1-1-2001

Sentencing Reform in the Other Washington

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ABSTRACT

Washington State's sentencing reform in the early 1980s encompassed all felonies, including those resulting in sentences to prison and jail; the state also enacted the first and only sentencing guidelines for juvenile offenders. Several lessons are suggested from Washington's experience: sentencing guidelines can change sentencing patterns and can reduce disparities among offenders who are sentenced for similar crimes and have similar criminal histories; a sentencing commission does not operate as an independent political force, except when such delegation serves the legislature's purpose; guidelines are policy-neutral technologies that can be harnessed to achieve the legislature's will; in states where citizen initiatives are authorized, sentencing issues will appear on the ballot, attract political support, and make significant changes to sentencing policy; guidelines allow a state to set sentences with advance knowledge of the consequences to prison and jail populations; guidelines are likely to become more complex over time as legislators strive to respond to new perceptions of crime seriousness, while simultaneously paying attention to prison and jail costs.

Twenty years ago, Washington State enacted what at that time was the most comprehensive reform of adult sentencing laws in the nation. The Sentencing Reform Act of 1981 rejected many core tenets of indeterminate sentencing, putting into place a sentencing system based on

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0192-3234/2001/0028-0002$02.00

principles of just desert and accountability. Since then, the legislature has not been shy about changing the act; it has been revised each year since its enactment. Sentences in 1999 differ significantly from those imposed in 1984; many are longer and require more conditions. Nevertheless, the act reached the millennium structurally intact.

The American experience with sentencing reform now spans a quarter century (Tonry 1996, chap. 1). Many of the reformers' goals have been achieved in at least some jurisdictions. Some were unrealistic or carried unintended consequences. Washington's reform is of particular interest because of its scope: the legislation encompassed all felonies, including those resulting in sentences to probation and jail; the state also enacted the first and only sentencing guidelines for juvenile offenders.

Washington's story suggests a number of lessons about sentencing guidelines. First, in contrast to mandatory sentences, which are rarely implemented as intended, sentencing guidelines can significantly change sentencing patterns. Second, guidelines can reduce disparities among offenders who are sentenced for similar crimes and have similar criminal histories. Third, unconstrained discretion in sentencing operates to favor whites and disfavor members of minority groups.

Washington's story also suggests lessons about the roles and powers of various institutions. First, sentencing commissions derive their power from the legislature and do not operate as an independent political force, except in circumstances where delegation to this body serves the legislature's purpose. Second, guidelines are policy-neutral technologies that can be harnessed to achieve the legislature's will. The legislature will use its power over sentencing policy in different ways at different times. Third, in states where citizens' initiatives are authorized, initiatives concerning sentencing are likely to appear on the ballot, attract popular support, and effect significant changes. Fourth, guidelines allow a state to set sentences with advance knowledge of the consequences to prison and jail populations and thereby to project necessary correctional resources. Thus, the branch of government setting the sentences also writes the check, increasing the opportunity for prudent resource management. Fifth, guidelines are likely to become increasingly complex over time, as legislators strive to respond to new perceptions of crime seriousness, while simultaneously paying attention to prison and jail costs.

Finally, any change in sentencing laws, procedures, and processes will alter the distribution of discretionary powers. Guidelines shift the

allocation of discretion; actors and agencies that lose discretion will work to regain it. Voluntary prosecutorial guidelines at the state level will not control charging and plea-bargaining practices. The idiosyncratic nature of this aspect of prosecutors' work, coupled with the complex patterns of interaction between the prosecutors and defense attorneys, means that outside scrutiny is unattainable.

This essay is divided into six sections. Section I discusses the 1970s reformers' vision and the history of legislative actions leading up to adoption of guidelines legislation (1975–81). The first five years of the work of Washington's guidelines commission are described in Section II, including the development of the sentencing grid and related policies (1981–86). The period 1986–92 is covered in Section III; during this time, the legislature reinstated itself as the source of policy direction. Section IV covers 1993–95, when citizen initiatives dominated state sentencing policy. We review experience since 1995 in Section V and conclude in Section VI.

I. The Reformers' Era, 1975–81

Washington's first sentencing laws were enacted at the turn of the century. The state was an early and enthusiastic convert to the rehabilitative ideal and indeterminacy, and it granted wide and unconstrained discretion to judges and correctional officials (Boerner 1985, pp. 2–3). Judges were authorized to choose between prison and probation with few exceptions, subject only to review for abuse of discretion. Probation could be coupled with a jail term of up to one year, and judges had unrestricted authority to impose conditions of probation. Prison sentences were imposed at the statutory maximum, with the parole board having authority to set release dates for those whose rehabilitation was "complete" and judged a "fit subject for release" (Wash. Rev. Code, title 9, chap. 95, sec. 100 [2001]). Judges made recommendations about minimum terms but had no power to set minimum terms or prescribe parole conditions.

A handful of the most serious crimes carried mandatory terms of imprisonment. In all other matters, the parole board's discretion to release, and to impose parole conditions, was essentially unrestrained. Taken as a whole, Washington fit Zimring's description of a "labyrinthine" sentencing and corrections system that "lacks any principle except unguided discretion" (Zimring 1977, p. 6). This characterization was also valid for the state's juvenile system, which was established in 1913.

Washington's sentencing policies must be understood in the context

of the division of power between state and local government. Both historically and at present, many political decisions about sentencing policies are influenced by whether the local or the state government pays the price. Washington's state prison system houses adult felons with sentences over one year; sentences of one year or less are served in jails and are the responsibility of local government. Supervision in the community, to the extent it is authorized, is a state responsibility. In the juvenile system, local authorities operate the diversion and probation programs and the detention centers; the state operates the institutions for those with sentences over a year and administers parole.

A. Options, 1975

Sentencing reform in Washington encompassed both the juvenile and adult sentencing codes. Because they were enacted separately—the juvenile reform in 1977 and the adult in 1981—and because the two systems are typically seen as worlds apart, this story is usually bifurcated. Connecting them, however, reveals their shared philosophical base and the breadth of reformist vision.

The story begins in 1975 with the House of Representatives' creation of a new subcommittee of the Social and Health Services Committee. This subcommittee was given a wide-ranging assignment that encompassed both adult and juvenile correctional systems. Representative Ron Hanna, the chair, had worked in juvenile corrections and was passionate about wanting to change the system. The committee's membership was unusual for the time, in that it was not numerically dominated by legislators representing districts with large correctional institutions. One member, Representative Mary Kay Becker, noted that the group viewed its task differently than did most legislative committees. The clear goal, she noted, was to develop state policy, rather than to review proposals from organizations (Becker 1979, p. 298).

During 1975, the committee visited most of the state's juvenile correctional institutions with two aims: viewing the facilities and hearing from administrators, staff, residents, agencies, and the general public. Everywhere the committee went, meetings were arranged so they could interact with people who spent their days working with juvenile and adult offenders. They focused on a simple, powerful question: How can the state do a better job?

The tour proved invaluable. Committee members gained close-hand knowledge of state facilities and talked with a wide range of people. They developed access to a network of experts outside the state capital,

contacts that proved valuable later in testing reactions to proposed legislation.

The tour also revealed that the views and priorities of organizations they typically relied on concerning juvenile issues were out of tune with those of others in the system. The juvenile court administrators and judges became seen by the committee as strongly vested in the status quo and unwilling to examine the effects of their decisions and practices. As the system was constructed, the state paid for juvenile institutions and group home beds, with local government covering other costs. This gave local government representatives a strong financial incentive to decide that youth offenders needed to be institutionalized or removed from their families. The lack of interest of these groups in altering this arrangement caused the reformers to look elsewhere for political support.

The committee also became aware of the national debate that was challenging the rehabilitative underpinnings of sentencing and corrections. The desirability of individualized decision making was a premise of these systems in the United States for most of the 1900s. In the early 1970s, the U.S. Parole Commission challenged this norm by analyzing the patterns of its decision making, then devising a guidelines matrix based largely on past practice (Gottfredson, Wilkins, and Hoffman 1978). This approach did not require agreement ahead of time on sentencing purposes or appropriate penalties. The analysis was descriptive, based on examining past decisions and describing the patterns. From that point, decision makers thinking about sentencing and parole had the option to mirror historical practices or to set new policy directions.

Influential individuals in Washington were reading about the U.S. Parole Commission and studying the works of Marvin Frankel (1972), Norval Morris (1974), and Kenneth Culp Davis (1969), among others. By 1975, the King County prosecutor, Christopher T. Bayley, was advocating a radical departure from the individual treatment model for sentencing. Bayley argued for a fundamental change based on the following philosophy. First, punishment—expressed as a loss of liberty—should follow conviction for every serious crime. Second, the amount of punishment should be determined by the seriousness of the crime the defendant committed. Third, other factors, such as the defendant's need for treatment, his or her attitude, or predictions of future dangerousness, are irrelevant. Fourth, variations must be permitted in individual cases, for it is impossible to foresee every future possibility, but

these exceptions must be principled and supported by written reasons (Bayley 1976*a*).

A 1975 Governor's Task Force proposal brought this debate to public attention. The task force's proposal pushed the rehabilitative ideal to its outer limits. It proposed abolishing all distinctions in punishment between crimes, thus severing the proportionality link between crime and punishment. All felonies, regardless of severity, were to be punishable by an indeterminate sentence of not more than five years. A category of "dangerous offenders," subject to an indeterminate life sentence, was to be reserved for the most serious offenders (Governor's Task Force on Decision Making Models in Corrections 1975). The proposal's proponents were articulate advocates of the "rehabilitative ideal" and sought to extend it to its logical conclusion (Allen 1981).

