapacitation being conducted by The Rand Corporation can be used to estimate incapacitation effects of the DSL. Rand has conducted two surveys of California jail and prison inmates to estimate the crime rates and arrest probabilities needed to examine incapacitation effects. The surveys obtained inmates' self-reports of crimes used to estimate the crime parameters as well as details about the inmates' conviction offenses and prior records. Analyses of the surveys can estimate the number of crimes committed by the full California prison population as well as various subgroups of California prisoners. In turn, these estimates can be used to explore important questions about the impact of the DSL on public protection.

First, the data could be used together with the Community Release Board data to estimate how much crime is prevented by sentencing practices under the DSL. For each felon sentenced to prison, the Community Release Board obtains detailed information about the felon's prior record, his demographic characteristics, and his conviction offense. The Rand data can provide estimates of crime rates for offenders matching the descriptions for each inmate. These estimates can then be summed over the entire number of inmates entering prison during a time period to estimate the crime prevented by prison incarceration. Similarly, analysis of the Community Release Board data obtained in three counties for non-prison sentences can be used to estimate the incapacitation effects of local jail terms.

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1. After the analysis has identified cases that are apparently disparate, those cases are further reviewed by staff to identify the basis of the unusual sentence. This administrative review is likely to have an important effect on outcomes of the review. The interim statistical analysis of the first 725 cases identified a number of potentially disparate cases; however, none were found disparate after this administrative review.
2. The first survey obtained responses from 624 California prison inmates; the second obtained responses from over 800 California jail and prison inmates, along with similar numbers in both Michigan and Texas. The surveys are part of Rand's research program on career criminals. One of the present authors, Mark Peterson, is the principal investigator of the survey work (Peterson and Harriet Braiker, *Doing Crime: A Survey of California Prison Inmates*, R-2200-DOJ, April 1980).
Second, the Rand data could be combined with research on changes in sentencing practices to estimate changes in the incapacitation effect from the ISL to the DSL. As we discussed above, research on changes in sentencing practices would indicate groups of defendants who are treated differently under the DSL, for example a group of defendants who typically received probation and jail terms under the ISL but now receive prison terms under the DSL. The Rand survey can provide estimates of crime rates for these groups of offenders. When multiplied by the increase (or decrease) in typical sentences under the DSL, these crime rates would indicate the change in the incapacitation effect for those groups. Again, the estimated changes in incapacitation effects could be aggregated across all groups of defendants to obtain an estimate of the net change in the incapacitation effect.

Third, research using the Rand data might aid the legislature in making related decisions about modifications of the sentencing structure and new prison construction. Research can provide a better means to assess the relative costs and benefits of various levels of correctional capacity and expense by indicating the marginal changes in crime rates with more or fewer state prisoners.

The research can also suggest modifications to the DSL sentencing structure that will more effectively protect the public. The Rand survey data can be examined in terms of the DSL sentencing structure to determine the incapacitation effect of present use of the enhancements and base terms. The research could then offer suggestions for changes in the DSL sentence structure, along with estimates of the effects of those changes both on incapacitation and prison population. For example, results of the first Rand survey suggest that an enhancement be imposed for a prior felony conviction, whether or not a prior prison term has been served. The Rand data show that inmates who had a prior felony but no prior prison term were generally as active in crime as inmates who served a prior prison term. In turn, both groups were more active than inmates without any prior felonies.\footnote{Peterson and Braiker (1980).}

It is important to emphasize that research examining incapacitation effects through the Rand surveys would not necessarily serve as prescriptions for greater incarceration. Analysis of incapacitation effects could indicate groups of inmates whose incarceration appears to afford little public protection, because they were unlikely to commit a substantial number of future crimes. A policy of public protection would suggest reduced incarceration for these inmates.

In short, incapacitation research can be used as a basis for using scarce prison and jail space most effectively to protect the public. However, research on incapacitation could not solely determine changes in the DSL sentencing structure. The objectives of incapacitation must be weighed along with others, i.e., just punishment, deterrence, and equitable sentencing.

