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Controlling Felony Plea Bargaining in California: The Impact of the "Victims' Bill of Rights"

California Department of Justice

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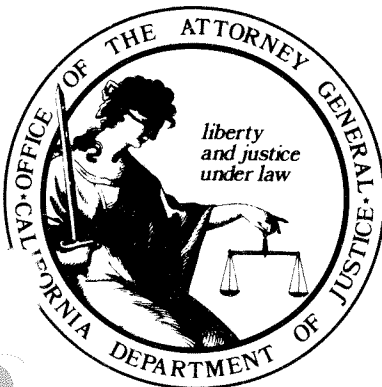
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**Controlling Felony
Plea Bargaining
in California:
The Impact of the
"Victims' Bill of Rights"**

Candace McCoy, J.D.
Robert Tillman, Ph.D



California Department of Justice
Division of Law Enforcement
Criminal Identification and Information Branch
BUREAU OF CRIMINAL STATISTICS

John Van de Kamp, Attorney General

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". . . there is a constant pressure upon the law to do something, whether it may do anything worthwhile or not. . . Giving up on the naive faith in formal lawmaking which finds expression in the common phrase, "There ought to be a law against it," would do much for the efficiency of the criminal law." Roscoe Pound, Criminal Justice in America, (1930), p. 69.



July 1986

For the past three years, I have been pleased to sponsor the Criminal Justice Fellowship Program, which brings a few of the finest doctoral candidates and senior fellows to the California Attorney General's Office to undertake research projects. The purpose of the program, administered by the Bureau of Criminal Statistics (BCS), is to advance knowledge in criminal justice, encourage the development of policies based on research findings, and enhance the use of BCS data. Through this program, we have sponsored research on such topics as juvenile justice practices and policies, the exclusionary rule, and the prevalence and incidence of criminal behavior.

This monograph represents the intensive, year long efforts of our first two fellowship recipients, Robert Tillman and Candace McCoy. In June 1982, California voters approved Proposition 8, the "Victims' Bill of Rights," an omnibus package of criminal justice legislation. The monograph is an in-depth analysis of the impact of Proposition 8 on two key aspects of the criminal justice system: plea bargaining practices and the use of sentencing enhancements.

I am proud of the quality of this research and the resulting monograph. Candace's and Robert's experience in sociological research, jurisprudence, and the practice of law is successfully blended to create a thought-provoking analysis of one of the major criminal justice initiatives of the 1980's. The monograph answers many important questions, while raising other interesting and provocative issues regarding the impact of Proposition 8.

A handwritten signature in cursive script that reads "John K. Van de Kamp".

JOHN K. VAN DE KAMP
Attorney General

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This report was prepared as part of the Attorney General's Criminal Justice Fellowship Program. However, the contents do not necessarily reflect the official position or policies of the Attorney General.

August, 1986

CONTENTS

Page

Introduction.....xi

 Organization of the Report.....xi

Acknowledgements..... xii

Chapter 1

History and Provisions of Proposition 8.....1

 Legislative History.....1

 Elements of Proposition 8.....2

 Focus of the Study.....3

 The "Ban" on Plea Bargaining.....3

 Habitual Offender Enhancements.....4

 Conclusions.....5

 Notes.....7

Chapter 2

Legal Impact, Organizational Theory and Plea Bargaining.....9

 Legislative Intent and Evaluation Research.....9

 Courts as Complex Organizations.....10

 Plea Bargaining and Organizational Relationships.....11

 Controlling Discretion in Plea Bargaining.....12

 Notes.....15

Chapter 3

Responses to Propositions 8's Limitations on Plea Bargaining.....19

 Common Procedural Events.....19

 Effect on Trial Rates Statewide.....21

 Effect on Guilty Plea Practices Statewide.....22

 A Closer Look: Trends in Three Different Counties.....24

 Factors Influencing Adjudication in Each County.....26

 Court Structures and Response to Proposition 8.....28

 Implications.....37

 Notes.....39

Chapter 4

The Impact of a New Habitual Offender Law.....43

 Uses of PC 667(a): Hypotheses.....43

 Qualitative Findings.....44

 Quantitative Findings: The Attrition of 667(a) Enhancements.....45

 Effects on Sentencing.....47

 Conclusions.....50

 Notes.....51

Chapter 5

A Statistical Assessment of Proposition 8.....53

 Interrupted Time-series Analysis.....54

 The Impact on Certified Guilty Pleas.....56

 The Effect of Proposition 8 on Sentencing.....60

 A Reassessment of the Trend.....62

 Conclusions.....65

 Notes.....66

86-10-195

Chapter 6
Implications of Proposition 8 for Justice Administration.....69

Review: The Empirical Findings.....69
Causal Connections: Proposition 8 and Changes in Courtwork.....70
Symbolic Politics and Criminal Justice Reform.....71
Citizens' Distrust of Court Efficiency.....72
Due Process and Municipal Court Guilty Pleas.....74
The Possibility of Organizational Change.....76
Conclusions.....77
Notes.....79

Appendix I: Data Sources.....81

Quantitative Data Sources.....81
Qualitative Data Sources.....82
Data Analysis: Software.....83
Notes.....84

Appendix II: ARIMA Analysis.....85

Notes.....90
Other Sources.....91

Tables

<u>Table Numbers</u>	<u>Page</u>
3-1 Trials as a Percent of Superior Court Criminal Dispositions, Fiscal Years 1974/75 - 1983/84.....	21
3-2 Certified Guilty Pleas as a Proportion of Superior Court Dispositions, 1980-1984 Serious Felonies versus Other Felonies, Statewide.....	23
3-3 Voter Response to Proposition 8 Statewide and Alameda, Los Angeles, and San Diego Counties.....	28
4-1 Sentence Enhancements for Persons Received in Prison, Penal Code Section 667(a) By Quarter, Statewide.....	46
4-2 Sentence Enhancements for Persons Received in Prison, July 1982 - August 1984, Penal Code Section 667(a), Alameda, Los Angeles, and San Diego Counties.....	47
4-3 Prison Sentences as a Percent of Robbery and Rape Complaints Ending in Conviction, 1980-1984, Alameda County, San Diego County, and Compton.....	48
4-4 Median Prison Sentence Length (In Years) For Robbery and Rape Complaints, 1980-1984 Alameda County, San Diego County, and Compton.....	49
5-1 Parameter Values and Diagnostic Statistics For the Pre-Intervention Series, Statewide and Alameda and San Diego Counties.....	56
5-2 Parameter Values and Diagnostic Statistics, For the Full Series, Including the Intervention Component, Certified Guilty Plea Rate, Statewide.....	57
5-3 Parameter Values and Diagnostic Statistics For the Full Series, Including the Intervention Component, Certified Guilty Plea Rate, Alameda County.....	58
5-4 Parameter Values and Diagnostic Statistics For the Full Series, Including the Intervention Component, Certified Guilty Plea Rate, San Diego County.....	59
5-5 Parameter Values and Diagnostic Statistics For the Full Series, Including the Intervention Component, Prison Sentences, Statewide.....	62

Figures

<u>Figure Numbers</u>	<u>Page</u>
3-1 Trials as a Percent of Superior Court Criminal Dispositions, Fiscal Years 1974/75 - 1983/84.....	22
3-2 Certified Guilty Pleas as a Percent of Superior Court Dispositions, 1980 - 1984 Serious Felonies versus Other Felonies, Statewide.....	23
3-3 Certified Guilty Pleas as a Percent of Superior Court Dispositions, 1980 - 1984 All Felonies, Alameda County, San Diego County, and Compton.....	25
5-1 Certified Guilty Pleas as a Percent of Superior Court Dispositions, 1978 - 1984 Serious Felonies versus Other Felonies, San Diego County.....	54
5-2 Certified Guilty Pleas as a Proportion of Superior Court Dispositions, 1978 - 1984 Serious Felonies versus Other Felonies, Alameda County.....	57
5-3 Certified Guilty Pleas as a Proportion of Superior Court Dispositions, 1980 - 1984 Serious Felonies versus Other Felonies, Statewide.....	59
5-4 Certified Guilty Pleas as a Proportion of Superior Court Dispositions, 1980 -1984 All Felonies, Compton.....	60
5-5 Prison Sentences as a Proportion of Total Superior Court Sentences, 1978 - 1984 Serious Felonies versus Other Felonies, Statewide.....	61
5-6 California Youth Authority and Mentally Disordered Sex Offender Sentences as a Proportion of Total Superior Court Sentences, 1978 - 1984 Serious Felonies versus Other Felonies, Statewide.....	63
5-7 Prison, California Youth Authority, and Mentally Disordered Sex Offender Sentences, As a Proportion of Total Superior Court Sentences, 1978 - 1984 Serious Felonies versus Other Felonies, Statewide.....	64
5-8 Probation, Probation with Jail, and Jail Sentences as a Proportion of Total Superior Court Sentences, 1978 - 1984 Serious Felonies versus Other Felonies, Statewide.....	64

INTRODUCTION

In 1922 the legal scholar and later Supreme Court Justice Felix Frankfurter declared that a "practical breakdown of criminal machinery" had occurred. The criminal justice system had collapsed "under the weight imposed upon it by industrial urban life"¹ This view was at the center of the progressive-era movement to reform the criminal justice system. The consensus among progressive reformers was that the institutions of criminal justice, having continued to operate in much the same way as they had in the 19th century, suffered from an extreme lack of organization. The solution was to be found in professionalism and efficient administration.

Sixty years later, the progressive solution had apparently been realized; criminal justice agencies -- police, prosecutors and courts -- had fully embraced the ideals of professionalism and the principles of efficient management. Yet, the system was once again under attack. This time critics argued that the system had become too self-contained; that prosecutors and judges were less concerned with substantive justice and community interests than they were with "keeping the cases moving" in a system overburdened with technicalities and procedural obstacles. The practical result, according to this contemporary critique, was a system of justice that allowed serious criminals to evade the full force of the law, frequently returning them to the streets where they continued to contribute to ever-rising rates of crime. This critique was voiced not only by professionals and reformers, but was also heard in popular discussions -- in editorial pages and radio talk-shows. In the late 1970's and early 1980's, lawmakers responded to these public demands for change with legislation aimed at creating a tougher justice system.

In this study we analyze the consequences of one such attempt at reforming criminal justice: California's "Victims' Bill of Rights." That law, an omnibus package of reform measures, represented a demand by the voters for a major shift in the orientation of criminal justice, away from the rehabilitation model that dominated the 1960's and 1970's and toward a more punitive, retributive model. How criminal justice officials responded to that demand is the subject of our study.

This focus of inquiry ultimately brings us to a broader theoretical question concerning the implementation of change in large, bureaucratic institutions that maintain their own goals and informal rules of operation. In addressing this issue we place ourselves in the company of numerous contemporary analysts of modern organizations who have been struck by a paradox: while these organizations seem to be constantly changing, they also seem extremely resistant to conscious efforts to introduce specific measures of planned change into their daily operations. This study, then, represents both an empirical evaluation of some of the specific consequences of the "Victims' Bill of Rights" and an attempt to contribute to theoretical discussions on this problem.

Organization of the Report

In the first two chapters we attempt to locate the law, both historically and theoretically. The first chapter describes the specific elements of Proposition 8, its political history and legislative precedents. In Chapter 2, the law's plea bargaining and habitual offender provisions are discussed within the context of organizational theory and previous research.

The next three chapters present empirical findings. Based primarily on field work conducted in courtrooms, district attorneys' and public defenders' offices, Chapter 3 provides an in-depth analysis of the impact of Proposition 8 on plea bargaining in three jurisdictions: Alameda County, San Diego County, and the city of Compton, California. All three jurisdictions responded differently to the law, but in none of them was plea bargaining eliminated or its use decreased. Chapter 4 considers the impact of Proposition 8's habitual offender enhancements section. There, we focus on how those enhancements have been used in the plea bargaining process. In Chapter 5, Proposition 8 is seen within the context of long-term changes in felony prosecution in California. The specific impact the law had on two trends -- a shift of plea negotiations to lower courts and an increase in the sentencing of offenders to prison -- is assessed in a time-series statistical analysis. In the final chapter the broader implications of these findings are discussed. There, we return to the issues of due process, implementation of legal change, and symbolic politics that surround controversial laws such as Proposition 8.

¹ Criminal Justice in Cleveland (Cleveland: Cleveland Foundation, 1922), p. vi.

ACKNOWLEDGEMENTS

This project required the cooperation of many people. In completing the fieldwork component of the research, we were fortunate enough to obtain the cooperation and assistance of the district attorneys' offices in each of our three jurisdictions. We would like to acknowledge the assistance of the following members of those offices: in Alameda County, District Attorney John Meehan and Assistant District Attorneys Donald Ingraham and Howard Janssen; Richard Miller, District Attorney of San Diego County, and Steve Casey and Chuck Nickle of that office; Curt Livesay, Assistant District Attorney and Ron Ross, Head Deputy of the Compton Branch of the Los Angeles County District Attorney's Office. These people went out of their way to provide us with access to their staffs and their work-places, without which the study simply could not have been completed. In all three jurisdictions, we benefited from discussions with numerous defense attorneys -- both public and private -- and superior and municipal court judges who gave freely of their time and knowledge.

Assembling the study's quantitative data involved the cooperation of a number of state and local agencies. We would especially like to thank: Dan George and Peggy Hunter who maintain Alameda County's CORPUS data system; Lynn Angene and Pat Clark who maintain the JURIS data base for the San Diego District Attorney's Office; and Neil Riddle of the Los Angeles County District Attorney's Office whose efforts produced the PROMIS data used in the report. The California Board of Prison Terms was also very helpful in supplying data on habitual offender enhancements.

Special recognition is also extended to Maureen Newby who was responsible for the time-series analysis reported in Chapter 5. The many hours she spent at a computer terminal helped to move our analysis beyond the routine, allowing us to raise and answer difficult empirical and conceptual questions. We are also grateful for the helpful assistance on the statistical analysis provided by Professor Richard Berk of the University of California, Santa Barbara, and the editorial review by Professor Floyd Feeney of the University of California, Davis.

Finally, we would like to express our gratitude to the California Attorney General's Office and the Bureau of Criminal Statistics for sponsoring this project. This study was completed under the auspices of the Attorney General's Criminal Justice Fellowship Program; a program designed to provide criminal justice researchers the means both to conduct relevant research and to communicate those results to policymakers and the public. In accomplishing those goals, the Bureau of Criminal Statistics and its staff have done a remarkable job in creating a productive environment and providing a tremendous range of resources for researchers. We hope that the present work will be the first in a lengthy series of significant research efforts to emerge from their program.

Chapter 1

HISTORY AND PROVISIONS OF PROPOSITION 8

On June 8, 1982 Californians passed one of the broadest pieces of criminal justice legislation ever enacted in the state: Proposition 8, "The Victims' Bill of Rights." The stated intent of the initiative was to overcome the perceived imbalances in the criminal justice system which, proponents believed, favored "defendants' rights" over "victims' rights." Proposition 8 was designed as an omnibus package of criminal justice legislation covering such diverse topics as safe schools, bail, the insanity plea, restitution to victims, and plea bargaining. Its underlying theme was that professionals who operate the court system -- judges, prosecutors, and defense attorneys -- were not, in their daily actions, reflecting the "will of the people," but were instead operating under their own set of rules. Thus, Proposition 8 was intended to be a means of imposing this supposedly popular will -- which generally demanded more certain and severe punishment for offenders -- on the criminal justice system.

Legislative History

Most criminal laws are enacted after proceeding through the legislative process, where they are reviewed and modified by various committees and benefit from practitioners' comments. Proposition 8, in contrast, was passed directly by the voters using the initiative process. The creators of Proposition 8 argued that such a tactic was necessary because, in their view, the Legislature had been "dragging its feet" on criminal justice legislation, and direct action by the people was required. Thus, unlike previous legislation which sought major changes in California's criminal justice system -- for example, the 1977 Determinate Sentencing Law -- Proposition 8 arose from outside the system rather than from within. The fact that criminal justice practitioners had little opportunity to comment on the initiative greatly increased the likelihood that elements of the law would conflict with established system practices and thereby result in implementation problems.

Despite its maverick character, Proposition 8 was passed by a majority of the voters -- statewide, 56.4 percent in favor, 43.6 percent opposed -- in the primary election on June 8, 1982 and went into effect the next day. The vote was no surprise to most observers, who were well aware of the public's "get tough on crime" attitude. Passage of the initiative may also have been helped by the presence of a controversial gun control measure on the ballot; unusually large numbers of "hardliner" voters may have gone to the polls to vote against gun control and, incidentally, for Proposition 8.

Seen in the context of criminal justice policy in California over the last two decades, Proposition 8 signaled an important shift. The dominant official attitude toward crime legislation in the state during the 1970's had a decidedly liberal cast, emphasizing the rights of defendants and rehabilitation over punishment. During the late 1970's, when crime rates were rising dramatically, a small group of conservative lawmakers attempted to introduce harsher, more punitive laws into the Penal Code. However, their efforts were generally stymied by the liberal members of the Assembly Committee on Criminal Justice, who were able to kill the conservatives' bills before they reached a vote in the full house. Having found their attempts to enact tougher criminal laws blocked in the normal legislative process, the conservative lawmakers took their ideas directly to the voters.

However, their efforts could have been unnecessary because the political atmosphere had changed in the first two years of the 1980's. Suddenly, liberals as well as conservatives, both in the state Senate and the Assembly, began to respond to the public's concern about crime. In 1981, then Governor Edmund G. Brown Jr., had declared that crime was "the issue that concerns our citizens more than any other."² That was the year when everyone "jumped on the anti-crime bandwagon," and nearly 300 criminal justice bills flooded the Legislature.

Despite this changed atmosphere, in the Spring of 1981 conservative legislators publicly proclaimed that they would take their proposals directly to the public via the initiative process in the primary election scheduled for the following year. Following a petition drive which, although contested, eventually produced the required number of signatures, the initiative was placed on the June ballot. It was labeled "The Victims' Bill of Rights," and it became part of the California Constitution and Penal Code when it passed on June 8, 1982.

This election outcome was immediately challenged in the California Supreme Court. Plaintiffs claimed that the initiative violated a California law requiring that all initiatives refer only to a "single subject." Because Proposition 8 covered diverse topics -- although all were in some way related to criminal justice -- its critics maintained that it violated this standard and should be struck down. In a decision handed down in September 1982, the court ruled otherwise,⁴ so the law remains in effect.

In fact, Proposition 8's supporters, who also generally have criticized the California Supreme Court as being "too soft on crime," may have been surprised when the Court upheld each provision of the new law. Several individual sections of Proposition 8 have been challenged, and in almost every case the Court has upheld the new law, which in many instances required that established California case law be overturned. As of this writing, the Court has upheld many of Proposition 8's provisions including the sentencing enhancement provisions, the "truth in evidence"⁵ section, and the victim's right to speak at hearings and to receive restitution. One specific subject of this essay -- Proposition 8's plea bargaining limitation -- has not been challenged in appellate proceedings, nor is it likely to be.

Thus, it is fair to say that "The Victims' Bill of Rights," enacted almost four years ago with the support of a conservative political apparatus and driven by the public's discontent with the criminal justice system, is by now well-embedded in California law.

Elements of Proposition 8

Proposition 8 changed California law in two ways: by adding sections to the state's Penal Code and by adding sections to the state Constitution. The constitutional amendments included several broad pronouncements which (1) provided for restitution to crime victims; (2) established a "right to safe schools" for public school students; (3) curtailed the state's evidentiary exclusionary rules; (4) required that "public safety" be the basis for the decision to grant bail; (5) provided for the unlimited use of prior convictions for the purposes of impeachment in criminal proceedings; and (6) stated that "when a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court. . . ."⁶

Proposition 8 also added sections to the state's Penal Code which (1) abolished the diminished capacity defense; (2) provided for sentence enhancements of five years for "habitual offenders" with prior convictions for "serious felonies"; (3) gave families of crime victims the right to express their views at sentencing hearings and parole hearings; (4) prohibited plea bargaining in "serious felony" cases; (5) prohibited the sentencing of any person 18 years of age or older who has been convicted of a "serious felony" to the California Youth Authority; and (6) repealed the statute defining Mentally Disordered Sex Offenders, among other provisions.

To many observers, several of these sections appeared to be radical departures from existing law and procedural standards. Despite their radical appearance, however, many of Proposition 8's elements had been proposed in other legislation or duplicated existing laws. For example, the aims of the section abolishing the Mentally Disordered Sex Offender category had already been accomplished by laws enacted in 1981. Likewise, the "diminished capacity" defense, which Proposition 8 abolished through a revision to the Penal Code, had already been eliminated through legislation effective January 1, 1982. Even the controversial "truth in evidence" section, which sharply curtailed the state's restrictive exclusionary rules, had been preceded in 1981 by a Senate proposal to amend the state Constitution. This Senate proposal, which had covered virtually the same topics and contained very similar wording, was not passed.

Thus, Proposition 8 was not so much a radical reversal of recent trends in criminal legislation as it was a phenomenon that gave public visibility to a submerged trend toward more punitive "law and order" legislation in California. While political support for these measures had been weak in the late 1970's, the tide had shifted by 1980, when even the most liberal lawmakers began to publicly declare their support for tough anti-crime measures.

Focus of the Study

This study evaluates the effect of two sections of Proposition 8: the "ban" on plea bargaining and the use of "habitual offender" sentence enhancements. While other sections of the law have important policy implications, we chose to concentrate on these two because they hold the potential for significantly and measurably changing the felony prosecution process in California.

Unlike some of the more general statements of policy, characteristic of other Proposition 8 provisions, the plea bargaining limitation and sentencing enhancements were direct, definite orders to criminal justice personnel to change their adjudication practices. These are good study subjects because the impact of the particular legal changes should be discernible in available quantitative data. Moreover, these two elements of the law are important because they reflect themes found in criminal justice legislation enacted in other states across the country in the late 1970's and early 1980's: the desire to reduce the discretion of criminal justice officials and impose more severe, mandatory sentences on offenders. As discussed in the next chapter, these efforts have seldom accomplished their goals, but the movement to implement such "reforms" in criminal justice remains strong today. Therefore, the question of whether changes in law and policy can indeed achieve their stated goals may influence future attempts to change the criminal justice system in California as well as in other states.

The "Ban" on Plea Bargaining

Plea bargaining, the negotiation between prosecutors and defense attorneys for sentencing or charge accommodations in return for defendants' guilty pleas, is a frequent target of the public's scorn and dissatisfaction with our modern judicial system. In the public's view, this practice leads to a dilution of the impact of criminal laws because it allows the guilty to avoid serious punishment and reduces general deterrence when its prevalence becomes widely known among potential offenders.

As previously mentioned, California lawmakers had begun to respond to the public's dissatisfaction by sponsoring legislation to restrict plea bargaining even before Proposition 8 was passed. Senate Bill 980, introduced in the California Senate in March 1981, would have prohibited "any plea of guilty or nolo contendere as a result of the existing procedures or any plea agreement, as defined, where (1) the defendant is charged with any offense for which the granting of probation or suspension of sentence is prohibited; (2) the defendant is charged with a "violent felony. . . ." The bill also carved out exceptions which are identical to those contained in Proposition 8. Although the bill was defeated, it was clearly a forerunner of Proposition 8's restrictions on plea bargaining.

Proposition 8 expanded and elaborated upon Senate Bill 980 by adding Section 1192.7 to the California Penal Code. It reads:

(a) Plea bargaining in any case in which the indictment or information charges any serious felony or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or a dismissal would not result in a substantial change in sentence.

(b) As used in this section, "plea bargaining" means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or considerations by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

This new Penal Code section also contains a list of 25 "serious felonies" to which the prohibition applies. This list includes such crimes as murder, rape, robbery, arson, various sexual assault crimes, and residential burglary.¹⁰ Currently, these "serious felonies" account for approximately one-fourth of all felony arrests in California.

On its face, then, this section would seem to erect a major obstacle to the practice of plea bargaining in felony cases. However, even a casual reading reveals several loopholes which could allow the practice to continue within Proposition 8's parameters. First, as many critics pointed out, the exceptions stated (i.e., insufficient evidence, witness unavailable, no substantial change in sentence) are so vague and general that they could conceivably be applied to every case in which plea bargaining was likely to occur prior to Proposition 8, anyway. Further, there is no requirement that such exceptions be proven in court when a case is resolved through a plea bargain. This left open the possibility that exceptions would be declared indiscriminately or, at the other extreme, they could simply be assumed to apply, with no in-court acknowledgement at all.¹¹

Secondly, the text of the law states that plea bargaining is prohibited "in any case in which the indictment or information charges any serious felony. . . ." In California, most felony cases begin in a lower court with the filing of a complaint. Most defendants plead not guilty to this complaint at their initial appearance in court. Later, either before or after a preliminary hearing, the defendant may plead guilty. Whether the defendant has already pled guilty or not, the case proceeds to superior court, where an "information" is filed. But in those felony cases in which guilty pleas have already been accepted by the municipal court, the superior court simply receives the "certified" plea, files the felony "information," and sentences the defendant immediately. As we found in our fieldwork, the sentence almost always follows the disposition recommended by the municipal court judge. By referring to superior court "Informations" and "Indictments" but not to municipal court "Complaints," Proposition 8 does not prohibit plea bargaining in the lower court. As we shall discuss at length in later chapters, this wording allowed for the possibility that plea negotiations would simply shift from superior to municipal courts.

It is difficult to determine if these loopholes, which practitioners are now using, were intentionally inserted into the law as a safety valve. A literal interpretation and application of the plea bargaining "ban" could potentially produce a huge backlog of cases in criminal court, if the ban meant that most cases should go through trials. It seems unlikely that omission of the word "complaint" in the section prohibiting plea bargaining could have been accidental, since previous legislation attempting to limit plea bargaining (Senate Bill 980) sponsored by the same legislators and politicians who later supported Proposition 8, had included the word "complaint."

Furthermore, at least one of the persons involved in the drafting of Proposition 8 stated in an interview that the omission was intentional and that evasion of the law's restrictions had been anticipated. However, he indicated that even if this wording permitted plea bargaining to continue mostly unaffected by the new law, it would have served its purpose. Analogizing legal change to the movements of a train, he claimed that the law was intended to "jolt the cars" so that the "train" of criminal justice could start moving in the proper direction. In his view, Proposition 8 was not intended to provide practical guidelines to court professionals, but was intended as a message to them expressing the public's dissatisfaction with the way criminal justice was operating in California.¹² Thus, the goals of this new law involved more than a change in plea bargaining and sentencing; they were also symbolic.

Habitual Offender Enhancements

California law has long provided for more severe sentences for those persons deemed "habitual offenders," although these sanctions have changed considerably in recent years. The Determinate Sentencing Law, which became effective in 1977, required that a "presumptive" term be assessed for each conviction, and that additional sentence enhancements of three years be added to this base term for persons convicted of any of a group of "violent felonies," if the offender had served a prior prison term for one of these felonies in the previous ten years. One-year enhancements were required for convictions in the "non-serious felony" group.

Advocates of Proposition 8 argued that the habitual offender enhancements established by the Determinate Sentencing Law were inadequate for several reasons. First, they required prior prison terms to have been served, thereby excluding many persons convicted of "serious felonies" who had received probation. Second, they allowed for a "washout" period after which an offender could not be held liable for prior convictions; e.g., a previous conviction which occurred 11 years prior to the instant conviction could not be used for enhancement. Third, enhancement sentences could be served concurrently, rather than consecutively, with the base presumptive term, according to the sentencing discretion¹³ of the judge. "Hardliners" wanted only consecutive sentences to be imposed.

In response to these criticisms, Proposition 8 added Section 667(a) to the Penal Code. It reads:

Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

This provision of the initiative expands the scope of the previous habitual offender laws so as to apply them to a much larger population of offenders: those with prior serious felony convictions rather than prison terms. Also, it significantly increases the severity of those sanctions. One of the results of this law is to steeply raise the stakes in the plea bargaining process for defendants with previous convictions, a fact which, we conclude, has altered the dynamics of prosecution in those cases.

Furthermore, Proposition 8 also sought to assure that habitual offender enhancements would actually be imposed after they were proven in court; this would require placing a limitation on judicial discretion. One aspect of the Determinate Sentencing Law "habitual offender" enhancements that angered the backers of Proposition 8 was that the imposition of these enhancements was not mandatory. Judges retained the discretion to strike or dismiss them even after they had been proven. This judicial power, for a similar set of enhancements, became the center of controversy in a case decided by the California Supreme Court in 1978. In People v. Tanner,¹⁴ the court ruled that superior court judges had the power to strike or dismiss the "mandatory" prison enhancements for persons convicted under the state's "use-a-gun-go-to-prison" law. This decision infuriated "law and order" advocates and even led to a campaign to recall several Supreme Court justices. Although the Supreme Court later reheard the case and reversed its original decision, the controversy surrounding the Court remained.

The phrase in Proposition 8 stating that "any prior felony convictions. . . shall (emphasis added) subsequently be used without limitation for the purposes of . . . enhancement" has been widely interpreted as meaning that "the trial court no longer has the power to strike prior convictions, and judicial and statutory authority to the contrary has been superseded."¹⁵ This section in Proposition 8 must be seen as a direct response to the controversy sparked by the state Supreme Court in Tanner and an attack on judicial discretion reflecting a long battle between political conservatives and the California Supreme Court.¹⁶

Conclusions

Apparently, both the plea bargaining and the habitual offender sections of Proposition 8 were intended to curtail the discretion available to criminal justice officials. These provisions transformed into practical measures the underlying political theme of the initiative: that these officials were to carry out the will of the people by imposing certain and severe punishments on convicted felons. Proposition 8 fashioned both substantive laws and procedural guidelines under which officials were to comply with this mandate.

Yet, it would be a mistake to characterize Proposition 8 as a straightforward directive to criminal justice practitioners. Many of its provisions are exceptionally vague and open to a broad range of interpretation -- in fact, this vagueness has spurred much criticism of the initiative from a variety of justice professionals. Moreover, several of the statute's provisions overlap and inevitably result in contradictions in everyday practice. For example, this study will show that although the new habitual offender enhancements are sometimes used to secure tougher sentences in apparent compliance with the intent of the law, this result is usually accomplished through plea bargaining, an apparent violation of other provisions of Proposition 8. Thus, in certain cases the "spirit" of the law may be realized only if the "letter" of the law is violated.

Therefore, we should be careful when we speak of the "success" or "failure" of Proposition 8 in achieving legal change. Evaluations of similar attempts to change prosecution practices in other states have shown that such efforts often produce unanticipated consequences which may or may not be consistent with the ostensible goals of the reform measures. Furthermore, we may observe real change, but it may have been caused by the new law or by something else.

It is important to understand these dynamics before plunging into legal reform or before evaluating it. In the next chapter, we discuss the goals of evaluation research, theories of organizational change, and reports from several jurisdictions on the character of plea bargaining and the opportunities for its transformation. Afterwards, we apply these ideas in an evaluation of the effects of Proposition 8 on limiting plea bargaining and enhancing sentences for convicted felony offenders.

Notes

¹ Impact studies of the Determinate Sentencing Act include Jonathan D. Casper, David Brereton and David Neal, The Implementation of the California Determinate Sentencing Law (Washington, D.C.: National Institute of Justice, U.S. Department of Justice, 1981) and Sheldon L. Messinger, Andrew Von Hirsch, and Richard F. Sparks, "Report on Strategies of Determinate Sentencing," a collection of chapter abstracts from Strategies of Determinate Sentencing (Washington, D.C.: National Institute of Justice, U.S. Department of Justice, 1983) and Sheldon L. Messinger and Phillip E. Johnson, "California's Determinate Sentencing Statute: History and Uses," in Determinate Sentencing: Reform or Regression (Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, 1978).

² Los Angeles Times, 20 September 1981, Section I, p. 3

³ Ibid.

⁴ Brosnahan v. Eu, 31 Cal. 3rd 1 (1982).

⁵ The provision of Proposition 8 that required five-year prison term enhancements for prior felonies was upheld by a lower court in People v. Villasenor, 152 Cal. App. 3d 30 (1984) and approved by the California Supreme Court in People v. Jackson, 37 Cal. 3d 826 (1985). There, the Court said that other Penal Code sentencing standards limiting the number of prison years added by enhancements to twice the imposed base term sentence did not apply to the Proposition 8 enhancements for prior serious felony convictions; "five years" means exactly that. Regarding the victim's right to speak at the sentencing hearing and receiving restitution money from the criminal, the Supreme Court has tacitly approved both provisions of Proposition 8 by allowing favorable lower court opinions to stand. See People v. Zikorus, 150 Cal. App. 3d 324 (1983) and People v. Sweeney, 150 Cal. App. 3d 553 (1984).

The Court approved the controversial "truth in evidence" provision in principle, but has generally applied it so that its effect has been to cut back California case law when it exceeded the protections offered by federal case law, so that the more stringent California standards would coincide with federal standards. "Independent state grounds" for the rule excluding evidence obtained from an unconstitutional search or seizure, for example, were abolished in In re Lance W., 37 Cal. 3d 873 (1985); modified footnote 19: 38 Cal. 3d 412a. The federal exclusionary rule standard now prevails. The federal rule also now applies to whether or not a confession was voluntary and therefore admissible evidence. Previously, it had to be proven "beyond a reasonable doubt," but in In re Randy H., 153 Cal. App. 3d 316 (1984), a lower court said Proposition 8 requires that voluntariness be proven only by a "preponderance of evidence," a standard as yet untouched by the California Supreme Court. Similarly, the Court upheld Proposition 8 regarding use of prior convictions as evidence against a suspect in another crime, and applied the federal court's rule that all prior adult felony convictions showing "moral turpitude" may be used against the defendant. (The U.S. Supreme Court has never ruled on this issue.) See People v. Castro, 38 Cal. 3d 301 (1985). Since the Castro case involved a juvenile record, the adult standard did not apply. Similarly, in Ramona R. v. Superior Court, 37 Cal. 3d 802 (1985), the Supreme Court refused to apply Proposition 8 to permit a juvenile's statements from a pretrial hearing to be used at trial. These cases involving juveniles are the few that do not fall under Proposition 8, according to the Court.

The prohibition of superior court plea bargaining instituted in Penal Code Section 1192.7 has not been directly challenged. In fact, it has been ignored by both defendants and state prosecutors in cases where such challenge was possible. For example, People v. Jackson, *supra*, involved a plea bargain and whether Penal Code Section 667(a)'s five-year enhancement could be imposed under its terms. Neither side in the litigation challenging this part of Proposition 8 mentioned that under another section of the law it was probably illegal to negotiate the later-disputed plea agreement at all.

⁶ California Constitution, Section 28.

7 Sections 6300 through 63300 of the Welfare and Institutions Code (Article I, Chapter 2, Part 2, Division 6) were repealed by Statutes of 1981, Chapter 928, Section 2, effective January 1, 1982.

8 Senate Constitutional Amendment 7 would have amended the California Constitution by adding to Article I, a Section 28 that read:

Notwithstanding any other provision of this Constitution, evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile or criminal offense, except as provided by statute or as required by the United States Constitution.