The political response to the proposal was quick and sharp, with prosecutor Bayley leading the charge in the press. The controversy soon evolved into a major public debate on sentencing and its purposes. In December 1975, Bayley sponsored a conference on this topic that included addresses by such national figures as Norval Morris and Robert Martinson. A subsequent *University of Washington Law Review* issue featured articles from a variety of perspectives (Symposium 1976).

The political stakes were revealed in the next election. Two superior court judges in King County, both vocal supporters of the rehabilitative ideal, were defeated in their bids for reelection. Both were well-respected jurists. Incumbent judges were rarely challenged during this period and even more rarely unseated. The election upset was remarkable.

B. The Juvenile System

Starting in the 1970s, pressures to alter the state's juvenile system began to mount from numerous sources, including U.S. Supreme Court decisions, population increases in state juvenile institutions, and concerns about upward trends in juvenile crime rates. Several U.S. Supreme Court decisions had mandated due process and procedural safeguards for juveniles (Feld 1998). In addition, financial incentives from the federal government encouraged states to remove status offenders from juvenile court jurisdiction (Becker 1979, p. 292).

Between 1969 and 1975, the Washington legislature had repeatedly considered comprehensive juvenile justice reform proposals, and although most passed at least one house, all died before passage. The

proposals were drafted by a variety of groups, including the Judicial Council, Northwest Washington Legal Services, and superior court judges. The failure of the proposals was caused by the serious polarization of interests: one group's remedy was antithetical to others (Becker 1979, p. 295). A recent increase in commitments to state juvenile institutions added to concerns about the juvenile system, particularly in terms of state budget implications.

By 1976, Representative Hanna's subcommittee reached consensus on changes to the juvenile system. They chose to tackle the juvenile laws first because the sense of political and practical urgency was far greater, thus offering more political opportunity. The subcommittee came to four key conclusions. Expenses for juvenile treatment had increased continuously without a significant increase in the rate of effectiveness. Rather than emphasize treatment, the system should emphasize work as a productive, therapeutic endeavor. Crisis intervention programs for families were the key to keeping children out of the court and institutional system. For the juvenile courts, a pilot project should experiment with the determinate sentencing model proposed by Marvin Wolfgang, in which the "strictness of the sentence would be related to the severity and frequency of the child's criminal behavior" (Substitute House Resolution 46, 44th Legislature, 2d Extraordinary Sess. 1 [1976]).

Committee leaders pressed forward. More "accountability," both by offenders and by the system, emerged as a powerful rallying point. In June 1976, a legislative subcommittee reviewed a document prepared by a nonpartisan staff member that defined three major deficiencies of the existing juvenile system. First, the system was not accountable to citizens. No way had been found to measure its performance. Its ends were unclear, the means inconsistent. Second, the system did not hold youthful offenders accountable. Violent offenders often had their cases handled informally, while misdemeanants and nonviolent offenders went to court. Third, the system was unable to help offenders. The conflict between the punishment and rehabilitation roles of probation workers and institutional officers undermined their ability to help, and juvenile crime had been increasing, undermining the system's effectiveness (Naon 1976, p. 41).

Other aspects of the juvenile code were controversial, particularly concerning responses to truants, runaways, and youth in conflict with their families. Finding political consensus on these issues was an exceptional challenge. When a crime is committed, the state's role is clear:

to restore balance to the social contract. When a juvenile runs to the streets and refuses to return home, the state's role is more ambiguous. Should the state arrest and confine the youth in a detention facility or an institution? Does the answer change if the youth left home because of physical or sexual abuse by a parent? As the elements for reform of the offender side of the law took shape, the political consensus for status offenders was more elusive (Lieb and Brown 1999, p. 274).

1. *Bipartisan Coalition Supports Reform.* By January 1977, a bill to reform the offender side of the juvenile code was introduced, and a broad coalition of supporters testified. A bipartisan coalition spanned the political spectrum, including the American Civil Liberties Union, Legal Services, the defense bar, prosecutors, crime victims, and law enforcement. The King County Prosecutor's Office sent two attorneys to the state capitol to keep the bill alive and help resolve disagreements. A separate bill regarding status offenders was introduced in the Senate; eventually, both bills were combined (House Bill 371, 45th Leg., Extraordinary Sess., 1977). This consolidation increased the political momentum and support base and allowed the leaders to break the previous political logjams.

The "missing links" in the reform coalition were juvenile court administrators and probation staff, some of whom actively lobbied in opposition. Because these groups had become identified as "defenders of the status quo," their resistance was viewed as predictable. Judges did not actively support or oppose the law; a later survey revealed that at the time, many believed the legislation had little chance of passing (Steiger and Doyan 1979).

Because many sections of the bill were drafted quickly, and the system changes were enormous, a clause that delayed implementation for one year helped to garner votes. The plan was to spend the next session perfecting the legislation. For reasons unrelated to the juvenile law, the governor surprised the state in 1978 by not calling a legislative session, something that had rarely occurred in recent history. Thus, the legislation went into effect in 1978 with some internal contradictions (House Bill 371, 45th Leg., 1st Extraordinary Sess. [1977] Codified at Wash. Rev. Code, title 13).

2. *Juvenile Guidelines.* The legislation radically altered the juvenile justice system. Decision making was formalized, with discretion shifted from probation staff to the prosecutor. Previously, probation counselors decided which cases to keep out of court and which to refer to prosecutors; it was a decision-making process described as based often

on "extra-legal factors and idiosyncratic choice" (Schneider and Schram 1983, p. 24). Due process rights and other procedural guarantees were provided to juveniles. Juvenile courts could no longer shift the costs of delinquent youth to the state by committing them to state care and instead the courts were given incentives to use less onerous local sanctions.

The law established standards for a sentencing system based on age, offense, and prior history. Courts were given discretion to depart from the guidelines, if necessary, to impose a just sentence. This provision, labeled a "manifest injustice sentence," could be used to increase or reduce the amount of punishment; written reasons were necessary and the sentence could be appealed.

The 1977 act created a new commission to review and evaluate the sentencing and dispositional aspects of the law. The Washington State Juvenile Disposition Standards Commission was directed to report to the legislature every two years regarding changes to the sentencing grid. The body was given substantial authority—its recommendations went into effect unless modified by the legislature. Although the commission's responsibilities paralleled those of the typical adult sentencing commission, its structure and operations were far less independent. The ten-member panel was chaired by the division director of juvenile institutions.

Implementation moved to the state agency responsible for juvenile institutions, the Department of Social and Health Services. The agency assigned Warren Netherland, an institutional warden, to oversee the task. Netherland was a strong believer in the just deserts philosophy and a strategic thinker. Working with a broad coalition, he solicited the views and suggestions of groups with a stake in the reform. When it came time to draft the guidelines, Netherland worked with a hand-picked group and exercised control over all decisions. The sentencing standards took effect July 1, 1979.

The standards commission early on set operating procedures that required consensus decisions before statutory changes were recommended. Since the membership included prosecutors and the defense bar, it was difficult to reach agreement on major changes in sentencing. During the first decade of the group's operation, revisions to the guidelines were primarily technical in nature. Its recommendations were not controversial and were either adopted as proposed or allowed to take effect without modification (Steiger 1998, p. 343). By the second decade, however, juvenile crime again became a topic of political

debate, and key legislators grew frustrated with the body's inaction. Eventually, the juvenile standards commission was eliminated and its functions were transferred in 1996 to the adult sentencing commission.

The political climate that influenced changes in the state's juvenile system was equally focused on adult sentencing. Here, though, the reform process was slower.

C. Voluntary Parole Guidelines Falter

The experiences of the U.S. Parole Commission in developing guidelines influenced Washington's Board of Prison Terms and Paroles. Beginning in 1974, members began discussing matrix guidelines as a possible remedy for perceived disparities. At that time, the board had jurisdiction over more than 12,000 individuals, including approximately 4,000 in the prison system (Petersen and Gearhart 1979).

In 1975, the board agreed to "establish explicit policy and rationale for Board decision-making" (Patrick and Petersen 1979, p. 3). According to a board document, this decision was "undoubtedly activated, if not induced, by the introduction of determinate sentencing legislation in the 1975 legislative session" (Patrick and Petersen 1979, p. 3). Several advantages were envisioned. With explicit criteria, rationales for decisions would be clearer and more understandable to offenders and the public. Disparities in decision making would be reduced. Board practices could be evaluated by comparison with explicit policy (Patrick and Petersen 1979, p. 3).

The board sought and received a three-year grant in 1976 from the Law Enforcement Assistance Administration of the U.S. Department of Justice to develop and implement guidelines. In July 1976, the board adopted a matrix model to fix minimum terms of confinement that divided crimes into thirteen categories. For each offense category, low, medium, and high ranges were set according to the perceived likelihood of parole success.

In fall 1977, researchers concluded that board members were generally ignoring the guidelines (Patrick and Petersen 1979, p. 11). By the following spring, three new members joined the board, including a new chairman. The guidelines fell into disuse. The effort revived in 1978 with a new set of guidelines based on a consensus process in which board members assigned weights to hypothetical cases. This version, however, did not influence decision making to a great extent; overall, the board stayed inside these guidelines only about 63 percent of the time (Patrick and Petersen 1979, p. 17). A similar compliance

rate could have been achieved by setting one guideline sentence of thirty-six months. In practice, thirty-six months was the minimum term sentence selected by board members for about 60 percent of offenders (Barnoski 2000).