**Research on Violent Offenders**

Future legislation is likely to be considered aimed at permitting the Department of Corrections to retain custody of certain mentally disordered violent offenders (MDVOs) beyond their DSL terms because of their presumed dangerousness to
the community. Such legislation in part assumes that prison and mental health officials can identify in advance MDVOs whose post-release criminal behavior will probably be worse than other offenders convicted of similar crimes. We have pointed out that under the retroactive application of the DSL two groups of defined MDVOs were released. This “natural experiment” enabled researchers to compare the post-release behavior of this group with that of other similar offenders not classified as MDVOs. We believe that an extensive study of the two groups should compare their subsequent convictions, institutional commitments (i.e., prison, jail, mental), arrests, and parole violations for defined post-release follow-up periods. Information about these outcomes would be drawn from rap sheets and parole and institutional files. The research should also examine the validity of methods employed to classify MDVOs and be aimed at reviewing policy alternatives to protect the community from MDVOs in light of study findings.

PROJECTS IX AND X: PROSECUTORIAL DISCRETION AND THE EFFECTS OF LEGISLATION ON COURT PRACTICES

The final two projects that we propose can examine in quite different ways the ability of court participants to limit and potentially frustrate legislatively intended changes to the DSL. This research can aid California policymakers to effect desired changes in sentencing practices under the DSL.

Research on the Elasticity of Punishment

Legislative attempts to substantially modify court procedures or penalties frequently meet resistance from court participants who prefer established practices and norms. This has been shown most clearly for legislative changes in punishment levels, where mandatory incarceration or substantial increases in penalties often produce adjustments in dispositions to avoid the harsher penalties. Empirical studies show an inverse relationship between the severity of punishment and its frequency of imposition. If penalty levels are sharply increased, they tend to be imposed less often; if sharply decreased, they tend to be imposed more often.

This relationship can be tested by examining California’s experience with penalty increases under the DSL. If those increased penalty levels result in fewer convictions, convictions on lesser charges, or fewer prison terms, the legislature’s intention of greater punishment or greater public protection might be frustrated. Court reaction to changes in punishment levels might disturb the equitability of sentences. Moreover, policy changes with an intended incapacitation effect may be less effective than anticipated. Conversely, decreases in penalty levels might result in the unintended punishment of more individuals.

As part of his study of court practices in three jurisdictions, Jay Casper at Stanford University is considering how the DSL affected lawyers’ and judges’ perceptions of the “going” punishment appropriate for particular crimes. Thus, Casper should have information about changes in the court process that might further explain the simultaneous increase in commitments and reduction in penalty levels.
Analysis of court responses to changes in penalty levels will provide valuable evidence about the relationship between penalty levels and their frequency of imposition. Presumably, the substantial changes in upper and middle terms under SB 709 should lead to their less frequent imposition and to an increased use of the lower term. However, there should be no comparable changes in use of the base terms for crimes not changed by SB 709—data for these crimes serve as controls for crimes changed by the law.\footnote{Robbery provides a more sensitive comparison. SB 709 changed only the upper term for robbery, not the middle. Therefore, unlike for other crimes with changed penalty levels, we should expect a decrease in imposition of upper terms, but little or no increase in imposition of lower terms.}

The relationship between penalty levels and frequency of imposition can be examined by using Community Release Board data.\footnote{The Judicial Council will have statewide data about the in-out decision and the base term for all conviction offenses. However, their data do not indicate the date of an offense. If a defendant receives a non-prison sentence, the data do not indicate which penalty levels applied to the case.} Analysis of the Community Release Board data for three sample counties would provide a detailed analysis of possible changes in filing, bargaining, and sentencing practices that follow changes in penalty levels. Since the Board records the date that a conviction offense occurred, the applicable penalty level for each case can be easily determined.

**Research on Prosecutorial Discretion**

The DSL apparently increased the prosecutors' power to determine the results of criminal cases. Further, unlike others who make important decisions about criminal cases, prosecutors do not have their decisions constrained by rules or by public observation. This increased and largely unconstrained prosecutorial discretion raises important policy issues. The legislature's attempt to achieve equitable sentencing may be impeded by the fact that prosecutorial practices do vary substantially among jurisdictions or even among deputies in the same office. Prosecutorial discretion also substantially constrains the decision alternatives available to judges, again possibly affecting both sentencing equity and just punishment. Finally, prosecutors might exercise their discretion in ways that limit the success of intended statutory changes in the DSL.

Three existing studies will look at this issue of the exercise of prosecutorial discretion under the DSL. Casper and the Berkeley-Rutgers study will both examine prosecutors' actions through interviews and observations in several jurisdictions. These studies will provide insights about prosecutors' roles in the processes of filing, negotiating, trying, and sentencing cases under the DSL. The studies will also be useful in suggesting hypotheses about the effects of prosecutors' actions.