9 Senate Bill 980 (March 1981).

10 Penal Code Section 1192.7(c) states:

As used in this section "serious felony" means any of the following: (1) murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or threat of great bodily harm; (5) oral copulation by force, violence, duress, menace, or threat of great bodily harm; (6) lewd acts upon a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant uses a firearm; (9) attempted murder; (10) assault with the intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a non-inmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of a residence; (19) robbery; (20) kidnapping; (21) taking of a hostage by an inmate of a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering or providing heroin, cocaine, or phencyclidine (PCP) to a minor; (25) any attempt to commit a crime listed in this subdivision other than an assault.

11 California Legislature, Assembly Committee on Criminal Justice, Analysis of Proposition 8, (Sacramento, CA 1982).

12 Personal interview with George Nicholson, 15 August 1984.

13 Cathie Wright et al., California Legislature, Assembly Republican Caucus, In Defense of the Victims of Crime: An Analysis of Proposition 8 (Minority Analysis of Proposition 8, Assembly Committee on Criminal Justice, 1982).

14 24 Cal. 3d 514 (1972) was later "depublished" under California court practice. See Stolz, infra note 16, for the long People v. Tanner saga. Note that the Supreme Court may have changed its tune regarding sentencing enhancements. As Tanner was to the Determinate Sentencing Law, People v. Jackson (note 5, supra) is to Proposition 8. Jackson upheld the mandatory flavor of PC 667(a) enhancements. See also 45 Cal. 3d 345 (1975).

15 Attorney General's Guide to Proposition 8, (Sacramento, Ca., 1982), Chapter 9, p 3.

16 Preble Stolz, Judging Judges (New York: The Free Press, 1981).

Chapter 2

LEGAL IMPACT, ORGANIZATIONAL THEORY AND PLEA BARGAINING

Considering all the effort involved in proposing and enacting new legislation, citizens reasonably form the impression that laws are serious things. When drafted, they must be carefully aimed toward particular goals; when operative, they must influence the behavior of the people to whom they are addressed.

It is frustrating and saddening, then, when social scientists announce that "nothing works" -- or even that a law not only has failed to cause desired changes but, in fact, has made matters worse. Though a durable tradition of commentary on legislative implementation takes this despairing tone,¹ and although some laws' impacts are occasionally described as completely disastrous,² often the problem lies not with the laws but with the focus of their evaluations.

Legislative Intent and Evaluation Research

Whether a law has "worked" -- in a simplistic sense, whether it has had the effect intended by its supporters -- is usually difficult to assess. Legislative intent may be obscure or conflicting, so it is difficult to determine the drafters' or voters' intent; to match observed outcomes to the intent; and thus to assess whether the law produced acceptable results.

Furthermore, declarations of legislative intent and impact evaluations based on them invite political posturing. Supporters of a particular law often make inflated claims of what it will accomplish, so evaluators are bound to say the innovation "failed" if success is measured only by whether the legislation completely met its glowing goals.

In short, legislative intent is usually diffuse. The "intent" of a law may be to achieve what its drafters said they wanted, or it may be to achieve what its text demands, or it may be to serve deeper, murkier, but equally important psychological needs of the populace. Criminal justice policies, in particular, are susceptible to "symbolic politics" in which "the rewards offered to constituents involve not substantive changes in the distribution of costs and benefits but largely symbolic reassurances that needs are being attended to, problems are being solved, help is on the way."³ For example, if plea bargaining under Proposition 8 proceeds today much as it did before the law was passed, we should not necessarily conclude that the law "failed." From the perspective of symbolic politics, problems of implementation may be secondary to the primary question of whether the law successfully encouraged a public perception that "something is being done" and, equally important, that it sent to justice professionals the very general message that they should "get tougher."

In this study, however, we cannot plumb the symbolic needs served by Proposition 8, nor will we speculate on the multifaceted intent of its drafters. Instead, we hope simply to describe what actually happened in California's criminal courts. A law has had an impact -- apart from the question of whether that impact matched the law's "intent" -- if it causes or encourages small but significant changes in the behavior of its target population. Rather than set out to assess whether a law was successful or not, evaluators can first ask a question that is more important to the men and women whose daily lives the legislation touches: how has our world changed?

That is how we hope to describe the impact of Proposition 8's plea bargaining limitations and sentence enhancements on the behavior of courthouse actors. We draw on two intellectual traditions: organizational theory and sociolegal literature on plea bargaining. From the first, we take the approach that purposeful organizational change is possible but such attempts must overcome the organizational inertia that inevitably affects bureaucracies. In other words, "some things work, to some extent." As an illustration, court functioning did indeed change after Proposition 8. However, these changes may or may not be attributed primarily to the influence of Proposition 8. Furthermore, the changes were different depending on the characteristics of local courthouse workgroups.

From the literature about plea bargaining, we conclude that California plea bargaining, while cooperative on the surface, is powered by adversarial dynamics and is susceptible to longterm "ratcheting" -- that is, gradual, incremental change in courthouse actors' shared conceptions of justice.

We conclude from our empirical findings that plea bargaining and sentencing have indeed changed, and that, in turn, notions of appropriate punishments are changing. But whether these changes were caused solely by Proposition 8 or by a tangle of other legal and political factors is a difficult empirical question that tests the limits of social scientific methodology. Therefore, one of the major goals of this study is to determine the specific contribution Proposition 8 made to any observed changes. We measure this impact using time-series statistical tests. These tests and their strengths and limitations are discussed in Chapter Five.

This chapter is a brief overview of available academic and professional studies on these subjects. Later we will use these studies to analyze the effects of Proposition 8.

Courts as Complex Organizations

To understand a change caused by a new law, it is first necessary to appreciate the characteristics of the organization that the law is designed to change. Proposition 8 is aimed at criminal courts, which are decentralized, semi-autonomous groupings of legal professionals serving local political jurisdictions.

Courts administer laws and are directed to do so in particular ways. H.L.A. Hart has underscored a distinction between "primary rules" and "secondary rules."⁴ The former are rules of recognition: laws such as the substantive criminal law, prohibiting or requiring certain behavior and addressed to all citizens. Secondary (procedural) rules, however, are addressed to government officials and usually are "rules about rules"; they prohibit or require authorities to administer the laws in certain ways. The functions of procedural rules are to smooth the complex process of decision-making, to limit the discretion available to organizational actors in it, and to make the process accountable to the law and to the public.⁵ Rules controlling plea bargaining or measuring criminal sentences are apt examples.

Since they concern people who almost always work in bureaucracies, these procedural rules must be enforced with an eye to organizational structure and dynamics. Organizations differ in the extent to which they will accept certain change strategies, and their acceptance of change is often associated with their particular organizational structures. Courts are not organized on the Weberian bureaucratic model of most modern corporations and public agencies.⁶ In the courtroom, there is no "boss" nor are there levels of workers each assigned to particular specialized tasks (although each courtroom actor, such as a judge or district attorney, usually employs a support staff organized on hierarchical lines). Courts are decentralized, loosely-knit groupings of professionals, and, unlike highly stratified private corporations or public bureaucracies, court personnel are in constant communication, involved in mutual interaction with many opportunities to influence each other. To a large extent, court work is talking, proving, explaining -- judging -- and change is accomplished not by increasing opportunities for communicating and enforcing what leaders want, but by providing better reasons for a policy outcome than were offered for it before.

Courts' compliance with new rules, then, cannot be assured simply by announcing a new policy from "top management" and pressuring line personnel to follow it. Paradoxically, those who interpret our laws are comparatively insulated from organizational pressures to apply new laws against themselves, at least in the short run. When legislation imposes some new court procedure, court workers cannot truthfully say what it really means until it has been analyzed and tested by the give-and-take of adjudication. Unlike the European inquisitorial court system, where the judge controls procedure and compliance much like the boss of a hierarchically-structured corporation, American criminal courtrooms are adversarial. Each new rule is prodded and examined from the diverse viewpoints of prosecutors, defenders, police, probation workers, and judges.

Of course, change will be accepted by any organization, including courts, when organizational actors have individual reasons to change, anyway. If prosecutors or judges, for example, can serve their own "agendas" by shifting plea bargaining into municipal court, then a legislative order that they do so will probably meet little resistance. One way to assess whether the changes mandated by Proposition 8 already fit court professionals' visions of acceptable court functioning is to observe whether the change was already taking place, even before the law was passed. We undertake such an examination here.

In sum, when new legislation requires court personnel to alter their accepted work patterns, change will not occur immediately. A complex interplay of organizational forces will ensue, and no particular outcome can confidently be predicted. Whether and to what extent a change occurs will be influenced by such organizational variables as: the varying strength of diverse courthouse professionals and patterns of rule communication among them; how radically the new rule departs from past accepted practice; and the strength of outside interest groups in urging the court to follow the new law.

This study focuses on these organizational factors and the influence they have had on the implementation of Proposition 8 in three California counties. We show that, following Proposition 8, plea bargaining shifted from superior courts to municipal courts where such a change had already been contemplated, but it stayed in superior court when there was no internal organizational reason to change. What this meant for the character of plea bargaining and sentencing outcomes depended on the particular work patterns and legal attitudes common to courthouse professionals in each county.

Plea Bargaining and Organizational Relationships

Several writers have noted the unique interplay of roles, tasks, and goals characterizing American criminal courts. The work world of judges, criminal lawyers, and related personnel has been described both as an "assembly line" for cases and as "a truth-testing machine."⁷ The truth-tester metaphor is drawn from the traditional model of courts as adversarial arenas where facts are sorted out, vigorously challenged, and mustered into the closest approximation of truth that a human institution is likely to produce.

In the 1960's, several studies challenged this ancient ideal by applying social science observational techniques to criminal court work. They concluded that the adversarial system of justice was a myth -- in criminal courts, at least, administrative necessity and the constant personal interaction of court professionals produced an "ethic of cooperation."¹⁰ The most obvious empirical indicator of such agreeable accommodation, the commentators noted, was that very few cases ever reached the procedural stage usually admired as the full flower of adversarial truth-testing: a jury trial. (Only about ten percent of felony cases disposed of in California superior courts are resolved after jury trials.) Since most cases end in guilty pleas, these scholars set out to assess whether adversarial norms were evident in plea negotiations.

A small industry was spawned. Once social scientists and lawyers looked behind bar association rhetoric and doctrinal analysis of trial standards, they began to probe more carefully into the social dynamics of plea bargaining. In 1966, the American Bar Association published its Survey of the Administration of Criminal Justice in the United States, devoting an entire volume to Newman's detailed description of plea negotiation and the needs and values it serves.¹¹ Several commissions¹² reviewed plea bargaining practices and vigorously advocated reform, while social scientists began to haunt courtrooms, producing studies criticizing plea bargaining as essentially coercive against defendants¹³ or as "assembly line justice." Later, in the 1970's, critics attacked plea bargaining from a different angle, claiming that it produced sentences more lenient than offenders deserved.¹⁴

A major thesis of plea bargaining literature is that plea negotiation is accomplished by court professionals who inevitably begin to regard the process as routine. Routinizing undermines the ideal of due process under which every case would be carefully scrutinized for legal sufficiency and every defendant's personal characteristics would be taken into account in sentencing. This routinizing of what in theory should be a probing, adversarial process led some critics to claim that plea bargaining is essentially a cooperative endeavor, where challenges to accepted courthouse norms are discouraged. (Some scholars applaud this lack of legal jousting, claiming that a plea negotiation process in which defense, prosecutors, and judges "strain for cooperativeness" by sharing information and discussing case facts in a forthright manner is more likely to produce substantive justice for individual defendants than adversarial wrangling would.)¹⁵

It is interesting to note that of all these sociolegal studies from across the nation, California courts and procedures have been most often observed. We have a lode of material describing and evaluating guilty plea practices in several California jurisdictions, so examining plea bargaining under Proposition 8 will mine an established tradition. Most of the California studies have, in some manner, broached the issue of organizational dynamics and how they affect plea bargaining.

Some California studies describe the observed cooperation in plea bargaining not as semi-conspiratorial mutual backscratching, but as the outgrowth of a perception of social reality that all court professionals learn to share. That shared world view encourages court workers to handle criminal cases by "a cognitive ordering and classification of objects into categories."¹⁶ Attorneys and judges, confronted daily with court calendars filled with similar types of offenses and offenders, quickly perform organizational triage. They mentally separate the cases into categories based on the treatment a particular type of case usually receives, much as doctors in a hospital emergency room separate urgent cases from the more minor ones.

These categories are formed by the particular history of the court and community. What crime has a person who threatens a woman with a knife, committed? Will it be different if her purse is taken? If she is elderly? Most professionals in one particular courthouse will agree that the first facts would be treated as an attempted assault, while others would charge an attempted robbery but easily drop the conviction charge to assault if no other facts are produced. The second incident would be a robbery with a sentencing enhancement for "use of a deadly weapon." Depending on how vicious the defendant appeared, another enhancement for "elderly victim" would be added; the enhancements, moreover, would be added or dropped depending on the discussions between the lawyers and/or the judge about the provable facts of the case. In other words, they would be the subject of plea bargaining.

These "categories" and what case facts comprise them, grow from the shared experience of the courthouse professionals. The punishments considered appropriate for each offense type are also products of this categorization process. Overall, the experience that shapes this "social construct" is "courtwork": the discussions, arguments, and patterns of interaction established in the non-hierarchical, communicative organization of the criminal court. The raw material of these discussions consists of the facts of the cases and the law. If the law changes, will the socially constructed categories of offenses and appropriate punishments change, too?

Because court workers, including judges, agree on the definition of relevant criminal categories and appropriate sentences for them, some commentators have concluded that legal rules have little influence on plea bargaining.¹⁷ Some believe that any contested plea negotiation involves only a challenge to whether a certain case fits into one particular "socially constructed category" or whether it properly fits into a different one, for which punishment is less severe. But the underlying taxonomy of crimes and punishments is left unchallenged.

In our study, though we believe that the description of plea bargaining as a "socially constructed" process is basically correct, we disagree with its corollaries that plea bargaining is not adversarial and that legal rules are irrelevant to the negotiation process. Though the complex interplay of court professionals' decision-making in plea negotiation may appear cooperative, it incorporates important opportunities to challenge the opinions of opponents. Moreover -- and here an evaluation of Proposition 8 will be especially useful -- these challenges are made most convincingly with legal arguments.

If the law changes, the discussions in plea bargaining sessions will too. Slowly, the "socially constructed categories" by which court workers measure crimes, criminals, and punishments will be altered, if the law interjects new ideas (such as five-year sentencing enhancements for prior convictions) into the plea bargaining calculus.

Controlling Discretion in Plea Bargaining

To say that Proposition 8 has had an effect, however, is not to say that it has limited plea negotiations or rendered the imposition of habitual offender sentencing enhancements mandatory. Indeed, if recent evaluations of criminal justice reform measures have proven anything, they have proved that it is almost impossible to sharply limit the discretion available to legal actors. Rather than eliminating plea bargaining, these measures often simply encourage a shift of discretionary practices to different points in the justice system. Analogizing the system to a series of pipes moving water (or cases) from one point to another, with numerous outlets along the way, researchers have referred to this tendency as "hydraulic discretion."¹⁸ Closing the valves at one point in the system -- forbidding plea bargaining in superior court, for example -- builds pressure so that discretion in processing cases will simply reappear elsewhere, at other criminal justice decision-making points.

Numerous evaluations of legal "reform" measures have illustrated this tendency. In 1977 the Michigan legislature passed a "Gun Law" which imposed a mandatory two-year sentence enhancement on anyone who used a firearm in the commission of a felony. Plea bargaining was also banned in such cases. A recent evaluation of the law's impact found that prosecutors were not, as anticipated, simply using the new enhancements as "bargaining tools," but were following the law by alleging and proving the gun-use enhancements in the majority of cases, whenever possible. Yet, average sentence lengths for cases in which prison terms were imposed had not increased substantially. The reason was that judges simply adjusted base sentences so that including a two-year enhancement did not alter the "going rate," i.e., the sentence the defendant would have received without the enhancement. Thus, the court maintained its equilibrium in the face of outside intervention by increasing judicial involvement in sentence bargaining. (This occurred, of course, when a "void" in bargaining had appeared. Before, the prosecutor had controlled negotiations through charge bargaining.)¹⁹

Evaluations of the impact of policies to ban plea bargaining in other jurisdictions have produced similar findings.²⁰ In a study of a plea bargaining ban adopted by the prosecutor's office in a Midwestern community, Church²¹ found that the response of officials was merely to change the form of bargaining. As in Michigan, the ban only covered "charge bargaining," in which guilty pleas are exchanged for a reduction in crimes charged. With this option forbidden, bargaining shifted to negotiations over sentences. Perhaps anticipating this, the drafters of Proposition 8 were careful to forbid both charge bargaining and sentence bargaining in superior court.

One of the few evaluations of a plea bargaining ban that found such a policy to be relatively successful was conducted in Alaska. In 1975 the Attorney General imposed a statewide prohibition on plea bargaining on all district attorneys. In Alaska district attorneys are accountable to the Attorney General. A later evaluation of the policy (which was cited by Proposition 8 advocates) concluded that "the institution of plea bargaining was effectively curtailed in Alaska, and it had not been replaced by implicit or covert forms of the same practice." Furthermore, "court processes did not bog down; they accelerated. . . defendants continued to plead guilty at about the same rates. . ."²²

However, these findings must be viewed skeptically. The evaluation suffered from serious methodological shortcomings that may have altered the empirical basis for the conclusions. Furthermore, even if the policy was successful, Alaska is sufficiently atypical (compared to other states) that reformers should be cautious in predicting similar results elsewhere. The chief difference is the size of caseloads. The number of felony "cases" prosecuted over a two-year period in Alaska's three largest cities (where the majority of people in that scantily-populated state live) totaled only 3,188 -- equivalent to the caseloads of some of the smaller counties in California.²³

Furthermore, Alaska's state budget is ample enough -- the state has no sales tax, for instance, since oil revenues provide most public needs -- that every defendant could conceivably receive a full trial without straining court resources. In fact, under the Alaskan experiment, the trial rate rose from about 10 percent to 20 percent, which certainly meant that not every defendant had demanded a trial after plea bargaining was eliminated, as doomsayers had predicted they would. On the other hand, the 10 percent increase represented a doubled trial rate. Other states could accommodate such a leap in trials only with difficulty.

Previous research has also found that plea bargaining is influenced by the presence of sentencing "enhancements" that increase the severity of sentences because of characteristics of the offense or the offender. In their study of determinate sentencing in California, for example, Casper, et al., found that probation eligibility and enhancements for prior felony convictions and use of a gun "have quickly become part of the plea-negotiation process."²⁴ In the three California counties studied, it was found that "in 1978-79, the most frequently alleged enhancements were typically dropped in a third to half the cases. . ."²⁵ Similar findings were reported in an unpublished study by the California Bureau of Criminal Statistics on the use of the enhancements mandated by California's controversial "use-a-gun-go-to-prison" law. That study found that while 85 percent of the defendants eligible for the enhancement had it used against them, only 60 percent of those charged had the additional sentence imposed. Of the other 40 percent, the enhancements for the great majority (83 percent) were dropped as part of plea negotiations.²⁶

In summary, the literature on plea bargaining bans and offense or offender-specific enhancements do not inspire much confidence in predicting that such changes will be mechanically implemented once mandated by law. Rather, it is more likely that their effects will be filtered through the organizational screens of the principal local criminal justice agencies. While the members of these organizations do not operate outside the law, the discretion they must, of necessity, be granted allows them to be selective in implementing new laws as they see fit.

Yet, we hypothesize, it would be possible to change plea bargaining and sentencing if the changes demanded are not too radical. Since courts are decentralized organizations, as we have discussed, discretion and bargaining power must be distributed among several court professionals. As a group they can be encouraged to slowly change their thinking -- to alter their perceptions of appropriate categorization of criminal acts, actors, and punishments -- but these changes do not inevitably follow legislation. Brereton and Casper have described this process as "racheting": laws have impact, but it is long-term and incremental. The incremental character of change requires evaluators to change their scope, to view the impact of specific laws over long periods of time, and to look for changes in unintended and unanticipated places.²⁷

It was with these facts in mind that we approached the local jurisdictions to study the effects of Proposition 8. We suspected that some change may have occurred, but what and how could only be discovered by looking at the day-to-day contexts in which the law was applied. These changes and their contexts are described in the next chapter.

Notes

¹ Eugene Bardach, The Implementation Game: What Happens After a Bill Becomes a Law (Boston: M.I.T. Press, 1977); Jeffrey L. Pressman and Aaron Wildavsky, Implementation (Berkeley: University of California Press, 1973).

² Today's most popular example is Charles Murray's Losing Ground: American Social Policy 1950-1980 (New York: Basic Books, 1984). Murray claims that the anti-poverty programs not only failed but have made poverty worse.

³ David Brereton and Jonathan Casper, "Evaluating Criminal Justice Reforms," 18 LAW AND SOCIETY REVIEW 124 (1984).

⁴ H.L.A. Hart, The Concept of Law (New York: Oxford University Press, 1972).

⁵ Michael Gottfredson and Don Gottfredson, Decisionmaking in Criminal Justice (Boston: Ballinger Press, 1980).

⁶ The classic description of bureaucratic organization was made by German sociologist Max Weber. Bureaucracy, he said, confers one type of authority. Bureaucratic organizations are characterized by hierarchy, task specialization, technical competence, record keeping, income sources independent of clients, and administration by rules. See Max Weber, The Theory of Social and Economic Organization, Talcott Parsons, ed. (New York: Oxford University Press, 1947). By contrast, a professional organization is rarely hierarchical, mostly because "knowledge is largely an individual property; . . . it cannot be transferred from one person to another by decree." Amitai Etzioni, Modern Organizations (Englewood Cliffs, New Jersey: Prentice-Hall, 1964), p. 76. Each member of the courthouse workgroup is an independent professional exercising personal judgment in relation to criminal cases. When these workers come together to decide a case -- whether in the courtroom or in plea negotiation -- their decisions are influenced not by orders from above, but by abstract legal rules and by shared norms that they have developed. Although the judge is the figure who is responsible for final decisions, the judicial role can scarcely be described as that of a "boss."

This is not to say that the offices of individual court personnel are characterized by this decentralized, professional style. On the contrary, probation offices, district attorney organizations, and court support staff are organized on a well-recognized Weberian hierarchical pattern. But when representatives of these offices come together to make decisions in court, the court itself is a decentralized grouping of independent professionals. See the description of courts as fragmented organizations in Malcolm Feeley, Court Reform on Trial (New York: Basic Books, 1984).

⁷ For example, J. Eisenstein and Herbert Jacob, Felony Justice: An Organizational Analysis of Criminal Courts (Boston: Little, Brown, 1976); Herbert Jacob, Justice in America: Courts, Lawyers and the Judicial Process, 3rd ed. (Boston: Little, Brown, 1978); Abraham Blumberg, Criminal Justice (Chicago: Quadrangle, 1967); Martin A. Levin, Urban Politics and the Criminal Courts (Chicago: University of Chicago Press, 1977); Peter F. Nardulli, The Courtroom Elite: An Organizational Perspective on Criminal Justice (Boston: Ballinger Press, 1978).

⁸ The assembly line metaphor was developed by Herbert L. Packer in The Limits of the Criminal Sanction (Palo Alto: Stanford University Press, 1968) to describe the characteristics of his "crime control" model of criminal procedure. For a discussion of the guilty plea as an administrative assembly line, see Rossett, Arthur and Donald Cressey, Justice by Consent (New York: J. Lippincott, 1976).

⁹ The adversary system as a truth-tester has been variously described as a "fight theory" by Jerome Frank, a "sporting theory" by Roscoe Pound, and a "grimly combative proposition" in a critique of the entire enterprise by Judge Marvin E. Frankel. See Frankel, Partisan Justice (New York: Hill and Wang, 1978).

¹⁰ For example, see Rossett and Cressey, *supra* note 8, or Albert Alschuler, "The Prosecutor's Role in Plea Bargaining," 50 U.CHI.L.REV. 50 (1968) or David Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office," Social Problems, 12 (1965), 255.

¹¹ Donald J. Newman, Conviction: The Determination of Guilt or Innocence Without Trial (Boston: Little, Brown, 1966).

¹² See report on plea bargaining, National Advisory Committee on Criminal Justice Standards and Goals (1973), recommending that plea bargaining be abolished by 1978. See also Federal Rule of Criminal Procedure 11, including debates about its amendments: 1966, 1975, 1979, discussed in "Note -- Plea Bargaining: Proposed Amendments to Federal Criminal Rule 11," 56 MINN.L.REV. 718 (March 1972). The rule assumes that the guilty plea process is inevitable and attempts to regularize it. For a discussion of the A.B.A. standards, see D. L. Rotenberg, Progress of Plea Bargaining, 8 CONN.L.REV. 44 (Fall, 1975).

¹³ To these critics, "coercion" does not imply explicit threats. Rather, the argument is that the logic of plea negotiation, in which a defendant is punished by higher penalties if he refuses to "go along" with negotiated pleas, exerts such strong pressure that it subverts ideals of due process. See Albert W. Alschuler, "The Defense Attorney's Role in Plea Bargaining," 84 YALE L.J. 1179 (May 1975) and Thomas Uhlman and Darlene Walker, "He Takes Some of My Time, I Take Some of His," LAW AND SOCIETY REVIEW, 14 (1980) 323. Further, critics claim that felony punishments are so heavy that a prudent defendant will confess to anything in the hopes of a lighter sentence. See Rosett and Cressey, supra note 8. For a graphic portrayal of this dynamic, in which the U.S. Supreme Court approved the "trial penalty," see North Carolina v. Alford, 400 U.S. 25 (1970).

¹⁴ Some studies of jurisdictions that "eliminated" plea bargaining have concluded that sentences became heavier after plea negotiation was ended; implicitly, these studies would argue that the average sentences bestowed under a plea bargaining system were too lenient. See Law Enforcement Assistance Administration Limiting the Plea Bargain in Multnomah County (Ore.) (1977), including data from a Rand study of the experiment, and "Elimination of Plea Bargaining in Black Hawk County: A Case Study," 60 IOWA L.REV. 1053 (1975).

¹⁵ California studies are many. A history of plea bargaining in Alameda County from 1870 through 1910 is found in Lawrence Friedman and Robert V. Percival, The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910 (Chapel Hill: University of North Carolina Press, 1981). Studies of particular California prosecutor or defense offices and their bargaining practices include Lief H. Carter, The Limits of Order (Lexington, Mass.: Lexington Books, 1974); David Sudnow, supra note 10; Jerome Skolnick, "Social Control in the Adversary System," Journal of Conflict Resolution, 11 (March 1967); Pamela Utz, Settling the Facts (Lexington, Mass.: Lexington Books, 1978); Lynn Mather, Plea Bargaining or Trial? (Lexington, Mass.: Lexington Books, 1980); Rossett and Cressey, supra note 8; Douglas Maynard, The Language of Negotiation (New York: Russell Sage, 1984) among others.

As for the idea that cooperative plea bargaining is better than adversarial jousting, see Utz, infra.

¹⁶ Mather, supra note 15 at 28. Sudnow, supra note 10, also describes the phenomenon, and Heumann opines that this categorization approach is the result of a definite, observable -- and perhaps inevitable -- educative process of court professionals. Milton Heumann, Plea Bargaining: The Experience of Prosecutors Judges and Defense Attorneys (Chicago: University of Chicago Press, 1978).

¹⁷ Albert W. Alschuler, "The Defense Attorney's Role in Plea Bargaining," 84 YALE L. J. 1179 (1975) at 1270. Mather disagrees: "To the contrary . . . there are rules for the plea bargaining process which can be studied and observed; they are rules embedded in the social and cultural experience of the courtroom." Mather, supra note 15 at 3. Alschuler probably disapproves because he believes the "social and cultural experience" is not much influenced by legal rules. The degree to which formal laws will influence informal bargaining is discussed in Lewis and Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 86 YALE L.J. (1977). Note that legal arguments are not made in plea discussions in every case, but they are understood as the background against which individual case facts will be argued should a contest develop. Further, it is often difficult for the lay observer to know when legal arguments are indeed being made, since they are couched in the give-and-take "language of negotiation." See Maynard, supra note 15.

18 Candace McCoy, "Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California," 9 JUSTICE SYS. J. 256 (Winter, 1984) offers just one example.

19 Milton Heumann and Colin Loftin, "Mandatory Sentencing and the Abolition of Plea Bargaining," 13 LAW AND SOCIETY REV. 393 (1979). Colin Loftin, Milton Heumann and C. McDowall, "Mandatory Sentencing and Firearm Violence," 17 LAW AND SOCIETY REVIEW 287 (1983).

20 In 1973 New York revised its criminal laws relating to drug use, eliminating plea bargaining in drug cases and imposing severe mandatory sentences on convicted offenders. An evaluation of the law's impact found that it did not encourage more drug arrests, nor did it increase convictions in drug cases. In fact, the probability of conviction actually declined after the law was enacted. However, the law did cause serious court congestion and delay. Joint Committee on the New York Drug Law, The Nation's Toughest Drug Law: Evaluating the New York Experience (Washington, D.C.: Government Printing Office, 1979).

21 Thomas Church, "Plea Bargains, Concessions, and the Courts," LAW AND SOCIETY REVIEW 377 (1976).

22 Michael L. Rubinstein et al., Alaska Bans Plea Bargaining (Washington, D.C.: Government Printing Office, 1980).

23 Jacqueline Cohen and Michael Tonry, "Sentencing Reforms and Their Impacts" in Blumstein et al., eds., Research on Sentencing (Washington, D.C.: Government Printing Office, 1983).

24 Jonathan Casper et al., The Implementation of California's Determinate Sentencing Law (Washington D.C.: Government Printing Office, 1981), p. 220.

25 Id. at 215.

26 California Bureau of Criminal Statistics, "Penal Code Section 1203.06: California's Mandatory Sentencing Law," (Sacramento, 1979).

27 See Note 3 supra.

Chapter 3

RESPONSES TO PROPOSITION 8'S LIMITATIONS ON PLEA BARGAINING

Proposition 8 has been in effect for over three years. Did it cause plea bargaining to change in serious felony cases? As would be expected from the actual terms of the law, which allow negotiations to continue either in municipal court or in superior court under three exceptions to the "ban," plea bargaining has continued unabated in California. As many felony defendants are convicted through pleas of guilty now as before the law was passed, and there has not been a surge in trials or clogged courtrooms.

This is not to say, however, that the plea bargaining process is unchanged. As would be expected from our knowledge of organizational dynamics, courthouse workers are slowly transforming their plea negotiation practices. While the number of guilty pleas has not changed, the substance of plea bargaining may have. Such incremental reforms are likely to be different depending on organizational, social, and legal factors present in varying degrees in different county criminal justice systems. These changes can be observed in daily court activities, in what plea bargaining participants tell us about it, and in quantitative data on trial rates, guilty plea "locations," and sentencing outcomes drawn both from local jurisdictions statistical reports and from state data bases.

This chapter portrays how three different counties implemented the Proposition 8 plea bargaining limitation. It begins with a description of the common legal framework mandated by state law, through which every California felony case is adjudicated. Within these "common procedural events," criminal justice professionals make discretionary decisions in handling cases. Statewide data show the frequency of events such as trials and guilty pleas, both before Proposition 8 and after it. One major finding is that, although the proportion of offenders pleading guilty has not changed, there has been a shift in the "location" of a great number of guilty pleas from superior to municipal court. Another major finding is that some counties embraced this shift, while others did not. Plea bargaining practices in three populous counties serve as examples of this variation, and the factors that encouraged some counties to shift cases or retarded such a development are examined.

The subjects of this study are Alameda County, San Diego County, and part of Los Angeles County: the Compton district. These jurisdictions are similar in that they encompass large, urban areas with high volumes of criminal cases. Like almost all American courts, they have traditionally relied upon extensive plea negotiations in order to adjudicate this caseload. They thus represent ideal sites for studying the effects of an attempt to limit plea bargaining.

Yet these counties are quite different in the political and social characteristics of their residents, in their criminal justice practices and, specifically, in their responses to Proposition 8. Although courthouse workers in each jurisdiction conscientiously considered how to address Proposition 8, they applied its restrictions differently depending on the opportunities and pressures for change evident within their own political jurisdictions and courthouse organizations.

Despite these differences, all three jurisdictions are in California and thus operate under the state Penal Code, so they necessarily share certain procedures and legal requirements. Procedures and laws that are common to all California felony prosecutions define the framework within which legal professionals operate; plea bargaining practices will vary among different counties only within this general, shared structure.

Common Procedural Events

Statutory mandates and administrative necessity have combined to produce a common sequence of procedural "events" in California courts that utilize the dual municipal court/superior court system. What follows is a functional, rather than a statutory, description of felony procedure. Discrete prosecutorial events may have different names or legal definitions, but a very general overview describes these stages by

function -- by what they actually achieve in the processing of a criminal case. This anthropological device affords comparison of "functional equivalents" in disparate counties.

Generally, any urban felony defendant in California will first be arraigned in municipal court, where a felony complaint describes the charges brought against him or her. The function of this initial appearance is to apprise the defendant of the charges and to arrange such matters as bail and legal representation.²

Very soon -- often within two or three days of the arraignment -- there occurs a procedural event that is not mandated (nor prohibited) by the California Rules of Criminal Procedure. At this point, there occurs a brief appearance by both counsel, during which preliminary matters regarding discovery, possible pretrial motions, and, most importantly, the probability of a guilty plea are discussed. In Alameda County, this municipal court proceeding is called a "pretrial." In some other counties, it is described on court calendars as "pretrial motions" or "trial readiness conference." In San Diego County, it is called the "pre-preliminary examination."

San Diego's terminology for this procedural stage, which has become the focal point for municipal court plea bargaining and thus is most likely to be affected by Proposition 8, is legally the most precise. This informal prosecutorial event precedes the statutorily-mandated preliminary examination, a formal hearing in which the defendant has the opportunity to challenge the evidence amassed against him up to that point.

Technically, the judge at the preliminary examination must assess whether there exists sufficient evidence to "hold the defendant to answer" to the felony charges in superior court. Tactically, the hearing often is the opportunity for all parties in the case to offer testimony and present evidence, which is then evaluated by the opposing side. This permits informed assessment of the strength of the case and alerts both the state and the defendant to possible weaknesses in the arguments and evidence likely to be brought forward in superior court. Some California court workers informally call the preliminary hearing a "bind-over hearing," because the defendant and his case will be "bound up" and "delivered over" to superior court unless the municipal court judge finds insufficient evidence to hold the suspect on these charges.

Once the case reaches superior court, procedural events functionally mirroring municipal court procedures will occur. Charges are brought against the defendant in superior court by use of an "information" mimicking the municipal court "complaint."³ Most counties' superior courts employ a procedural stage akin to the municipal court "pre-preliminary hearing," but the difference in superior court is that legal defenses have by then become more fully developed. Settlement discussions between counsel or involving both counsel and the judge may occur here, but their legal status is obscure under Proposition 8. If no guilty plea is forthcoming, this stage is likely to be characterized by complete pretrial motions, such as the motion to suppress evidence gained from illegal search. Once these motions have been made, argued, and ruled upon, the final stage in the process is the trial.