In January 1979, the board revised the guidelines to reduce the number of crime categories from thirteen to eight and adopted guidelines for parole violations. In June 1979, compliance in minimum term setting was again found to be modest: terms were set within the guidelines in less than two-thirds of cases. The researchers concluded that even though the board as a collective body was committed to the guidelines, the individual practices of members suggested that "the degree of its collective commitment lacks the intensity necessary to realize one of the primary objectives of the guidelines: reduction of disparity in minimum terms set for similar offenses" (Patrick and Petersen 1979, p. 44). Only one of the 163 departures from the guidelines was accompanied by a written justification, even though board policy required justification in each departure. The report concluded that board members, "individually and collectively, *must* decide whether they can and will *totally* support the guideline policy. If the entire membership of the Board agrees to support *and* conduct their decision-making responsibilities under the tenets of the guideline policy, they must be prepared to exercise peer pressure in the prevention of penal philosophy that is in conflict with the collective philosophy" (Patrick and Petersen 1979, p. 44).

The controversy within the board about the guidelines, and the modest levels of compliance, suggested that voluntary guidelines were an unlikely means to control this body's discretion.

D. Voluntary Sentencing and Prosecution Guidelines

Also responding to the public debate, the Superior Court Judges Association adopted judicial guidelines in 1978. Like the parole board's initial effort, the judicial guidelines were designed to reflect past practice. The guidelines covered the jail versus prison decision (sentences under a year in Washington are served in jail; others are prison sentences), and maximum sentence length. The guidelines were voluntary; no statute or court rule required compliance or even consideration by individual judges. A 1981 study found that judges used the guidelines in 70 percent of cases, and of those, 66 percent were within the guidelines (State of Washington Superior Court Judges Association and Office of the Administrator for the Courts 1981).

The state's prosecuting attorneys also adopted guidelines. King County developed office policies for filing and disposition decisions in the early 1970s (Bayley 1976*b*, 1978). Several other counties followed, and in 1980, uniform (but voluntary) charging and disposition policies were adopted by the Washington Association of Prosecuting Attorneys (1980).

In some states, similar voluntary restrictions on discretion averted legislative action (e.g., in Maryland and, for a time, Florida; Carrow 1984). It is ironic that Washington's experience with voluntary guidelines adopted by the parole board, the judiciary, and prosecutors taught two lessons: guidelines were a legitimate means to control discretion, and voluntary guidelines were not likely to reduce disparity because compliance will be modest.

E. Adult Sentencing Reform

The leaders in the House of Representatives who championed juvenile sentencing reform applied the same principles to reform of adult sentencing. Legislation drafted in the King County Prosecutor's Office, first introduced in 1977 and based on just deserts principles, passed the House of Representatives but died in the Senate. The same thing happened in 1979.

Reform pressures did not abate, however, and in 1980, a bipartisan select committee on corrections was appointed by the House of Representatives to concentrate on adult sentencing. This committee, led by Representatives Mary Kay Becker and Gene Struthers, spent months conducting hearings across the state and debating alternatives. Representative Becker had been a leader in the juvenile reform legislation. Norm Maleng, who had replaced Christopher Bayley as King County Prosecuting Attorney, became a strong advocate for reform. Maleng's chief of staff, Robert Lasnik, became the principal lobbyist for the proposal.

The committee considered the experiences of other states with sentencing reforms and studied the reform arguments and proposals. Ultimately, the committee drafted legislation that drew on national reform proposals, but selectively. The legislation reflected a consensus of otherwise disparate interests and groups. (Representative Becker jokingly described the unlikely consensus between herself, a liberal Democrat, and Representative Struthers, a conservative Republican, as akin to "Jane Fonda and John Wayne co-authoring a book on the history of the Vietnam War" [*Seattle Post-Intelligencer* 1984, p. 4A].) The coali-

tion of disparate political groups supporting the reform mirrored the state's experiences with juvenile sentencing reform and presaged the consensus that would later be reached in other states and the federal government in adopting sentencing guidelines (Stith and Koh 1993).

Following House passage, the proposed reform legislation moved to the Senate, where it had stalled each session since 1977. No hearing was expected, as the judiciary committee chair was on record as opposing determinate sentencing. Serendipitously, control of the Senate shifted when a Democratic senator switched party affiliation a third of the way through the session. The new Republican chair of the judiciary committee supported sentencing reform, and thus the reform package developed by the House select committee moved quickly, was approved by the Senate, and was passed into law in 1981. Implementation was delayed until 1984; a newly created sentencing guidelines commission was directed to develop the sentencing grid and related policies.

Although the final vote on the Sentencing Reform Act of 1981 was virtually unanimous, this result masked opposition by two key groups—judges and corrections officials. As with the juvenile reform, these opponents played significant roles in the system and had the potential to block legislative action. Judges resented the reform's restrictions on their discretion, but they were a disorganized political force.

The governor, John Spellman, was not a strong proponent, but he had not played a major role on criminal justice issues and chose not to involve himself in the deliberations. Coincidentally, his legal counsel, as a King County deputy prosecutor, had played an instrumental role in the juvenile reform. The secretary of corrections, Amos Reed, did not take a public stand. Later, on April 22, 1983, when the bill-signing ceremony occurred, the governor commented to the secretary, "Well, Amos, we didn't think this bill would ever pass, did we?"

F. The 1981 Reform Bill

The legislature's central role in sentencing reform distinguished, and continues to distinguish, Washington from many other states that enacted commission-centered reforms. Unlike Minnesota's commission, described as having "primary control over the setting of statewide sentencing policy" (Frase 1993, p. 337), the Washington commission's role was advisory from the beginning. Washington's legislature never delegated its power over sentencing. When it revoked its long-standing delegation of sentencing policy to judges and the parole board, the

legislature did not redelegate this authority to a commission. The commission was to serve a valuable role by crafting details and providing policy advice, but the legislature intended to control sentencing policy.

When the Washington commission started work, the legislature had already resolved many sentencing policy issues. Their scope and detail were influenced by two factors. First, reformers had worked on the measure for seven years, negotiating and crafting resolutions to concerns from organizations and legislators. Second, the state already had experience with juvenile guidelines and there were aspects of that law that reformers either wanted to duplicate or to avoid in the adult system. To a smaller extent, Minnesota's experiences with sentencing guidelines were known and offered policy makers a chance either to mirror that state's law or to take different approaches.

The legislative framework included the following elements:

Just Deserts Emphasis. The multiple—and often inconsistent—purposes of sentencing were integrated into principled coexistence, with just deserts the primary but not exclusive purpose.

Truth and Certainty. All sentences were to be determinate; that is, both length and conditions were to be known "with exactitude" (Wash. Rev. Code, title 9, chap. 94A, sec. 030[16] [2001]) at the time imposed, with the sole exception of provisions allowing up to a one-third reduction in sentence for good behavior in jail or prison. The power of courts to suspend or defer sentences was abolished, as were parole release and supervision.

Structuring but Not Eliminating Discretion. Sentencing ranges of prescribed—and relatively narrow—width were to be based solely on the crime of conviction and the offender's criminal history (Wash. Rev. Code, title 9, chap. 94A, sec. 40 [2001]). The sentencing ranges were presumptive, not mandatory; judges could depart from the range with written justification, subject to substantive appellate review (Wash. Rev. Code, title 9, chap. 94A, sec. 120[3] [2001]). The commission was to develop the nation's first statewide prosecutorial guidelines covering charging decisions and plea agreements.

Rehabilitation Given a Limited Focus. Sentences intended to rehabilitate offenders were restricted to a defined class of first-time, nonviolent offenders (Wash. Rev. Code, title 9, chap. 94A, sec. 120[5] [2001]). This group was seen as composed of excellent candidates for treatment-oriented sanctions. For all other sentences, sentence conditions were restricted to "crime-related prohibitions," not the performance

of affirmative conduct (Wash. Rev. Code, title 9, chap. 94A, sec. 030 [2001]). Crime-related prohibitions were intended to relate specifically to the offense of conviction, for example, for a sex offender, a prohibition against unsupervised contact with minors.

Shift in Priorities. In setting the ranges, the commission was to "emphasize confinement for the violent offender and alternatives to total confinement for the non-violent offender" (Wash. Rev. Code, title 9, chap. 94A, sec. 040[5] [2001]).

Setting the Price Tag. The commission was directed to estimate the impact of the guidelines on prison and jail populations, but current capacity need not dictate sentencing policy.

Legislative Control. The legislature retained its authority over sentencing, with the guidelines commission serving in an advisory capacity.

The commission's task was to develop guidelines that would implement these policy decisions. The legislation called for a fifteen-member body of criminal justice professionals, state agency leaders, and citizens; four legislators served as nonvoting members.

The governor's decisions on commission appointments were greatly influenced by his legal counsel, Marilyn Showalter. Showalter understood the need to appoint members who could tackle the substantive and political challenges ahead. The designated chair, Donna Schram, was a citizen with extensive experience in criminal justice research, including a major evaluation of the state's juvenile justice reform (Schneider et al. 1981). Norm Maleng was appointed as one of the prosecutor's representatives and was later elected by the group as its first vice chair. The judicial, prosecutorial, and defense bar representatives were highly respected by their peers. The commission set to work late in 1981.

II. The Commission's Era, 1981–86

Washington's commission began its work where every sentencing commission begins—by concentrating on the criminal code, crime definitions, and dissecting the degrees of harm represented by various crimes. For several months, commission members worked in subcommittees in which they had ample opportunities to engage in understanding the legislation and each other's experiences and views.

The chair was careful to incorporate extensive discussions into the meetings and for several months took very few votes. She understood that for the commission to succeed, members had eventually to set

aside their "representative" statuses and instead to view themselves as part of a body with greater responsibility to the state.