Rand is collecting detailed records from cases involving robbery in Alameda County, and the Berkeley-Rutgers project is collecting records in burglary. The Rand data have already been subjected to preliminary analysis.\footnote{See Section II.} These data sets contain details about the conviction offense, the defendant's prior criminal record, and prosecutor and court actions for the cases. Both data sets are similar to data collected by the Community Release Board for its disparate sentence review, although somewhat more limited.

Examination of prosecutorial practices through analyses of one or more of
these data sets will provide important information about a number of basic policy issues. First, the analyses can explore how prosecutorial filing, bargaining practices, and attempts at proof have changed from the ISL to the DSL. For example, our review suggests that prosecutors are more likely to file and attempt to prove available enhancements for weapons and, perhaps, prior record under the DSL. The analyses can verify this preliminary observation and identify the types of cases in which filing practices have changed. Similarly, since all three sets indicate whether there was a plea and/or sentence bargain for each case, studies can examine changes in prosecutorial bargaining practices, e.g., changes in the kinds of cases that are bargained, or changes in the "toughness" of bargains.

Since they include both ISL and DSL cases, changes in prosecutorial discretion under the DSL can be examined within both the Rand and the Berkeley-Rutgers studies. Changes under the DSL can also be studied through the Community Release Board data, if it is supplemented by a set of ISL cases. Analyses of supplemented Community Release Board data would provide much greater information about the effects of the DSL on prosecutorial practices. The Board's data include all conviction offenses and apply to three counties, as opposed to the single conviction offense within one county for the other two data sets. Thus the Board's data might reveal important jurisdictional differences in prosecutors' actions under the DSL.

Second, the effects of prosecutorial actions on the goal of just punishment can also be examined through analyses of all three sets of data. The analyses can consider whether prosecutorial filing and bargaining action or attempts at proving specific charges produce disproportions between the seriousness of offenses and their ultimate punishment. Although all three data sets can be used to explore these issues, the Rand study provides the opportunity to examine a wider range of punishments because its data include cases filed as felonies (i.e., robbery) that resulted in conviction in the Superior Court, even if the disposition was a misdemeanor. The Community Release Board data include only felony convictions. The wider range of dispositions for the Rand study might provide a more sensitive analysis of prosecutorial actions affecting just punishment.

Third, the Community Release Board data can be used to examine the effect of prosecutorial actions on sentencing equity. Identification of sentence inequities requires a substantial sample to account for legitimate sentencing variation, a sample larger than those of the Rand or Berkeley-Rutgers studies. Also, differences in prosecutorial practices among jurisdictions are likely to contribute heavily to differential sentencing. While the Rand and Berkeley-Rutgers studies are limited to a single jurisdiction, the Community Release Board has data to examine prosecutorial actions throughout the state.

Fourth, the Community Release Board can be used to examine how prosecutorial practices respond to legislative changes in penalty levels. This analysis requires the comparison of changes in prosecutorial action over time. Both Rand and the Berkeley-Rutgers studies obtained DSL data for limited periods of time. In contrast, the Community Release Board will continue to collect data so that prosecutorial responses to successive changes in legislation can be tracked. Since prosecutors might file different charges or bargain for different conviction offenses in response to substantial changes in penalty levels, this analysis must examine the multiple crime categories in the Community Release Board data.

Analyses of prosecutorial actions for homicide cases should provide a particu-
larly interesting examination of how prosecutorial practices respond to changes in legislated penalty levels. Penalties for lesser homicides have been substantially increased. Penalties for second degree murder have changed from DSL terms of 5, 6, and 7 years to indeterminate sentences with a mandatory 15 years before parole. Original penalty levels for voluntary manslaughter of 2, 3, or 4 years were raised to 2, 4, or 6 years under SB 709. In homicide cases, prosecutors have particularly wide latitude for changing their practices in response to these substantial penalty changes. Legal definitions of homicides are distinguished by subtle differences in the circumstances of the crime and the defendant's mental state, which give prosecutors great discretion in those cases.

The cumulative information from the research projects examining prosecutorial discretion will reveal how prosecutorial actions affect penalty levels, court practices, and the basic purposes of the DSL. This research might also aid the legislature in determining whether it is desirable to constrain prosecutorial discretion and, if so, what procedures might be appropriate.