For purposes of analyzing plea bargaining procedures, the important point to note in relation to these common procedural events is that plea negotiation may occur at any of them, and a defendant may plead guilty any time a case is "docketed" to appear in court for whatever reason. In general, however, experience in the majority of urban California courts is that plea negotiation takes place in municipal court sometime after arraignment but before preliminary hearing and in superior court after the information is filed but before protracted pretrial motions or the actual trial get underway.

Moreover, it is important to emphasize that, under this system, many felony cases may be settled even before they are "held to answer" in the superior court. If a guilty plea has been negotiated at the very early "pre-preliminary" stage in the municipal court, the lower court judge will have simply "certified" the case to superior court -- technically, for the upper court to affix the sentence, but practically for a quick review to ascertain that the sentence negotiated in municipal court was not unjust. Interviews with judges and attorneys indicate that the municipal court agreement is overturned in an extremely small number of cases. Municipal court may have considerably more power to settle felony cases than citizens or even courthouse professionals usually believe it does.

This is the organizational and legal structure to which Proposition 8's plea bargaining restrictions were to be applied. Procedural events common to all California courts represent both the standards that local officials must meet in the prosecution process and the material available to them as they strain to accommodate any new procedural or substantive requirement. To some degree, this system is flexible; there are a number of distinct points in the process where crucial decisions are made. Guilty pleas and the discussions that encourage them could be shifted to some other "event" if discretion becomes too restricted at one particular decision point. The mercurial character of discretion thus allows for the widely varied responses, within the legal prescriptions described, that Proposition 8 evoked in individual jurisdictions.

In the following sections, this variation is explored in detail in three California jurisdictions. In each, local criminal justice officials responded to the challenges posed by Proposition 8 by using one or more of the "loopholes" written into the statute. While professionals in each California county developed their own unique strategies for addressing the situation created by the new law, the three responses described here probably represent the principal methods of implementing the plea bargaining limitation statewide. Taken together, these local responses constitute the statewide trends in trials and guilty plea procedures that evolved after Proposition 8 was passed.

Effect on Trial Rates Statewide

Prior to its passage, Proposition 8's critics had claimed that a ban on plea bargaining would result in a tremendous surge in trials, thus seriously clogging criminal courts. An outright ban on plea negotiations could quite possibly produce this outcome, since the judge would not be allowed to impose particular sentences in response to guilty pleas, and since defendants would have everything to gain and nothing to lose by having their cases heard by juries.

Therefore, the first question to ask is: has the "trial rate," i.e., the proportion of felony cases concluded through trials, increased since Proposition 8 took effect in June 1982? The data in Table 3-1 and Figure 3-1 show this "trial rate" for the last ten years, covering all California felony cases adjudicated in superior courts, for fiscal years (July through June) 1974-1984.

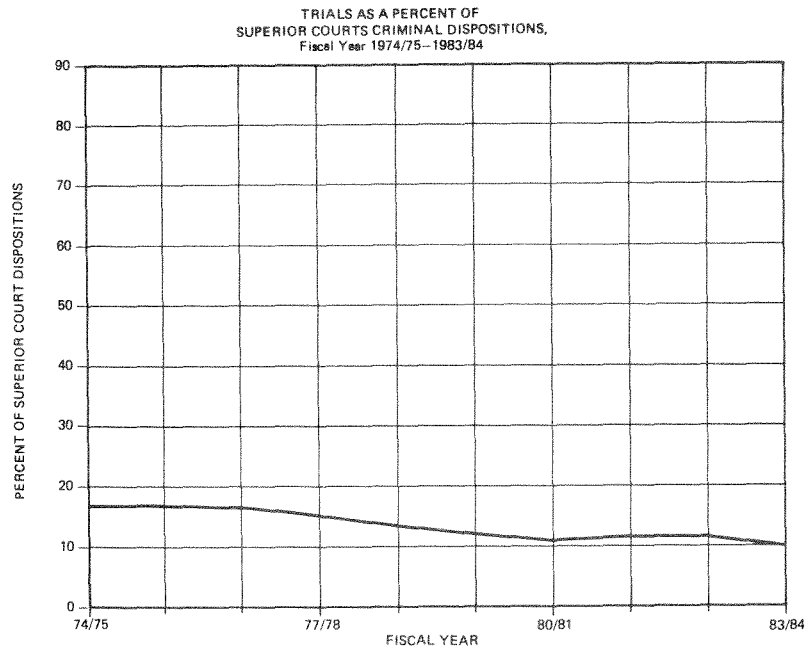
table 3-1

TRIALS AS A PERCENT OF SUPERIOR COURT CRIMINAL DISPOSITIONS Fiscal Years 1974/75-1983/84

Fiscal year	Total dispositions	Total trials	Percent trials
1974/75	50,714	8,410	16.6
1975/76	50,107	8,488	16.9
1976/77	49,102	8,095	16.5
1977/78	49,003	7,493	15.3
1978/79	49,264	6,765	13.7
1979/80	51,281	6,357	12.4
1980/81	58,314	6,488	11.1
1981/82	60,998	7,138	11.7
1982/83	67,261	7,800	11.6
1983/84	66,534	6,700	10.1

Source: California Judicial Council.

fig. 3-1



The last two cells of Table 3-1 show the number and proportion of trials occurring in the two years since the passage of Proposition 8 in June 1982. It is apparent that the trial rate did not increase as Proposition 8's critics had predicted. In fact, the proportion of felony cases ending in trials, as opposed to those ending in guilty pleas, actually decreased from 11.7 percent in fiscal year 1981-1982 to 10.1 percent in fiscal year 1983-1984. This decline continued a downward trend in the use of trials over the past ten years.

The data show that, even after Proposition 8, the great majority of defendants plead guilty, and presumably they do so after some sort of negotiation. The next obvious question, then, is: though low trial rates indicate that plea bargaining in California continues unabated after Proposition 8, are courts operating within Proposition 8's plea bargaining procedure limitations?

Effect on Guilty Plea Practices Statewide

The preceding overview of California criminal procedure showed that there are two types of felony guilty plea cases: cases "certified" from municipal court, and cases "held to answer" in superior court and later concluded through guilty plea there. A powerful indicator of whether Proposition 8 has had an effect on California plea bargaining would be a comparison over time between the proportion of felony cases terminated through municipal court "certifications" as compared to those that are "held to answer" in superior court. If lower court dispositions increase, one reason may have been the passage of Proposition 8. Data collected from all California counties show that there has indeed been an increase in the use of guilty pleas "certified" in municipal court.

We used Bureau of Criminal Statistics statewide data on felony dispositions (Offender-Based Transaction Statistics -- OBTS) to track adjudication trends before and after Proposition 8. Felony dispositions from all California counties were categorized by whether the most serious offense charged at arrest was one of the twenty-five "serious felonies" which are subject to Proposition 8's plea bargaining restrictions, or whether it was a felony not subject to those restrictions. If Proposition 8 had no effect, courts would dispose of both kinds of cases in essentially the same way. But if Proposition 8 was followed, outcomes of serious felony charges would show a different pattern.⁵

Most important, the data can reveal where felony defendants pled guilty. OBTS calculates the percentage of superior court dispositions that are achieved through municipal court-generated certified guilty pleas or through superior court proceedings. (Recall that certified pleas, although entered in lower courts, technically are sentenced in superior courts.) Table 3-2 and Figure 3-2 present statewide data on how "serious felony" and "other felony" cases were concluded. It shows the proportion of dispositions achieved through certified pleas versus the proportion of cases prosecuted in superior court,⁶ for six-month periods from 1980 through 1984.

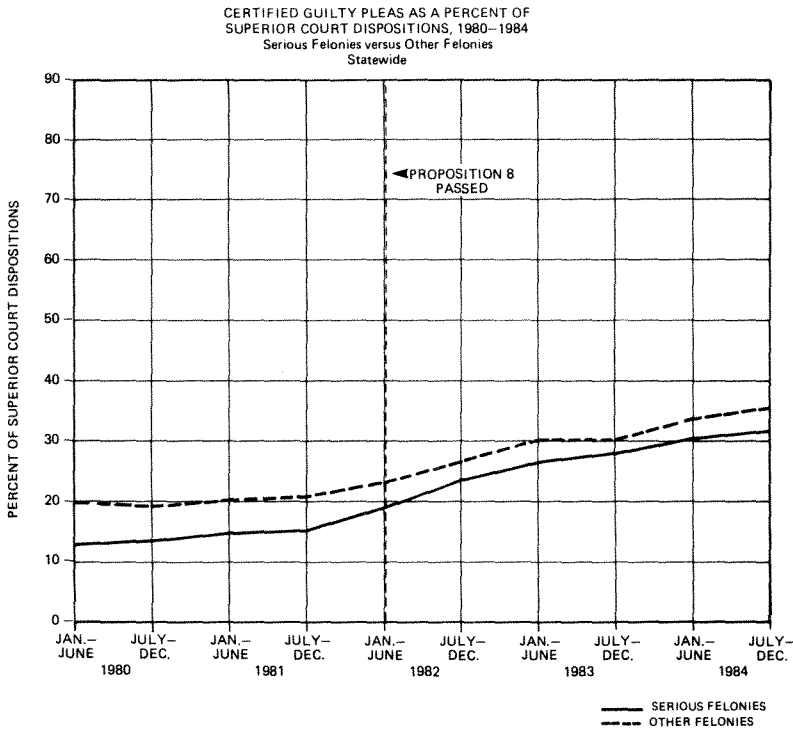
table 3-2

CERTIFIED GUILTY PLEAS AS A PROPORTION OF
SUPERIOR COURT DISPOSITIONS, 1980-1984
Serious Felonies versus Other Felonies
Statewide

Year	Serious felonies	Other felonies
1980		
January-June	12.8	19.7
July-December	13.4	19.1
1981		
January-June	14.6	20.2
July-December	15.0	20.7
1982		
January-June	18.8	23.0
July-December	23.4	26.6
1983		
January-June	26.4	30.2
July-December	27.8	30.2
1984		
January-June	30.3	33.7
July-December	31.6	35.5

Source: Offender-Based Transaction Statistics, Bureau of Criminal Statistics.

fig. 3-2



Statewide, the percentage of certified guilty pleas increased substantially after Proposition 8 was passed in June 1982, which suggests that Proposition 8 may indeed have had the effect of shifting felony plea negotiations to lower courts.

However, several qualifications must be added to this interpretation. First, the use of certified pleas was already increasing prior to passage of Proposition 8, although the increase was not as great as in the post-Proposition 8 period. Second, not only was there an increase in the use of certified pleas in "serious felony" cases but in "other" felony cases as well. Since Proposition 8's plea bargaining restrictions apply only to "serious felonies," they should have no effect on "non-serious felonies." These data suggest, then, that Proposition 8 may have only amplified a general trend towards early disposition of felony cases in municipal court, a trend which began prior to June of 1982.

In Chapter 5, statistical tests will explore the question of whether the increase in felony certifications from municipal court was caused by Proposition 8 or by other factors. Regardless of the cause, a shift in felony plea bargaining from superior court to municipal court could have important implications for the quality of justice achieved by the California criminal court system.

A Closer Look: Trends in Three Different Counties

Statewide, then, there has been a decided shift in the "location" of plea bargaining, from superior to municipal court. Statewide data in the OBTS system represent an aggregate of all case outcomes reported to state data banks by criminal justice agencies throughout California. Because this yields a general, overall picture of California felony adjudication, it does not show the extent to which individual counties contributed to the trend, or even resisted it. To understand in more detail how Proposition 8 has been implemented, variation among local jurisdictions must be described.

Proposition 8 presented local criminal justice officials with a difficult decision: should plea negotiation be shifted to municipal court, as the text of the law apparently allowed? If so, to what extent?

Officials also had to address a related, crucial question: If plea bargaining remained in superior court -- as it would to some degree, even if municipal court began to handle a much larger caseload -- how would it be accomplished legally? Since Proposition 8 prohibits superior court bargaining in serious felony cases, the procedural stage between superior court arraignment and trial often becomes murky. Apparently no plea negotiation can occur at that stage, or at least no concessions may be made in return for a guilty plea. Thus, judges, prosecutors, and defense attorneys experienced ambiguity in what their proper functions would be in any pretrial discussions. Many counties have superior court "pretrial conferences" or "readiness calendars," but the legality of what transpires at this procedural stage is obscure.

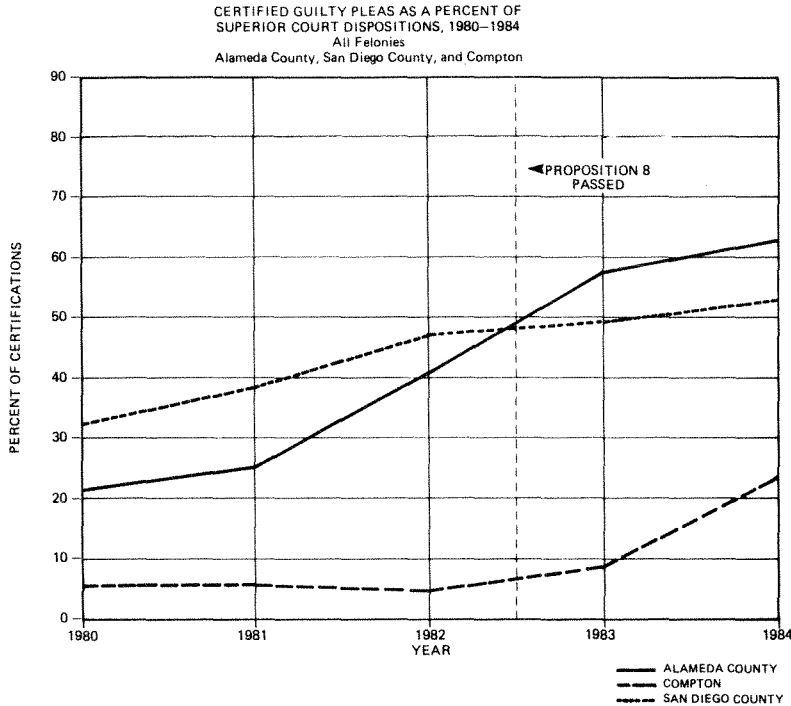
Every county has some provision both in municipal court and superior court for an early discussion aimed at settlement of the criminal case through a guilty plea. However, because the superior court "pretrial conference" under Proposition 8 operates under doubtful or at least ambiguous legality, we would expect court workers to cast about for a different procedural stage in which to engage in felony negotiation. Over the past decade, most populous counties have slowly been shifting felony plea bargaining into municipal court. Thus, the municipal court "pre-preliminary exam" (or the "pretrial," or whatever other name this legally undefined stage may acquire in different counties) has become increasingly critical to the smooth functioning of California felony prosecution, an outcome perhaps encouraged by Proposition 8. Inevitably, though, some cases will proceed to superior court, and some counties will rely on this process more than others do. What is the character of superior court bargaining under Proposition 8 constraints? Reports from several local jurisdictions can address this question.

Here, we focus on three jurisdictions: Alameda County, San Diego County, and the Compton district of Los Angeles County. These jurisdictions have large but not monstrous caseloads. In 1983 the Municipal Court of Alameda County handled 8,061 felony filings; the court has 33 judges (or judicial equivalents). San Diego's 46 lower court judges processed 10,930 felony

filings in 1983. The Compton court processed 2,266 of Los Angeles County's approximately 37,000 felony filings in 1983. The trial rate (proportion of felony cases concluded by trial, as in Table 3-1) is generally the same among the counties, and in recent years has been fairly constant in each.

Using OBTS data, we calculated the trends in the use of certified pleas for disposing of felony cases in each jurisdiction. Figure 3-3 shows that, in each county, the proportion of serious felony cases concluded through municipal court guilty pleas is different from the overall state norm.

fig. 3-3



Alameda County showed a dramatic increase in the use of certified pleas in the post-Proposition 8 period. By 1984, 63 percent of all felony dispositions in superior court were from certified pleas sent to it by municipal court. In San Diego, felony procedures also produce a high percentage of certified pleas: 53 percent of all felonies concluded in superior court in 1984 were originally resolved by municipal court pleas. But, in contrast to Alameda County, the use of municipal court certified pleas has been quite common in San Diego for several years; 32 percent were certified in San Diego as early as 1980, compared to the 1980 total of 21 percent in Alameda County.

Compton procedures, on the other hand, involve very few certified pleas from municipal court. Until 1984, municipal court disposed of less than 10 percent of the Compton felony caseload.

In summary, statewide, felony plea bargaining has been migrating from superior court to municipal court. In individual counties, however, three different responses are discernable: a sharp shift in felony dispositions from superior to municipal court, a slight shift in what had already been a high certification rate, and no shift to municipal court.

Factors influencing Adjudication in Each County

The data presented above show that felony adjudication is different in each local jurisdiction, despite the unifying influences of the California Penal Code, common court procedures, and laws such as Proposition 8 that apply to every county in the state. Criminal procedures vary depending on many factors, including the values and history of courthouse workgroups. In turn, those values and histories themselves have been shaped by the distinct political and cultural backgrounds of the people who live in these different jurisdictions. To understand why Proposition 8 affected felony procedures differently, we present here a comparison of several demographic and historical factors present in each county, and speculate that these factors account for the divergent responses to the new law observed in the quantitative data.

One would expect a "ban" or limitation on plea bargaining to have its greatest effect on jurisdictions with high rates of serious crime and concomitant high caseloads in criminal courts, because there the necessity to negotiate rather than try cases would be great. For this reason we chose to focus on Alameda County, San Diego, and Compton, all of which have high rates of arrests for serious crimes.

These three jurisdictions are all densely populated. Alameda County encompasses the city of Oakland and is situated across the bay from San Francisco. San Diego County contains the city of San Diego and is situated about ninety miles south of Los Angeles. Both also embrace several smaller cities and suburbs. Compton is a completely urban section of the county of Los Angeles.¹⁰

As one might expect, crime rates are fairly high in each jurisdiction. According to a report from the state Office of Criminal Justice Planning,¹¹ in 1982 Compton had the fourteenth highest crime rate of 462 California communities. In 1983 the number of violent felony crimes reported to the police in San Diego County was 10,412; in Alameda, it was 11,354.¹² The Bureau of Criminal Statistics computes a "California Crime Index" (crimes per 100,000 population) based on the number of violent felony and property offenses reported, adjusted by the population of the county. In 1983 San Diego's crime index (per 100,000 population) was 2,668; Alameda's was 3,620.¹³ Compare this to the rate of 1,983 in predominantly suburban Santa Barbara County.

Of the three jurisdictions, Compton is the poorest in terms of residents' average income. The residents of the communities in its jurisdiction are mostly black and Hispanic and many are poor; in 1980, 75 percent of Compton's residents were black and 26 percent were living below the official poverty level.¹⁴ Much of the landscape in the area is dominated by warehouses, factories and other manufacturing concerns located in close proximity to rows of small, often dilapidated, stucco and wood-frame houses.

The ethnic composition of the population is reflected in the arrest statistics. In 1983 the Compton Police Department reported that 87 percent of those persons arrested for felonies were black, 11 percent Hispanic, and 1 percent white (not Hispanic). Forty-three percent were between the ages of 18 and 24. Drugs and juvenile gangs are thought to be connected to a significant portion of the area's crime. In 1984, 42 percent of the felony arrests reported by the Compton police were for drug violations (as compared with 27 percent statewide) and 51 percent of those persons arrested for drug violations were between the ages of 18 and 24.¹⁵

In general, Compton combines the too-familiar ingredients of urban poverty to produce high rates of serious crime. The results become evident in the Compton criminal courts, where defendants are strikingly similar: young, black (occasionally Hispanic) males with previous records, often facing charges related to drug use or sale.

Alameda County also encompasses neighborhoods of grinding poverty. Like Compton, the city of Oakland contains several predominantly black neighborhoods where most of the residents live in poverty or are members of the "working poor." Drug use and sales among young males from these neighborhoods produce a constant stream of defendants in Alameda County criminal courts. (The community's response to this drug problem and related gang-style homicides has been to pressure courthouse officials to "get tough." The results of this neighborhood activism are discussed below). Unlike Compton, though, Alameda County has a diverse ethnic mix of Anglos, recent Asian immigrants, a comparatively small Hispanic community, and a well-established Asian community, as well as many predominantly black middle class neighborhoods. The county's median personal income is about normal for California Standard Metropolitan Statistical Areas.

While the city of Oakland dominates Alameda County, there are several smaller cities such as Berkeley, Fremont, Hayward, and Union City in the county courts' jurisdiction. Yet, even though the county's population density is not as concentrated as in the wholly urban district of Compton, its 1982 population was about 1,138,200, and the density (number of residents per square mile of land area) was 1,552. San Diego is the least urban of the three study sites. Its population in 1982, about 1,965,900, was larger than Alameda's,¹⁶ but residential density was less than one-third of Alameda County's density of 462.

Although San Diego is the least dense, the types of crime and the ethnic mix found in that county are comparable to Alameda's. Homicide rates are high in each county¹⁷ and San Diego's drug "problem," while different from Alameda's, is acute because the city is on a prime smuggling route from Central America. San Diego's proximity to Mexico also accounts for its slightly different ethnic mix; while both counties have roughly 70 percent Anglo population, Alameda County's second most numerous ethnic group are blacks. San Diego has only about 4 percent blacks, but approximately 13 percent of its residents are of Hispanic origin.¹⁸ San Diego also has a higher average personal income than Alameda or Compton, probably reflecting the vigorous defense industries and chic tourist and retirement enclaves scattered about the county.

In terms of sheer caseload volume in, it is fair to say that criminal prosecution in Alameda County is dominated by the courts in the city of Oakland. The county system operates municipal courts in Fremont, Hayward, Berkeley, Oakland, the city of Alameda, and Livermore. The Oakland Municipal Court handles 40 percent of all county felony filings and the Oakland Superior Court handles, by far, the largest caseload of felony adjudications.¹⁹ Therefore, most of the focus in this section will be on prosecution practices in Oakland.

Similarly, the city of San Diego accounts for much of the county's criminal prosecutions. The downtown San Diego Municipal Court handled 57 percent of all county felony complaints in 1983; the remainder were distributed evenly among the branch courts of El Cajon, North County, and South Bay.²⁰

Compton differs from the two counties because it is but one of the branches of a much larger countywide operation. As one district of Los Angeles County, Compton has one municipal court and one superior court, with criminal justice professional offices clustered around them. The operations of the Compton branch of the Los Angeles District Attorney's office are overseen by a Head Deputy, who supervises approximately forty attorneys. These deputies are assigned to different units responsible for different phases of prosecution or special types of cases. Members of the municipal court unit handle all misdemeanor cases and felony cases through the preliminary examination. After a case has been bound over to superior court, the case is taken over by one of four "teams" within the superior court unit. The members of these teams, headed by a Supervising Deputy, are assigned to specific superior court departments and are given responsibility for handling either pretrial matters or trials. Prosecutors' offices in downtown Oakland and downtown San Diego use roughly the same organizational structure.

All three counties have highly organized prosecutors' and public defenders' offices, with attorney staffs assigned directly to particular courtrooms. (One minor exception to this pattern is in San Diego's defender system, which traditionally has relied heavily on contract arrangements with private counsel, but has recently funded a public defender to handle serious felonies). Each county covers wide geographical areas and populations, so the principal criminal justice agencies are decentralized, with branch offices spread throughout the counties, but roughly situated wherever a municipal court is found.

The divergent political preferences of the residents of Alameda County, San Diego County and Compton influence citizens' involvement in criminal justice issues. Alameda County is a Democratic stronghold, while San Diego County is staunchly Republican, although Democratic voter registration in the city of San Diego has recently overtaken the Republican count. Furthermore, ethnic groups and neighborhood organizations tend to be more vigorous and active in Alameda County. In San Diego, where the largest ethnic group is Hispanic, courthouse workers informally characterize the political strength of that group as weak because many of its members are illegal immigrants who cannot vote or run for office. Local politics and the political attitudes of residents have little impact on legal professionals in Compton. Most court workers do not live in the community and are frequently transferred in and out from other districts in the county.

Although the split between Democratic and Republican voting patterns may say little, directly, about voters' concerns with serious crime, support of Proposition 8 on the June 1982 ballot would. Although a majority of voters in each county supported the measure, considerably more San Diegans approved of "The Victims' Bill of Rights" than did Alameda County residents. In the county of Los Angeles, the vote split almost evenly, and the district of Compton soundly rejected the measure, as Table 3-3 shows.

table 3-3

VOTER RESPONSE TO PROPOSITION 8
Statewide and Alameda, Los Angeles, and San Diego Counties

Jurisdiction	Number		Percent	
	For	Against	For	Against
Alameda County.....	135,576	118,909	53.3	46.7
San Diego County.....	271,335	126,710	68.2	31.8
Los Angeles County...	693,626	673,519	50.7	49.3
Compton.....	2,472	5,772	30.0	70.0
Statewide Total.....	2,826,081	2,182,710	56.4	43.6

Source: Statement of Vote, Results of the June 8th, 1982 Primary, California Secretary of State, Elections and Political Reform Division, Sacramento, Ca.

In sum, several factors -- social, organizational, political -- could account for any observed difference in the response to Proposition 8 by courthouse professionals in different counties. There has indeed been a different response to the law in these three jurisdictions, as the proportion of cases concluded through municipal court certifications shows. Both San Diego and Compton seemed to be fairly unaffected by the limitation on plea bargaining, but in different ways. That is, San Diego continued to use certifications heavily both before and after the law passed, while Compton eschewed the certification device both before and after June 1982. Alameda County, by contrast, had not relied much on municipal court felony plea settlement before Proposition 8, but began extensive use of the procedure as soon as Proposition 8 passed.

Why did these jurisdictions respond to the new law so differently? Factors relating to differential court organization in each county probably account for most of the variation. In turn, these organizational factors are influenced by the counties political and social environments.

Court Structures and Response to Proposition 8

A. In San Diego County

One quite obvious historical fact may explain the municipal court certified plea rate in San Diego. There, a "unified" court system was instituted in 1977. Under this system, a municipal court judge is permitted, through special approval by the California Supreme Court, to act as a superior court judge for sentencing purposes. The effect of this innovation is that San Diego Municipal Court can be quite efficient in "pre-preliminary hearing" negotiations. The designated judge, in his municipal court role, conducts plea negotiations and simply "switches hats" if the defendant pleads guilty. Then, in his superior court role, he also sentences the offender. The cases are certified pleas and are not reviewed further by superior court.

This innovation began in 1977, so it is no surprise that San Diego has had a high certification rate since then, and that Proposition 8 did little to affect it. The switch to municipal court bargaining had occurred in San Diego well before Proposition 8 was passed.

The trend in San Diego may be explained because its court organization was different from Alameda's and Compton's. In turn, that particular organizational style was the product of San Diego's demography and politics. In 1977 the "El Cajon Experiment" was the pet project of several innovative, active municipal court judges. These judges (who are now on the superior court bench) determined that they could streamline their courts by discouraging preliminary examinations where felony cases would probably settle early, anyway.

Unlike judges in the other two jurisdictions, San Diego Municipal Court judges are directly and deeply involved in plea negotiations. At the "pre-preliminary examination," felony cases are discussed in the judge's chambers, with active participation by the judge and both counsel. Only one judge is assigned to this function, so "judge-shopping" is curtailed, and every felony case is given at least cursory review before it proceeds to a preliminary examination in open court. (Of course, if a plea bargain is achieved at the "pre-preliminary" discussion, no preliminary exam need be held. The case ends quickly with a guilty plea.)

Prior to undertaking the "El Cajon Experiment," San Diego Municipal Court judges had operated very much like those in other counties; that is, they would participate in plea negotiations only if the prosecutor and defense attorney could not agree between themselves on an acceptable case outcome. Generally, they reviewed decisions already made between counsel or, if no agreement was reached, they would continue to work on the case by conducting a preliminary examination. Thus, by developing the "pre-preliminary examination" in San Diego, innovative judges both eliminated the daily messiness of many court hearings and increased their own judicial power over sentencing.

In an interview, these judges were asked why they had expended so much energy to change lower court procedures in 1977. They all agreed that it had been an efficiency and economy measure. It "avoided duplication," one judge said. He explained that, prior to the experiment, there had been no reason for municipal court judges to be involved in plea bargaining, because "we didn't have the authority to sentence for felony guilty pleas, so the defense couldn't be sure what was coming. So you had no pleas!" Yet, plea discussions would naturally take place at all levels of court functioning, including municipal court. It seemed like a waste of energy to plea bargain in the lower court, only to have the defense or prosecution balk until superior court plea negotiation set a definite "price" on the case. When the lower court judges were given sentencing authority, superior court no longer had to engage in so many plea discussions.

Yet, if duplication of effort were the main issue, superior court judges, not municipal court judges, would have been expected to complain, since they "duplicate" the lower court's efforts and not vice versa. The efficiency justification for the lower court reform apparently went deeper than the "duplication" argument. More important to these judges, it seems, was their effort to streamline the work of municipal court by reducing preliminary examinations and to increase the power of the lower court judge in plea bargaining. If a case ended through a guilty plea achieved in the "pre-preliminary" plea negotiation, it naturally would not require a preliminary examination in open court. The judges saw this as a great advantage. One explained:

It reduced the number of prelims substantially. And you know how messy prelims are. You get all the victims and police and everyone all waiting around to testify, and then chances are someone won't show, and the average prelim is continued at least once. So everyone goes home and then they come back. And there was no reason for it because in a lot of these cases, you have the suspect cold. He's guilty and he knows it and he'll plead if everyone understands what he's going to get.

The key to municipal court plea negotiation under the new procedures, then, was that judges had much more control. Defendants would plead guilty only if they "knew what they were going to get," so the lower court judges had to have the authority to make binding promises about sentences. When the lower court judges received special permission to act as superior court judges for purposes of sentencing, the "El Cajon Experiment" succeeded in drastically reducing the number of felony cases that proceeded through preliminary examinations. It also altered the balance of power between judges, prosecutors, and defenders. Judges became more powerful in lower courts, because they could efficiently control plea negotiations -- and therefore sentencing -- at very early stages of felony prosecution.

The county district attorneys had at first opposed the innovation because it wrested a measure of control over plea bargaining away from their office. If judges regularly disagreed with the prosecutor's assessment of cases, a power struggle would result. In most counties, after all, the district attorney effectively controls the early stages of felony prosecution by setting the sentencing "price" of a case, negotiating it with the defense attorney, and only then submitting it to the judge for approval. Increased judicial involvement in the municipal court felony processes would perhaps detract from the prosecutor's power. In San Diego, though, early settlement of a high volume of felony cases eventually became normal when the prosecutor was²² satisfied that sentencing remained "tough" even with high judicial involvement.

Defense counsel, on the other hand, generally approved of the measure. They pointed out that the sentences handed down after early plea bargaining were fair, and "would only get worse" the further a case proceeded in the criminal prosecution process. A few defenders, however, were upset about the effect of this innovation on due process. Although their clients generally received fair "deals," the criminal justice system itself was harmed, they felt. They believed it was important to have some sort of public hearing -- even if it was only a preliminary hearing -- so that defendants, victims, and the court itself could be completely satisfied that the case was really as strong as plea bargainers said it was. Unfortunately, this long-term goal of criminal justice system accountability conflicted with their client's short-term goal of quickly achieving an acceptable case disposition. Professionalism dictated that they prefer their client's demands over their own organizational concerns, so they went along with the lower court plea negotiation innovation.

This professional dance among the judiciary, the district attorney, and defenders occurred with little notice or criticism from San Diego voters. As long as sentencing was "tough," few citizens cared about the process by which it was accomplished. And, since the judges and district attorneys basically agreed on the "going rate" for certain types of crimes -- recall that the sociolegal literature on plea bargaining would predict such harmony as long as all court actors agreed on "socially constructed categories" of "normal crimes and punishments" -- it was relatively painless to shift a large proportion of felony plea bargaining and case settlement to municipal court.²³

This 1977 innovation certainly explains the high certification rate in San Diego, which, as noted above, was mostly unaffected by Proposition 8. Inadvertently, professionals in the San Diego courthouse had "complied" with the letter of Proposition 8 long before the law was even proposed. Other counties, interpreting Proposition 8 to mean that plea bargaining may occur in municipal court, will change the dynamics of lower court criminal adjudication much as San Diego had already done. This could produce a greater proportion of felony cases concluded through municipal court "certification" and a concomitant drop in the proportion of cases in which preliminary examinations are held.

It is unlikely, however, that other counties will develop procedures identical to San Diego's. Municipal court judges there have authority to sentence defendants as if they were in superior court. Without this powerful tool, judges elsewhere will probably not become as involved in plea negotiation, even though Proposition 8 will prompt the system to shift many cases to municipal court. This shift to the lower court, which also may discourage preliminary examinations, is the aspect of San Diego procedure that will probably be mirrored in other counties after Proposition 8.

Proposition 8 did not empower lower court judges like the San Diego El Cajon experiment did. In fact, the statute could be interpreted as a move to limit judicial discretion. However, since one interpretation of the law is that plea bargaining may occur in municipal but not superior court, the increase in guilty plea certifications could have much the same effect on lower court procedures that the El Cajon experiment did. The increased volume of cases would pressure court actors to dispose of felony cases more quickly, at the "pre-preliminary exam" stage. In counties with low judicial involvement in municipal court plea negotiation, we would expect district attorneys to handle much more plea bargaining in the lower court, with some supervision by superior court sentencing judges. In fact, that is the pattern that is developing in Alameda County.

B. In Alameda County

In Alameda County, few felony convictions were achieved by guilty plea in municipal court throughout the 1970's. A slight trend toward more lower court certifications was underway in the early 1980's, and it increased sharply immediately after the law passed. Certified pleas now account for the majority of serious felony dispositions in Alameda County.

This was no fluke. Alameda County District Attorney John Meehan explained to researchers that "we did a lot of work on Proposition 8 before it ever became law -- background legal work deciding its pros and cons." He continued:

Reading it, it clearly said [no plea bargaining on an] indictment or information. It didn't say complaint, which the drafters, I'm sure, were aware of. I talked to [the initiative's drafter] about it, and he was also asked in a public forum at the District Attorneys Association if he deliberately left out the municipal court complaint. And he said yes. Now we figured it was going to pass the voters. So a couple of months before it ever passed, I got together with the defense bar and the courts and we agreed that we would be following the law and the intent of its drafters if we did not plea bargain in the superior court but would in municipal.

Clearly, the new law was affecting the behavior of its target population but, as organizational theory would predict, the legislation had impact because it did not demand too radical a departure from existing practices. Furthermore, such theory would predict that professionals would change their procedures anyway if there were powerful intra-organizational reasons to do so. In Alameda County, district attorneys claimed that the felony caseload had become increasingly burdensome and that courts were breaking down under the strain. They therefore welcomed the shift to municipal court because they could "weed out" many more cases through increased lower court activity.

By increasing municipal court involvement in felony cases, district attorneys could augment their control over felony adjudication as long as lower court judges did not become restive. When discussing criminal procedure, members of the Alameda County District Attorney's office inevitably dot their statements with phrases like "professional," "good management," "legal standards," or "good evidence." Deputies who control charging claim to be "rigorous screeners" who charge a felony only if they have enough evidence to meet the trial standard of "guilt beyond a reasonable doubt."²⁴ Municipal court prosecutors said that it was not in the public interest to pursue cases that would end up dismissed, so they perceived one of their professional duties to be to prevent "weak cases" from proceeding too far. In short, district attorneys assumed the functions that judges would undertake elsewhere. (Of course, had they not, the relatively passive stance of Alameda County Municipal Court judges could quickly have become more active.)