The staff organized research to document past sentencing practices. While the reform was to be prescriptive, not merely descriptive, past practices were seen as an essential baseline. For offenders sent to prison, parole board and Washington State Department of Corrections' records were used. For persons sentenced at the local level (under a year), records were scattered across the state in county jails and probation officers' files.

The commission eventually ranked felonies into fourteen seriousness levels and devised a scoring system for criminal history that assigned variable weights based on the number of convictions, their seriousness, the similarity of the prior conviction to the current offense, and the length of time between convictions. Ranges were set using the "typical" crime as the standard; the King County Prosecutor's staff assisted the commission by providing examples of each. Individual circumstances that fell outside the normal range of conduct were to be addressed by exceptional sentences. The commission's proposed sentencing grid was a matrix with 140 cells (see fig. 1).

Commission members became forceful proponents of the just deserts philosophy; some started with this conviction, and others, particularly the judges, became convinced over time. The legislature's direction was clear—the guidelines were to "apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant" (Wash. Rev. Code, title 9, chap. 94A, sec. 340 [2001]). This principle significantly influenced the commission's deliberations and was repeatedly invoked during discussions.

Judicial discretion within the applicable sentence range was unrestricted; judges could impose any sentence within the range for any reason they deemed appropriate, and appellate review was prohibited (Wash. Rev. Code, title 9, chap. 94A, sec. 370 [2001]). For less serious felonies, the range was modest—for serious offenses, it was substantial. Similarly, decisions to use the first-time offender waiver were immune from judicial review. Since the legislature had selected a presumptive sentencing system, the commission needed to set direction on how cases outside the norm were to be recognized and determine the degrees of freedom allowed in setting terms outside the range.

The original legislation defined "exceptional sentences" as warranted when the "imposition of a sentence within the standard range

SERIOUSNESS LEVEL	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XV	Life Sentence without Parole/Death Penalty									
XIV	23y 4m 240 - 320	24y 4m 250 - 333	25y 4m 261 - 347	26y 4m 271 - 361	27y 4m 281 - 374	28y 4m 291 - 388	30y 4m 312 - 416	32y 10m 338 - 450	36y 370 - 493	40y 411 - 548
XIII	14y 4m 123 - 220	15y 4m 134 - 234	16y 2m 144 - 244	17y 154 - 254	17y 11m 165 - 265	18y 9m 175 - 275	20y 5m 195 - 295	22y 2m 216 - 316	25y 7m 257 - 357	29y 298 - 397
XII	9y 93 - 123	9y 11m 102 - 136	10y 9m 111 - 147	11y 8m 120 - 160	12y 6m 129 - 171	13y 5m 138 - 184	15y 9m 162 - 216	17y 3m 178 - 236	20y 3m 209 - 277	23y 3m 240 - 318
XI	7y 6m 78 - 102	8y 4m 86 - 114	9y 2m 95 - 125	9y 11m 102 - 136	10y 9m 111 - 147	11y 7m 120 - 158	14y 2m 146 - 194	15y 5m 159 - 211	17y 11m 185 - 245	20y 5m 210 - 280
X	5y 51 - 68	5y 6m 57 - 75	6y 62 - 82	6y 6m 67 - 89	7y 72 - 96	7y 6m 77 - 102	9y 6m 98 - 130	10y 6m 108 - 144	12y 6m 129 - 171	14y 6m 149 - 198
IX	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	5y 51 - 68	5y 6m 57 - 75	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144	12y 6m 129 - 171
VIII	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144
VII	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116
VI	13m 12+ - 14	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 6m 46 - 61	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102
V	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 41 - 54	5y 51 - 68	6y 62 - 82	7y 72 - 96
IV	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 2m 53 - 70	6y 2m 63 - 84
III	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 51 - 68
II	0 - 90 Days	4m 2 - 6	6m 3 - 9	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57
I	0 - 60 Days	0 - 90 Days	3m 2 - 5	4m 2 - 6	5m 3 - 8	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29

FIG. 1.—Sentencing grid for crimes committed after July 26, 1997, and before July 25, 1999

would impose an excessive punishment on the defendant or would pose an unacceptable threat to community safety" (Laws of 1981, chap. 137, sec. 2[2]). As the commission worked to implement the reform, members studied Minnesota's experience and were impressed with that state's emerging case law interpreting its exceptional sentence provision. The commission decided that Minnesota's appellate decisions would reinforce Washington's reform and assist in creating a "common law of sentencing," one of the stated legislative intents. The commission thus recommended that the legislature replace the original language with Minnesota's provision requiring "substantial and compelling" reasons to justify a departure from the applicable guidelines (Wash. Rev. Code, title 9, chap. 94A, sec. 120[2] [2001]). The legislature concurred in 1983, and the early appellate decisions reviewing exceptional sentences in Washington frequently referred to Minnesota decisions.

The commission chose to guide judicial discretion by creating a set of aggravating and mitigating factors that would justify an exceptional sentence. While careful to state that these factors were "illustrative only and are not intended to be exclusive reasons for exceptional sentences" (Wash. Rev. Code, title 9, chap. 94A, sec. 390 [2001]), the commission reinforced the legislative emphasis on just deserts by selecting only factors relating to the crime. Offender characteristics unrelated to the crime were noticeably absent (Boerner 1985, pp. 2–33).

Washington's commission struggled with whether the guidelines should be based on the statutory definition of the crime or instead should more sensitively measure criminal conduct, varying by elements of the crime or other defined variables (degree of harm to victim, etc.). The eventual decision that sentences were to be based solely on the crime of conviction was reinforced by language that "real facts which establish elements of a higher crime, a more serious crime, or additional crimes cannot be used to go outside the guidelines except upon stipulation" (Wash. Rev. Code, title 9, chap. 94A, sec. 370[2] [2001]). The commission intended to eliminate the former practice of basing sentences on conduct the offender was believed to have done, regardless of whether it was proven or admitted. The commission believed this policy would reinforce the goal that prosecutors charge and accept plea agreements that accurately reflected the crime or crimes that were committed. Crimes that prosecutors either could not or chose not to pursue could not justify an exceptional sentence.

A. Prosecutorial Discretion

The 1981 legislation recognized that sentencing guidelines increased the relative power of prosecutors by increasing the importance of the crime of conviction in determining the ultimate sentence. The legislature thus directed the commission to "devise recommended prosecuting standards in respect to charging of offenses and plea agreements" (Wash. Rev. Code, title 9, chap. 94A, sec. 040[2][c] [2001]). To accomplish this, the commission reviewed earlier efforts of the California District Attorney's Association (1974), the National District Attorney's Association (1977), and the U.S. Justice Department under Attorney General Edward H. Levi (Levi 1978) and Benjamin R. Civiletti (1980), as well as guidelines adopted by the King County (Seattle) Prosecuting Attorney's Office (1980) and the Washington Association of Prosecuting Attorneys (1980).

The commission developed guidelines for charging decisions and plea agreements. When enacted in 1984 they became the most comprehensive set of prosecutorial guidelines ever adopted in the United States (Wash. Rev. Code, title 9, chap. 94A, sec. 430–60 [2001]; Boerner 1985, p. 12-1). Crimes against persons and those against property were distinguished with regard to the necessary evidentiary strength for prosecution, with person crimes set at a lower threshold. A series of nonevidentiary reasons were listed that could support a decision not to prosecute. For the key decisions regarding the number and nature of charges, the direction was that only "charges which adequately describe the nature of the defendant's conduct" were to be filed, and prosecutors should "decline to file charges that are not necessary to such an indication" (Wash. Rev. Code, title 9, chap. 94A, sec. 440 [2001]). Prosecutors were directed not to "overcharge" to obtain a guilty plea; defendants were normally expected to plead guilty to the charge or charges which "adequately describe the nature of his or her conduct" (Wash. Rev. Code, title 9, chap. 94A, sec. 440 [2001]) or go to trial unless one of eight specified situations was present to justify concessions in return for a guilty plea.

The legislation included an enforcement mechanism. When plea agreements were reached, the "nature of the agreement and the reasons" were to be disclosed to the court, and the court "shall determine if the agreement is consistent with the interests of justice and the prosecuting standards" (Wash. Rev. Code, title 9, chap. 94A, sec. 090 [2001]). Once the guidelines were approved by the commission, the

key policy decision was whether they were advisory or mandatory. Here, the commission adopted language based on Attorney General Levi's memorandum on federal prosecution standards (Levi 1978; Boerner 1985, p. 12-8): "These standards are intended solely for the guidance of prosecutors in the state of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state" (Wash. Rev. Code, title 9, chap. 94A, sec. 430 [2001]).

This provision made the prosecutorial guidelines voluntary. Ultimately, they were to join previous voluntary efforts by the state's parole board and judiciary as ineffective efforts to constrain discretion.

B. Retroactivity and Intermediate Sanctions

Guided by what it saw as the difficulty of applying the new guidelines to sentences imposed under the former indeterminate system, the 1981 legislature anticipated prospective application of the guidelines (applied to persons committing crimes on or after July 1, 1984). The parole board was directed to use the guidelines as a benchmark, thus anticipating that the board would operate for some period. Some drafters of the reform anticipated that the board's responsibilities would eventually be taken over by a newly created body, the Clemency and Pardons Board (Lasnik 1981, p. 7).

When the commission considered the paths taken by California and Minnesota in converting from indeterminate to determinate sentences, the two systems' differential premiums on accurate charges was of great concern. Since the conversion could apply constitutionally only when it benefited offenders, sentences would be reduced, in many cases, quite significantly. This choice had few political supporters.