CONCLUSIONS

Our review indicates that thus far the California criminal justice system has adjusted well to determinate sentencing. For the most part, courts have mastered the technical requirements of the law. More convicted felons are being sentenced to prison, representing a trend that started before the DSL. Initially, average sentence lengths under the DSL appear to be lower than under the ISL, and the range of sentences is now narrower. The certainty of prison terms is popular with prison inmates, and prison discipline does not appear to have been adversely affected by the law, although discipline has been deteriorating over several years.

Our review also indicates potential problems in corrections that could jeopardize California's system of determinate sentencing. Present sentencing practices probably will create steady increases in the prison population, exceeding the single cell capacity of the Department of Corrections. The relief valve role played by the Adult Authority is no longer available to deal with crowding. Excessive prison population will likely contribute to greater violence and disciplinary problems in prison. In turn, crowded California prisons invite judicial intervention, potential restrictions on new prison commitments, or the potential return to indeterminate sentencing procedures.

It will be up to the legislature to deal with the impact of the DSL on corrections. With the DSL the legislature has restored to itself almost complete responsibility for determining the population of prisons through its sentencing policies. Recent legislative action increasing criminal penalties will likely aggravate rather than relieve correctional problems. Within two years after the DSL was adopted, the legislature twice enacted broad legislation (AB 476 and SB 709) increasing the length of DSL prison terms.123 Our estimates suggest that these increases to date have been moderate, and our review provides some evidence that the legislature may have begun to consider fiscal and correctional effects of continued penalty

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123The legislature has also eliminated some of the incentives in the probation subsidy act that kept convicted felons in local jails and on probation.
increases. Nevertheless, the increased prison terms under these bills will further increase prison populations. Other legislation passed subsequently has further increased prison terms (SB 13, 1979). Early experience suggests that the legislature may well have difficulty with pressures for piecemeal changes in the penalty structure, which in turn may raise questions about the rationality of its sentencing policies and exacerbate the problem of prison crowding.

Research proposed in this report would contribute to future decisions on sentencing and correctional matters by the legislature and other policymakers. Research on corrections would describe the effects of crowding on California prisons to guide later decisions about new prison construction or attempts to limit prison population.\textsuperscript{124} Additional research on correctional policy would examine prison programs and prison discipline as they are affected by the statutory changes of the DSL and by the increasing population.

Four studies of sentence policies would aid the legislature in adjusting DSL sentences to achieve the basic purposes of the law within reasonable prison populations and cost.\textsuperscript{125} One study would compare the severity of sentences under the ISL and DSL. A second would see how well actual sentences meet legislative determinates of just punishment. A third would examine the sources of sentence inequities and the effects of the DSL on sentencing equity. The fourth would estimate incapacitation effects of the DSL, the reductions in crime achieved through isolating felons from society.

Our review also suggests a second potential problem with the DSL arising out of prosecutors’ increased discretion under the law. Because prosecutors’ actions are only slightly constrained by the DSL or by public scrutiny, their exercise of discretion could frustrate the law’s basic purposes of just and equitable punishment. Proposed studies of prosecutorial discretion and the relationship between the severity and imposition of punishment would examine how legislative policies are limited by prosecutorial and other court processes.

In addition to their contribution to California’s policy decisions, the proposed research would provide information for persons in other states interested in determinate sentencing. Each of the studies examines critical effects of the DSL or the success of the law in meeting its objectives. In addition, the proposed study of the legislature’s actions under the DSL is perhaps the most important part of an overall description and evaluation of the law. Because of its central role under the DSL, the legislature’s actions in adjusting sentence policies or prison capacity should be monitored over several years. Together, these studies will document major effects of the DSL and provide the basis for a thorough evaluation of the California criminal justice system under determinate sentencing.

\textsuperscript{124}This research could not be available for several years. Although present decisions about prison construction would have to be made without the results, the research could aid further decisions in the 1980s or the state’s defense of litigation about prison conditions.

\textsuperscript{125}The legislature’s ability to actually change sentences depends on court reactions to statutory changes. This issue is examined in the research described in the next paragraph.
APPENDIX

DATA USED TO GENERATE TABLE 5

Table A.1

CALIFORNIA PRISON POPULATION—SOURCES OF ENTRY AND EXIT

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<th>Year</th>
<th>Male Prison Population</th>
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REFERENCES