By shifting a great bulk of felony decision-making to municipal court, the Alameda County District Attorney was simply emphasizing and institutionalizing a latent tendency that had already been present, though understated, in felony prosecution policies there for quite some time. A conscious policy decision was made to comply with Proposition 8 by shifting felony review to the lower court. However, rather than trusting this increased caseload to outdated organizational structures, the approach tightened evidentiary review even more in the municipal court.

This management decision involved planning for passage of the new law, reassignment of key personnel, and redirection of support services to the lower court. Meehan explained:

We discussed it and I told everybody, "Here is what we're going to do. I intend to shift a number of the inspectors (investigators) to municipal court, and I intend to shift also some of my most senior deputy district attorneys, and I'm going to put them in a posture so that they can really review those cases. We're going to make every attempt to have cases trial ready at the preliminary examination stage." These DAs are skilled trial lawyers who know what to expect at all stages of felony prosecution. Now you have to understand that we never even had inspectors in Muni Court. I told them "Go out and hustle the witnesses, talk to the police, check all the evidence, and have it ready by prelim." This all has to be done prior to prelim if you are going to plea bargain and know what you're dealing with.

Clearly, Proposition 8 prompted an increased emphasis on early disposition of felony cases -- at the "pretrial" stage, in Alameda County parlance -- similar to San Diego's emphasis on the "pre-preliminary examination." Deputy district attorneys agreed that a major change had occurred. While the "pretrial" had always been important, now there was even more pressure to assume a quasi-magisterial role in the municipal court, by obtaining and reviewing evidence at this very early stage of felony prosecution and engaging in vigorous plea negotiation with defense attorneys.

The Chief of the Oakland Municipal Court's District Attorney's Office, one of the "senior attorneys" newly assigned to the lower court, chuckled that "it used to be that any ambitious DA would work hard to get an assignment to superior court. Now it's the fashion to get your experience over there and then come back here, where the real action is."

Of course, trial experience was not suddenly downgraded. What the attorney meant was that many more important decisions relating to felony dispositions were being made in municipal court, and that a deputy DA had to know what likely trial outcomes were for particular types of cases, and what sentencing norms would be, before he could be trusted to plea bargain in municipal court. Again, the concepts of the "normal crime and punishment" and the "going rate" in sentencing were carefully considered in management decisions.

Superior court judges professed to have noticed little difference in caseload or prosecution practices after the district attorney began to place more emphasis on municipal court procedures. They were quite aware, however, that Proposition 8 forbade superior court plea bargaining, and they felt uneasy when they discussed cases in chambers to elicit a guilty plea. One explained:

After Proposition 8, we stayed out of the bargaining. Now if the DA came into court with an agreement worked out, and it was a just disposition, that was okay. The DA would say the magic words about "no change in sentence" [the exceptions to the bargaining ban] and we would hand down the sentence. But you know you can't go on like that forever. The DA and defense aren't going to agree, and a lot of cases just go into orbit. They get continued and revolve around the courthouse without ever landing. What they need is for the judge to say "Okay, reel this one in and hammer it down."

In fact, soon a "readiness calendar" was begun in superior court, so plea bargaining in judges' chambers once again became routine. Had Proposition 8 exerted no influence, then, on superior court? One deputy district attorney, who regularly handled the superior court "readiness calendar," opined that the effect of the law had been to make judges more wary of bargaining in serious felony cases, but that non-serious felonies were fair game. The attorney himself kept track of whether Proposition 8 applied by stamping his "blue card" summaries of each case with "serious felony" if the case warranted. Very few of the readiness calendar cases were serious felonies, he said, because the "really nasty stuff, the habitual offenders and all" were handled by the Major Violators Unit, whose policy was not to negotiate.

In sum, the Alameda response to Proposition 8 was to dispose of many more serious felony cases in municipal court and, when cases did proceed to superior court, to be assured that "middle level felonies" -- residential burglaries, drug sales -- were the primary subjects of bargaining. These cases were fit under the exceptions to the bargaining ban. The "heavy stuff" -- homicides, rapes, any felony committed by a person with a long criminal record -- would not be negotiated. (This does not mean such defendants would not plead guilty. District attorneys would demand that they "plead to the sheet," i.e., to the charges as set forth in the information, and then the judge would sentence the offender without having negotiated the case.)

Superior court personnel were also aware of sentencing policies in municipal court. One public defender, who stated emphatically that Proposition 8 occasioned a shift in felony bargaining to municipal court, also emphasized that this was possible only because the superior court "certification judge" -- the jurist assigned to review the sentences achieved after municipal court bargaining -- kept tight control over sentencing outcomes. "He's well known as the most liberal," the attorney said. "You know when you get a guilty plea in muni court, and you agree on a sentence, it can't be too high or he'll slap it down."

This oversight function of the superior court had considerable influence on the "price" of cases in municipal court. Many defendants were willing to plead guilty because they perceived they would get the best "deal" with this particular judge serving, in effect, as an appellate sentencing court. This judge explained his role:

With the lust for law and order, every day the district attorney must get harsher. So the municipal cases come to me, and many are plea bargained, and increasingly many are a demand to plead to the sheet. No disposition will be arrived at unless you have predictability of the certification judge. You want to know what that judge will do if you plead to the sheet, and you want a judge with some compassion and understanding. So they must know that if they plead guilty, I will not take the same hardnosed position the DA does. They know my track record. I will call it as I see it. I don't succumb to public pressure; that's not my job. If I wasn't here, the certification rate would fall off one hundred percent.

Though this might seem to be institutionalization of leniency, few court professionals interpreted the certification judge's role as a mitigator of "just" -- i.e., harsh -- punishment. Even district attorneys, who presumably would be frustrated by the judge's philosophy, averred that they understood his position and welcomed it because they needed predictability. Furthermore, although they would not say so directly, they apparently accepted these sentences as just, as long as the "really nasty cases" were adjudicated in superior court.

Finally, court workers perceived that these "certified" sentences were necessary to the smooth movement of cases through the system. A defendant who pled guilty in municipal court would be rewarded with a slightly lighter sentence than he would expect in superior court. Everyone would be happy; the defendant would receive the benefit of a lighter sentence; the district attorney would have a certain conviction with a significant though not heavy punishment attached; and the court would not have to spend more time on the case. The certification judge was perceived as the gatekeeper to superior court, whose sentencing pronouncements kept the "going rate" of sentences manageable and acceptable. The caseload therefore was adjudicated smoothly.

The function of the certification judge, it seems, was to regulate the market price of sentences. The same function was served in San Diego by the judge assigned to municipal court plea bargaining. In a twist on the old quip about the existence of God, one Alameda County courthouse professional said that "if Judge (the "lenient" certification judge) didn't exist, we'd have to invent him."

Since a greater proportion of felony cases were concluded in municipal court, it seems that superior court would have fewer cases. The workload would therefore be much more manageable, and it would not be necessary to plea bargain, if plea bargaining is caused by heavy caseloads. In Alameda County, we found little confirmation for this version of the effect of Proposition 8 on superior court. Court professionals uniformly complained of the heavy caseload in superior court, and many attributed this to the high trial rate in homicide cases. Further, few interviewees thought that caseload pressure affected plea bargaining rates. Rather, cases were "settled" because superior court judges had reviewed evidence thoroughly in the readiness conference, and the sentence offered was a just disposition.

Court professionals agreed that superior court should be reserved for only the most serious cases in which trials were probable. District Attorney Meehan noted:

During the time it takes to try one murder case, you could probably do about twenty drug cases. And you could try them all, but the very nature of a drug case is that it often will be decided on search and seizure motions. And you look at these terrible violence cases, and they are horrible. But the drug case, who did he hurt, did he harm? He sold drugs and that's a terrible thing, but we can't say we're going to try his case and not the murder.

Yet, Meehan emphasized that this did not mean that drug dealers should be treated lightly. He added that "the individual drug offense in itself may seem nonviolent, but drugs are the root cause of most of the violent offenses." Recent events had substantiated this; several bloody shootouts between rival drug dealers had exacerbated Oakland's already-high homicide rate. Residents of the neighborhoods where the shootings occurred, frightened and angry, had demanded that the police round up all drug users and dealers. In turn, some police officers had made public statements that they could not take action because the district attorneys would only plea bargain the cases and turn the criminals loose, anyway.

A public outcry over plea bargaining in municipal court followed. (Recall that drug dealing is not covered by Proposition 8 unless the sale is to a minor). These cases were prime targets for the rejuvenated municipal court felony bargaining, because most court professionals did not think them important enough to take up superior court time and because they often had evidentiary problems which would "wash out" in bargaining. Meehan said:

Of course we'd love to try the drug cases. But there are about fifteen thousand addicts now in Alameda County, and they are poor addicts who support themselves by burglarizing your home and robbing your stores. It's not like Santa Clara County where they just pull the money out of their bank accounts. We can't put all the drug dealers through trials. I've begged and pleaded for more courts and judges, and maybe then we can.

Meehan apparently reserved his office's resources for the most serious cases -- often, the drug offender who had become a burglar or robber. Those cases would be carefully sifted in superior court. Lesser felonies would be handled in municipal court.²⁵ But the public was convinced that, if a defendant pled guilty, somehow something nefarious had occurred. Meehan continued:

The public doesn't understand that, if you have lots of serious non-drug cases, you've got to give them priority. But even more important, they don't realize that a disposition by guilty plea is not necessarily lenient. They just want to see these drug offenders behind bars. Fine. In municipal court, we will only agree to a sentence that includes prison or county jail time. But it's really hard to explain this, because there's always another addict who shows up on the streetcorner after we've just sent his friend away. People conclude that drug offenders are not incarcerated, though they are.

The effect of Proposition 8 in Alameda County, then, was that criminal procedure did indeed change as the law demanded. Yet this compliance did little to satisfy public distrust of the plea bargaining process.

C. In South Central Los Angeles -- Compton

In contrast to both San Diego and Alameda Counties, Compton's rate of guilty pleas certified from municipal court has always been low. Compton's trend line in Figure 3-3 is fairly constant even after Proposition 8 was passed, indicating that plea bargaining occurs in superior court there, and that this approach was largely unaffected by the new law. The data do indicate a jump in the rate of lower court felony guilty pleas in 1984, but the increase was caused by factors unrelated to Proposition 8.²⁶

Judicial control over the bargaining process is important in Compton, as it is in San Diego, but court professionals there strain to keep the locus of power in superior court. However, under the terms of Proposition 8, this is quite difficult, since bargaining on the superior court "information" is forbidden. Court professionals in Compton complied with Proposition 8 by relying, instead, on the exceptions to the bargaining ban written into the law. Superior court plea bargaining is permitted under the terms of Proposition 8 if it fits under an exception to the bargaining ban; court professionals in Compton say that most cases there fall under one of the three listed exceptions.

The first thing one learns about plea bargaining when talking with members of the District Attorney's Office is that it does not exist in Los Angeles; their office has forbidden the practice. There are, however, a great many "case settlements" in which charge or sentence reductions are exchanged for guilty pleas. While the difference between "plea bargaining" and "case settlement" is largely semantic, this shift in terminology indicates the predominant attitude in Los Angeles (as well as, probably, in most jurisdictions): that plea negotiations are an essential part of the felony adjudication process and do not necessarily subvert the interests of justice. Consequently, "plea bargaining" takes place in Los Angeles at much the same rate and in much the same manner in the post-Proposition 8 period as it did prior to Proposition 8.

Unlike district attorneys in other counties, the Los Angeles D.A.'s office did not interpret Penal Code Section 1192.7 as meaning that plea bargaining in serious felony cases was prohibited in superior court but was allowable in municipal courts. To merely shift negotiations into the municipal court was seen as a "violation of the spirit of the law." As a result, in Los Angeles County the adjudication of felony cases has largely remained in superior court. At the same time, the proportion of trials conducted annually has not risen: statistics from the Administrative Office of the Courts show that the percentage of superior court cases concluded by trial was 9.1 in fiscal year 1980/81 and 9.4 in fiscal year 1982/83. Over the same period, the proportion of guilty pleas increased somewhat from 75 percent to 82 percent.²⁷ Apparently, a caseload crisis generated by Proposition 8 was avoided in Los Angeles.

This very general description shows that Los Angeles County responded to the new limitations on plea bargaining in a very different way than did counties like Alameda. To better understand how plea negotiations take place after Proposition 8, we examined more closely one jurisdiction in the county: Compton. There we found a rather typical urban court system in which relatively large volumes of serious felony cases were handled with a great deal of efficiency. While courtroom actors in Compton are certainly aware of the new laws and procedural requirements that regularly issue from Sacramento, their primary orientation seemed to be towards the policies, both formal and informal, that govern criminal justice in Los Angeles, and more specifically, in the South Central District.²⁸ In Rosset and Cressey's terms, they work within their own "subculture of justice."

The courts in Compton operate under a master calendar system in which cases entering superior court go first to a master calendar court where defendants are arraigned and dates for a trial and a "pre-trial conference" are set. Under this system the master calendar court assumes a central role, functioning somewhat like a switchingyard. Cases enter the yard and are then routed out to various other departments for trial, sentencing, motions, etc. The master calendar judge is a dominant figure in the prosecution process; it is this jurist who determines, in large part, whether a case will be resolved through a negotiated plea or whether it will continue to trial.

This dominance results from the fact that the master calendar judge conducts or oversees the "pre-trial conference," the locus of most plea negotiations in Compton. At these conferences, held daily in the judge's chambers, prosecutors and defense attorneys attempt to hammer out a disposition that is not only agreeable to them but also conforms to the judge's standards. The judge actively participates in negotiating a disposition by indicating, either explicitly or implicitly, what the sentence will be if the defendant pleads guilty. The latter form of participation is facilitated by informal policies about expected sentences. For example, it was the court's policy to generally give a low-term prison sentence if a defendant pled guilty at the superior court pre-trial conference; if he demanded a trial, the standing offer was withdrawn and the defendant risked an upper or mid-term.²⁹ With incentives such as these, the court was able to dispose of the great majority of cases through negotiated guilty pleas. If a disposition was not reached at the initial pre-trial conference, a second or third conference could be held, allowing the defendant to change his plea right up to the day of the trial.

Given the fact that plea negotiations -- or "case settlements," as courthouse workers term them -- pervade superior court, is it accurate to say that Proposition 8's requirements are being met in Compton? The answer is yes. The District Attorney's Office, while ruling out the lower court negotiation tactic, has made extensive use of P.C. 1192.7's unusually broad exceptions to the ban on plea negotiations. Thus, virtually every serious felony case, in which a charge or sentence reduction is exchanged for a guilty plea, is seen as falling under one of these exceptions cited in the law.

The Compton Branch follows the guidelines for "case settlement" set forth by the Los Angeles District Attorney's Office. These guidelines specify that when the conditions for one of the three "exceptions" cited in P.C. 1192.7 are met:

The deputy actually prosecuting the case must obtain the prior approval of the appropriate Head Deputy or Deputy-in-Charge and must prepare a written disposition report signed by the deputy and the approving authority under the following circumstances: (1) When a defendant is allowed to plead to a charge or charges which could result in less than the maximum sentence. (2) When a defendant, who is charged with multiple offenses separately punishable under Penal Code Section 654, is allowed to plead to fewer than all such offenses. (3) When a special enhancement, prior, or ineligibility for probation allegation is stricken as part of a case settlement. (4) When the defendant is allowed to plead to a misdemeanor.³⁰

In the Compton Branch Office this means that the Head Deputy must personally approve all "case settlements."

These guidelines further state that "departure from this Felony Case Settlement Policy may be made in cases not enumerated in Penal Code Section 1192.7 in two instances: (1) Where the admissible evidence is legally insufficient to establish the defendant's guilt; or (2) Where unusual or extraordinary circumstances exist which demand a departure in the interest of justice."³¹

The first exception apparently applies to cases where the defendant is thought to be "factually guilty" but some difficulty exists in proving "legal guilt." The purpose of this guideline is to prohibit deputies from avoiding trials when the available evidence would indicate a high probability of conviction at trial. Apparently, then, these policy guidelines do not so much restrict plea negotiations as they restrict the avoidance of trials for reasons of organizational expediency rather than legal necessity. This attitude towards plea bargaining was reflected in a statement by the former Los Angeles District Attorney:

I'm not saying that we do not plea bargain at all. We do not give cases away. What they (the public) see as the evil of plea bargaining is accepting a lesser sentence in a particular case just so you can clear that case from your calendar, and that's not right and that's not appropriate.³²

As the guidelines state, when an approved "case settlement" is reached, a "disposition report" must be completed. It explains the reasons for the action and is placed in the case folder. According to deputies in the Compton Branch Office, the principal reason cited for "case settlements" refers to problems, actual or anticipated, with witnesses. The deputies, as well as one judge interviewed, claimed that many of the residents in the area mistrusted the police and the criminal justice system in general and therefore were reluctant to become involved in criminal proceedings. Furthermore, because of the pervasive influence of gangs in the area, victims and witnesses frequently feared retaliation if they testified. Even if these factors were overcome, there were often more practical matters of transportation and child care that prevented witnesses from appearing at hearings.

In the opinion of members of the District Attorney's Office, in cases where such problems were anticipated and a trial might result in a nonconviction disposition, charge or sentence reductions in exchange for a guilty plea were legitimate under the exception stated in Penal Code Section 1192.7, allowing plea negotiations when "testimony of a material witness cannot be obtained."

With such broad exceptions to the superior court plea bargaining ban so readily available, prosecutors in Compton have found little reason to shift negotiations to the lower court. But, beyond the need to skirt the restrictions created by Proposition 8, it seems perplexing that prosecutors, as well as judges and defense attorneys, did not see a lower court shift as an attractive alternative to cumbersome superior court procedures. With county-wide caseloads certainly as high as in either San Diego or Alameda Counties, certified pleas would seem to provide an ideal mechanism for processing routine felonies about which there is little legal dispute. Why then has there been a reluctance in Los Angeles to make use of a tactic that other jurisdictions have found so convenient?

In fact, there have been attempts to move more cases into the lower courts there. In 1980 a policy had been instituted in Los Angeles County that allowed defendants who pled guilty at or before the preliminary hearing to choose the superior court judge who would sentence them. The policy was clearly meant to provide an inducement to defendants to plead early, assuming that defense attorneys were aware of the judges who were most likely to give more lenient sentences.

These "Santa Claus judges," as they are called, represent the functional equivalent of the certification judge in Alameda County. But there is one important difference. In Los Angeles, the deputy district attorney handling the case must agree to the defense's choice of a sentencing judge. Presumably, prosecutors will not agree to submit cases to a judge who will give an overly lenient sentence, but will instead either seek some compromise choice or refuse the arrangement altogether. As a result, prosecutors retain control over this tactic and, as defense attorneys in Compton complained, defendants often get no better "deal" by pleading in lower court than they would if they took their case into superior court. With no organizational or legal incentive to shift felony negotiations to municipal court, superior court remained the major forum for felony dispositions.

In the spring of 1982, a number of judges, sensing that Proposition 8 would pass, sponsored a second attempt to move cases to municipal court. However, the District Attorney's Office thwarted the effort because, according to one senior superior court judge:

The D.A.'s Office is always trying to stay very centralized, so the downtown office can control the sentences handed out in plea bargaining. Otherwise, they're afraid their deputies would give away the store.

By keeping plea bargaining in superior court, the District Attorney's Office intended to retain control over the actions of its officers in the far-flung district offices -- no easy task in a county the size of Los Angeles. Consequently, certified pleas from municipal to superior court are still relatively uncommon there.

In summary, with plea bargaining apparently so well-accepted in the superior court,³³ and with an interpretation of P.C. Section 1192.7 by the District Attorney's Office which does not exempt the municipal court from Proposition 8's plea bargaining restrictions, the pressures that influenced other counties to move felony adjudication to the lower courts are effectively diluted in Los Angeles. Rather than simply ignore Proposition 8, however, courtroom actors have achieved formal compliance with the law's requirements by simply declaring plea negotiations, that apparently violate the prohibition on plea bargaining, to be "exceptions" to the law and thereby legally permitted. Once such a declaration has been accepted by all parties, no mechanisms exist to review the appropriateness of their application. Thus, the practice of plea bargaining continues in Los Angeles County. Whether or not this situation violates the intentions of those who drafted the law will be discussed in the final chapter of this report.

Implications

This overview of the response to Proposition 8 by legal professionals in three counties confirms the observations offered in Chapter 2. That is, court organizations will change, but only if there are powerful sociolegal reasons to do so, and only after much give-and-take between many legal professionals. The outcome is not mandated from above, and therefore the response will vary depending on the particular character of the counties and their legal professionals. Furthermore, as the plea bargaining literature shows, the guilty plea process is an important part of California felony adjudication, and is so deeply-rooted in professionals' vision of "normal crimes" and their appropriate punishments, that it is not likely to be abolished.

Commentators on the plea bargaining process have often claimed that there is nothing wrong with plea negotiation as long as sentencing outcomes are just and fair.³⁴ Similarly, the public's outrage over plea bargaining is usually premised on a belief that the practice produces lenient sentences. If informed that plea bargaining remains despite a law forbidding it, the public's outrage would likely be assuaged if they were also told that sentences had gotten tougher. In Chapters 4 and 5 we will examine the impact of Proposition 8 on sentencing.

Other critics of plea negotiation dislike the device not because of its outcome but because it subverts legal values concerned with open challenge of evidence in court.³⁵ These concerns, while less frequently voiced by the public, are central to the notions of justice that underlie our legal institutions. In Chapter 6 we will discuss the effects of the plea bargaining limitation on the quality of due process in California courts.

Notes

¹ These are urban jurisdictions, yet this choice does not imply that Proposition 8 has been unimportant in less densely populated counties. Where statewide trends are cited, of course rural counties are included. Naturally, however, the description of Proposition 8's effect on the superior court/municipal court interplay will apply to any county employing that dual system, i.e., any county with a population over 40,000. Thirty-four of California's fifty-eight counties have municipal courts. Their caseloads vary; total felony filings in Butte County Municipal Court in 1983, for instance, constituted 170 cases. Los Angeles, with 24 separate municipal courts, processed 38,125 felony filings in 1983. (Source: Judicial Council of California, 1984 Annual Report, Table A-28, p. 219-220.) Constitutional and statutory provisions carving out jurisdiction of lower courts include California Constitution, Article VI, Section 5 and Penal Code, Section 1462.

In those counties utilizing solely a superior court system for felony adjudication, anecdotal evidence suggests that court professionals implemented Proposition 8's plea bargaining limitation very much like Los Angeles county did -- that is, by relying on the exceptions to the plea bargaining ban in superior court enumerated in the new law.

² Section 859 of the Penal Code states that a felony offense "over which the superior court has original jurisdiction" commences with a "complaint" lodged against the defendant at an initial "appearance before a magistrate." Magistrates include judges both of superior and of municipal court. (Penal Code Section 808.) There is no statutory provision for the municipal court "pre-preliminary" discussions, but Penal Code Section 859a (a) states that a defendant may plead guilty before a magistrate any time his counsel is present, at which time the municipal court judge "shall . . . certify the case . . . to the superior court." If the defendant does not plead guilty within ten days, the case proceeds to a preliminary examination. (Penal Code Section 859b.) If the municipal court judge finds from the hearing that an offense was committed and that there is probable cause to believe the defendant committed it, he or she will "hold the defendant to answer" and send the case to superior court. (Penal Code Section 872.)

³ The superior court "Information" functionally mirrors municipal court's "Complaint." A grand jury indictment also can trigger superior court review, but the device has been eclipsed by informations. No cases have been instigated by grand jury indictment in Alameda County, for example, since 1979. In 1977, by contrast, 88 cases began with grand jury indictments, while 2,544 proceeded from felony informations. 75 indictments were handed down in 1978. (Source: Alameda County District Attorney Legal Information system, referred to as DALITE.)

⁴ The certification process is covered by Penal Code Section 859a. A superior court judge (or judges) reviews the certified cases. Each case carries an "indicated sentence" from the municipal court, which is usually the result of some negotiation or discussion of the case between counsel and sometimes between counsel and the lower court judge. This sentence could be overturned by a superior court judge if it was disparate compared to other similar cases, or if the judge believes the defendant pled guilty to a charge that did not describe the real wrongdoing, or for some other reason. As mentioned, the number of times superior court sends such a case back to municipal court is "infinitesimal," in the words of one interviewed municipal court judge.

⁵ See Appendix I for a discussion of how "serious felonies" were counted in the data.

⁶ Unfortunately, OBTS data do not cleanly delineate among superior court felony cases that end in guilty pleas, dismissals, or trials. The Table II representation of "cases prosecuted in superior court" therefore excludes certified guilty plea cases from municipal court, but includes cases that proceed to trial as well as those that plead guilty. Since the proportion of superior court "prosecutions" includes trials, if OBTS were able to subtract trial cases from the prosecution category, the number of prosecutions that conclude with guilty pleas in superior court would appear even smaller. The purpose of the table is to show that the proportion of serious felony cases concluded by municipal court guilty pleas, as compared to those settled by superior court guilty pleas, has increased significantly, and that increase would appear even more steeply on the table if we were able to subtract trial cases from the superior court dispositions.

⁷ Judicial Council of California, 1984 Annual Report, Table A-28, p. 219-220. Note that felony "filings" include all felony complaints filed. Dispositions may include reduction to misdemeanor under P.C. Section 17(b), certified guilty pleas on felonies, or holding felony defendants to answer in superior court.

⁸ Id. Compare trial rate from Table A-22, page 207.

⁹ Note, however, that there is a considerable body of literature that indicates that caseload pressure may have little to do with the reasons prosecutors and judges seek guilty pleas or the reasons that defendants plead guilty. Heumann, for example, has shown that high guilty-plea rates historically have not necessarily been associated with heavy caseloads. Milton Heumann, A Note on Plea Bargaining and Case Pressure, 9 LAW & SOCIETY REV. 515 (Spring 1975). Defendants plead guilty, moreover, even if the local justice system in which their cases are being adjudicated has considerably more resources to devote to trials than neighboring jurisdictions with similar guilty-plea rates. Organizational and administrative pressures may exert some general influence on plea bargaining, but the specific reasons judges and prosecutors accept guilty pleas probably have more to do with the weight of evidence in the particular case and the defendant's willingness to admit guilt. See also Malcolm Feeley, Two Models of the Criminal Justice System: An Organizational Perspective, 7 LAW & SOCIETY REV. 407 (1973).

¹⁰ Los Angeles County accounts for approximately 40 percent of all California felony prosecutions annually, so any attempt to describe the impact of Proposition 8 statewide must analyze its impact in Los Angeles. Studying criminal justice practices in a county the size of Los Angeles, however, is a formidable task. It is extremely difficult to obtain a complete grasp of criminal justice processes in a county with a population of seven and a half million, spread over a large area in vastly different communities, with ten separate superior court districts. Faced with this problem, our strategy was to examine a single jurisdiction within the county: the South Central Judicial District. Although the South Central jurisdiction is not typical of L.A. County as a whole, it has certain features which make it relevant to this study, primarily a high proportion of serious felony cases in its criminal court caseloads. And, because South Central's District Attorney's Office, Public Defender's Office, and Superior Court judges are all part of larger county-wide organizations, and their policies are, to some degree, uniform across the entire county, we can offer some measure of generalization from Compton's practices to a broader overview of Los Angeles felony procedures.

¹¹ California Office of Criminal Justice Planning, California Jurisdictions 1982: Crime Rates and Jurisdictional Rankings (Sacramento, Ca.: 1983).

¹² California Bureau of Criminal Statistics, 1983 Criminal Justice Profile Alameda County, p. 5 and 1983 Criminal Justice Profile, San Diego County, p. 5.

¹³ Id.

¹⁴ City and County Data Book: 1983, U.S. Dept. of Commerce, Bureau of the Census (Washington, D.C: Government Printing Office).

¹⁵ California Bureau of Criminal Statistics, Monthly Arrest and Citation Register: 1984, California Bureau of Criminal Statistics note 12 supra.

¹⁶ California Department of Health Services, Vital Statistics of California, 1982 (March 1985), Table 1-3, p. 16.

¹⁷ Id. The F.B.I. in its Uniform Crime Reports: 1984 reports that Oakland ranks sixth in the nation in number of homicides per capita.

¹⁸ San Diego Union-Tribune, The Union-Tribune Review of San Diego Business, 1984, p. 18, quoting the U.S. Census. It is illustrative of the ambivalence felt by San Diego business leaders toward the migrant Hispanic community that local demographic descriptions present ethnicity of the population in two groups: "General Population," including White, Black, Indians, Asians, and Other, and "Persons of Spanish Origin," including White, Black, Indian, and Other. Totals for the two groups are kept separate in the report, but in this study we have combined them for population totals, and included all the "Spanish Origin" category under "Hispanic." It is unclear how many of these are citizens of the United States.

¹⁹ Judicial Council of California, Annual Report, 1984, Table A-28, p. 219.

20 Id. at 220.

21 Personal interview with three San Diego judges, 4 December 1984. Throughout this report, interview quotes are taken verbatim from tape recordings, but are often changed slightly to fit rules of grammar or syntax, or simply to emphasize certain points. A few were reconstructed from written interview notes.

22 Scott Green et al., San Diego County Municipal Court Experiment Evaluation Report (San Diego: Comprehensive Planning Organization, Criminal Justice Evaluation Unit, November 1979).

23 Naturally, the defense bar would also be expected to influence sentencing outcomes. But other studies of San Diego plea bargaining have hypothesized that the defense bar there is less influential in policymaking because it is fragmented and poorly funded. Ironically, Utz notes, this has meant that the San Diego defense bar is more adversarial in plea bargaining than Alameda County's, where defenders and prosecutors tended to share a vision of acceptable negotiated outcomes more than they did in San Diego. See Pamela Utz, Settling the Facts (Lexington, Mass.: Lexington Books, 1978).

24 District attorneys in other jurisdictions are said to charge a defendant with a crime if the evidence available at the time meets the lesser standard of "probable cause to believe a crime was committed and the defendant probably committed it." There is some rough statistical evidence supporting Alameda County's claim of "tight charging." In 1984 police there submitted 16,251 felony cases to the District Attorney for prosecution; 11,898 resulted in complaints filed; 4,353, or about 27 percent, were denied. By contrast, in San Francisco County, 8,311 felony cases were submitted, and 841, or about 10 percent, were denied. In San Diego, about 14 percent were denied. (Note that of felony cases reaching disposition in municipal court, 57 percent were dismissed in San Francisco, while the dismissal rate in Alameda County was 39 percent. Tight charging means fewer cases need to be dismissed later.) (Source: Bureau of Criminal Statistics, Crime and Delinquency in California, 1984.)

25 Since this report was written, the District Attorney's Office promulgated a new policy concerning guilty plea practices in drug cases. Guilty pleas would be accepted, but only to the offense "as charged." No agreement to recommend a nonincarcerative sentence was permitted, either in municipal or superior court. Throughout the time in which community groups pressured the police and District Attorney to prosecute drug dealers more vigorously, members of the District Attorney's Office averred that the county justice system needed more judges and courtrooms. This was seen as the only alternative to concluding drug cases through "cheaper" guilty pleas and receiving lower sentences than would be expected if trial resources were expended. Eventually three additional superior court judges were obtained for the county, the District Attorney gained eight new lawyer positions, and a special Drug Offenders Prosecution Unit was instituted in the D.A.'s organization.

26 The increase in certified pleas was due to two factors. In 1984 law enforcement agencies began a crackdown on drug dealers and users resulting in a tremendous increase in drug arrests. At the same time, the two master calendar courts in Compton were consolidated into one, the judge of which instituted an informal policy whereby first-time drug offenders were typically given a probation sentence with a testing requirement for drugs. Defense attorneys frequently entered certified pleas after being assured that their clients would receive this sentence.

27 Judicial Council of California, Administrative Office of the Courts, Annual Reports: 1983 and 1984 (San Francisco).

28 Arthur Rosett and Donald Cressey, Justice by Consent (New York: Lippincott, 1976).

29 For a description of other sentencing policies in this court see note 26 supra.

30 Memorandum, L.A. District Attorney's Office, 7 December 1984.

31 Ibid.

32 Los Angeles Herald, 31 May 1984.

³³ The institutionalization of plea negotiations at this stage in Los Angeles County is reflected in a sign that hangs in the entrance to one of the superior court departments, where pretrial conferences are frequently scheduled, in the Central District. The sign reads as follows:

Case Settlement

At the pretrial conference, counsel for both sides shall be familiar with the contents of the preliminary hearing, shall have previously conferred, and shall be prepared to discuss with the court disposition of the case other than by trial. The Deputy District Attorney assigned to the case shall be prepared to state what disposition, if any, other than by trial, he is authorized to make, and shall have obtained any authorization to make, and shall have obtained any authorization necessary to act on the date of the pretrial conference. Defense trial counsel shall personally attend the pretrial conference and, having previously conferred with the defendant, shall be prepared to state what disposition other than by trial will be acceptable to the defendant.

³⁴ See Utz, supra note 23 and Lynn Mather, Plea Bargaining or Trial? (Lexington, Mass.: Lexington Books, 1980) for presentation of California plea bargaining as "substantive justice." See also Milton Heumann, Plea Bargaining: The Experiences of Prosecutors, and Defense Attorneys (Chicago: University of Chicago Press, 1978).

³⁵ A succinct summary of objections to the bargaining system is found in Albert W. Alschuler, "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System," 50 U. CHI. L. REV. 931 (1983). See also Stephen J. Schulhofer, "Is Plea Bargaining Inevitable?" 97 HARV. L. REV. 1037 (March 1984).

The idea that plea negotiation subverts justice even though case outcomes may be fair has several facets. One is that victims and the general public distrust decisions achieved behind closed doors, even though these can be proven to have been principled decisions. Another is that plea bargaining sends the message to defendants that their sentences are the result of tactical manipulation rather than just punishments imposed for proven wrongful acts. A California critic cites another problem: negotiated outcomes tend to obscure the court's findings on what it was the defendant actually did and what punishment was assessed and laws relating to use of firearms and the like were sidestepped. Plea Bargaining, Report of the Joint Committee for the Revision of the Penal Code, California Legislature, Final Report, October 31, 1980 at 181-183.

Chapter 4

THE IMPACT OF A NEW HABITUAL OFFENDER LAW

Although the literature about plea bargaining often gives the impression that relations among prosecutors and defense attorneys are highly cooperative, such observations may put the plea bargaining cart before the "facts and law" horse. It is equally plausible that relations become cooperative as courtroom actors work together to resolve particular cases, but the raw materials with which attorneys work -- the provable facts in individual cases, applied to existing legal standards -- are carefully scrutinized with partisan eyes before they are placed upon the negotiating table. Plea bargaining, though cooperative in its methods, may be distinctly adversary in its underlying substance.