The commission chose to recommend that the 1981 legislative direction to the parole board be supplemented with additional language. The original language directed the board to "consider the purposes, standards and sentencing ranges" of the Sentencing Reform Act and attempt to make decisions that were "reasonably consistent" (Wash. Rev. Code, title 9, chap. 95, sec. 009[2] [2001]). New language was added that the board should also "consider the different charging and disposition practices under the indeterminate sentencing system" and justify sentences outside the range with written reasons (Wash. Rev. Code, title 9, chap. 95, sec. 009[2] [2001]). Washington's transition between systems continues to this day, with a part-time, three-member board remaining to review the terms and releases of approximately

1,000 inmates still in 1999 subject to sentences for pre-July 1, 1984 crimes (Marsh 1999). Other solutions have been considered, but concerns about sentence reductions and implementation burdens have trumped other options. (See Office of Financial Management 1997 and Indeterminate Sentence Review Board 1989.)

The commission spent many hours discussing the legislature's directive that alternatives to total confinement be emphasized for nonviolent crimes. Ultimately, a conversion method was selected: all sentences under one year could be converted to partial confinement (confinement "for a substantial portion of each day with the balance spent in the community"), and up to thirty days of total confinement could be converted to community service at a rate of one day to eight hours (Wash. Rev. Code, title 9, chap. 94A, sec. 380 [2001]). The commission considered day fines but could not reach consensus on this recommendation. Bringing the conversion alternatives to the court's attention, the commission recommended that courts be required to indicate in the sentencing why alternative sanctions were not ordered. This was proposed as a way to learn how the courts viewed alternative sanctions in individual cases and if availability of alternatives in individual counties influenced judges' decisions. (Unfortunately, this requirement is viewed by practitioners and judges as unnecessary and has never been effective in influencing discretion.) These modest alternatives were to be all that were developed. The currency of punishment in Washington was to be confinement, and that judgment was not to change.

C. Population Forecast Shows Sufficient Capacity

By late fall 1983, the commission had a proposed set of guidelines, and its research database was complete, thus allowing the first projections of population impact. Commission members held their breath. The research director announced that the proposed guidelines were reconcilable in projected operation with prison capacity and would, by 1996, decrease the prison population by more than 40 percent to 4,076 (Lange 1982). For jails, the guidelines overall could be implemented within the allocated capacity for felons as long as alternatives to confinement were created (Sentencing Guidelines Commission 1983, p. 42).

For some, the projections seemed too good to be true. Washington had seen prison forecasts in the past "fine tuned" to support various political positions. The governor was the first to challenge the com-

mission's work, telling the news media the forecast represented "blue sky figures" (*Tacoma News Tribune* 1983). The executive branch was worried that the legislature might cancel funding for a planned 500-bed prison. Corrections officials suggested that guidelines would, in fact, increase prison crowding and require even more prison beds than were needed under indeterminate sentencing (*Spokane Chronicle* 1983). The corrections secretary declared that "there's nothing scientific" about the forecast (Lange 1982).

From the other side, a citizen's group argued that the state should immediately cancel its plans for a new 500-bed prison. The commission advanced a more moderate option: continue with the planned new prison, but shelve additional prison construction plans. Here, the commission members' individual credibility was critical, in particular Norm Maleng's. Maleng was known as a prosecutor who would not compromise public safety—in this case, represented by adequate prison space. For Olympia insiders, the reputation of the research director, David Fallen, increased confidence in the prison space projections. Fallen was known to be an exceptional researcher who would never bend science for politics.

In the late fall of 1983, the commission reviewed the draft guidelines and, with the prison forecast showing some room for increases in sentence severity, adjusted some penalties upward. The range for second-degree burglary was increased, as the commission members knew that this felony affected more citizens than any other crime and was not experienced merely as a loss of property but as a personal threat.

The commission appeared before the 1983 legislature with a set of recommendations that could be implemented within existing resources and had been adopted unanimously. Commission leaders came to Olympia on numerous occasions, testifying before committees and meeting informally with the party caucuses. Panels of commission members met with editorial boards throughout the state. Norm Maleng played an active role in legislative negotiations. At a late point in the session, the proposed policy for multiple serious offenses came under scrutiny. Robert Lasnik understood that dissatisfaction with the guidelines on these serious cases could threaten the reform's political viability. He proposed consecutive sentencing for offenders with three or more serious violent offenses, and this amendment was accepted by commission representatives and the bill's sponsors. In April 1983, when the commission's guideline bill was passed, Washington joined the small but growing list of sentencing guidelines states.

D. Implementation

Commission leaders understood that implementation was their next challenge. Major system changes are especially vulnerable to political challenge during their early stages, when the cost of returning to the "old ways" is relatively modest. The commission's first task was to organize the law's complexities into a user-friendly publication. The commission created an implementation manual with individualized sentencing sheets for every major felony. By consulting one sheet, practitioners could identify the applicable scoring rules for criminal history, the sentencing range, and the available sentencing options for each case. This approach resolved concerns about the system's complexities.

Following the advice of staff and members of Minnesota's commission, the commission initiated a proactive media relations campaign (Parent 1988, pp. 136–46). Members met with reporters and editorial boards throughout the state to explain the act, its rationale, and the care with which it had been implemented.

Judicial opposition remained but was significantly moderated by the leadership of the four judges on the commission, all of whom were highly regarded by their peers. While initially skeptical about the wisdom of the Sentencing Reform Act, these judges worked hard to implement the legislature's intent; their support was a significant factor in the act's successful implementation.

Opposition among correctional officials, both state leaders and line staff, remained deep-seated. The reform's proponents believed that shifting from coerced to voluntary rehabilitation was an opportunity to refocus from surveillance to service delivery. The legislature did not increase funding for this purpose, however, and corrections officials did not redirect the state's organizational focus. When commission staff or members spoke to correctional groups and referred to the legislative intent that parolees receive voluntary services, the audiences broke into laughter. The law's emphasis on rehabilitation for first-time, nonviolent offenders was never enthusiastically implemented by the corrections department. Because many offenders in this group were considered at low risk to reoffend, services to this population appeared to many officers as superfluous. Instead, staff concentrated on enforcement of court orders.

In 1984, the department of corrections convinced the legislature that the reform's original provision that all prisoners exit prison through work release was unrealistic. Given that some offenders were poor

public safety risks, work release instead became optional (Wash. Rev. Code, title 9, chap. 94A, sec. 150[5] [2001]). In later years, the department repeatedly returned to the legislature, seeking "reform" of the Sentencing Reform Act.

The commission encountered significant challenges in setting sentences for sex crimes, and it concentrated on this issue during the year between legislative adoption of the guidelines in 1983 and the next legislative session. Victim advocates argued that presumptive prison sentences for intrafamily crimes would be viewed as too harsh by the family and would discourage prosecution, and thus they favored an option combining supervision and outpatient treatment. Treatment providers pointed to the compulsive nature of these crimes and argued that without treatment, sex offenders would likely continue to reoffend after release (Lieb and Matson 1997, p. 85).

The commission's resolution exemplified the pragmatism that has characterized sentencing reform in Washington. Working with victim advocates and offender treatment providers, the commission crafted a sentencing option that permitted treatment for sex offenders without prior sex convictions (except those convicted of forcible rape). This "special sexual offender sentencing alternative" included a suspended prison sentence, the only instance in which this centerpiece of the former indeterminate system was authorized (Wash. Rev. Code, title 9, chap. 94A, sec. 120[8] [2001]). This sentencing option, along with more detailed sentencing guidelines for drug offenses, was adopted by the 1984 legislature. Thus, as with the first-time offender provisions in the original act, when state policy makers saw the need, Washington's reform employed the indeterminate system's mechanisms of coerced rehabilitation.

On the eve of implementation, Washington's guidelines received significant statewide and national attention. A columnist in the *Washington Post* noted that "those of us who have been calling for the reform and rationalization of criminal sentencing should just shut up for a while and watch Washington State. Virtually everything the reformers have been demanding is in the new law" (Raspberry 1984).

E. Prison Population

While implementation of the law went smoothly, the consequences for the prison population was dramatic. By 1985, the percent of violent offenders receiving state prison sentences had increased to 65 percent from the 1982 rate of 49 percent, while nonviolent offenders sent to

prison declined from 13 percent to 9 percent (Fallen 1986, p. ix). Since 86 percent of all convictions were for nonviolent offenses, this shift reduced the state's overall imprisonment rate from 20 percent in 1982 to 17 percent in 1988 and significantly reduced prison commitments (Fallen 1986, p. 5).

At the same time, parole board releases of prisoners accelerated owing to court rulings in 1986. Prisoners successfully argued that the board was ignoring the legislative mandate that they consider sentencing guidelines in setting release dates, and the court's rulings required the board to reconsider its previous decisions (*In re Myers*, 105 Wn. 2d 257 [Wash. 1986] and *Addleman v. Board of Prison Terms and Paroles*, 107 Wn. 2d 503 [Wash. 1986]). By 1986, the Office of Financial Management estimated that the act had reduced prison inmates by 1,074 (15 percent of the total population) (Fallen 1986, p. 35). This was remarkably close to the commission's 1983 forecast.

Imprisonment rates began to drop. From 156 per 100,000 population in 1984, the rate decreased to 147 in 1986 and reached a low of 124 in 1988, a decrease of 20 percent during a period in which the national average increased by 30 percent, from 188 per 100,000 in 1984 to 244 in 1988. Washington dropped from twenty-fifth in the nation in imprisonment rates in 1984 to thirty-ninth in 1988 (Bureau of Justice Statistics 1998, p. 491).