The adversarial assumption, not the cooperative one, is apparent in many legislative changes. New laws frequently benefit one side in adjudication at the expense of the other. Laws increasing potential sentences benefit prosecutors by giving them more leverage, a stronger position in the negotiation process. When sentences suddenly increase, prosecutors find that defendants who formerly would have held out for better "deals" before pleading are now willing to plead early and to charges carrying much more severe sentences. One need not impute too much rationality to the defendants in these situations to predict that they will find the risk of going to trial too great and will be willing to take what they can get in exchange for a plea of guilty.

Habitual offender laws provide just such a resource for prosecutors. Soon after they were first enacted in the late 19th century, prosecutors began to use these laws as "chits" in the plea negotiation process.¹ Available evidence suggests that this tactic remains common today. After surveying a number of prosecutors and defense attorneys, William F. McDonald recently concluded that "habitual offender laws are being used with considerable frequency but their use is for plea bargaining not for sentencing. Only a small proportion of eligible offenders are being sentenced as habituals."²

In this chapter we seek to determine how California's new Habitual Offender Law (PC 667(a)) has affected felony prosecution in the three jurisdictions described in the preceding chapter. We start by continuing our discussion of plea bargaining since, as McDonald's survey results suggest, such laws often affect plea negotiations as much as sentencing; indeed, in practice it is virtually impossible to separate the two. We then examine data showing the frequency with which these enhancements are being used and their impact upon sentences.

As in Chapter 3, our methodology includes a qualitative component -- interviews and observations in local criminal justice settings -- and a quantitative component. Our statistical data are compiled from the data bases maintained by the California Board of Prison Terms and computerized records maintained by the district attorney's offices and courts in each jurisdiction: from the CORPUS system operated by Alameda County; from the San Diego District Attorney's JURIS system; and from the Los Angeles District Attorney's PROMIS system. These data bases and our samples are described in detail in Appendix I.

Uses of PC 667(a): Hypotheses

As we discussed in Chapter 1, in adding 667(a) to the Penal Code, Proposition 8 stated that "any prior felony convictions. . . shall (emphasis added) subsequently be used without limitation for the purposes of. . . enhancement". This wording has been interpreted as prohibiting judges from striking or dismissing the enhancement. In our fieldwork we found a diversity of opinion regarding this interpretation, with many judges continuing to exercise this discretion. However, there is nothing in the law that restricts prosecutors discretion to allege the enhancement or drop it after an initial allegation. This discretion enables prosecutors to use the habitual offender enhancement as a tool for inducing defendants to enter guilty pleas under the terms set by the prosecutor. These "coerced" pleas can thus be accomplished only if, for most cases, the enhancement remains a threat, not a reality.

Therefore, we expected PC 667(a) enhancements to be frequently used, but only in the bargaining process, not as part of sentencing. This means that the enhancement will

be frequently charged but rarely imposed. However, this does not mean that it will have no effect on sentencing. To the contrary, we hypothesized that the use of PC 667(a) as a bargaining tool would produce more severe sentences for defendants charged with serious felonies, as they are forced to plead to higher terms if they have previous serious felony convictions. We thus anticipated that overall sentence severity and length, for those defendants initially charged with a serious felony, would increase in the post-Proposition 8 period.

Qualitative Findings

Our initial hypotheses concerning both plea bargaining changes and sentencing severity were readily confirmed in our local interviews. Prosecutors repeatedly stated that the law had provided them with a powerful means for "coming down hard" on the "real bad guys". Yet, they admitted that the enhancement was most frequently used in the plea negotiation process where they were typically dropped from the final conviction charges. None said they would refuse to drop the charge in exchange for a plea. Nevertheless, they contended that the law was a powerful weapon in prosecutor's arsenal. As one deputy district attorney put it, the law hangs like "Damacles sword" over the heads of defendants.

Defense attorneys were even more expressive in their assessment of the law's impact. When asked about the law's effect, they frequently responded as one attorney did, shaking his head in dismay and stating, "Man, it's hurt us."³ Most characterized the new law as Draconian, an instance of "overkill," creating situations in which relatively nondangerous offenders could end up facing extraordinarily long sentences. A defense attorney in San Diego described the situation in the following way:

Well, now the stakes are higher. . . (prosecutors) have another card in their deck. The reality of it is that if he's got a couple of Prop. 8 priors, the con's looking at ten more years. (The defendant) may very well want to settle the case, even though they feel they didn't do anything wrong. There are lots of people going down as a result of that, and the people who are faced with that kind of time are sort of stunned by the idea that, because they had a couple of burglaries before, they might be facing ten years on the priors alone. And that's the question they ask: "I paid for this lawyer, why am I looking at ten more years?"

Underlying their criticism was the feeling that Proposition 8's habitual offender enhancement distorted the original intent of the enhancements defined by the Determinate Sentencing Act. The San Diego defense attorney claimed that:

When (determinate sentencing) was initially passed, it was a compromise to go to a system where people would know what they were being charged with and know what their sentences were, and at the same time would provide a structure so that the people would be paying a particular price as opposed to being let go. And what it has become now is a political tool for those politicians who are perceived as getting tough on crime and what they have done is jacked the sentences totally out of proportion. . .

While in all three jurisdictions we found that PC 667(a) enhancements were the objects of plea negotiations, the manner in which they were used in the bargaining process differed in each locale. In Alameda County, all enhancements are generally alleged in the complaint and may be dropped either in a municipal court disposition or later if the case continues to superior court. Some serious felony cases, involving defendants with prior convictions, are transferred to the Career Criminal Unit within the District Attorney's Office where the policies on plea bargaining are much tougher and where most cases are taken into superior court. However, the proportion of all felony cases handled by the Career Criminal Unit is relatively small and does not affect most cases eligible for PC 667(a) enhancements.⁴

In San Diego, enhancements for prior felony convictions are generally not alleged in the initial complaint but are added to the information only after the case has weathered a preliminary hearing and has been bound over to superior court. Prosecutors in San Diego claimed that, unlike Alameda County, they would not charge the prior felonies immediately in the municipal court complaint because at that early stage there was not enough information about the case and the defendant's record. Since the statute makes no mention of when the enhancement is to be charged, they reasoned that it was legally correct to allege the prior convictions in superior court, when the case file had been completely developed from investigation and checking "rap sheets." San Diego defense attorneys perceived this policy as an outright threat. "Either plead your guy in municipal court and accept the sentence we set, or we'll hit him with his priors in superior court," is how one attorney characterized the district attorney's practice. Given the choice, most defendants would accept the lower court sentence and plead there rather than face a higher sentence produced by PC 667(a) in a superior court proceeding.

In Compton, because of the emphasis on disposing cases in superior court, PC 667 (a) enhancements were generally charged only after the case had gone to superior court. However, according to members of the District Attorney's Office, enhancements cannot simply be avoided by pleading in municipal court. If a certified plea is agreed upon and priors are later discovered, the district attorney retains the right to amend the complaint or information to include the priors.

While in both San Diego and Alameda Counties the decision to drop priors is largely in the hands of the prosecutor, in Compton this decision is often made by a superior court judge as part of a negotiated plea. In these instances, defendants agree to plead to all charges in the information with the understanding that at sentencing the judge will stay the enhancements. According to deputies in the D.A.'s office, this tactic allows defendants to obtain a reduced sentence while the prosecutor gets a guilty plea without violating Proposition 8's restrictions on plea bargaining.

In summary, our qualitative research indicated that PC 667(a) had become an important part of plea bargaining in all three jurisdictions, although its procedural posture was different in each county. Most courtroom actors claimed, moreover, that the new law had significantly increased sentence severity. One minority opinion regarding sentencing was voiced, however, by an experienced Oakland private defense attorney. He said:

Yes, the effect of Proposition 8 has been to give the D.A. more power, but sentences are not necessarily tougher. That is because so much more felony plea bargaining goes on now in municipal court. If you're smart, you plead the guy quick and dirty before they hit him with the prior. And personally, I think that's what they intended Prop. 8 to do, because they get the same heavy sentences in municipal court they used to get in superior court, without having to pay the price in D.A. effort. The only problem is explaining that to defendants. Things have changed, you tell them, and they have to plead guilty immediately to get the kind of sentence we used to be able to talk about. Some of them are awfully skittish about pleading to 25-year prison terms within a week of their arraignments!

Quantitative Findings: The Attrition of 667(a) Enhancements

Early critics of the "Victims Bill of Rights" in the legislature warned that any expanded prison capacity brought about by the passage of the prison bond initiative (Proposition 1, also on the June 1982 ballot) would be completely consumed by the larger prison populations brought about by the longer sentences resulting from Proposition 8's habitual offender section.⁶ But, in order for this dire prediction to come true the new law would have to be applied to a substantial number of eligible offenders.⁷ Did this occur? We therefore asked: in the years following Proposition 8, how many offenders were eligible to be charged with the enhancement? How many offenders were actually charged? For how many defendants were those allegations proven? And finally, how many actually had the enhancement imposed as part of their sentences?

Data from the state Board of Prison Terms provide an estimate of these numbers. Table 4-1 below displays this information, by quarter, for all persons received in state prisons between July 1, 1982 and June 30, 1984. Table 4-2 presents similar data for prisoners sentenced from Alameda, San Diego and Los Angeles Counties. Unfortunately, these data only refer to those persons receiving prison sentences and excludes defendants who were charged with the PC 667(a) enhancement but had it dropped when they were given a non-prison sentence or were not convicted. However, we suspected that the number of defendants charged with PC 667(a), convicted in the instant case and given non-prison sentences, was small. In these cases, we reasoned, judges and prosecutors would be unlikely to accept non-prison sentences for those defendants they considered serious enough to charge as habitual offenders.

table 4-1

SENTENCE ENHANCEMENTS FOR PERSONS RECEIVED IN PRISON, 1982-1984
 Penal Code Section 667(a)
 By Quarter, Statewide

Quarter received	Eligible ^a	Prisoners		
		Charged	Proven	Imposed
1982				
July-September		3	1	1
October-December		53	33	31
1983				
January-March		180	87	66
April-June		179	87	74
July-September		204	114	91
October-December		217	107	79
1984				
January-March		203	112	88
April-June		285	169	121
July-August		103	60	47
Total	5,016	1,427	770	598

^aQuarterly data on the number of prisoners eligible for the enhancement are not available.
 Source: California Board of Prison Terms.

A quick glance at the numbers in Table 4-1 is all that is needed to disconfirm one of our original hypotheses. Contrary to our expectation that the enhancements would be used extensively, the data show that the new habitual offender law was charged in only 28 percent of the eligible cases. This does not mean that in all of these cases prosecutors were aware of the defendant's prior "serious felony" convictions and made the conscious decision not to charge the habitual offender enhancement. In some cases defendants' records may be unavailable or inaccurate thereby preventing prosecutors from charging those defendants technically eligible for the enhancement. Still, the fact that so few eligible defendants are actually charged with the enhancement contradicts the statements of prosecutors we interviewed who claimed that the PC 667(a) charge was alleged whenever possible.

The data do, on the other hand, confirm our hypothesis that the habitual offender enhancements, once charged, are infrequently imposed. The statewide data show that only 42 percent of those persons who were initially charged with PC 667(a) and sent to prison had the additional five years imposed at sentencing. Furthermore, the bulk of those habitual offender enhancements that dropped out, did so before being proven in court, suggesting that many were dropped by prosecutors in the course of plea negotiations. Apparently, once the charges are proven in court, judges are somewhat reluctant to dismiss, strike or stay them since 78 percent of those proven were imposed.

table 4-2

SENTENCE ENHANCEMENTS FOR PERSONS RECEIVED IN PRISON,
 July 1982--August 1984
 Penal Code Section 667(a)
 Alameda, Los Angeles, and San Diego Counties

Jurisdiction	Prisoners			
	Eligible	Charged	Proven	Imposed
Alameda County	372	70	38	29
San Diego County	272	80	43	34
Los Angeles County	2,153	450	244	189

Source: California Board of Prison Terms.

In our three selected counties¹⁰, the picture is very similar to the one displayed in the statewide data. Of those offenders eligible for the habitual offender enhancement, relatively few (between 18 and 30 percent) are actually charged. Of those offenders charged with the enhancement, a little over half have those charges proven in court and only 42 percent have those enhancements imposed. It is also striking how uniform these patterns are across counties. One would have expected more variation in the extent to which these charges are brought and the points in the system at which they drop out because of differing plea bargaining strategies in each locale. If nothing else, then, the charge is being applied consistently.

Effects on Sentencing

Even though the five-year habitual offender enhancements are infrequently charged and even less frequently imposed, they might still result in more severe sentences for serious offenders. As we earlier indicated, prosecutors can use the enhancement as a threat in order to obtain early pleas to relatively tough sentences. Defense attorneys told us, often in despairing tones, that in these situations their clients often "get scared" and agree to lengthy sentences, even in cases where legal deficiencies might well result in a dismissal or acquittal, or (more likely) convictions on lesser charges with lighter sentences.

If these threats were invoked with any frequency we would suspect that the severity of sentences for serious offenders would have increased after Proposition 8. To determine if the new law has had this effect we examined our local data on the sentences for robbery and rape cases before and after the passage of Proposition 8. We chose to look at sentences for these two offenses for primarily practical rather than conceptual reasons; they were the only two serious felony offenses for which we had sufficiently large numbers of cases every year in all three jurisdictions. In addition to their methodological adequacy we decided to focus on these two offenses because, unlike many other serious felonies, they were relatively unaffected by other statutory changes that might have affected sentences near the time Proposition 8 went into effect. Sentences for both offenses were subject to legislation passed in the late seventies that increased sentence ranges and modified the enhancements applicable to these offenses. The results were substantial increases in sentence lengths.¹¹ However, much of these impacts should have been felt by 1980, and no other significant sentencing changes occurred after this time.¹²

Our sample consisted of all cases (i.e., defendants) in which the most serious charge in the complaint was either robbery or rape, and the defendant was eventually convicted on any charge between January 1, 1980 and December 31, 1984. We decided to select our sample on the basis of the most serious charge in the complaint rather than at conviction. Only in this manner can the data model the effects of plea bargaining on sentencing. Had we selected cases on the basis of conviction charge, we would have excluded many cases disposed of after extensive charge bargaining. In other words, we want to be able to measure the effects of changing plea bargaining practices that might result in more (or fewer) cases pleading to reduced charges and receiving less severe sentences.

First, we looked for changes in the likelihood that convicted offenders would be sentenced to prison -- what is sometimes referred to as the "in-out decision." In California the most common negotiated sentence involves a promise of no state prison from prosecutors and it is this "deal" that defense attorneys will usually seek first for their clients. Conversely, prosecutors are usually careful not to agree to such dispositions too quickly lest they acquire a reputation for "giving away the store." However, such negotiated pleas are common and the "going rate" in most jurisdictions usually specifies a range of "normal crimes" for which this sentence is regarded as appropriate.

In Table 4-3 we attempt to determine if any significant changes in sentences can be observed in our three jurisdictions after the passage of Proposition 8. Specifically, the data show the percentage of prison sentences for those robbery and rape cases that resulted in a conviction, by jurisdiction, between 1980 and 1984.

table 4-3

PRISON SENTENCES AS A PERCENT OF
ROBBERY AND RAPE COMPLAINTS ENDING IN CONVICTION, 1980-1984
Alameda County, San Diego County, and Compton

	Alameda County ^a		San Diego County ^b		Compton ^c	
	Number	Percent	Number	Percent	Number	Percent
Robbery						
1980...	284	54.7	198	44.0	124	63.3
1981...	268	54.3	235	52.5	134	63.5
1982...	272	53.6	276	60.3	132	57.1
1983...	250	54.5	218	50.8	157	54.7
1984...	169	57.7	180	43.3	172	66.4
Rape						
1980...	38	54.2	27	44.0	23	70.0
1981...	58	56.9	27	52.9	54	76.1
1982...	46	54.1	30	58.9	33	73.4
1983...	31	39.7	37	63.7	33	84.6
1984...	38	43.2	43	60.5	33	84.6

^aSource: CORPUS.

^bSource: JURIS.

^cSource: PROMIS.

Had PC 667(a), or any other element of Proposition 8, affected sentencing one would expect to see a systematic increase in the rates of imprisonment in the post-Proposition 8 period (1983 and 1984). The data in Table 4-3 do not show a clear pattern in that direction. Despite some year-to-year fluctuation, the probability that defendants initially charged with robbery would, if convicted, be sentenced to prison remained much the same in 1984 as it was in 1980. While there was an increased probability of imprisonment for those charged with rape in San Diego and Compton, it would be difficult to attribute this increase to Proposition 8 since the trend actually began in 1981. This, combined with the fact that the probability of imprisonment in Alameda County actually declined, leads us to conclude that Proposition 8 did not affect rates of imprisonment for rape cases.

Although these data suggest that Proposition 8 did little to "get tough" with offenders, the rate of imprisonment may not be the best indicator of an increase in sentencing severity. It may be that most of those offenders affected by the habitual offender enhancement would have received prison sentences had the law not been in effect simply because judges and prosecutors are less likely to be lenient with repeat offenders. For this reason, a better indicator might be the length of the term received by those offenders sentenced to prison.

Since 1977 California has operated under a system of determinate sentencing. Every offense has a specified range -- lower, middle and upper -- of prison terms that represent the "base terms" from which judges choose. Judges are instructed to impose the middle term unless factors in mitigation or aggravation warrant a lower or upper term. Sentence lengths may also be increased with any of a number of enhancements for use of a firearm, infliction of great bodily injury, prior convictions, etc. The upper end of the range of potential sentences is also extended by a system of consecutive sentences that, within certain limits, allows sentences to be "stacked" one upon another. At the same time, many offenses include probation options for offenders who meet certain requirements. Thus, a system that was meant to provide certainty and uniformity allows for a broad range of punishments and gives judges and prosecutors a great deal of discretion in determining the sentences given to individual offenders.¹³

The range of prison terms for robbery are two, three and five years; for rape, three, six and eight years. But both offenses are subject to numerous enhancements that can drive actual sentences much higher. Rape, in particular, carries several severe enhancements that, in recent years, have dramatically increased the sentences of those convicted of this offense and other sexual assaults.¹³

In Table 4-4 we calculated the median sentence lengths for those offenders sentenced to prison as calculated in Table 4-3. Again, offenders were classified in terms of the most serious charge in their complaint regardless of their final conviction charges. Sentences were calculated on the basis of the total amount of prison time imposed for all conviction charges, including enhancements, less suspended time. Median rather than mean sentence lengths were calculated in order to minimize the effects of outliers, i.e., those offenders who received unusually long sentences.

table 4-4

MEDIAN PRISON SENTENCE LENGTH (IN YEARS) FOR
ROBBERY AND RAPE COMPLAINTS, 1980-1984
Alameda County, San Diego County, and Compton

	Alameda County ^a		San Diego County ^b		Compton ^c	
	Number	Years	Number	Years	Number	Years
Robbery						
1980...	284	3.0	198	6.0	110	4.0
1981...	268	3.0	235	5.0	115	4.0
1982...	272	3.0	276	5.0	87	3.0
1983...	250	3.0	218	4.0	118	3.0
1984...	169	3.0	180	3.0	132	3.0
Rape						
1980...	38	6.0	27	6.5	14	7.5
1981...	58	4.5	27	8.5	40	9.0
1982...	46	6.0	30	6.0	22	6.5
1983...	31	6.0	37	8.0	12	5.0
1984...	38	6.0	43	7.0	23	6.0

^aSource: CORPUS.

^bSource: JURIS.

^cSource: PROMIS.

We may assume that during this period there were no legislative changes that might have resulted in a general reduction in sentence lengths and therefore any significant changes brought by Proposition 8 should be evident. The data, however, do not show any systematic increase in sentence lengths after 1982. The sentence lengths for both robbery and rape cases either stayed relatively stable or, for robbery cases in San Diego and Compton, actually declined during the period (a trend for which we will not hazard an explanation). Thus, it appears that the new habitual offender enhancement did not push aggregate sentence lengths upward.

Although the overall length of prison sentences was apparently unaffected by Proposition 8, it is possible that PC 667(a) did impact particular types of cases. In their study of a Michigan mandatory two-year sentence enhancement for gun use in certain offenses, Loftin, et al.,¹⁵ found that the law's most significant impact was on a subset of the most serious offenders for whom the "going rate" did not apply and who felt the full brunt of the law. A similar situation could have occurred in California. Prosecutors, while opting not to apply the habitual offender enhancement to every case possible, could have reserved it for only the most serious offenders -- the "real bad guys." However, the local data do not provide any evidence that this happened. Only in Compton, and there only for robbery cases, does there seem to have been a significant increase at the upper end of the sentence range. In both Alameda and San Diego, the upper ends of these ranges remained fairly stable throughout the period.

Conclusions

The empirical results of this chapter can be summarized rather easily. Proposition 8's habitual offender law apparently has had little effect on the sentencing of offenders charged with serious felonies primarily because the enhancement is not charged very often and when charged, it is frequently dropped in the plea negotiation process.

Why prosecutors do not charge the enhancement more often is a tougher question. It seems unlikely that they are simply unaware of the law or that they fail to check defendants' records to determine if the enhancement is applicable. It seems more likely that the answer lies in the "going rate," the local norms that determine sentencing expectations in each jurisdiction. Although we have no empirical evidence to support this hypothesis, we may speculate that the application of PC 667(a) to every case possible would conflict with the understandings shared by prosecutors, judges and defense attorneys of the reasonable and morally appropriate punishment for various offenses. To send a burglar to prison for twelve years simply because he/she had two prior convictions, while legally permissible, would likely upset the "moral calculus" upon which courtroom actors base their everyday negotiations. Prosecutors who stubbornly sought such severe sentences would gain a reputation for being unreasonable and would soon learn the necessity of maintaining cooperative relationships with their co-workers -- judges and defense attorneys.

This, however, is not to conclude that the new law has had no effect on prosecution. In at least two of the jurisdictions studied, our qualitative data revealed that the law was being used primarily to obtain guilty pleas at early stages in the process. Defendants feel sufficiently threatened by the promise of harsher sentences, later in the prosecutorial process, that they plead guilty before evidentiary testing in the courtroom occurs. Potential increases in sentence lengths for repeat serious felons may be offset by inducements to plead at this stage, through prosecutorial agreements not to charge the habitual offender enhancement. Thus, equilibrium in sentences may be maintained through adjustments in plea negotiation procedures.

Changes in sentencing standards can be neither too abrupt nor too radical a departure from existing standards, but instead must fit within the broad conceptions of "just deserts" held by the principal decision-makers in the process. Adversarial dynamics among courtroom actors favor a "ratcheting" of sentencing such that plea bargaining practices can cushion the effects of sentencing severity. In general, as in other large organizations staffed by professionals who maintain considerable autonomy and discretion in their actions, change within criminal courts is a process that must be negotiated among these professionals and cannot simply be imposed from without.

Notes

¹ After Ohio passed one of the first habitual offender enhancements in 1884, prison reformer Robbie Binkerhoff reported to the National Prison Association that "in Ohio the law has been largely nullified by the failure of the prosecuting attorney to indict habitual criminals as such." (Source: Quoted in Samuel Walker, Popular Justice [New York: Oxford University Press, 1980], p. 99.)

² William F. McDonald, "The 'Bitch' Threatens and Bites: A Survey of Habitual Offender Laws in The United States" (Paper delivered at the Annual Meeting of the American Society of Criminology, Cincinnati, Ohio, November 1984). Quoted by permission.

³ Indeed, in one jurisdiction, the head deputy public defender, apparently believing that we were advocates of the new law, refused to be interviewed because of the "damage" that Proposition 8 had inflicted on his clients.

⁴ In an interview, the head of the Career Criminal Unit stated that out of 1,563 felony cases disposed of by the DA's office in a three month period, only 28 were handled by the Career Criminal Unit.

⁵ See California Penal Code Section 969 1/2.

⁶ Assembly Committee on Criminal Justice, Analysis of Proposition 8, (Sacramento: Assembly Office of Publications, 1982), p. 44.

⁷ The Dept. of Corrections estimated that approximately 1,200 offenders a year would have the five years prescribed by the law added to their sentences. (Source: California Department of Corrections, Population Projections: 1985-1989 [Sacramento: Dept. of Corrections, 1984], p. 8.)

⁸ We were able to check our hypothesis against the San Diego data, the only local data in which the enhancements could be isolated. In that sample we found 209 cases in which PC 667(a) was charged. Of these, 162 resulted in a conviction and 146 of those, or 91 percent, resulted in prison sentences. Although these data may not be representative of the entire state they do provide support for our hypothesis that most convicted defendants charged with PC 667(a) receive prison sentences. Thus, the BPT data presented likely include the great majority of those convicted defendants charged with the habitual offender enhancement. Furthermore, the JURIS data show that of these 146 cases in which the defendant was sentenced to prison only 59, or 40 percent, had the PC 667(a) enhancement(s) actually imposed. This proportion is very similar to the 43 percent shown in the BPT data. The differences in absolute numbers in the two sets of data are attributable to the fact that the samples are different. While the JURIS data include all those defendants sentenced through December 1984, the BPT data count only those persons actually received in prison and only those received by August 14, 1984.

⁹ Although this rate of charging may seem low it is consistent with the finding of researchers in other states. In a recent study of plea bargaining in six jurisdictions (El Paso, TX; New Orleans, LA; Seattle, WA; Tucson, AZ; Delaware County, PA; Norfolk, VA) William McDonald found that although habitual offender laws were available in each jurisdiction, the laws were rarely applied to eligible defendants. In only one of those jurisdictions, New Orleans, was the charge used with any frequency. Of a sample of 968 defendants, in all six jurisdictions, who were eligible for the enhancement by virtue of prior felony convictions, only 14.6 percent were sentenced as "habitual offenders." (Source: William McDonald, Plea Bargaining: Critical Issues and Common Practices [Washington, D.C.: Government Printing Office, 1985] pp. 43-44.)

¹⁰ We were unable to break down the Board of Prison Terms data so as to isolate cases sentenced from Compton. Therefore, we took data from Los Angeles County as a whole.

¹¹ One of the more significant changes in sentencing was brought about by Senate Bill 13, which created special enhancements and changed the way consecutive sentences could be applied for cases involving "violent felonies" committed after January 1, 1980. Particularly affected were rape cases. Data presented by the Judicial Council show that the mean sentence length for persons convicted of rape increased

dramatically after the law was implemented: from 6.65 years in the last quarter of 1979 to 18.8 years in the 1982 calendar year. (Source: 1983 Report to the Governor and the Legislature [San Francisco, 1984], p 5.) By the second quarter of 1984, the mean sentence length for forcible rape had declined to 15.3 years. (Source: Judicial Council of California, "Sentencing Practices Quarterly" nos. 27 and 28, [San Francisco, 1985.]) Despite these changes in sentences caused by non-Proposition 8 factors there are two reasons why they should not bias our results. First, since we are concerned with detecting an increase in sentence lengths in the post-8 period, our results are not confounded by the increases in sentence length occurring in the pre-8 period. Secondly, we need not attempt to explain any decreases in our data, only increases.

Another factor which limits the possible impact of PC 667(a) on rape cases is that even before Proposition 8, offenders convicted of rape could have their sentences lengthened by five years for each prior sexual assault conviction suffered within ten years of the instant offense under the provisions of PC 667.6. For certain offenders, then, an enhancement equally as severe as PC 667(a) existed even before Proposition 8 and for them we would not expect to see an increase in sentence severity. However, these offenders represent only a portion of those persons convicted or charged with rape. Proposition 8's five-year enhancement covers a much broader pool of offenders: those charged with rape who have suffered previous convictions for any of the broad class of "serious felonies" at any point in their past, not within ten years. Therefore, because of the broader scope of PC 667(a), Proposition 8 could have a significant effect on sentences in rape cases.

¹² One factor which might have affected robbery sentences was the addition of Section 213.5 to the Penal Code, effective September 22, 1982, which recognized residential robbery as a distinct offense, punishable by three, four, or six years in prison (as compared with two, three, or five years for other forms of robbery). The Department of Corrections anticipated that the law would add an estimated 6 months to the terms of approximately 305 offenders convicted of residential robbery annually. (Source: California Department of Corrections, Population Projections, 1985-1989 [Sacramento: Department of Corrections, 1984], p. 8.)

¹³ A much more detailed discussion of determinate sentencing in California is found in Casper, et al., The Implementation of the California Determinate Sentencing Law (Washington, D.C.: Government Printing Office, 1981).

¹⁴ See note 9 supra.

¹⁵ Loftin, et al., "Mandatory Sentencing and Firearms Violence", 17 LAW & SOCIETY REV. 300 (1983).

Chapter 5

A STATISTICAL ASSESSMENT OF PROPOSITION 8

Quantitative data presented in Chapter 3 displayed a shift in felony guilty plea processes from superior courts to lower courts following the passage of Proposition 8. Early critics of the law had expected that shift; they said that Proposition 8 would encourage criminal justice professionals to continue plea bargaining while conforming to the literal wording of the new law, either by plea bargaining in municipal court and thus avoiding the superior court bargaining prohibition, or by relying on the listed exceptions to the ban. Observations in several counties found that these have indeed been the primary responses. However, the quantitative data also revealed that the migration to municipal court had begun prior to June 1982, suggesting that Proposition 8 may have only continued or amplified a pre-existing trend.

Pinpointing a specific cause for the earlier increase in the use of certified pleas is difficult, but several of the prosecutors we interviewed, including the president of the California District Attorneys' Association, suggested that the trend was part of a general movement to make courts more efficient. Prosecutors say that municipal courts, at least in felony processing, are becoming increasingly concerned with rigorous screening. Prosecutors diagnose felony cases as soon as the police bring them into the system. Two types of cases can generally be handled immediately: cases with little legal weight and cases with overwhelming weight. These are defendants whose legal problems are either minor or nonexistent, or those against whom the evidence of guilt is overwhelming. In either type, the prosecutor is likely to handle the case so as to achieve a quick disposition, thereby saving professional resources for the trickier cases, where evidence is not yet well-developed and weighed, or where the gravity of the offense dictates very careful treatment.

Court professionals use a medical term to describe those felony defendants whose guilt seems overwhelming from the moment their cases enter the system. These cases are "deadbang," as one judge explained, "dead on arrival." A defense attorney whose client is "DOA" will scramble simply to get the best sentence possible in comparison to other similar cases. Prosecutors will readily agree to the guilty plea and a certain sentence, and judges will cheerily close the case. From a practical viewpoint, there seems little reason to do anything else.

With "deadbang" cases and "reasonable doubt" cases (i.e., those in which the state may be unable to prove guilt) concluded in lower courts, superior courts are free to devote more of their attention to the more serious and the more complex cases that require extensive legal scrutiny. Although conclusive evidence for this explanation is difficult to gather, this argument seems logically convincing and accords with available data showing the increasing propensity of California prosecutors to reject felony complaint requests. This increase in the early screening of cases could be seen as part of the move to clear the courts of cases that will only result in a dismissal or acquittal.¹ Dismissal or *nolle pros* rates, however, do not probe the frequency or legal background of "deadbang" case convictions. We have no statistical tests that can confirm what court professionals told us: that the rise in felony guilty pleas in municipal courts is attributable mostly to "deadbang" cases, and that Proposition 8 simply ratified a growing propensity to dispose of these cases quickly. Furthermore, even if this is so, we question whether the medical metaphor should pervade the legal system to this extent. In the final chapter, we will criticize this development.

In light of this trend², our empirical question becomes: did Proposition 8 effect a shift in the level of certified guilty pleas in California lower courts? Looking at two counties where a change in those levels did occur, we arrive at two different answers: in Alameda County, Proposition 8 clearly evoked a dramatic increase in the use of certified guilty pleas; in San Diego County the law had little effect as local procedural changes had already moved substantial numbers of cases to early disposition in lower court. With such wide variations across counties, conclusions about the meaning of statewide patterns must be made with caution.

The same caution must be exercised before reaching any conclusions about the effects Proposition 8 may have had on sentencing. In Chapter 4 we found that in the three jurisdictions studied, the new law had little effect on sentencing outcomes; convicted offenders went to prison at the same rates and for nearly equal lengths of time both before and after the law went into effect. Yet, it is possible that these

jurisdictions were peculiar and different results could be found when the data from the rest of the state are examined. Unfortunately, comparable data on prison sentence lengths at the statewide level are not available.³ However, we can calculate statewide trends in the probability that convicted felons will be sentenced to prison. With these measures we can begin to answer the broad question: did the "Victims" Bill of Rights" result in tougher sentences for convicted offenders in California?

However, causal connections based on a simple "before and after" comparison must be avoided. As our brief history of the initiative and its predecessors indicated, following the implementation of determinate sentencing in 1977, a number of changes in California laws were enacted that moved criminal justice in an increasingly punitive direction. The impact of these laws was felt throughout the criminal justice system from law enforcement to corrections. Also, throughout much of the pre-Proposition 8 period both crime and arrest rates were increasing and courts were undoubtedly forced to respond to potential rapid increases in criminal caseloads by making procedural adjustments. As a result, prosecution practices in California courts were undergoing substantial change prior to passage of the "Victims" Bill of Rights." Therefore, rather than see the law in isolation, we feel that Proposition 8's impacts should be seen in relation to other previous and contemporaneous changes in California criminal justice.

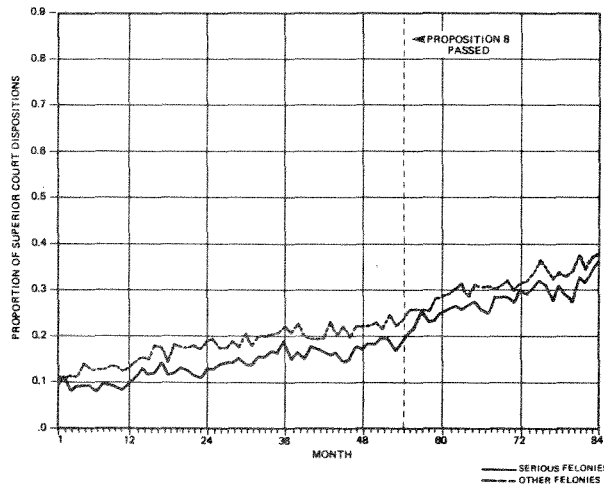
The best empirical method for obtaining this perspective is to arrange our data into time-series, encompassing long periods of time before and after Proposition 8 was implemented. Analyzed in this fashion, change is seen as cumulative and incremental, rather than sudden and radical; and, we reduce the risk of attributing any observed changes to Proposition 8 that may have, in fact, been part of an earlier trend. The problem with this methodology is that it makes it difficult to isolate the specific contribution of any single influence to observed trends. We will attempt to overcome this limitation by using statistical techniques that measure the impacts on a series at a certain point in time and by comparing the impacts on those cases that should have been affected by the law with those that should not.

Interrupted Time-series Analysis

The simplest method for determining if Proposition 8 was responsible for the increase in the use of certified guilty pleas is to simply compare the rate of increase in their use before and after the law was passed. Figure 5-1 presents the data on serious felonies disposed through certified pleas statewide, broken into two trend lines pre- and post-Proposition 8. These trend lines are actually simple regression lines in which the correlation between time (expressed in months) and the proportion of superior court dispositions resulting from certified pleas was plotted over the two time periods. For each of these regression lines we were then able to obtain a slope which may be interpreted as representing the rate of increase in the use of certified pleas. Thus, Figure 5-1 shows that although the use of certified pleas in "serious felony" cases was increasing throughout the entire period, the slope in the post-period (.0035) was greater than the slope in the pre-period (.0020) suggesting that there was a greater tendency to dispose of cases in lower court after Proposition 8 was passed.

CERTIFIED GUILTY PLEAS AS A PERCENT OF SUPERIOR COURT DISPOSITIONS, 1978-1984
 Serious Felonies versus Other Felonies
 Statewide

fig. 5-1



To determine if the difference in these two slopes is statistically significant, i.e., if the change in slopes was not due to random fluctuation, we could apply standard statistical tests.⁴ However, statistical problems inherent to regression models limit the applicability of this technique to our empirical question. Like many statistical models, Ordinary Least Squares (OLS) regression, as we used above, assumes that all observations are independent, i.e., that the value of one data point is in no way determined by the value of another data point. However, with time-series data one must necessarily assume that one data point is influenced by the value of other data points, particularly when they occur in close temporal proximity. Thus, the observations are autocorrelated rather than independent. In this study, autocorrelation is evidenced by the fact that the proportion of felony dispositions achieved through certified pleas in any month is greatly influenced by the proportion that occurred in the preceding months; that is, the use of certified pleas is not a decision that is made anew each month but rather is part of long term trends stemming from earlier decisions. Therefore, it is reasonable to assume that the data in Figure 5-1 are autocorrelated.

This autocorrelation does not affect the regression slopes but does have a biasing effect on any statistical tests of significance that might compare differences in the slopes. This means that we can not simply apply tests of significance to the two slopes to determine if the post-8 increase in the use of certified pleas can be attributed to Proposition 8.

To overcome these limitations we utilize an ARIMA (AutoRegressive Integrated Moving Average) model which incorporates autocorrelation into the model. Full discussions of ARIMA models can be found elsewhere⁵ and our discussion here will be brief and schematic. ARIMA models consist of two components: a deterministic component comprised of the observable factors that influence the series in a constant, systematic fashion and a "stochastic" component that follows laws of probability. A series can be generated by either an autoregressive model (AR), or a moving average model (MA), or a combination of both. In simplistic terms, we may say that in an autoregressive model the current time-series observation is composed of portions of preceding observations and a random shock, while a moving average model is composed of a current random shock and portions of the preceding random shocks. For both models, the driving force of the series is assumed to be a series of small "shocks" (the error term) that initially set the process in motion and continue to keep it in motion thereafter. While these random shocks are comprised of a vast assortment of factors that influence the dependent variable in a fashion which can be statistically modeled, theoretically no deterministic or explanatory independent variable is isolated.

The first task in modeling a series is to determine whether the series is stationary or nonstationary. Briefly, we can say that a series is stationary if it has a mean, autocorrelation and variance that are essentially constant over time. If a series trends or drifts upwards or downwards, it must be differenced (a process which calculates successive changes in the values of data in the series, thereby removing trend or drift).

To identify an appropriate model, we consider the patterns of two crucial parameters: the "autocorrelation function" and the "partial autocorrelation function" for the differenced or stationary series. Both of these measures indicate the strength of the relationships among the observations at different lags, and will have a distinctive pattern depending on whether the series is a moving average or an autoregressive or a combination of both. Once an appropriate model has been tentatively identified, its adequacy is diagnosed by examining the autocorrelation and partial correlation of the residuals. If the residuals are insignificant (white noise) we assume that the model "fits" the data well, i.e., allows one to predict the values of observations.

The resultant model can be used to describe the entire series, but this is not our objective. We want to know if the series was substantially different after a certain point in time, a point that may be called an "intervention." To test this hypothesis we must introduce an additional variable into our model, an intervention component. The intervention component can be modeled as four general types of impacts. Abrupt, permanent impacts occur when the effect is felt immediately after the intervention and remains constant throughout the post-intervention portion of the series. In abrupt, temporary impacts the effect of the impact is also immediate but thereafter the contribution it makes decays and eventually returns to the pre-intervention level. In contrast, gradual, permanent impacts indicate a change in the series that occurs over a number of post-intervention observations and remains constant throughout the remainder of the series. A gradual, temporary impact rarely occurs in the social sciences and need not be discussed here. If the residuals remain insignificant when the intervention component is added we can assume the intervention we have modeled is adequate.

In an attempt to satisfy the quantitatively-inclined but not burden readers more interested in policy, we will present a summary of the results of the ARIMA tests along with a brief discussion of their implications and include a fuller discussion of the results of the statistical analysis in Appendix II.

The Impact on Certified Guilty Pleas

We began our analysis with the statewide, serious felony series. First, the series was regularly differenced to make it stationary. Next, the pre-intervention series was modeled and a first-order moving average model (0,1,1) was found to provide the best fit to the data. The parameter estimates and diagnostic statistics for all the pre-intervention series are presented in Table 5-1.

table 5-1

PARAMETER VALUES AND DIAGNOSTIC STATISTICS
FOR THE PRE-INTERVENTION SERIES
Statewide and Alameda and San Diego Counties

Series	Parameter value	Standard error	t-statistic	Residual mean square	Ljung-Box Q
Certified guilty plea					
Statewide					
Serious felonies	$\theta_1 = .49$	.120	4.07	.0002	$Q_{20} = 24$
Other felonies	$\theta_1 = .55$	.115	4.79	.0002	$Q_{20} = 22$
Alameda County					
Serious felonies	$\theta_1 = .73$	.095	7.66	.0042	$Q_{20} = 15$
Other felonies	$\theta_1 = .56$	.109	5.12	.0050	$Q_{20} = 11$
San Diego County					
Serious felonies	$\theta_1 = .65$	.104	6.27	.0048	$Q_{20} = 20$
Other felonies	$\theta_1 = .71$	.093	7.64	.0029	$Q_{20} = 21$
Prison					
Statewide					
Serious felonies	$\theta_1 = .45$	.124	3.60	.0002	$Q_{20} = 22$
Other felonies	$\theta_1 = .30$	.129	2.33	.0002	$Q_{20} = 19$

Note: The t-statistics for all parameter values are significant at the .05 level. Also, all the Ljung-Box Q statistics are insignificant at .05 (see Appendix II, Note 5), meaning that the residual autocorrelation and partial autocorrelations are not significantly different than zero. None of the autocorrelation or partial autocorrelation functions for the model residuals revealed significant spikes (with the exception of those listed in Appendix II, Note 2).

With the pre-intervention ARIMA model tentatively specified, we then assessed the inclusion of an intervention component. The parameter values and diagnostic statistics for the full series with the intervention component are presented in Table 5-2. Although an abrupt, temporary impact was found to be significant, the "decay" away from the impact and towards the pre-intervention level was so slight, we determined that an abrupt, permanent model would be more appropriate. Diagnostic assessment of that model revealed a significant impact of .0052 beginning at the first post-intervention observation (July 1982) and continuing throughout the post-intervention series. In other words, the number of certifications as a proportion of superior court dispositions rose by .0052 each month, beyond the level that would have been achieved had the pre-intervention trends continued unchanged. Conceptualized another way, we can say that Proposition 8 caused a 3.7 percent increase relative to the pre-intervention mean.

While an increase of .0052 each month is statistically significant, in practical terms it is quite small. It appears that Proposition 8 had much less of an effect on the use of certified guilty pleas than a simple visual inspection of the plotted series might lead one to believe. Furthermore, contrary to our expectations, the full impact was felt immediately after the law was passed (as indicated by the fact that the intervention component was best modeled as an abrupt, permanent impact). Given the manner in which most legislation is implemented, it would seem logical that any shift in local policies would have taken at least several months to reach a full impact, particularly in light of the fact that many prosecutors and judges at the time claimed to be skeptical about the law's legality and awaited the Supreme Court's decision on the "single subject" question before responding to the law's requirements. We believe, however, that observed changes in the statewide data are the product of events in several counties. Immediately following the law's passage, several jurisdictions (one of which was Alameda) instituted policies that produced dramatic shifts of cases to lower courts, while the majority of jurisdictions continued with "business as usual," i.e., tending to shift plea negotiations to lower courts at the same rates they had prior to the law. Therefore, the slight impact seen in the statewide data was likely produced by more dramatic changes that took place in several specific jurisdictions.

As a second means for checking the specific impacts of the law on felony cases, we applied the same statistical techniques to the "other felony" data. Since Proposition 8's restrictions on plea bargaining apply only to "serious felonies," presumably, prosecutors and other officials would have no incentive for shifting negotiations in these cases to lower courts. Thus, we would expect no significant impact on other, "non-serious" felonies.

The best fitting ARIMA model for the "other felony" pre-intervention series was also a regularly differenced first-order moving average model. After estimating several intervention components, we determined that an abrupt, permanent impact was significant. That impact resulted in an increase of .0045 at the first and every succeeding post-intervention observation. The general effect was an increase at the point of intervention of 2.5 percent over the level of the pre-intervention mean. Again, the impact was significant in statistical terms only; a .0045, or less than half a percent, increase does not indicate a radical shift in policy. More interesting is the fact that the "other felonies" appear to have been affected by the law in much the same way as the "serious felonies." This statistical finding is easily interpreted, however, since in our field work observations we found that prosecutors, judges and defense attorneys did not frequently distinguish "serious felony" cases from other cases. Only for the purposes of enhancement and in cases where the "serious felony" status was at issue was the distinction applied. Therefore, it appears that in those jurisdictions where a policy decision was made to shift plea negotiations to lower court, the policy affected all felony cases.

table 5-2

PARAMETER VALUES AND DIAGNOSTIC STATISTICS
FOR THE FULL SERIES, INCLUDING THE INTERVENTION COMPONENT
Certified Guilty Plea Rate
Statewide

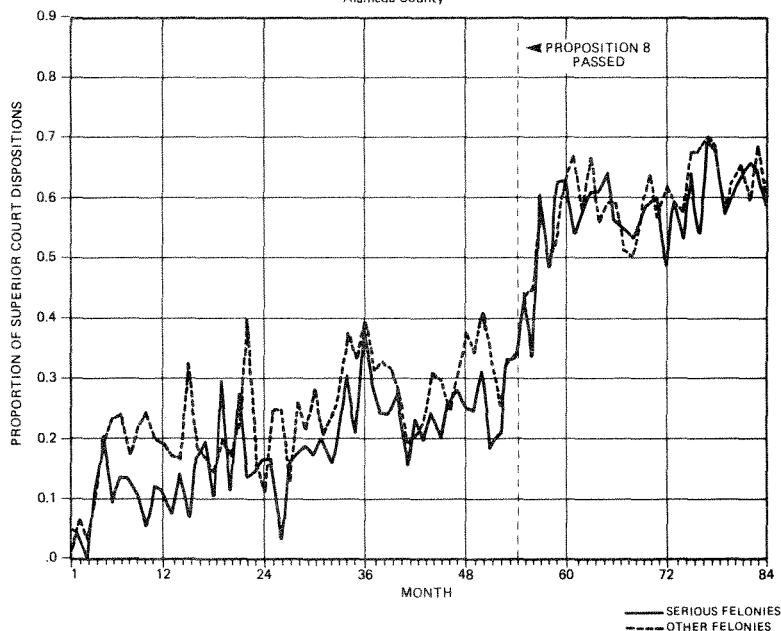
Series	Parameter value	Standard error	t-statistic	Residual mean square	Ljung-Box Q	Pre-intervention mean	Percent increase
Serious felonies	$\theta_1 = .48$	.10	4.73	.0003	$Q_{20} = 8.9$	.139	3.74
	$w_0 = .0052$	.002	3.32				
Other felonies	$\theta_1 = .56$	.092	6.11	.0002	$Q_{20} = 16$	.181	2.49
	$w_0 = .0045$	.001	3.63				

Note: All parameter values are significant at the .05 level and the chi-squares are insignificant at the .05 level.

As mentioned earlier, the individual jurisdictions we examined showed considerable variation in their responses to the law. To more precisely measure these responses we also applied the same interrupted time-series techniques to the data from these jurisdictions. The monthly proportion of "serious felony" and "other felony" superior court dispositions processed as certified guilty pleas between 1978 and 1984 in Alameda County are presented in Figure 5-2. Because the samples are much smaller at the county level, the month-to-month fluctuations are much greater than in the statewide series. Nonetheless, the general pattern reflected in the annual trends remains.

fig. 5-2

CERTIFIED GUILTY PLEAS AS A PROPORTION OF
SUPERIOR COURT DISPOSITIONS, 1978-1984
Serious Felonies versus Other Felonies
Alameda County



Modeling the "serious felony" series first, we found the best-fitting ARIMA model for the pre-intervention series was again a regularly differenced, first order moving average model (0,1,1). For statistical reasons described in Appendix II, we modeled the intervention component as an abrupt, temporary impact beginning one month after the intervention (August 1982). The parameter values and statistics for this intervention model are presented in Table 5-3. Using this model we forecast an increase of .13 in the certification rate for serious felonies in the first month following the intervention. The impact decreased in magnitude in the succeeding months so that by the sixth post-intervention month 95 percent of the impact had dissipated.

Stated in more practical terms, this means that one month after the passage of Proposition 8 the proportion of superior court dispositions obtained through certified guilty pleas increased by .13 over what would have been expected, had the pre-intervention trends continued. This impact continued to be felt in the several months that followed, although with less and less force, until by the sixth month the certification rate leveled off at approximately .56. By the seventh month, while the overall level of the series was still increasing, the rate of increase in the use of certified pleas was very close to the rate of increase evident before June 1982.

These statistical findings are consistent with the picture suggested by the plotted series in Figure 5-2. It appears that an initial dramatic increase in the use of certified pleas was followed by a general stabilization in their use. The sudden impact immediately after the intervention had the effect of significantly raising the value of the post-intervention mean over the pre-intervention mean while leaving their slopes nearly equal.

These findings are also consistent with the fact that in Alameda County a policy was implemented by the District Attorney's Office soon after the law was passed, with the stated intent of moving cases to early disposition in lower courts. (Our statistical data show this policy has been quite successful, both in accomplishing that goal very rapidly and in making it last.)

As with the statewide data, we compared the impact on "serious felonies" with the impact on "other felonies" in Alameda County. Once again, the pre-intervention ARIMA model was a first order, moving average model. The intervention component was modeled as a higher-order, abrupt, temporary impact and a significant impact of .098 at the first post-intervention point was found. That impact eventually leveled off at the seventh post-intervention observation so that the series stabilized at .57.

Although the initial impact was less for the "other felonies" than for the "serious felonies," the impact nonetheless represented a dramatic departure from the level of the pre-intervention series. Thus, we can conclude that in Alameda County, Proposition 8 caused a sudden shift in plea negotiations to lower court for both "serious felony" cases and also "other felony" cases. As we mentioned earlier, in Alameda County once the decision was made to shift negotiations to the lower court the policy was embraced by prosecutors who saw it as an efficient mechanism for handling all cases, not just "serious felony" cases.

table 5-3

PARAMETER VALUES AND DIAGNOSTIC STATISTICS
FOR THE FULL SERIES, INCLUDING THE INTERVENTION COMPONENT
Certified Guilty Plea Rate
Alameda County

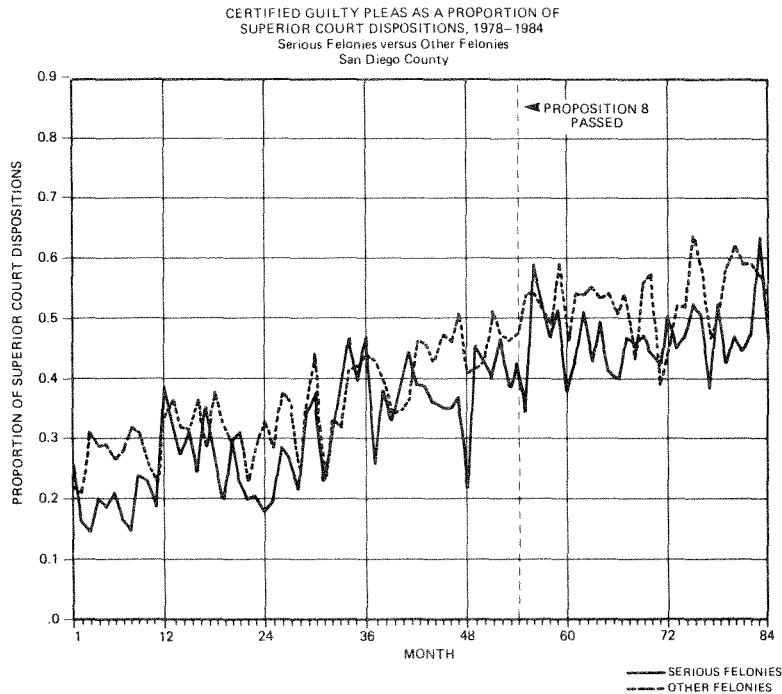
Series	Parameter value	Standard error	t-statistic	Residual mean square	Ljung-Box Q
Serious felonies	$\theta_1 = .77$.074	10.43	.0049	$Q_{20} = 13$
	$w_1 = .13$	.047	2.77	
	$d_1 = .55$	.171	3.19	
Other felonies	$\theta_1 = .68$.079	8.52	.0045	$Q_{20} = 18$
	$w_1 = .098$	.042	2.33	
	$d_1 = .61$	.189	3.21	

Note: All parameter values are significant at the .05 level and the chi-squares are insignificant at the .05 level.

Recall that in Chapter 3 the annual data on certified guilty pleas in San Diego County suggested that there was little increase in their use after the passage of Proposition 8.

The monthly data for "serious felony" and "other felony" cases, with the pre-intervention and post-intervention slopes calculated, displayed in Figure 5-3, would appear to lend further support to this conclusion. However, as we mentioned earlier, regression slopes can be misleading so we also modeled the San Diego certification data as an interrupted time-series.

fig. 5-3



The pre-intervention, "serious felony" series was modeled as an ARIMA (0,1,1) model. Each of the possible intervention components was modeled and none were found to be significant. The same procedures were followed for the "other felony" series. Again, using an ARIMA (0,1,1) model to estimate all three intervention components, we found no significant impact due to the intervention. Therefore, based on the pattern of autocorrelation of the full differenced series, we identified, estimated and accepted an ARIMA (0,1,1) model for the full series. The parameter values and statistics for both San Diego series are presented in Table 5-4.

table 5-4

PARAMETER VALUES AND DIAGNOSTIC STATISTICS
FOR THE FULL SERIES, INCLUDING THE INTERVENTION COMPONENT
Certified Guilty Plea Rate
San Diego County

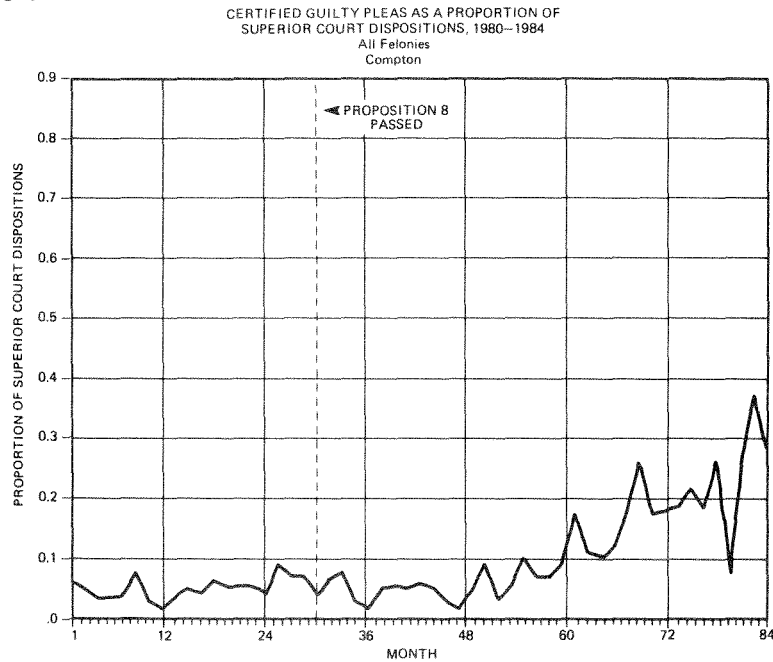
Series	Parameter value	Standard error	t-statistic	Residual mean square	Ljung-Box Q
Serious felonies	$\theta_1 = .71$	.077	9.30	.0048	$Q_{20} = 20$
Other felonies	$\theta_1 = .72$	.073	9.96	.0032	$Q_{20} = 17$

Note: All parameter values are significant at the .05 level and the chi-squares are insignificant at the .05 level.

Thus, our conclusion that Proposition 8 did not affect the use of certified guilty pleas in San Diego is consistent with the policy changes in that county, described in Chapter 3.

We were unable to assemble comparable data on the use of certified guilty pleas that distinguished between "serious felony" and "other felony" cases in Compton. Data were available, from the Los Angeles Superior Courts, on certified pleas for all felony cases. These monthly rates, from January 1980 through August 1984, are displayed in Figure 5-4.

fig. 5-4



The data in Figure 5-4 show that although there was a significant increase in the use of certified pleas in the post-intervention portion of the series, this increase did not begin until April or May 1983. Since the increase at that time can be explained by factors unrelated to Proposition 8,⁸ we decided that an interrupted time-series analysis was not necessary to determine that Proposition 8 had little effect on the use of certified guilty pleas in Compton.

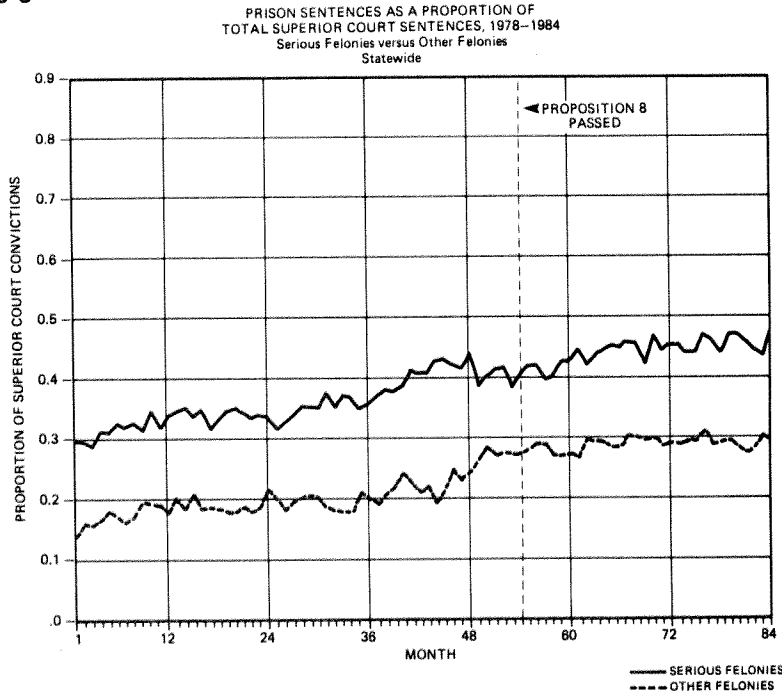
The Effect of Proposition 8 on Sentencing

Our brief discussion of the campaign for the "Victims" Bill of Rights" in Chapter 1 indicated that the publicly proclaimed intent of the law was to "get tough" with criminals. This purpose was clearly enunciated by then Attorney General George Deukmejian who was quoted in the state sample ballot as saying . . . "There is absolutely no question that this proposition will result in more criminal convictions, more criminals being sentenced to prison, and more protection for the law-abiding citizenry."⁹

One measure of this expected "toughness" is the probability that felony defendants, once convicted, will be sentenced to prison. As discussed earlier, one mechanism contained in Proposition 8 that could increase this probability is the habitual offender law which, by greatly increasing the possible sentences faced by some defendants facing serious felony charges, increases the likelihood that in such cases prosecutors will obtain guilty pleas from defendants who agree to accept prison sentences. In our analysis of sentencing in three jurisdictions (reported in Chapter 4) we found that for two serious felony offenses this probability did not increase after June 1982. But again, the idiosyncrasies of local prosecutorial and judicial policies make it difficult to generalize from these three jurisdictions to the state as a whole. In the analysis that follows we examine statewide data to determine if this probability increased for a much broader sample of "serious felonies" and "other felonies"; or, put more precisely, whether that probability increased at a rate greater than one would have expected had the law not gone into effect.

To accomplish this goal we turn to OBTS data on offenders sentenced in California superior courts (including defendants convicted via the certified guilty plea process) from 1978 through 1984. The data displayed in Figure 5-5 below represent the number of defendants sentenced to prison as a proportion of all superior court sentences by month of final disposition from January 1, 1978 through December 31, 1984. The data are further broken down according to whether the defendant's most serious charge at arrest was a Proposition 8 "serious felony" or an "other felony." These data, then, represent the proportion of persons legally eligible to be sentenced to prison who actually received that punishment.

fig. 5-5



Looking only at the post-Proposition 8 side of the trend line for "serious felonies," we see that the proportion of eligible persons sentenced to prison did indeed increase; from 40.6 percent in June 1982 to 47.4 percent in December 1984. However, several other prominent features of the data immediately force us to question how much Proposition 8 had to do with this increase. First, the trend line was already moving up prior to the intervention point and the post-intervention increase appears to be a continuation of this trend. This suggests that whatever caused judges and prosecutors to more frequently seek prison sentences in the pre-8 period also caused them to do so in the post-8 period. Secondly, not only did those convicted defendants originally charged with "serious felonies" show an increased likelihood to be sentenced to prison but so did those charged with "other felonies." This again indicates that something other than Proposition 8 was driving the rate upwards.

As we did earlier, to determine the impact that Proposition 8 may have had on prison sentences, we applied the ARIMA interrupted time-series statistical tests to both series. With both pre-intervention series modeled as ARIMA (0,1,1) models, no significant impact was found for any of the three intervention models. We then returned to the full series autocorrelation pattern and estimated, identified, and diagnosed an ARIMA (0,1,1) model for the full series. The parameter values and statistics for both series are presented in Table 5-5.

table 5-5

PARAMETER VALUES AND DIAGNOSTIC STATISTICS
FOR THE FULL SERIES, INCLUDING THE INTERVENTION COMPONENT
Prison Sentences
Statewide

Series	Parameter value	Standard error	t-statistic	Residual mean square	Ljung-Box Q
Serious felonies	$\theta_2 = .52$	.094	5.51	.0003	$Q_{20} = 9.9$
Other felonies	$\theta_1 = .34$	.102	3.37	.0002	$Q_{20} = 19$

Note: All parameter values are significant at the .05 level and the chi-squares are insignificant at the .05 level.

In answer to our original question, we conclude that Proposition 8 did not increase the probability of imprisonment in "serious felony" or "other felony" cases that reached conviction, beyond the level that would have been attained had the law not been implemented.

A Reassessment of the Trend

Supporters of Proposition 8 might argue, however, that had it not been for the law, the upward trend in the use of prison sentences might have leveled off and fallen short of what they feel is an appropriate level of severity. In any case, they might state, the data show that for serious offenders the probability of being incarcerated for long periods of time has increased, and whether or not Proposition 8 was solely responsible is unimportant. What is important is that more serious offenders are being sent away, resulting in, as then Attorney General Deukmejian put it, "more protection for the law-abiding citizenry."

Based on the data presented above, this conclusion would seem reasonable. The probability that serious offenders, once convicted, would be sentenced to prison did increase in the post-8 period. However, if one's interest is in the proportion of offenders "kept off the street," the data could be misleading. Prison is not the only state institution where adult serious offenders may be incarcerated for long periods of time. During much of this period, persons convicted of serious felonies in California could also be sentenced as youthful offenders to the California Youth Authority or as Mentally Disordered Sex Offenders to correctional/medical facilities. It is safe to say that offenders receiving sentences to these institutions were also being kept "off the streets" for long periods of time.

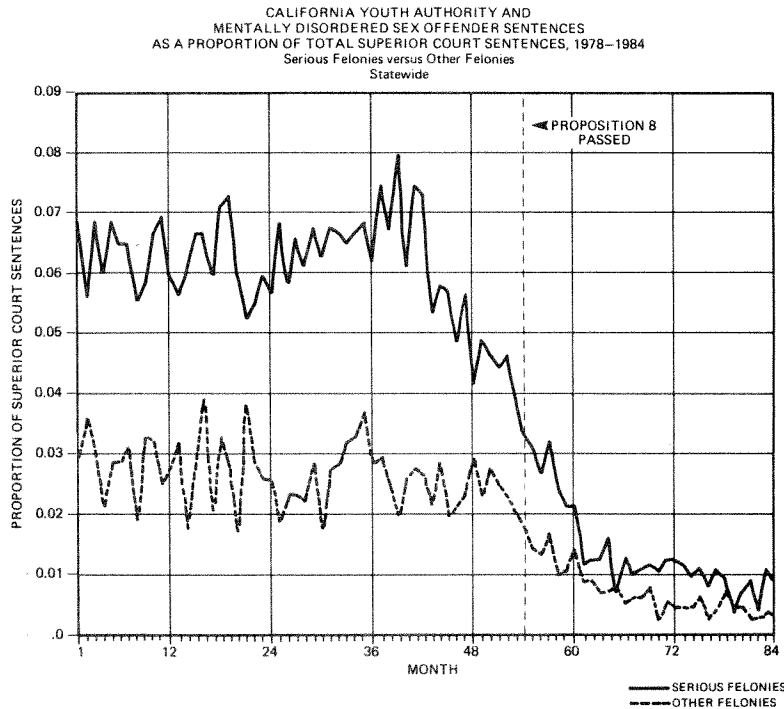
In 1982 two laws went into effect that eliminated these alternatives to prison for serious offenders and which could account for much of the increase in prison sentences evident in Figure 5-5. Section 8 of Proposition 8 added Section 1732.5 to the Welfare and Institutions Code, which reads, ". . . no person convicted of murder, rape or any other serious felony, as defined in Section 1192.7 of the Penal Code, committed when he or she was 18 years of age or older shall be committed to the Youth Authority." Prior to this, superior court judges had the option of sentencing offenders between 18 and 20 to CYA until they were 25 years old. The Department of Corrections estimated that this change in the law would result in 740 new offenders being sentenced to prison annually¹⁰; offenders who previously would have been sentenced to CYA. Although Proposition 8's requirement was reversed by later legislation (SB 821, effective January 1, 1984)¹¹ these offenders still appear in the data in Figure 5-5 as having received prison sentences.

The second, albeit less influential, change in criminal law that affected prison sentences was legislation (effective January 1, 1982 and duplicated by Proposition 8)¹² that repealed the Mentally Disordered Sex Offender program. Under that program judges had the authority to interrupt criminal proceedings and order a hearing to determine if the defendant could be diagnosed as a Mentally Disordered Sex Offender, defined as, "any person, who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others" (Welfare and Institutions Code, Section 6300). If the defendant was diagnosed as such, the judge could have had him/her committed to a state hospital for a period not exceeding the term they would have served had they been committed to state prison. The abolition of the MDSO law was part of the effort underway in the late 1970's and early 1980's to move criminal

justice in California away from a rehabilitative and towards a more punitive philosophy.¹³ In more practical terms, the Department of Corrections estimated that approximately 180 additional offenders were sentenced to prison in fiscal year 1982-83 as a result of this legislation.¹⁴

The effects these two statutory changes had on sentencing can be seen in Figure 5-6 in which CYA and MDSO sentences were calculated as a proportion of all superior court sentences. Those data show that the proportion of serious felony superior court sentences resulting in CYA/MDSO commitments declined from 7.5 percent at the beginning of 1978 to 1 percent at the end of 1984, with the sharpest decline occurring after January 1982. While these two dispositions never accounted for a large proportion of all superior court sentences their decline was significant enough to affect the proportional distribution of other sentences.

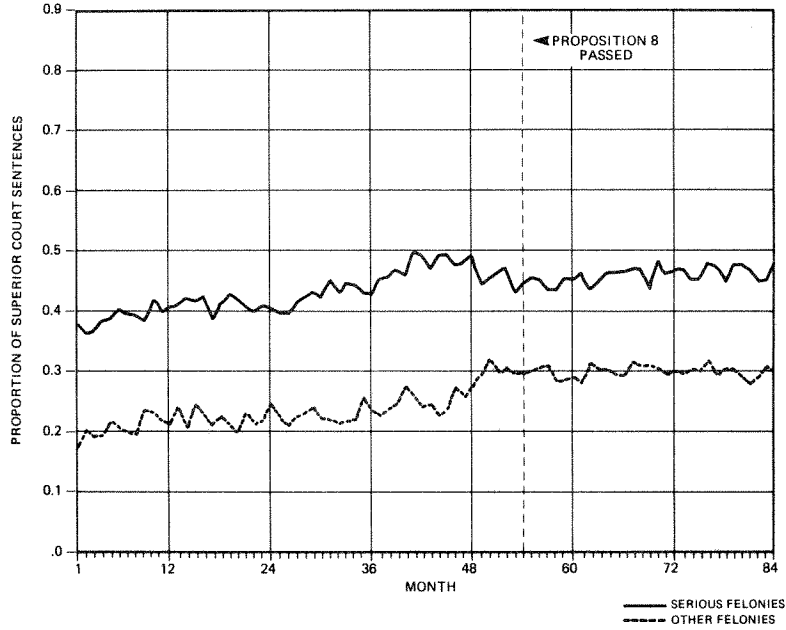
fig. 5-6



Because MDSO and CYA sentences also involve confinement in a state institution for long periods of time, we feel that the proportion of prison sentences alone is not the best measure of long-term incarceration. A better measure would combine all three sentences into what we will call a "state incarceration rate." This statistic allows one to compare sentences in which offenders are "locked away" for long periods of time (over a year) with such "local time" sentences as jail, probation, and probation with jail which require relatively short amounts or no incarceration time. With this measure we recalculated the data for "serious felonies," combining those defendants sentenced to prison with those sentenced as "youthful offenders" (between the ages of 18 and 23) to CYA and those sentenced as MDSO's. The results, displayed in Figure 5-7, present a different picture of sentencing trends. The trend line for "serious felonies" generally rose in the pre-8 period (with a slope of .0019) but began to level off in the beginning of 1982 and rose very slightly in the post-8 period (post slope = .0008). In other words, the data show that the likelihood that convicted serious offenders would be incarcerated in state institutions did not increase following the passage of Proposition 8; in fact, the probability actually decreased in relation to the pre-8 trend. A more pronounced version of this pattern is displayed in the "other felonies" series, where a steady increase in the pre-8 period (slope = .0015) is followed by a very slight decline (slope = .00001) in the post-8 period. An explanation for the stabilized trend in the post-period for both sets of data would require a rigorous analysis which we cannot undertake at this point. But we can conclude that it was apparently unconnected to Proposition 8 since in both series it began before June 1982.

fig. 5-7

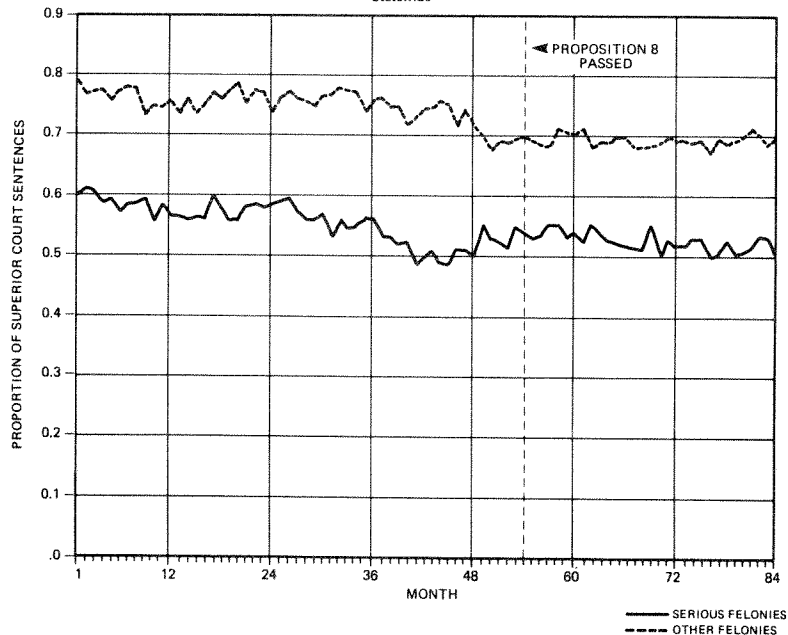
PRISON, CALIFORNIA YOUTH AUTHORITY, AND
MENTALLY DISORDERED SEX OFFENDER SENTENCES
AS A PROPORTION OF TOTAL SUPERIOR COURT SENTENCES, 1978-1984
Serious Felonies versus Other Felonies
Statewide



A leveling off in the "state incarceration rate" should be accompanied by a similar trend in the obverse measure, the "local time" rate, as it might be called, that includes jail, probation, and probation with jail sentences.¹⁵ In Figure 5-8 that rate was calculated for "serious felonies" and "other felonies" disposed of in superior court. Both series show a similar pattern. Following a steady decline in the use of these sentences throughout 1980 and 1981, suggesting that courts were indeed becoming more punitive, the trend remained relatively stable in the next three years. These data may be taken as further evidence that Proposition 8 did not produce more punitive sentencing practices in California courts.

fig. 5-8

PROBATION, PROBATION WITH JAIL, AND JAIL SENTENCES
AS A PROPORTION OF TOTAL SUPERIOR COURT SENTENCES, 1978-1984
Serious Felonies versus Other Felonies
Statewide



To summarize, in the preceding analysis we have attempted to show that simple trend data on prison sentences before and after Proposition 8 could mislead one into thinking that since the law was implemented the probability of serious offenders being "locked up" for long periods of time has increased. Based on our analysis of the data we argued that while it is certainly true that, proportionately, the number of offenders sentenced to prison has increased, that increase has not been caused by the imprisonment of a group of offenders who would have otherwise been "on the street" either following a short term in a county jail or by dint of a lenient probation sentence. On the contrary, almost all of the increase came from the "transfer" of offenders who would otherwise have been committed to other state institutions where, regardless of the different conditions of their¹⁶ confinement, they would have also been incarcerated for considerable periods of time.