Washington had the luxury of excess capacity. From 1987 to 1989, the state ran a "rent-a-cell" program with the federal government and other states; approximately 1,000 beds were rented. In this atmosphere, even though the excess capacity was generally known to be short-term, the legislature began to adopt a different attitude. With empty prison beds, the legislative debate on crime and the need to toughen sentences was not tempered by concerns about prison crowding.

Many local government representatives argued that the state had solved its crowding problem by shifting felons to local jails, whose funding was a local responsibility. The commission's research revealed that 20 percent of statewide jail space was dedicated to felons prior to the reform; the majority of jail beds were occupied by misdemeanants. For the first years after the reform, this distribution pattern for the state as a whole remained constant, although the effects varied for individual jails depending on whether they were above or below the state average in sending nonviolent offenders to prison. This research did not convince most local officials, however, nor were they persuaded when the commission found that jail population increases after the re-

form were primarily influenced by increases in misdemeanor convictions (Bell and Fallen 1990, p. ii). In this political atmosphere, legislative proposals for more severe sentences satisfied two political goals: getting tough on criminals and moving felons from local jails and budgets to state prisons.

F. The Courts Respond

There was a high degree of judicial compliance. In 1985, judges went outside the guidelines in only 3.5 percent of cases. Because the law allowed judicial discretion in the form of sentencing options for first-time and sex offenders, this statistic did not fully describe the exercise of discretion. By combining the decisions involving sentencing options with departure cases, the rate of sentences outside the presumptive range rose to almost 30 percent (Fallen 1986, p. 23). County-to-county variances in sentencing practices were significantly reduced (Fallen 1986, p. 16).

During the legislative debate on the act, critics argued that the state's trial rate would increase dramatically, since defendants no longer had an incentive to plead guilty. This prediction was not realized: the percentage of guilty pleas remained exactly the same in 1985 (90.1 percent) as it had been in 1982. The only changes were a slight decease in jury trials (7.8 percent in 1982, 6.7 percent in 1985) and a slight increase in bench trials (2.1 percent in 1982, 2.8 percent in 1995; Fallen 1986, p. 39; Sentencing Guidelines Commission 1995, p. 18).

G. Charging Practices

With sentencing guidelines, the crime of conviction became far more significant in determining the sentence. Soon after the reform's implementation, conviction patterns shifted (Fallen 1986; see table 1).

For eight of the nine seriousness levels calling for presumptive prison sentences, conviction rates were reduced postreform, supporting the thesis that prosecutors were exercising their discretion to reduce charges. Convictions of offenses with presumptive jail terms, however, reflect a mixed pattern more consistent with the typical variation from year to year. The changes for unranked crime patterns were notable. This category was created for low-frequency crimes whose widely varying nature justified greater judicial discretion. Since unranked crimes have a presumptive sentence range of zero to twelve months, a change of convictions from ranked seriousness levels to this unranked category significantly expanded judicial discretion. Over

TABLE 1

Changes in State Conviction Patterns (in Percent)

Seriousness Level	Fiscal Year 1982	Calendar Year 1985	Difference
Prison sentence:			
XIV	.2	.1	−.1
XIII	.5	.3	−.2
XII	.3	.4	+.1
XI	.1	.2	−.1
X	.9	.5	−.4
IX	5.6	3.5	−2.1
VIII	1.4	.9	−.5
VII	3.4	2.1	−1.3
VI	4.7	5.7	−1.0
Jail sentence:			
V	.8	.9	+.1
IV	10.6	9.5	−1.1
III	8.3	10.7	+2.4
II	34.5	32.2	−2.3
I	28.7	30.6	+1.9
Unranked	0.0	2.5	+2.5
Total	100.0	100.1	

time, this pattern was to become even more pronounced. Prosecutorial discretion was not only unconstrained but arguably increased in comparison to the discretion exercised by other actors in the criminal justice system (Boerner 1997).

H. The Appellate Courts

The first appellate decisions interpreting the reform were awaited with great interest. In its first decision in 1985, an appellate court upheld the act's key principles by reversing an aggravated exceptional sentence that relied on the explanation that an attempted escape had involved "sophisticated and well-planned methods" (*State v. Baker*, 700 P. 2d 1198 [Wash. App. 1985]). Because all attempted escapes involve planning, the court argued, this argument failed to meet the "substantial and compelling test" (*State v. Baker*, 700 P. 2d 1198 [Wash. App. 1985]).

Early decisions also held that factors used in determining the presumptive range (crime and criminal history) could not be used as a justification for an exceptional sentence (*State v. Hartley*, 705 P. 2d 821 [Wash. App. 1985]) and that uncharged conduct could not justify an

exceptional sentence (*State v. Harp*, 717 P. 2d 282 [Wash. App. 1986]). In 1986, the Washington Supreme Court unanimously declared the Sentencing Reform Act constitutional, stating that "the trial court's discretion in sentencing is that which is given by the Legislature" (*State v. Ammons*, 718 P. 2d 796 [Wash. App. 1986]). "The legislative wisdom of the Sentencing Reform Act," said the court of appeals, "is not the subject for judicial review" (*State v. Fisher*, 715 P. 2d 530 [Wash. App. 1986]).

By 1986 implementation was complete and the Sentencing Reform Act was an accepted feature of the criminal justice landscape. The reform was widely acknowledged as effective in accomplishing its objectives, even by those who did not share those objectives.

III. The Return of the Legislature, 1986–92

The legislature, which accepted the recommendations of the sentencing commission in every instance from 1983 to 1986, in 1987 began to reassert its primacy. The leaders of the coalition that produced the Sentencing Reform Act in 1981 had left the legislature by this time, and new perspectives became influential. Two issues were prominent: reassessment of sentence lengths for some crimes and reconsideration of postrelease supervision. Washington's experience would prove the prescience of Zimring's assertion that "it takes no more than an eraser" to change sentence lengths in a determinate sentencing system (Zimring 1977, p. 13).

A. Increased Sentence Length

The first change was symbolically important, although it affected few cases. In 1985, the Washington Cattleman's Association approached the commission regarding the sentence range for theft of livestock, "rustling" in the vernacular. The commission had set the presumptive sentence range at Seriousness Level II, the same as Theft in the First Degree (over $1,500). The cattlemen believed this ranking, which called for a presumptive sentence of zero-to-ninety days for first offenders, was a grossly inadequate response to sophisticated armed "rustlers." The commission's initial response was that exceptional sentences could handle these cases, and, thus, no statutory changes were necessary. The cattlemen were not appeased and the debate took on a rural versus urban tension, with the cattlemen arguing that most commission representatives lived in cities and were therefore insensitive to the realities and dangers of rural life.

The commission spent considerable time determining how to respond to the cattlemen without violating the proportionality of the guidelines. Ultimately, the group proposed two degrees of theft of livestock—first degree for theft with the intent to sell and second degree for theft for personal use. Presumptive sentence ranges were increased to three-to-nine months for first degree and one-to-three months for second degree (Wash. Rev. Code, title 9A, chap. 56, sec. 080 [2001]). The impact was small (an average of two convictions per year), but the resolution troubled some commission members who believed the body had sacrificed its principles to political expediency.

1. *Drug Offenses.* Political attention turned in late 1985 toward the harm caused by crack cocaine in particular, and by drug dealers in general. The initial sentence range for delivery of Schedule 1 drugs (heroin, cocaine, and other similar drugs) called for first-time offenders to receive a prison sentence (twelve to fourteen months); the first-time offender waiver allowed a zero-to-ninety-day period of confinement plus a year of supervision. By 1986, commission data showed that many offenders convicted of these crimes were receiving the waiver and avoiding a prison sentence. Norm Maleng led an effort to eliminate this sentencing option for such crimes. He consistently took the position that those who "deal" drugs deserve prison and saw the extensive use of the first-time offender waiver as inconsistent with this goal. It appeared that this adjustment would satisfy the political appetite for increased sentence severity, maintain proportionality within the sentencing grid, and simultaneously reinforce the reform's political viability by adjusting to changed views of crime seriousness.

Not everyone on the commission agreed with Maleng's argument, but all respected his political skills and understood the likely popularity of his position with the legislature. He informed the commission that the prosecutors intended to propose this amendment, but the commission did not formally consider the matter and did not testify. The proposal was adopted by a strong bipartisan majority and took effect in 1987.

The commission's decision to abstain on this issue was, at least to some observers, motivated by a desire to maintain the group's political cohesion and maintain credibility with the legislature. Given the departure of the reform's original legislative proponents, some commission members worried that taking politically unpopular positions would weaken the body's influence in future sentencing debates. As noted by Wright (1998, p. 458), commissions have limited political

capital and must select their political battles. In our opinion, the commission accurately assessed its political position; abstaining, however, did not protect the commission's declining political influence.

Concerns about drug offenses did not subside. By 1988, the commission's prosecutors convinced the group to revisit the sentencing ranges for these crimes. The commission recommended that the 1989 legislature increase the seriousness levels (and thus, the presumptive sentence length) for certain drug offenses. Its recommendation was incorporated into an omnibus bill developed and supported by a bipartisan group of legislators. When the legislation passed in 1989, the presumptive sentence ranges for first-offense delivery of drugs increased from 12–14 months to 21–27 months, the offender score points for prior drug convictions were increased, and a twenty-four-month enhancement was added for deliveries occurring within 1,000 feet of a school or a school bus stop or in a public park.

With some penalty increases, the impact on state prison populations is delayed because the increased confinement times show up in the future. In this instance, however, an increased volume of drug convictions occurred in the state at the same time as the penalty change, thus multiplying the population consequences. In combination with the impact of an average one-year sentence for drug deliveries becoming a two-year sentence, the results were dramatic. The number of convictions for drug offenses doubled between 1985 and 1987 and then doubled again between 1987 and 1989. Prison admissions for drug offenses increased from 143 in 1986 to 1,139 in 1989. By 1990, they reached 1,565 and constituted 37 percent of all prison admissions (Washington State Department of Corrections 1996, p. 3).

2. *Sex Offenses.* In 1986, the commission established a subcommittee to reconsider penalties and criminal code definitions for sex offenses. Under the indeterminate system, the wide-ranging discretion of judges and the parole board had been used to adjust penalties to individual circumstances. With determinate sentencing, the criminal code definitions became more critical. The King County Prosecutor's Office had a special assault unit that aggressively prosecuted sex offenses. The unit chief convinced the subcommittee that changes to the criminal code and penalties were necessary, given the harm caused to victims. The commission endorsed the subcommittee's proposed changes. The commission's 1987 legislative proposal was passed in one house but later stalled because of concerns about the need for more

prison beds to accommodate the increased number of prisoners. In 1988, the commission's recommendations were slightly revised and introduced by the legislator who had blocked passage the previous year. This legislation passed without controversy.

In 1989, the legislature again revisited sentencing laws for sex offenders. The kidnapping and mutilation of a child by a released sex offender became a topic of intense public attention, causing the governor to establish a special Task Force on Community Protection. The task force, which included sentencing commission members and was chaired by Norm Maleng, reviewed the state's criminal and mental health laws to determine policy options. The offender involved in the controversial child kidnapping had been released from prison after serving his maximum sentence. His declared intent, before release, to harm children greatly concerned corrections officials, but the threats were considered neither immediate enough to warrant a mental health commitment nor specific enough to warrant criminal prosecution.

The political environment demanded a solution for dangerous offenders about to be released from prison, as well as for sex offenders who would be sentenced in the future. The task force presented a package of proposals to the 1990 legislature, including increases in the presumptive sentence range for sex crimes, reduction of time off for good behavior, and a narrowly focused authorization for indefinite civil commitment for sexually violent predators who completed their prison sentences. Washington's attorney general proposed legislation to enact indeterminate life sentences for all serious violent offenses but did not invest any political capital in promoting his proposal. Task force leaders argued that a return to indeterminate sentencing would leave the state in a powerless position for offenders previously sentenced who exited prison with clear intent to harm and was thus only a partial remedy. The history of the task force's deliberations is detailed in a previous essay (Boerner 1992). The task force's recommendations were unanimously adopted by the legislature in 1990.

Despite these changes, the provisions allowing treatment in the community for sex offenders remained intact. As sentence lengths increased, the eligibility criteria were adjusted so that offenders previously eligible would continue to be eligible. This option retained the strong political support of the victim community, who successfully argued that its availability was essential for successful prosecution of intrafamily sexual abuse.

B. Postrelease Supervision

Washington's 1981 reform legislation abolished both parole and probation. Offenders who completed prison terms were to be released; in instances where work release was a reasonable public safety risk, offenders were to spend time in work release as a transition phase, then exit the system. Three central arguments justified this policy change. First, supervision by parole officers was said not to be helpful in reducing reoffending, but it gave corrections staff extensive discretion to set conditions and impose punishment on selected offenders, with little oversight. Second, parolees were eligible for voluntary services to assist their readjustment. Third, the state must limit its promises to citizens to those that are achievable and realistic. Ex-offenders decide whether to commit new crimes, and the state has relatively little influence on these decisions. The drafters believed that the effectiveness of supervision over released offenders was modest, at best, and highly unlikely to deter crime.

Judges could impose "community supervision" for up to one year, but the authority of courts to order affirmative conditions, such as participation in treatment or school, was severely restricted under the reform. The act authorized only "crime-related prohibitions" (Wash. Rev. Code, title 9, chap. 94A, sec. 030[11] [2001]) and "other sentence conditions authorized by the Act" as conditions of sentence, except with first-time offenders and certain sex offenders. For all other crimes, judges were authorized to impose a one-year term of "community supervision" during which the offender was "subject to crime-related prohibitions and other sentence conditions imposed pursuant" to the act (Wash. Rev. Code, title 9, chap. 94A, sec. 030[8] [2001]). Since those conditions did not include affirmative conduct or the obligation not to commit new crimes, the authority of corrections officers to seek sanctions for violations was substantially reduced. The intent was to replace the "former system of coerced rehabilitation with a system of facilitative rehabilitation" that was "offered but not compelled" (Boerner 1985, pp. 4–6). New crimes were to be prosecuted and charged.

1. *Correctional Officers.* It is not surprising that corrections officials did not share the reformers' views about parole. In 1986, Chase Riveland became secretary of the department of corrections, having previously served as a correctional administrator in Wisconsin and Colorado. Riveland argued that the act seriously restricted correctional

officers' ability to protect the public and left officers powerless as they observed released offenders headed toward criminal acts.

In 1986, a prominent state senator indicated interest in sponsoring a bill that resurrected postrelease supervision. Members of the commission met with him to explain the reformers' rationale for eliminating parole and to try to persuade him to drop the bill. The senator informed the commission that postrelease supervision was essential to public safety and that his judgment on state policy was more in tune with citizens' views than the commission's judgment.

The senator sponsored legislation to reinstate postrelease supervision, which did not pass. He then spearheaded a citizen's initiative drive. The measure did not gather sufficient signatures to appear on the ballot. Following the meeting with the commission, the senator worked assiduously to restrict the body's capacity and political credibility. He proposed numerous amendments to reduce the agency's operating budget, to limit the staff director to a half-time position, and to alter the body's authority. Although the amendments were often withdrawn before a vote, they sent a clear message of disapproval of the agency and of the senator's perception of the commission's arrogance.

2. *Amending the Act.* The senator and the department of corrections crafted a bill for the 1987 session to reauthorize postrelease supervision. The commission realized that opposing the bill altogether was unlikely to stop it, so commission representatives negotiated with the department of corrections to make the proposal as consistent as possible with the act. The result was a bill authorizing a one-year period of postrelease supervision for offenders convicted of serious crimes (offenses committed while armed, sex offenses, and drug offenses). The legislation passed in 1988, with expanded discretion for courts to order offenders to work, not to use or possess controlled substances, and to attend "crime-related treatment or counseling services" (Wash. Rev. Code, title 9, chap. 94A, sec. 120[8] [2001]).

Commission representatives successfully persuaded legislators that requiring offenders to "obey all laws" during this period of supervision was unwise, because prosecutors would lose some incentive to pursue new convictions, knowing that the behavior also qualified as a violation of sentence conditions and therefore the system could far more easily impose punishment under that label. A relatively complex scheme of supervision was developed that differentiated between offenders who

did and did not earn good time; those released early because of good time were under administrative rather than court authority.

Thus, once again, Washington's sentencing policies were pragmatically recast. Supervision after release was authorized, but selectively (a third of prison releases initially, rising to 68 percent by 2000), with sanctions for violations limited to the unserved portion of the original sentence (good time could reduce the period of incarceration by up to one-third) or sixty days per violation. The amendments granted no authority to reduce sentence lengths or conditions.

C. Prison Population and Sentence Lengths

By 1992, felony convictions had increased to 18,067, an increase of 127 percent from 7,953 in 1985. Average sentence lengths returned to 1985 levels, with an average prison sentence length of 44 months in 1992 (43.91 months in 1985) and an average jail sentence length of 2.8 months (2.55 months in 1985). The imprisonment rate, which had fallen to 124 per 100,000 population in 1988, began to climb, reaching 192 in 1992. This represented a 23 percent increase over the rate of 156 in 1983, the last preguideline year. This rate of growth, however, was far lower than the national increase of 75 percent from 188 to 330 per 100,000 population in the same period. Prison population continued to increase, reaching 9,930 in 1992 (Sentencing Guidelines Commission 1992*b*, p. iii; Bureau of Justice Statistics 1998, p. 491).

The guidelines' initial success in reducing the prison population provided a climate that enabled the legislature to revisit sentence lengths set in 1984. Significantly, while each change increased sentence length, each change used the guidelines to target particular crimes. This pattern has held; unlike Minnesota and other states (Frase 1993, p. 293), Washington has not had an across-the-board increase—or decrease—in sentence lengths.

IV. The Populist Era, 1992–95

Washington's political system reflects its populist origins. The first provision of the state constitution declares that "All political power is inherent in the people" (Washington Constitution, art. 1, sec. 1). The "people's power" has been jealously guarded and frequently exercised. In 1993 and again in 1995, the people of Washington exercised their "inherent" power to bring back mandatory sentences for certain offenders.

The nation's first "three strikes and you're out" law appeared as an

initiative in Washington, along with a second initiative related to felonies committed with a firearm. The 1981 Sentencing Reform Act had repealed Washington's previous broad mandatory minimum provisions and also its habitual criminal act, leaving only three mandatory minimum terms—murder in the first degree (not less than twenty years), assault in the first degree (not less than five years), and rape in the first degree (not less than three years) (Wash. Rev. Code, title 9, chap. 94A, sec. 120[4] [2001]).

A. Three Strikes

Mandatory sentences retained their political popularity in Washington. In 1992, a bill was introduced providing for mandatory life sentences—with release possible only upon a gubernatorial pardon or commutation—following the third conviction of a "most serious offense," which included most crimes of violence. Many leaders in the criminal justice system opposed the proposal; few, however, expressed their opinions openly. Elected officials judged the measure's political support as unstoppable (Wright 1998, pp. 451–53). The sentencing commission offered an alternative, which narrowed the provision's scope considerably. Both proposals failed when the legislature was unable to resolve the differences.