Conclusions

In this chapter we attempted to view Proposition 8 in the context of other long-term and short-term changes in California criminal justice. Using time-series statistical techniques we sought to determine the specific influence the law had on plea bargaining and sentencing practices. With this analysis we found confirmation of our original hypothesis: at the statewide level, while Proposition 8 did cause a statistically significant increase in the use of certified pleas, in practical terms it was only a very slight increase beyond the level that would have likely been attained had the law not been implemented. In other words, Proposition 8 may have merely hastened a trend towards the disposition of felony cases in municipal court that was already underway. In two of the three jurisdictions that were examined in more detail, Proposition 8 apparently had little effect on plea bargaining practices. In contrast, Alameda County responded to the law with a sudden shift of plea negotiations out of superior court and into municipal court. However, even in Alameda County, the statistical evidence suggests that this process was under way, albeit to a lesser degree, before Proposition 8.

We also found no support for the prediction, made by early advocates of the "Victims' Bill of Rights," that the law would result in more persons being sentenced to prison. It appears that the post-8 pattern of increased imprisonment, both of convicted "serious offenders" and "non-serious offenders," was the continuation of an earlier trend. Moreover, the fact that the use of probation and jail sentences remained fairly stable in the last three years of the series (1982 to 1984) suggests that prosecutors and judges, in the face of public outcries for more punitive sentences, have held to a consistent view of the appropriate punishments for relatively minor offenders.

These empirical findings provide support for our theoretical position that the impact of any law on the criminal justice system is limited or bounded by the internal organizational dynamics at work within the various agencies that comprise that system. Change in the criminal justice system must come from within and will meet strong opposition if it is forced on the system from without. What this implies for future criminal justice policies is discussed in the next chapter.

Notes

¹ The number of felony complaint requests rejected by prosecutors as a proportion of all felony arrests statewide, increased from 14 percent in 1978 to 18.5 percent in 1983 (Source: Offender Based Transaction Statistics data, 1978-1983).

² The word "trend" is used here in its broadest, everyday sense, i.e., to mean a systematic change in the level of a series of data points. As our later discussion reveals, in terms of Ordinary Least Squares regression, all the series are trending or have a strong, positive slope, implying deterministic behavior. However, in our time-series analysis we differenced the series, thereby removing the trend or the drift (probabilistic behavior due to random forces) without making a distinction between the two.

³ The California Board of Prison Terms collects data on prison sentences but at the date of this writing their data do not cover an adequate time period for the purposes of this study.

⁴ One technique is described by Carolyn Block in Descriptive Time-Series Analysis for Criminal Justice Decision Makers (Chicago: Illinois Law Enforcement Commission, 1979).

⁵ For the original mathematical statement see, G.E. Box and G.M. Jenkins, Time-Series Analysis: Forecasting and Control (San Francisco: Holden-Day, 1976). For more specific social science applications see Richard McCleary and Richard Hay, Applied Time-Series Analysis for the Social Sciences (Beverly Hills: Sage, 1976).

⁶ Two other urban counties which showed a similar increase were Santa Clara and San Francisco. In Santa Clara, the proportion of felony cases entering superior court as certified pleas increased from 26 percent in 1981 to 63 percent in 1984. In San Francisco, that rate increased from 13.4 percent in 1980 to 36.5 percent in 1984. Consistent with the findings of this study an early analysis of the impact of Proposition 8 on plea bargaining in San Francisco, conducted by the Public Defender's Office there, concluded that "the plea bargaining of felony cases in the municipal courts was in high gear before Proposition 8 took effect. If the practice did anything, it accomodated lawyers in getting around Proposition 8's restrictions on felony plea bargaining." (Source: San Francisco Public Defender's Office, "The Impact of Proposition 8 on Sentencing and Dispositions in San Francisco Superior Court," unpublished report [1983], p. 3)

⁷ Both the "serious felony" and the "other felony" series contained a significant outlier at the sixty-ninth observation. After checking the OBTS data against data from the Alameda Superior Courts we concluded that the outlier was an error and replaced it with a value equaling the average of the value at the point immediately preceding and the point immediately following the outlier.

⁸ See note 26, Chapter 3.

⁹ George Deukmejian, quoted in California Ballot Pamphlet (Sacramento: Secretary of State, 1982).

¹⁰ California Department of Corrections, Population Projections, 1983-1987 (Sacramento, 1983).

¹¹ That law permits judges who sentence adult offenders under age 21 to the Department of Corrections to specify that they serve their sentence in a CYA facility until they are age 25.

¹² Supra, Chap. 1

¹³ Kenneth Polk, "Rape Reform and Criminal Justice Processing," Crime and Delinquency, 31, No. 2 (1985), 194.

¹⁴ See Note 10 supra, P. 7.

¹⁵ These sentences and the sentences in the "combined state incarceration rate" represent most, but not all, superior court sentences recorded in the OBTS data. In 1980, sentences of death, fines, to California Rehabilitation Centers, and other sentences comprise approximately 1 percent of all superior court dispositions.

16 We should be clear here that we are not asserting that prison commitments or the number of prisoners in state prisons has not increased in recent years. To the contrary, statistics from the Department of Corrections show that the number of incarcerated felons increased dramatically from 18,502 in 1978 to 40,648 in 1984. (Source: California Department of Corrections, Population Projections, 1984.) We do not dispute the fact that part of this increase resulted from the increased use of prison sentences to punish offenders, but we do contend that the data do not indicate that Proposition 8 caused that increase.

Chapter 6

IMPLICATIONS OF PROPOSITION 8 FOR JUSTICE ADMINISTRATION

Empirical impact studies of new legislation often share a common logical flow. They describe the text and perhaps the background of the new law, then study how it was administered and obeyed, and finally, they highlight the great difference between "law on the books" and "law in action." Simplistic interpretations follow: this "gap" shows either that law is an impotent method of controlling behavior or that inept and corrupt legal professionals inevitably thwart the will of the people as expressed in the law.

By contrast, this study did not set out to assess the difference between what Proposition 8 mandated and what actually happened. We simply intended to describe what actually did happen, regardless of what the diffuse intent of the law's drafters may have been. It is clear, for example, that Proposition 8 addressed the topic of plea bargaining, mandating that it be more limited than it was before the law passed, but whether its drafters intended to shift bargaining to lower courts by omitting the word "complaint" from the plea bargaining prohibition is a matter of speculation. What this study has found is that plea bargaining is migrating to municipal courts in several counties, which may or may not have been the intent of Proposition 8.

Two important issues emerge from this finding. First, did Proposition 8 cause this shift and other observed changes in felony adjudication? Second, assuming that these observations in several counties paint an accurate picture of current felony processes in California, are these changes good for the quality of justice administered in criminal courts? In addressing the latter question, one approach usually adopted in impact studies is helpful; how closely court professionals adhere to the "will of the people" is an important inquiry when evaluating legislation passed by popular initiative. In a democratic society, the quality of justice is evaluated partly by whether courts strive to uphold values deemed important by the lay citizenry. This chapter addresses these issues.

It was easier to say in the preceding chapters what Proposition 8 did not accomplish than to state what effects it actually had on California's justice system. It did not end plea bargaining, and it probably did not increase the severity of felony sentences. It may have caused a shift in guilty plea processes to lower courts, however, which in itself has important implications for the administration of justice. Finally, it may have served a social or political function, by assuring the voters that "something is being done" about criminal justice. If so, the assurance will be short-lived, because citizen dissatisfaction with plea bargaining is likely to be exacerbated by the changes in that practice currently underway in California courts.

Review: The Empirical Findings

Did Proposition 8 end plea bargaining in serious felony cases? Unequivocally: no. On the basis of our qualitative and quantitative data in three jurisdictions and on the basis of statewide quantitative data, we conclude that plea bargaining is just as essential to criminal prosecution as it ever was. While the location of this bargaining and the procedures surrounding it changed in response to the law, overt negotiation over case dispositions among defense attorneys, prosecutors and judges remains the predominant method for disposing of criminal cases in California. These discussions usually occur in informal meetings between counsel or in more formal give-and-take in judges' chambers. Actual court hearings accomplish little in the guilty plea process except in those cases that proceed through a municipal court preliminary hearing, where witnesses and evidence are presented and evaluated; or cases that proceed to superior court, where evidentiary motions may be made.

Did the habitual offender enhancements mandated by Proposition 8 result in longer, more severe sentences for recidivists? With less certainty: probably not. We remain somewhat cautious in this conclusion because we were unable to determine exactly how many offenders were eligible for the Penal Code 667(a) five-year sentencing enhancement. However, available data suggest that many of those eligible are not charged with the enhancement, and that when the enhancement is charged, it is frequently not imposed. For that very small proportion of offenders against whom the enhancement is actually imposed, however, it is plausible that the legislation may have increased their sentences dramatically.

Furthermore, our local data provide strong evidence that, for the entire group of persons initially charged with serious felonies (not just those eligible for habitual offender enhancements) sentencing severity did not increase after the implementation of Proposition 8. The likelihood that serious offenders would be sent to prison, while increasing in the post-Proposition 8 period, did not increase any more than would have been expected had Proposition 8 not been passed. Most of the observed increase in the probability of imprisonment was likely caused by the shift of offenders from other state institutions to the state prisons, rather than by a decrease in the proportion of offenders sentenced to probation or county jail.

Yet, criminal justice and criminal prosecution in California have definitely changed since the passage of Proposition 8. Municipal courts now dispose of a far greater proportion of the felony caseload than prior to Proposition 8. Also, the probability that a person charged and eventually convicted of a felony will be sentenced to prison has increased since June 1982, when Proposition 8 was passed. Did Proposition 8 cause these changes?

Causal Connections: Proposition 8 and Changes in Courtwork

Causality is a thorny concept. Attributing causality to social phenomena is quite different from making the same assertion about physical phenomena. One cannot say that a law "caused" people's behavior to change in the same way that one can say that a combination of certain chemicals under certain temperatures "caused" an explosion. The difference is that social events are always contextual and historical. That is, they always occur in the context of other events that influence how people interpret their meaning and how people act on those interpretations. Moreover, they are always unique; their occurrence can never be exactly duplicated. Because of these differences, the social scientist looks for different kinds of causality than does a physical scientist.

Thus far, this impact study of Proposition 8 has generally regarded the law as a causal factor and has sought to determine its connection to observed changes in sentences, guilty pleas, and other prosecutorial events. However, it could be that the order of causality has been reversed. Change within social institutions is not uni-directional; rather, it is reciprocal, working through processes in which cause and effects are linked through feedback loops.¹

Proposition 8 may have been proposed and obeyed because its requirements were consonant with trends already in motion within the California justice system. The law, which on the surface appeared as a radical challenge to existing practices, could actually have encouraged and legitimated policies supporting the organizational interests of courtroom actors (e.g., shifting cases to lower court) while leaving intact well-understood and accepted courthouse practices and standards (e.g., sentencing standards represented in the "going rate").

Therefore, it is fair to say that Proposition 8 both created and responded to an organizational propensity to shift plea negotiations to municipal court. Some evidence supporting this hypothesis is found in the fact that, although Penal Code Section 1192.7 prohibits plea negotiations only in "serious felony" cases, in those jurisdictions where the shift of cases to lower court occurred, the pattern was evident for all felony cases rather than only "serious felonies." This suggests that prosecutors and judges shifted plea negotiations to lower courts not solely to conform to the letter of the law, but also because they found it in their organizational interest to dispose of as many cases as possible before superior court. Thus, Penal Code Section 1192.7 may have only hastened a process that was underway even before the "Victims' Bill of Rights" was on the ballot.

Similarly, enhancing the sentences of offenders who have previously committed serious offenses could also be a continuation of trends begun in the late 1970's. Every year since the institution of determinate sentencing in 1977, increasingly severe punishments have been mandated for a growing number of crimes, lengthening the range of potential sentences for offenders. Adding to the list of sentencing enhancements increases the power prosecutors exert in the plea bargaining process, for it is entirely within the prosecutor's discretion to charge or not to charge these enhancements. The new habitual offender law passed under Proposition 8 has continued this shift of power to the prosecutor's domain by adding a powerful weapon to the prosecutorial arsenal, even though it may be seldom used. Conversely, the law has lessened the influence of judges, even in those jurisdictions where they remain dominant figures in the plea bargaining process. In those cases where the five-year habitual offender enhancements come into play, the "deal," part of which may include dropping the PC 667(a) charges, has probably been struck before it reaches the judge.

This does not prove that the law's framers were aware of these trends and tailored Proposition 8 to meet these organizational interests, nor does it disprove it. The most that can definitely be said is that criminal justice professionals did not strenuously oppose Proposition 8 -- with the exception of some vocal displeasure from the defense bar concerning certain provisions of the wide-ranging law -- and that this probably aided the initiatives chances for passage in the voting booth. Most justice professionals probably assumed that their organizations were already in substantial compliance with the law, as San Diego courthouse workers related and as the District Attorney's written plea bargaining guidelines indicated. Court workers in Los Angeles County, too, assumed they already complied with the law because the exceptions listed in it essentially enunciated the reasons they would plea bargain, anyway. In other counties, court professionals went even further; they responded by conscientiously altering certain practices within already-existing organizational structures to comport with the actual wording of the statute. Oakland prosecutors are a good example of this response.

This raises an impact question not directly discussed in preceding chapters. Did criminal justice professionals subvert or evade Proposition 8? Emphatically: no. But neither did they experiment with some of the more unusual interpretations of this vague law, e.g., an outright ban on plea bargaining, offered by its champions. In brief, they responded as well as they could to confusing legislation. Their responses, predictably, supported their own organizational interests.

Symbolic Politics and Criminal Justice Reform

We have described the effect of Proposition 8 on the outcomes of prosecution and on the organizational structures within which guilty pleas are elicited. This tracks the work of courthouse professionals: judges, lawyers, probation and corrections personnel. But popular initiatives like Proposition 8 or, to a lesser extent, the Determinate Sentencing Law and similar legislation currently exerting an influence on California criminal justice, imply a distrust of court professionals' work. Indeed, Proposition 8's proponents promised in campaign arguments that the new law would thwart "soft-headed judges" and "conniving defense attorneys" who twist the justice system toward a concern for defendants' rights instead of victims' rights.

We believe that voters' perceptions of criminal adjudication involve more than a simple-minded, mean-spirited distrust of legal professionals. Rather, many voters perceive the primary motivation behind plea bargaining to be organizational, bureaucratic imperatives. They believe that judges and prosecutors urge guilty pleas to clear crowded dockets and caseloads, and that defenders convince clients to plead guilty because their fees would not compensate them for trial work. They believe that sentences are lenient because the system trades severe, "just" sentences for organizational efficiency.

It is entirely plausible that this and similar reasoning² was crucial to citizens who voted to "ban" plea bargaining. Perhaps it was not the fact of guilty pleas, but the perception of leniency associated with them, that motivated the vote.

The proponents of "get tough" laws understand this dynamic well. In the words of political scientist Murray Edelman, they deal in "symbolic politics."³ The high likelihood that such legislation will be merely a matter of "symbolic politics" constructed by moral entrepreneurs who are aware that such laws will arouse and then soothe the public -- while still allowing practitioners to continue with "business as usual" -- raises serious questions about whether legal change initiated by parties outside the system can proceed very far.

Although its advocates proclaimed the "Victims' Bill of Rights" to be a measure that would overcome the dominance of liberal legal professionals in criminal adjudication, restrictions on plea negotiations and judicial authority to drop sentence enhancements have merely resulted in shifting discretion to other points in the system. Surely this was predictable by anyone remotely familiar with the workings of the criminal justice system. Yet, even well-informed voters, who realize that guilty pleas cannot and should not be forbidden, nevertheless would vote for laws like Proposition 8 to communicate their concern about crime and their displeasure with justice professionals' representation of the public interest.⁴

The "symbolic" character of Proposition 8 also raises the question of whether serious and well-meaning efforts at changing our system of justice and eventually reducing intolerably high rates of crime can succeed within such highly politicized environments. If the public comes to believe that ending plea bargaining and raising the penalties for certain offenders is all that is necessary to both improve justice and reduce crime, then innovative but delicate policies to accomplish those ends may never be implemented. Furthermore, the "faddish" character of criminal justice legislation may, as one interviewed legislator predicted, prevent needed legislation from being introduced "if crime is not on the voters minds that year." Of course, this problem infects all legislation, but crime and justice administration issues seem particularly susceptible to these "opinion poll politics."⁵

There are many reasons why Proposition 8's supporters could have proposed the law and worked hard to convince voters to pass it. We must assume the best -- that they sincerely believed it would improve the criminal justice system, probably by slowly shifting more power to prosecutors. Yet it is clear, also, that the issue was presented to the voters in a manner that played upon their fear of crime and distrust of legal professionals. Years later, when citizens observe that the law did not achieve what they thought it would -- that plea bargaining continues, for example, and is even accomplished with less public scrutiny than before -- their mistrust of the courthouse is understandably validated and deepened.

Citizens' Distrust of Court Efficiency

We have concluded that plea bargaining changed under Proposition 8 -- in several counties, over half the felony cases are now concluded through guilty pleas in municipal courts -- and that sentencing did not become appreciably more severe for convicted defendants, who were initially charged with serious felonies.⁶ We have also concluded that, far from evading the plea bargaining limitation, legal professionals carefully considered the new legislation and conscientiously incorporated it into court procedures.

Ironically, however, this professional response has served only to strengthen those very elements of plea bargaining that engender public distrust of the practice. Of course, plea bargaining will never be popular in a system that promises every defendant the right to trial. Furthermore, an implicit theme, as well as a separate provision, in the "Victims' Bill of Rights" is that victims deserve a trial, too -- in the sense that witnesses and victims may want to "have a day in court" to confront the people who harmed them and to understand why judges sentence offenders as they do.

When guilty plea processes occur mostly in municipal courts, defendants are encouraged to plead guilty very soon after their arraignments. Fewer cases proceed through preliminary examination, which is usually the only opportunity short of trial for victims and witnesses to tell their stories or for defenders to offer exculpatory evidence in open court. Ironically, the result of a plea bargaining "ban" has been to encourage legal professionals to dispose of felony cases so quickly that citizens have little opportunity either to examine or influence felony adjudication. Voters' tendency to view plea bargaining as a nefarious marketplace in which lawyers and judges trade justice for organizational efficiency can only be reinforced by this recent development.

If voters' major objection to plea bargaining is that legal professionals deal in guilty pleas in order to lessen the load on their own organizations, their criticism deserves careful examination. (There are other reasons plea bargaining is opposed, and they are discussed below.) Shifting guilty plea processes to municipal court, while permissible under the terms of Proposition 8 and rational under organizational dynamics, is primarily an efficiency measure. It is that very efficiency that raises suspicion among voters.

It seems counter-intuitive to downgrade a value that is ordinarily considered a great good in organizations. Any public bureaucracy or private corporation strives for efficiency to conserve scarce resources and reach important goals. But the product of courts is not manufactured goods; it is justice. In important aspects, justice often conflicts with efficiency.

The court workers interviewed for this study unanimously denied that organizational efficiency -- or administrative convenience -- was a primary consideration in plea negotiation. Dozens of prosecutors and defense attorneys, for example, filled out questionnaires in which they were asked what factors were most influential in plea bargaining. If the district attorney agrees to recommend a sentence acceptable to the defendant, for instance, what factors are typically most important in reaching that decision? Both defenders and prosecutors overwhelmingly agreed: the strength of evidence and the witnesses likely to be produced at trial were the most important factors; followed by the seriousness of the case, the defendant's prior criminal record, and whether this would be a just and fair outcome both for the defendant and the community. (The lawyers diverged a bit in their rankings of these three factors.) Ranked even lower was "the quality and/or personality of defense counsel or trial judge" and, behind that, "availability of courtrooms and incarceration space." Rated last was "case overload in the District Attorney's Office."

Clearly, these professionals heatedly deny that they trade sentences in order to clear court dockets. They are not lying; rather, they are describing their work-worlds as they interpret them. They are legal professionals, and the most important factors to them involve their court skills and legal knowledge, as expressed in their capacity to predict what will happen at trial. They perform "triage," much as medical professionals in hospital emergency rooms diagnose and separate cases for later treatment. These lawyers can generally diagnose defendants; they know how serious a case is and what course its "disease" is likely to take. It is a natural behavioral response for them to agree to conclude both "deadbang" and lightweight cases quickly and to spend their energy on "treatment" of the more difficult defendants.

Yet victims and witnesses do not share this professional knowledge. To them, the more "deadbang" a case and the more blameworthy the defendant, the more attention is deserved. When the prosecutor and/or judge quickly dispose of a case because "there is nothing to argue about," citizens interpret this organizationally efficient move as mere administrative convenience.

This is not to say that all victims long for a day in court. In fact, many find it to be a great burden.⁸ What it does say is that citizens suspect any decision made behind closed doors, particularly when the professionals themselves say that they quickly dispose of "easy" cases. Publicity -- in the sense of "making a matter public" -- is an important democratic value for courts as well as legislatures.

In sum, court workers naturally separate their work by degree of difficulty and devote extra attention to the "problem" cases. This routinized workload is comparable to the normal behavioral response of workers in any organization. (Any manager in a private corporation, for instance, probably has been carefully trained to "prioritize and streamline" his or her workload.) This is an efficient response, but, in a subtle way, it is indeed the administrative convenience which raises such distrust of plea bargaining in the lay public.

The problem is that the citizens' vision of courts efficiency imperative is overblown. Prosecutors do not plea bargain in order to clear their desks, but they do plea bargain in order to prioritize their work. Unfortunately, citizens receive the impression that an overloaded court system drops cases simply to get rid of them. In turn, voters are likely to become skeptical and disillusioned because they perceive the sentences affixed to these "dropped cases" to be too light. And if sentences seem too light, voters are likely to blame either corrupt plots or overburdened courts.

Both these versions of plea bargaining -- the courts' administrative triage and the citizens' organizational overload -- are based on observations of justice system efficiency. One is simply a more realistic and behaviorally subtle version of the other. When citizens criticize courts for being more interested in efficiency than in justice, then this is not necessarily a spurious argument. When they take another step, believing that lenient sentences are exchanged for clear desks, the argument breaks down.

For some victims, of course, opinions of the justice system do not arise from thoughtful assessments of court efficiency; many people blame courts for not achieving revenge in victims' names, or for not fighting the moral disorder crime represents, or for ignoring any of a number of other important but murky desires. No sentence seems harsh enough to a person who has been wounded. The victim does not understand that this crime is measured and weighed in comparison to many other similar crimes and defendants, and that the outcome is the "going rate" for this type

of case. Citizens may criticize the courts for leniency, but judges and attorneys respond: "Lenient compared to what?" Furthermore, citizens criticize plea bargaining for bestowing low sentences simply because district attorneys cannot prove the cases. If so, the professionals respond, the problem is not in plea bargaining, but in the law itself. The law demands that nobody be convicted of a crime unless the state can prove beyond a reasonable doubt that the defendant committed it.

In fact, plea bargaining has been criticized from this completely distinct perspective -- not as bestowing leniency, but as undermining the law. If the evidence against a defendant is weak, these critics claim, then it should be examined in a public trial, and the defendant should be acquitted or perhaps convicted of a less serious crime as defined by the actual evidence proven. Plea bargaining allows the state to obtain "easy" convictions and to quickly sentence defendants whose cases deserved careful probing instead. Seen in this light, plea bargaining does not produce leniency. If anything, it punishes people who otherwise might not be convicted at all, and it undermines the evidentiary standards upon which the law is built. (Defenders of plea negotiation respond that "it all washes out" -- that these defendants are guilty of something, and that a guilty plea allows the state to obtain a certain conviction with a definite punishment attached, while a blameworthy defendant accepts his fate without quibbling over details.)

From either perspective, that plea bargaining trades efficiency for leniency or that plea bargaining undermines the law -- the tendency to shift felony guilty pleading to municipal court is unfortunate. Limiting plea bargaining, as Proposition 8's drafters must have known, need not entail a trial for every defendant. But it may require some sort of public hearing, and it definitely requires careful development and scrutiny of the evidence in each case. Proposition 8, ironically, has discouraged both.

Due Process and Municipal Court Guilty Pleas

Recall the procession of events in California felony prosecution described in Chapter 3: municipal court arraignment, "pre-preliminary" appearance, preliminary hearing, superior court arraignment, pretrial conference, and trial. One of the effects of Proposition 8 has been to shift a significant proportion of felony guilty pleas from the superior court conference stage into the municipal court "pre-preliminary" stage.

Municipal court processes prior to the preliminary hearing are a procedural no-man's-land. There is no mention of a "pre-preliminary hearing" or "municipal court pretrial conference" in the Penal Code; the device has grown spontaneously in populous California counties where legal professionals strain to shift felony guilty plea processes into the lower courts. (That this stage in felony prosecution is relatively ambiguous is shown by the fact that each county's "courthouse subculture" has developed a different name for it.)

Important decisions are made at this stage of felony processing. The defendant has already been arraigned and the defense attorney has interviewed the client. The prosecutor has reviewed the police report and probably received information from local and state data banks regarding the defendant's criminal and correctional record. If both attorneys are thorough, they will have conducted investigations into the strength of available evidence and witnesses' statements. Based on these facts, a guilty plea is often arranged between these attorneys at the "pre-preliminary" prosecutorial event.

The judicial role at this stage is also ambiguous, and it varies among counties. Of course, the Penal Code requires a municipal court judge to "certify" guilty plea cases to superior court for sentencing, but in almost every case the sentence negotiated in the lower court is final; superior court judges seldom second-guess the decisions of their lower court colleagues. When the municipal court judge agrees to accept the guilty plea and affix either a sentence suggested by the attorneys or a sentence agreed upon after in-chambers discussion with both attorneys present, this is the only painstaking review the case is likely to receive.

If defendants and victims are to be given their "due" -- in the sense that due process means careful consideration of every case -- two elements are missing from this pre-preliminary examination guilty plea procedure. First, in some (but by no means in all) cases, the information upon which attorneys and judges make evidentiary and sentencing judgments is too scant. Second, the important value of "publicity" -- of public airing and system accountability to the citizenry -- is ignored. These values would be less attenuated if felony defendants were permitted to plead guilty in municipal court only after preliminary hearings.

Due process is a slippery concept, but it underlies our entire jurisprudential framework. This report is not an appropriate place to plumb the philosophical meaning of that value, but it is important simply to state here that due process encompasses the "right to trial" -- perhaps not in the sense that every case must be tried, but that every case, at least, must be completely investigated and weighed. Due process also means that there must be a meaningful opportunity to challenge the evidence. It is here that the idea of publicity arises: opposing attorneys may develop and challenge evidence between themselves at the "pre-preliminary" stage of prosecution, but if the case is then quickly concluded with a guilty plea, how will anyone but the attorneys and the judge know that this challenge has occurred? The opportunity to see the evidence and understand its implications is important both to the defendant and to the citizenry.

Attorneys understandably argue that they know their cases and their clients, and that early guilty pleas are entirely appropriate when a case is "deadbang." However, in a small but significant number of cases the facts upon which this professional judgement is based have not been fully developed.

Cases concluding with guilty pleas in municipal court are often certified within a week of arraignment. A few stark facts available at that stage, such as a defendant's criminal record or availability of articulate and reliable witnesses, may seem sufficiently weighty so that a guilty plea is inevitable. But these facts should be challenged and weighed against other case facts as carefully as are facts in "close call" cases. All participants must be fully satisfied not only that these facts are accurate but that they "stack up" against other facts to justify a guilty plea and -- perhaps most important -- the sentence based on it.

To the attorneys' assertion that "Only deadbang cases are disposed of through certified guilty pleas," the skeptical rejoinder is "But how do you know it's really deadbang, unless you investigate more?" Of course, the majority probably are indeed cases where evidence of guilt is virtually unassailable, but this generality ignores those few defendants cases which turn out, on closer inspection, to have some life after all. It is the concern that no defendant be wrongfully convicted -- or, more realistically, that no defendant be convicted of a crime or given a sentence at variance with what his provable actions deserve -- that has justified Anglo-American jurisprudence's tenacious belief in careful adversary evidentiary testing. It may not be efficient to worry about a small number of individuals with problematic cases who otherwise would be swept along with the large group of cases labeled "deadbang", but our courts have traditionally interpreted due process to mean that individuals have the right to challenge the group label.

Careful investigation and evidentiary challenge involves not only facts pointing to the guilt of the accused, but also to his or her sentence. When the municipal court judge accepts or helps formulate a negotiated sentence in a guilty plea case, there is little opportunity to review a defendant's personal characteristics which may influence decisions concerning appropriate punishment. Under the Determinate Sentencing Act and its implicit rejection of the notion of rehabilitation as a goal of sentencing, there may seem to be no other alternative. But determinate sentencing may legally be influenced by mitigating and aggravating factors drawn from the character of the defendant as well as the facts of the crime.

The law says that factors relating to the defendant, his or her background and history, and prognosis for benefiting from various punitive alternatives must be presented to the sentencing judge in a presentence report prepared by the probation department. If a defendant pleads guilty and is sentenced in municipal court, there is scant opportunity to consider the information prepared and presented in this report.

It may be argued that the superior court judge who later reviews the sentences emanating from municipal court will review the probation report, thus complying with the Penal Code mandate that these factors be considered in setting the sentence. But, in at least two of the counties we studied, since the lower court sentence is essentially a fait accompli overturned only in the most unusual cases by the superior court, there is in practice no meaningful opportunity to incorporate the probation department recommendations into municipal court felony sentencing. Probation workers report that this is a great source of professional frustration.¹⁰

Finally, due process means, among other things, the right to confront accusers. A defendant who insists on this and other rights will simply refuse to plead guilty, but the system strongly encourages the guilty plea by implicitly promising a low sentence for it. The dynamics of the defendant's decision making and whether the

guilty plea system undermines due process in that decision have been hotly debated elsewhere.¹¹ Proposition 8 adds a new element to the debate: due process may involve some measure of process for victims, too.

Process does not guarantee outcome. If "victims' rights" is taken to mean heavy, vengeful sentences, this is a distortion of the idea of rights. But if due process means the right of confrontation and the right to bring forth evidence and test it, the ideal applies to everyone. Although a victim has no legally enforceable "right" to an evidentiary hearing, the logic of due process encourages prosecutors, judges and defenders to give the public its due, too. Defendants and witnesses alike must confront the evidence in open court, both because justice is their concern as well as the concern of legal professionals, and because everyone can thereby be satisfied that justice has been done.

The Possibility of Organizational Change

Proposition 8 was important legislation because it served symbolic needs in the populace and because, we believe, it did indeed affect court procedures. It did so because the change it demanded was incremental: a small but perceptible shift in the proportion of guilty pleas taken at early stages of prosecution. Change was possible because this was not too difficult for court organizations to accommodate, and most court actors had their own organizational reasons to obey the actual wording of the law.

To say that change was accomplished incrementally, however, is not to say that it was trivial. On the contrary, the shift of felony guilty plea processes to municipal courts has had serious repercussions for the quality of justice in California. Proposition 8 and related laws have prompted a subtle redistribution of power among court workers in felony prosecution, have expanded our understanding of the nature of plea bargaining and due process, and have affected justice professionals' concept of justice -- the shifting moral calculus upon which court workers base their notions of the right way to do their jobs.

When felony guilty plea processes migrate to earlier stages of adjudication, in most counties this represents a subtle strengthening of the power of the district attorney and concomitant constriction of the judicial sphere. Charging and investigation are prosecutorial functions and, as more cases are concluded in what has traditionally been considered to be the investigation stage, prosecutorial control over sentencing outcomes increases. In counties where judges participate in the "pre-preliminary" plea bargaining rather than passively approving or denying the sentence formulated between counsel at that stage, the judicial role is less attenuated. Nevertheless, we believe that the essence of judging, in the sense of evaluating evidence, is undermined when evidence is not elicited in some type of public hearing.

The more felony cases that are concluded at the "pre-preliminary" stage, the fewer will proceed through preliminary examination in municipal court, much less through superior court examinations. We have argued that this harms the value of due process, where due process is conceived as an opportunity to investigate the crime and the defendant and then to present and challenge the evidence publicly. There is no opportunity for citizens to know whether legal professionals have represented the larger public interest in plea negotiation over particular cases. Only court hearings and discussions with prosecutors -- who, after all, have the public as their clients -- can accomplish that.

Contrary to the usual doomsaying about the possibility of legislative impact, we believe that legislation can indeed encourage a subtle but critical change in legal professionals' conceptions of "what process is due." When laws encourage quick resolution of felony cases, attorneys and judges slowly begin to agree that preliminary hearings are unnecessary. Though no attorney would go so far as to say that investigation or interviewing clients is unnecessary, court procedures can create an atmosphere: a statement of what is an acceptable professional standard in courtwork. If prosecutorial events where evidence is brought forth and publicly tested are slowly de-emphasized, the professional work necessary to prepare for those events is also slowly downgraded. Almost imperceptibly, conceptions of "good lawyering" change, and it becomes normal to prepare cases carefully but not to "go that extra mile" in fully mining all aspects of a defendant's case.

This would be so, partly because there is no court actor whose organizational interests collide with the slow slide toward quick felony guilty pleas. Prosecutors believe cases are fully considered and fairly concluded under their system of legal triage. Judges carefully review evidence, but the split between municipal court and superior court fragments the information and work roles available to the judiciary. Defense attorneys must serve the short-term interests of their clients; when an acceptable sentence is offered to a defendant at an early stage of felony processing, it is the attorney's professional duty to accept it (especially if organizational signals are that the sentence will significantly increase later in the process.) All court professionals -- with the exception of probation workers, whose function is seriously undermined by lower court plea bargaining -- have organizational reasons to embrace municipal court guilty pleas.

Mather has described "mavericks" in the system: professionals who refuse to accept the prevailing definition of normal adjudication and normal punishments, instead demanding painstaking and frustrating consideration of every case.¹² The mavericks she described in her book on Los Angeles adjudication were defense attorneys who refused to plead clients guilty. Convinced that the state should explicitly prove every crime element and every factual allegation, these attorneys believed this necessary partly because it would prevent long-term degeneration of the justice system. But it is perhaps too much to ask of the defense bar that they sacrifice the short-term interests of their clients for the long-term interests of justice.

Alternatively, municipal court judges could become mavericks, refusing to accept the guilty plea agreements formulated between counsel at early stages of prosecution. But a powerful organizational disincentive is evident: if they refuse to accept these guilty pleas, they will have to preside over preliminary hearings in every case. This would represent a substantial investment of judicial energy that few courts would be willing to expend. "Pre-preliminary" guilty pleas thus become normal to all system actors.

However, if legislation can encourage a change in the courtroom's distribution of power and in conceptions of appropriate, "normal" adjudication by encouraging guilty pleas before preliminary hearings, legislation could also constrain "pre-preliminary" procedures. In the end, the only organizational actor with an interest in holding public hearings in every felony case may be the public itself. Legislation, it seems, is a never-ending process.

Conclusions

Clearly, the preference expressed in this interpretation of the observed impact of Proposition 8 is that most felony cases should weather a municipal court preliminary hearing before the court would accept a guilty plea. There is no provision written in the Penal Code providing for a procedural stage after preliminary examination, whereby a municipal court judge could certify a case to superior court for sentencing. On the other hand, there is no Penal Code definition of the "pre-preliminary" stage, yet local county courts across the state have formulated a guilty plea event at this stage.

This study of Proposition 8 demonstrates that one effect of that legislation has been to highlight guilty plea processes occurring before preliminary examination. It is possible that this was the intent of the legislation's drafters, although the most important consideration for the justice system is that this has actually been the effect, regardless of the law's intent.

Another observed impact of Proposition 8 is that discretion has indeed shifted, as many citizens probably desired. Legislation like Proposition 8 is profoundly anti-professional, aimed at limiting the discretion enjoyed by justice system workers. Whether it makes sense to legal professionals to limit judicial discretion or to distrust prosecutorial plea bargaining evaluations, this is indeed a crucial underlying impetus in popular legislation like Proposition 8. We have tried to explain this dynamic both from the professionals' and from the citizens' viewpoints, and have concluded that a more "public" justice system, in the sense of a more open justice system, would foster political legitimacy and accountability to the public.

Finally, Proposition 8 should be viewed in the context of many similar legislative adjustments designed to shift discretion within the criminal justice system. Power has probably been slightly redistributed, a development which should be carefully examined in light of its long-term effects on the courts. Criminologists often note that legislation can shift discretion but cannot eliminate it. The next logical conclusion seems to be that it is therefore useless to legislate.

On the contrary, the saga of Proposition 8's plea bargaining limitation and habitual offender enhancements demonstrates that legislation matters. When discretion is shifted, this motion has its own consequences. It is not value-neutral. In the case of Proposition 8, the shift of discretion into early prosecutorial stages in municipal court distorts the justice system's capacity to realize important democratic values of due process. Ironically, the values many supporters of Proposition 8 treasured most -- complete and public evidentiary testing, an opportunity for both victims and defendants to confront the evidence and understand the outcomes of adjudication -- have been undermined.

Notes

¹ Edwin Lemert, "Beyond Mead: The Societal Reaction to Deviance," Social Problems, 21 (1974), 457.

² A concern related to the "leniency" argument is described in a report on plea bargaining prepared for the California legislature. Researchers examined plea negotiation practices in several California counties. They concluded that plea bargaining styles vary significantly across California counties, but that there was little evidence that guilty plea processes granted leniency to offenders -- conclusions very similar to those of this study. A major concern of the public, though, was that plea bargaining undermined "truth in sentencing." Citizens felt that, even if offenders were punished, the result of plea bargaining was that it was impossible to tell what the person had really done to underscore to the defendant that the conviction and sentence are just punishment and not simply a game, or to understand if the punishment really fit the crime, because nobody proved the elements of the crime in court. These are valid concerns that may help to explain the frustration leading to legislation like Proposition 8.

³ Murray Edelman, The Symbolic Uses of Politics (Chicago: University of Illinois Press, 1964).

⁴ Hannah F. Pitkin, The Concept of Representation (Berkeley: University of California Press, 1967).

⁵ Stuart Scheingold, The Politics of Law and Order: Street Crime and Public Policy (New York: Longman Press, 1984); Francis T. Cullen, Gregory A. Clark, and John F. Wozniak, "Explaining the Get Tough Movement: Can the Public be Blamed?" 49 FEDERAL PROBATION 16 (June, 1985).

⁶ Sentencing may have become harsher, however, for small subgroups within that larger group. As mentioned, we do not have data on that group of offenders susceptible to the habitual offender enhancements who actually had the five-year enhancements imposed, or how their sentences would compare to sentences imposed on an identical felon group before Proposition 8 passed. We had hypothesized, however, that the five-year enhancements would drive up the "going rate" -- i.e., the "normal punishment" prosecutors usually name as the beginning "price" of a case subject to plea negotiation. We found scant evidence to support that hypothesis.

Another change that may have occurred is also absent from this study. We examined sentencing outcomes for a very large group of offenders: serious felons who were convicted. A small but important subset of that group consists of defendants who refuse to plead guilty in municipal court, continuing to contest their cases into superior court, but then pleading guilty there. There is some evidence that sentences imposed on these offenders are significantly harsher -- not only than the usual sentences that would have been imposed had they pled guilty in the lower court, but also significantly harsher than sentencing norms prevailing in superior court prior to passage of Proposition 8. This bothersome matter of the "trial penalty" -- or "confession reward," depending on your point of view -- will be examined in future research. Should the hypothesis of heavier superior court sentences be supported, it would add more weight to the "due process" related criticisms of municipal court plea bargaining enunciated in this chapter.

⁷ Another provision of Proposition 8 added Section 1191.1 to the Penal Code, which states: "The victim or next of kin has the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims and next of kin made pursuant to this section and shall state on record its conclusion concerning whether the person would pose a threat to public safety if granted probation."

⁸ Herbert Packer, The Limits of the Criminal Sanction (Palo Alto: Stanford University Press, 1968).

⁹ In a recent study, Virginia Neto found that although Proposition 8 granted crime victims the right to appear at sentencing hearings and express their views, few of those eligible chose to exercise that right. See Virginia Neto, "Victim and Agency Response to "Victim Allocution Rights" (Paper delivered at the Meetings of the Association for Criminal Justice Research, Sacramento, CA., at April 1985). See also Donald R. Ranish, and David Shichor, "The Victim's Role in the Penal Process: Recent Developments in California," 49 FEDERAL PROBATION 50 (March 1985). The Miami experiment in which the victim and/or defendant and/or police officers were present at various plea bargaining sessions is reported in Wayne Kerstetter and Anne Heinz, Pretrial Settlement Conference: An Evaluation Report (National Institute of Justice, Washington, D.C.: Government Printing Office, 1979). See also Wayne A. Kerstetter, "Police Participation in Structured Plea Negotiations," 9 J. of CRIM. JUS. 151 (1981).

¹⁰ Albert W. Alschuler "The Changing Plea Bargaining Debate," 69 CALIF. L. REV. 652 (May 1981) and Albert W. Alschuler "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for Fixed and Presumptive Sentencing" 126 U. PA. L. REV. 550 (1978). Owen Fiss, "Against Settlement," 93 YALE L. J. 1073 (1984).

¹¹ Joan Petersilia Granting Felons Probation (Santa Monica: Rand Corporation, 1985), p. 41.

¹² Abraham S. Blumberg "The Practice of Law as a Con Game," 1 LAW & SOC. REV. 15 (June 1967); Arthur Rossett and Donald Cressey, Justice By Consent (Philadelphia: Lippincott, 1976). As to the defendant's fear of a harsher penalty after trial should he not plead guilty to the state's offer, see David Brereton and Jonathan D. Casper, "Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts," 16 LAW & SOC. REV. 45 (1981). One study found no sentencing differential in the District of Columbia: See William Rhodes, "Plea Bargaining: Its Effect on Sentencing and Convictions in the District of Columbia," 70 J. CRIM. LAW & CRIMINOLOGY 960 (1979).

Appendix I: Data Sources

Quantitative Data Sources

A. Offender Based Transaction Statistics Data

The principal source of quantitative data for this study was the Offender-Based Transaction Statistics (OBTS) system maintained by the California Bureau of Criminal Statistics. These data track the progress of all persons arrested on felony charges in California through the criminal justice system. The data record the disposition for each individual defendant at each stage in the process -- law enforcement, prosecution, lower courts and superior courts. The OBTS data base annually records information for around 200,000 felony arrests, approximately seventy percent of all recorded felony arrests. Although an underreporting rate of thirty percent is rather high, the level remains fairly constant over time and, as comparisons with other sources of court data suggest, levels of disposition reporting from the courts may be higher than they are at the prosecution and law enforcement levels. Since all of the OBTS data used in this study concern court dispositions, we have increased confidence in the completeness of the data.

The OBTS data are reported annually in the form of "fall out" charts that display the attrition of cases at each stage in the prosecution process. Our methodological strategy was to break down these yearly data into monthly counts thereby producing enough observations for a time-series analysis. The data refer to cases reaching final disposition in a certain month, regardless of when the case began. Because of the large numbers of cases recorded annually statewide, the cells referring to particular disposition types within the monthly samples remain large and show considerable stability month-to-month. At the county level, however, the monthly dispositions show increased variance. By focusing on several of the largest counties in the state where the monthly samples remained relatively large, the effects of this problem were minimized.

An additional operation had to be performed on the data before they could be analyzed. Before 1982, those OBTS dispositions received after a cut-off date in the spring of each year were "up-dated" to the following year. This meant that, for example, a 1981 disposition received after the cut-off date in 1982 would be included in the 1982 file and would appear as a 1982 disposition. For the years 1980, 1981, and part of 1982, between fifteen and twenty percent of all dispositions were updated to a subsequent year. In this study we were concerned with changes in disposition patterns at specific points in time, therefore we had to move the up-dated dispositions back to the actual year in which they occurred.

The OBTS data record the "most-serious charge" at arrest and conviction. This charge is determined by a hierarchy system used by the Bureau of Criminal Statistics that ranks offenses by the severity of their possible penalties. All of the OBTS data analyzed in this study were categorized on the basis of the "most serious charge at arrest." In making the decision to generate samples based on this charge rather than the conviction charge, we concurred with Casper et al., that "The arrest charge both constrains eventual dispositions and best measures the seriousness of the original charged offense."¹

Several problems were encountered in assembling data matching the description of "serious felonies" found in the text of Proposition 8. First, while the law refers to "residential burglaries," the Penal Code makes no such distinction. Arrest and disposition data also do not distinguish between residential and commercial burglaries. Official crime statistics show that two-thirds of all reported burglaries are residential and we assume that a similar proportion of burglary arrests are for residential burglaries. However, we included disposition data on all burglaries, knowing that approximately one-third would not be classified as "serious felonies," because the benefits of including this sizeable category of offenses outweigh the disadvantages of having a small proportion of cases miscategorized as "serious felonies."

Secondly, Penal Code Section 1192.7 defines "any felony in which the defendant personally used a dangerous or deadly weapon" as a "serious felony." This distinction is typically made after arrest with the addition of a specific enhancement to the original charge. Data from the Bureau of Criminal Statistics (OBTS data) do not record these enhancements. Therefore, we were unable to include these cases in our sample.

B. Board of Prison Terms Data

The data in Chapter Four on habitual offender enhancements were obtained from the Board of Prison Terms (BPT). That agency collects sentencing information on all persons received in state prisons. The BPT data differ from the OBTS data in several respects. The unit of count in those data is the individual received in prison and the data record all of the sentences imposed on that individual for all cases in which he/she was prosecuted. The OBTS data record sentences for individuals in a particular case, so that, for example, an individual convicted and sentenced in three separate cases would be counted three times. Also, OBTS records only sentences imposed, not whether the individual actually went to prison. Despite these differences, these data are complimentary and can be used together as long as one recognizes their differences.

C. Local Data

Detailed sentencing data for individual jurisdictions were not available from any state agency. Therefore, we turned to local criminal justice agencies and their in-house information systems for these data.

In Alameda County we were fortunate enough to gain access to CORPUS, a county-wide criminal justice information system that records, among other data, the dispositions for all lower and superior court cases. Although the system is typically used to locate individual cases and not to produce statistics, we were able to use it to generate the data necessary for our study. From the CORPUS system we obtained data on all recorded felony cases that reached final disposition between January 1, 1978 and December 31, 1984, in which one of the charges in the complaint was one of eight "serious felonies": robbery, murder, manslaughter, rape, child abuse, arson, sodomy and kidnap. These offenses were selected because they represent those "serious felonies" that occur with considerable frequency every year. The dispositional data for each of these cases -- indicating outcomes for each proceeding, final disposition and sentence -- were listed on a hard copy. From this hard copy, cases in which the "most serious" charge was robbery or rape, were manually coded and reentered into a computer file.

Equivalent sets of data were collected from the San Diego District Attorney's JURIS system and the Los Angeles District Attorney's PROMIS system. Disposition data on the same types of cases (as well as residential burglaries) for the same period of time were copied onto a computer tape. From this tape tables were generated yielding the data reported in the preceding chapters.

Qualitative Data Sources

In each of the three jurisdictions studied in depth we interviewed prosecutors, defense attorneys, judges and court administrators. Formal courtroom proceedings as well as informal discussions among these principal actors were observed. Approximately three months were spent doing fieldwork in both San Diego and Alameda Counties where additional data were obtained from questionnaires distributed to members of the district attorneys' offices and public defenders' offices. This survey queried the members of these offices on their perceptions of the impact of Proposition 8 on their work. Less time (approximately one month) was spent in Compton where attention was focused on the response of prosecutors to the new laws.

Where possible, interviews were tape-recorded and transcribed. In situations where tape recorders were too obtrusive, interviews and dialogues were later reconstructed from field notes.

Information on the political history of Proposition 8 was obtained in interviews conducted with principal figures in the Proposition 8 campaign and its opposition. From those involved in the actual drafting of the law we asked specific questions concerning the intent of the law, although, as most researchers know, respondents' retrospective interpretations are often conveniently fitted to present realities.

The information gleaned from these interviews was combined with newspaper accounts, legislative reports and other documents to piece together the context in which the "Victims' Bill of Rights" emerged.

Data Analysis: Software

For the interrupted time-series analysis discussed in Chapter Five we used the BMDP 2T program. Besides being one of the few statistical packages that offers interrupted time-series, the program was available on floppy disks for use on personal computers. This is a distinct advantage for researchers who need only the time series program and want to avoid the expense of the full mainframe package. The principal problem we encountered with the program was the fact that the notation used in the manual does not always correspond to the notation used in social science applications of time-series. This, however, may actually be a consequence of the "state of the art" in social science applications, where time-series is a relatively new technique for which the standards have yet to be set.

Notes

¹ Jonathan Casper et al., The Implementation of California's Determinate Sentencing Law (Washington D.C.: Government Printing Office, 1981), p. 238.

Appendix II: ARIMA Analysis

The general case of the impact assessment model for a time series may be written as

$$Y_t = N_t + f(I_t).$$

Where Y_t = the value of the variable being modeled at time t ,

a_t = the t^{th} value of the noise model,

and $f(I_t)$ = the intervention component.

Of the eight different series modeled for this study, none required seasonal differencing, therefore, excluding seasonality, the general case of the noise model, N_t , may be written as

$$N_t = \frac{(1 - \theta_1 B - \dots - \theta_q B^q) a_t + C}{(1 - \phi_1 B - \dots - \phi_p B^p)(1 - B)^d}$$

where p = the order of the autoregressive process,
 d = the degree of non-seasonal differencing,
 q = the order of the moving average process,
 ϕ_1 to ϕ_p = the regular autoregressive parameter,
 θ_1 to θ_q = the regular moving average parameter
 a_t = the (random) white noise component,
 C = a constant,
 B = the backshift operator where $B(Y_t) = Y_{t-1}$.

In an impact assessment analysis, the intervention component, $f(I)$, is added to the noise model, therefore, our first task was to estimate a pre-intervention noise model. The plots of the autocorrelations (ACF) and the partial autocorrelations (PACF) for each pre-intervention series (January 1978 - June 1982) indicated that each was trending or drifting and required differencing. After differencing each series, the ACF and PACF were plotted and examined. We noted that for each series 1) the ACF and PACF patterns suggested that regular differencing was sufficient to impose stationarity, 2) the ACF revealed a spike at lag 1, and 3) the PACF indicated a decaying pattern. Thus, we tentatively identified and estimated an ARIMA (0,1,1) model for all the pre-intervention series. Diagnosis confirmed that the residuals for each series was a white noise process (a series of random shocks with a mean of zero and a constant variance) and the model was accepted. The parameters for each series are displayed in Chapter 5, Table 1. Below we present the general equation for a differenced MA 1 model

$$N_t = \frac{(1 - \theta_1 B) a_t}{1 - B}$$

Having specified and accepted an ARIMA (0,1,1) noise model for each series, we analyzed the impact of the intervention using three different intervention components. The simplest intervention component, a zero-order transfer function, involves an abrupt-permanent impact (permanent for the duration of the post-intervention series). This model is denoted as

$$f(I_t) = w_0 I_t$$

where the intervention variable I takes on a value of 0 before the intervention and a value of 1 in the post-intervention period. The parameter w_0 (omega) indicates the "step" or the magnitude that the level of the process increases (or decreases) following the intervention.

A second, more complex model is a first-order transfer function where

$$f(I_t) = \frac{w_0}{1 - d_1 B} I_t$$

This model, also a step function, represents a gradual, permanent change in the process level. Delta (d), which must be greater than -1 and less than +1, can be seen as the rate of increase or decrease. That is, a process reaches its asymptotic change in level in relation to the size of d. If d is large, the increase will be slow; if it is small, the asymptotic change in level will be realized rapidly. The asymptotic change can be determined by the equation

$$\frac{w_0}{1 - d_1}$$

The third intervention component hypothesizes an abrupt, but temporary impact in the level of the series. In other words, the series undergoes an abrupt change at the time of the intervention, but thereafter the contribution the intervention makes begins to decay. In this model the intervention component is represented by a pulse function where

$$(1 - B)I_t = 0 \text{ prior to and after the intervention, and} \\ = 1 \text{ at the moment of the intervention,}$$

and may be written as

$$f(I_t) = \frac{w_0}{1 - d_1 B} (1 - B)I_t$$

where the parameter w_0 indicates the magnitude of the impact the first month, $w_0 d_1$ represents the impact the second month, $w_0 d_1^2$ represents the impact the third month, and so on. We can also calculate the net impact of an intervention ($w_0 / (1 - d_1)$), or measure the impact longevity in the K^{th} post-intervention observation (percent decay = $1 - d_1^{k-1}$). In general, if delta is large we assume the decay is very slow and that an abrupt, temporary model might not be appropriate. When this occurs, we hypothesize a gradual, permanent impact assessment model. If delta is near zero in this alternative model, an abrupt impact is suggested and we estimate a final intervention -- an abrupt, permanent impact.

The statewide series for "serious" and "other" felonies was first modeled as an abrupt, temporary impact. All parameters (presented below) were significant at .05 for a two-tailed test except w_0 for "serious" felonies which was significant at .05 for a one-tailed test.⁴ However, since d was nearly 1, we concluded that a temporary model was inappropriate.

Serious Felonies

$\theta_1 = .54;$ $t = 5.39$
 $w_0 = .006;$ $t = 1.90$
 $d_1 = .97;$ $t = 63.07$

Other Felonies

$\theta_1 = .81;$ $t = 12.19$
 $w_0 = .0037;$ $t = 3.07$
 $d_1 = .99;$ $t = 873.22$

Next we estimated a gradual, permanent intervention. The parameter values for this model (displayed below) show that d was not significant for "serious" felonies and was beyond the bounds of system stability (>1) for "other" felonies. For this reason, we decided not to accept the gradual, permanent model either.

Serious Felonies

$\theta_1 = .48;$ $t = 4.71$
 $w_0 = .0098;$ $t = 2.61$
 $d_1 = -.83;$ $t = -1.62$

Other Felonies

$\theta_1 = .56;$ $t = 6.04$
 $w_0 = .009;$ $t = 3.82$
 $d_1 = -1.001;$ $t = -34.02$

Lastly, we respecified the intervention component as permanent, but abrupt. All parameters for this model (reported below) for both "serious" and "other" felonies were statistically significant at the .05 level. Further, none of the lags were significant and the Ljung-Box Q statistics at lag 20 (8.9 for "serious" felonies and 16 for "other" felonies) were well below the .05 critical value level and therefore not significant.⁵

Serious Felonies

$\theta_1 = .48;$ $t = 4.73$
 $w_0 = .0052;$ $t = 3.32$

Other Felonies

$\theta_1 = .56;$ $t = 6.11$
 $w_0 = .0045;$ $t = 3.63$

We are confident, then, in asserting that following the intervention the level of the certification rates for "serious" felonies rose .0052, or over half a percent per month more than it would have if the pre-intervention trends continued unchanged. Similarly, the series level for the certification rates for "other" felonies rose .0045, or 4.5% more than it would have if the pre-intervention trends continued. Stated another way, we can say that there was a 3.7% (.0052/.139) increase in state certifications for "serious" offenses and a 2.5% (.0045/.181) increase in state certifications for "other" offenses relative to the pre-intervention mean. The final impact assessment model for the "serious" felonies series may be written as

$$Y_t = \frac{(1 - .48B)a_t}{1 - B} + .0052I_t$$

and final impact assessment model for the "other" felonies series may be written as

$$Y_t = \frac{(1 - .56B)a_t}{1 - B} + .0045I_t$$

The Alameda series ultimately required more complex intervention models than the statewide series. As with the statewide data, we added an abrupt, temporary impact component to the ARIMA (0,1,1) noise model for both the "serious" and "other" felony certification rates first. The parameter estimates (given below) were significant for both series. However, the forecasts were very poor and did not track either post intervention series well. Thus, we decided to reconsider the abrupt, temporary intervention component.

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .64;$	$t = 7.47$	$\theta_1 = .61;$	$t = 7.34$
$w_0 = .24;$	$t = 3.56$	$w_0 = .09;$	$t = 2.44$
$d_1 = -.71;$	$t = -5.20$	$d_1 = .69;$	$t = 4.64$

Upon reexamination of the raw series, we noted that the full impact of the intervention did not appear to have been felt until the second month (August 1982). With this in mind, we respecified the intervention component as an abrupt, temporary impact beginning one month after the intervention.⁶ All parameter values for both series for this model (presented below) were statistically significant, none of the lags were significant, and the Q statistics at lag 20 (13 and 18 for "serious" and "other" felonies respectively) were not significant. Given that the residuals were white noise and the forecasts tracked the series reasonably well, we were satisfied that we had an adequate intervention model.

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .77;$	$t = 10.43;$	$\theta_1 = .68;$	$t = 8.52$
$w_1 = .13;$	$t = 2.77$	$w_1 = .098;$	$t = 2.33$
$d_1 = .55;$	$t = 3.19$	$d_1 = .61;$	$t = 3.21$

The interpretation of this impact assessment model is that one month following the intervention there was a .13 or 13% jump in certification rates for "serious" felonies and a 9.8% increase for "other" felonies. Following this initial impact, the impact added to each month decreased until it reached a certain level and remained there. For the "serious" certification rates series, 95% of the decay was reached by the 6th month following the abrupt increase ($95\% = 1 - .55^{6-1}$) when it leveled off at approximately .56 or a 56% certification rate. For the "other" felonies certification rates series, 95% of the decay was reached by the 7th month ($95\% = 1 - .61^{7-1}$) following the abrupt impact when it leveled off at approximately 57% certifications. The final impact assessment model for "serious" felonies certification rates in Alameda may be written as

$$Y_t = \frac{(1 - .77B)a_t}{1 - B} + \frac{.13}{1 - .55B} (1 - B)I_t$$

The final model for the certification rates for "other" felonies in Alameda may be written as

$$Y_t = \frac{(1 - .68B)a_t}{1 - B} + \frac{.098}{1 - .61B} (1 - B)I_t$$

Although we are satisfied with the above models, we report our estimations of a gradual, permanent and an abrupt, permanent impact assessment model for comparative purposes. The parameters displayed below are for the gradual, permanent impact assessment model. Omega was significant only for a one-tailed test at .05 for "serious" felonies and was not significant for "other" felonies. Further, delta was nearly 1 for both series which is interpreted as meaning that the series were trendless prior to the intervention and followed a trend of slope w_0 in the post intervention period. Yet we were uncomfortable with this interpretation not only because it is counter-intuitive, but because as McCleary and Hay state, "... such a radical change (from a state of equilibrium to a state of growth) would rarely be observed in the social sciences." Therefore, we chose not to accept the gradual, permanent impact assessment model.

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .58;$	$t = 6.30$	$\theta_1 = .46;$	$t = 4.55$
$w_0 = .022;$	$t = 1.90$	$w_0 = .023;$	$t = 1.68$
$d_1 = -.98;$	$t = -5.31$	$d_1 = -.995;$	$t = -13.95$

Lastly, we modeled an abrupt, permanent change and found that the intervention parameters (below) were not significant.

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .58;$	$t = 6.26$	$\theta_1 = .47;$	$t = 4.80$
$w_0 = .009;$	$t = 1.53$	$w_0 = .008;$	$t = 1.20$

The impact assessments for the San Diego series for "serious" and "other" felony certification rates were also modeled using an ARIMA (0,1,1) model and each of the three intervention components. The parameter values and t-statistics for each are given below.

Abrupt, temporary impact assessment:

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .74;$	$t = 9.90$	$\theta_1 = .76;$	$t = 10.72$
$w_0 = .051;$	$t = .88^*$	$w_0 = .072;$	$t = 1.29^*$
$d_1 = .39;$	$t = .54^*$	$d_1 = -.093;$	$t = -.11^*$

Gradual, permanent impact assessment:

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .72;$	$t = 9.18$	$\theta_1 = .74;$	$t = 10.37$
$w_0 = .003;$	$t = .05^*$	$w_0 = .007;$	$t = 1.12^*$
$d_1 = -.26;$	$t = -.01^*$	$d_1 = -.998;$	$t = -1.86^*$

Abrupt, permanent impact assessment:

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .72;$	$t = 9.50$	$\theta_1 = .74;$	$t = 10.24$
$w_0 = .003;$	$t = .68^*$	$w_0 = .003;$	$t = .91^*$

(* = not significant at the .05 level)

Given that all intervention parameters in these models were insignificant, we modeled the full series for both "serious" and "other" felony certification rates as a regularly differenced, first order moving average series. The parameter for these models is presented below.

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .71;$	$t = 9.30$	$\theta_1 = .72;$	$t = 9.96$

The Q-20 statistics of 20 for "serious" and 17 for "other" felonies were not significant and the residuals were white noise. Thus, the model for "serious" felony certification rates may be written as:

$$Y_t = \frac{(1 - .71B)a_t}{1 - B}$$

The model for "other" felony certification rates may be written as:

$$Y_t = \frac{(1 - .72B)a_t}{1 - B}$$

Unlike the impact assessment models, however, a noise model alone is, as McCleary and Hay state, "atheoretical and uninterpretable."⁸ Therefore, the only interpretation we can make from this model is that the intervention -- passage of Proposition 8 -- did not affect the certification rates for "serious" or "other" felonies in San Diego.

Finally, we analyzed the proportion of superior court convictions for "serious" and "other" felony cases that resulted in prison sentences. None of the three intervention models that were added to the ARIMA (0,1,1) model were significant, as can be seen from the parameter values and t-statistics listed below.

Abrupt, temporary impact assessment:

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .52;$	$t = 5.43$	$\theta_1 = .35;$	$t = 3.36$
$w_0 = .016;$	$t = .99^*$	$w_0 = .011;$	$t = .78^*$
$d_1 = -.15;$	$t = -.14^*$	$d_1 = .13;$	$t = .11^*$

Gradual, permanent impact assessment:

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .53;$	$t = 5.55$	$\theta_1 = .34;$	$t = 3.27$
$w_0 = .005;$	$t = 1.69^*$	$w_0 = .001;$	$t = .26^*$
$d_1 = -1.03;$	$t = -160.04$	$d_1 = -.61;$	$t = -.12^*$

Abrupt, permanent impact assessment:

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .54;$	$t = 5.80$	$\theta_1 = .34;$	$t = 3.37$
$w_0 = .002$	$t = 1.31^*$	$w_0 = .0005;$	$t = .32^*$

(* = not significant at the .05 level)

Again, since we found no significant intervention, we estimated an ARIMA (0,1,1) model for the full series for "serious" and "other" felony prison sentences. The residuals for both series were not different from white noise, the Q-20 statistics were not significant (9.9 for "serious" and 19 for "other" felonies), and, as can be seen below, the parameters were statistically significant.

<u>Serious Felonies</u>		<u>Other Felonies</u>	
$\theta_1 = .52;$	$t = 5.51$	$\theta_1 = .34;$	$t = 3.37$

The model for the prison sentences for "serious" felonies is:

$$Y_t = \frac{(1 - .52B)a_t}{1 - B}$$

The model for the prison sentences for "other" felonies is:

$$Y_t = \frac{(1 - .34B)a_t}{1 - B}$$

Notes

¹ We are deviating from McCleary and Hay by estimating the noise model from the pre-intervention series rather than the full series (even though the intervention is not dramatic in any of the series). See Richard McCleary and Richard A. Hay, Jr., Applied Time Series Analysis for the Social Sciences (Beverly Hills: Sage Publications, 1980). Our objective was to prevent the intervention from complicating the noise model to any degree, although practically speaking, all the noise models in this study were essentially the same whether the pre-intervention or the full series was modeled.

² There were some exceptions to this general statement. The residuals for the MA 1 model for certification rates for "other" felonies showed a significant lag 1 in both the ACF and PACF. An MA 2 model for the pre-intervention series proved to be significant and the residuals were white noise. However, the second moving average parameter was rendered insignificant when the various intervention components were added to the noise model, therefore, the second moving average parameter was dropped for this series. Also, lag 5 in the residuals of an MA 1 model for the pre-intervention "prison sentences for 'serious' felonies" series was significant. However, in the final ARIMA (0,1,1) model for the full series, it became insignificant.

³ The mean of the differenced series was insignificant in every series, so it was not necessary to include a constant term in any of the ARIMA (0,1,1) noise models. Nonetheless, as a check on this assumption, we estimated ARIMA (0,1,1) with a constant or trend parameter for each series. With the exception of both the "serious" and "other" felony series for the state, each trend parameter was insignificant or only marginally significant. Further, although both state series seemed to call for a constant, we noted that its inclusion caused the moving average parameter to approach the bounds of invertibility (> 1) and so we eliminated it from both state series.

⁴ The parameter estimates are all taken from the BMDP 2T backcasting option.

⁵ The Ljung-Box Q statistics is a test based on the residual autocorrelations as a set. It follows a chi-square distribution with degrees of freedom equal to the number of lags minus the number of parameters estimated in the model. At lag 20 (Q-20) the chi-square critical values at the .05 level are:

Degrees of Freedom	Chi-square
19	30.1
18	28.9
17	27.6
16	26.3

⁶ The gradual, permanent and abrupt, permanent intervention components were also estimated as higher order models, but were not significant.

⁷ McCleary and Hay, Applied Time Series Analysis for the Social Sciences, 1980, p. 159

⁸ McCleary and Hay, Applied Time Series Analysis for the Social Sciences, 1980, p. 159

Other Sources

- Bhattacharyya, M.N. and Allan P. Layton (1979) "Effectiveness of Seat Belt Legislation on the Queensland Road Toll -- An Australian Case Study in Intervention Analysis," 74 Journal of the American Statistical Association, 596-603.
- Box, G.E.P. and G.C. Tiao (1975) "Intervention Analysis With Applications to Economic and Environmental Problems," 70 Journal of the American Statistical Association, 70-80.
- Hilton, Michael E. (1984) "The Impact of Recent Changes in California's Drinking-Driving Laws on Fatal Accident Levels During the First Postintervention Year: An Interrupted Time Series Analysis," 18 LAW & SOCIETY REVIEW, 605-627.
- Hoff, John C. (1983) A Practical Guide to Box-Jenkins Forecasting. Belmont, CA: Lifetime Learning Publications.
- Liu, Lon-Mu (1985) "P2T Box-Jenkins Time Series Analysis," in W.J. Dixon, M.B. Brown, L. Engelman, J.W. Frane, M.A. Hill, R.I. Jennrich, and J.D. Toporek (eds.), BMDP Statistical Software. Berkeley: University of California Press.
- Loftin, Colin, Milton Heumann, and David McDowall (1983) "Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control," 17 LAW & SOCIETY REVIEW, 287-318.
- McCain, Leslie J. and Richard McCleary (1979) "The Statistical Analysis of the Simple Interrupted Time-Series Quasi-Experiment," pp. 233-293 in Thomas D. Cook and Donald T. Campbell (eds.), Quasi-Experimentation: Design and Analysis Issues for Field Settings. Boston: Houghton Mifflin.
- McDowall, David, Richard McCleary, Errol E. Meidinger, and Richard A. Hay, Jr. (1980) Interrupted Time Series Analysis. Beverly Hills: Sage Publications.
- Pankratz, Alan (1983) Forecasting with Univariate Box-Jenkins Models. New York: John Wiley and Sons.
- Ross, H. Laurence, Richard McCleary, and Thomas Epperlein (1981-82) "Deterrence of Drinking and Driving in France: An Evaluation of the Law of July 12, 1978," 16 LAW & SOCIETY REVIEW, 345-374.