The measure was promoted by a conservative Washington think tank, which turned next to the initiative process. Any proposition may be placed on the ballot with sufficient voter signatures (8 percent of the previous general election's voters). Initiatives are common in Washington, as in most western states—in 1993, for example, voters also adopted measures concerning term limits and freedom of reproductive choice. The "three strikes" initiative easily qualified for the 1992 ballot and passed with over 75 percent of the state vote, carrying each of Washington's thirty-nine counties (Boerner 1997, p. 31).

Washington's "three strikes" law is narrower than those subsequently passed in many other states. It imposes a mandatory life sentence, without reduction by good time or parole, on the third separate conviction of a designated group of "most serious offenses" including homicide, serious assaults, most sex offenses, robbery, any crime committed with a deadly weapon, and repeat drug offenses (Wash. Rev. Code, title 9, chap. 94A, sec. 120[4] [2001]). Because each conviction must meet this criterion, its scope is narrowed considerably. By contrast, Washington's former habitual criminal law applied on the third conviction of any felony.

When the law was passed, state forecasters estimated that it would affect eighty offenders a year. The prison population increases would not appear immediately, however, because such offenders were already subject to long prison terms. The state estimated prison population increases of 134 in 2000, 407 in 2005, and 673 in 2010 (Boerner 1997, p. 31).

These estimates, in fact, proved to be quite high. Convictions have averaged 30 per year (1995 = 36, 1996 = 33, 1997 = 32, 1998 = 25, 1999 = 23, 2000 = 31; Sentencing Guidelines Commission 2000*b*). The average age at conviction was thirty-eight; robbery was the most frequent "third strike" conviction (50 percent), followed by assault (20 percent), and rape (10 percent) (Sentencing Guidelines Commission 1999*a*).

B. "Hard Time for Armed Crime"

Encouraged by the success of "three strikes," the same initiative sponsors returned to the legislature in 1994 with an initiative concerning weapon use in crimes. Titled "Hard Time for Armed Crime," this initiative proposed a two-tiered system of mandatory prison sentence enhancements for felons committing crimes while armed with a deadly weapon. Those armed with a weapon other than a firearm would receive a basic enhancement of six to twenty-four months, depending on the class of felony. For crimes involving firearms, the enhancements would range from eighteen to sixty months. For repeat offenses, enhancements would be doubled. All enhancements were consecutive and to be served without time reductions for good behavior. Sentence ranges for three firearm-related crimes would be increased (reckless endangerment, theft of a firearm, and unlawful possession of a firearm). First-degree burglary would be broadened to include crimes in any building, not just residences.

The initiative also made criminal justice decisions more public. Prosecutors were required to make public their reasons for plea bargains, and the sentencing commission was required to publish sentences imposed by individual judges.

The projected impact of the "hard time" initiative was far greater than the impact of "three strikes." The sentencing commission estimated population increases of 209 in the first year, 810 by the fifth year, and 1,145 by the tenth year. The capital and operating expenditure requirements were estimated at $64 million the first biennium, $57 million the second, $68 million the third, $50 million the fourth, and $55 million the fifth—a total increase of $294 million over the first decade (Boerner 1997, p. 33).

Washington law allows the legislature two choices when initiatives gain the necessary signatures: adopt the initiative as proposed, or adopt an alternative and place both the initiative and the legislative alternative on the ballot. Legislative leaders believed a more moderate alternative would be defeated, and none was proposed. With the memory of the people's overwhelming vote on "three strikes" in mind, by strong bipartisan majorities, the legislature adopted the initiative (Van Wagenen 2001, p. 6).

C. Publication of Judges' Sentencing Decisions

The initiative's direction to the sentencing commission regarding judicial sentencing patterns was very specific. The initiative required that the commission record each judge's sentences for all violent crimes and those involving deadly weapons. When the commission had set up its original database, the group decided not to record judges' names with each sentence. The judicial members successfully argued that such information could be used to unduly pressure judges who were, after all, operating within discretion granted by the legislature. Since there was no requirement for judge-specific data in the original act, this decision had been uncontroversial, both inside the commission and outside.

The commission first responded to the legislative direction by publishing the total number of standard range sentences imposed by individual judges, with detailed information on each exceptional sentence (Sentencing Guidelines Commission 1996). The initiative's chief proponents objected strongly, both to the limitations of the information and to its timing, since it was released after the election cycle. Subsequent reports covered each judge's felony sentences, and publication was advanced to September of each year.

Up to this point, commission publications and data on judicial sentencing patterns have not been the focus of a judicial election campaign. The evidence as to whether judges' decision making has been influenced is more ambiguous. The overall rate of exceptional sentences has increased slightly since the reporting requirement was adopted, but the percentage of mitigated departures steadily declined until recently (Sentencing Guidelines Commission 2000*a*; see fig. 2).

The initiative's requirement that prosecutors make their reasons for plea bargains public has had no discernible effect. No organized system exists for recording plea bargaining reasons, and judges do not routinely require prosecutors to indicate why they enter into bargains.

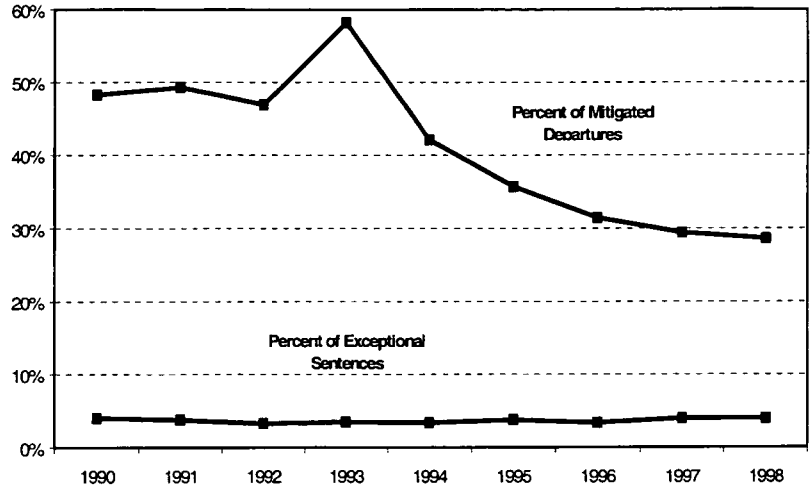

FIG. 2.—Rate of mitigated departures has declined since adoption of reporting requirement.

The sentencing commission's report on judicial sentencing indicates whether the prosecutor agreed with or opposed an exceptional sentence. The nonimplementation of this initiative provision has not attracted criticism. For the initiative sponsors at least, concerns about leniency toward criminals was focused on judges, not prosecutors. Although complaints that judges are "soft on crime" are not uncommon, such criticisms are seldom lodged against prosecutors. Prosecutors are far more likely to be seen as allies in a "get tough" movement (Boerner 1995, p. 198).

Although Washington's citizen initiatives have substantially influenced state sentencing policy, their impact pales in comparison with Oregon's experience. In that state, initiatives directed toward sentencing-related topics have been frequent. Initiatives have become the primary force in Oregon sentencing policy, easily eclipsing the state's sentencing guidelines (Rosenblum 1995, p. 177; Greene 1997, p. 3).

Felony convictions continued to increase during this period, reaching 20,619 in 1995, a 14.1 percent increase over 1992. The average prison sentence length increased to 47.5 months (an 8.2 percent increase over 1992), while the average jail sentence length dropped slightly (from 2.8 months in 1992 to 2.7 months in 1995). The imprisonment rate increased by 10 percent, from 192 per 100,000 in 1992 to 212 per 100,000 in 1995, once again significantly lower than the 25.6

percent increase nationwide from 330 per 100,000 in 1992 to 411 per 100,000 in 1995. Prison population continued to increase, reaching 11,440 (Sentencing Guidelines Commission 1995, p. 10; Bureau of Justice Statistics 1998, p. 491).

V. The Revival of Reform, 1995–2000

The "reform" of the 1981 act has not been limited to changes originated by citizens. Beginning in 1993, the legislature adopted amendments that primarily have increased officials' discretion and authorized sentences that are arguably inconsistent with the core principles of the original act. Three of the changes—boot camp legislation, special provisions (based on drug court rationales) for drug possession offenders, and increased flexibility for non-state-prison sentences—decreased sentence severities and increased judicial discretion. One provision increased the role of risk predictions and increased community corrections officials' discretion. A "two-strikes" provision for serious second sexual offenses increased sentence severity and weakened proportionality protections. Each change, however, employed the structure of the act, and none repealed any portion of the original act.

A. Boot Camps

In 1993, the legislature endorsed the boot camp concept as a means to add structure and discipline to offenders' lives in the hopes of improving their productivity after release. Washington's version became known as a "work ethic camp"; judges could recommend it for those facing prison terms up to three years. If the offender agreed to participate and was accepted by the department of corrections, he or she was credited with three days for each day in the camp, with the balance served on supervised release. Offenders who failed to complete the camp, or did not comply with release conditions, would serve the remainder of the original prison sentence.

While the authorizing legislation did not use the terms "probation" or "parole," the sentence was not determinate. This was the first provision since adoption of the Special Sex Offender Sentencing Alternative in 1984 to authorize indeterminate sentences. It also was the first to reduce penalties.

The program was widely viewed as a desirable option for several years and reached a daily census of 199 in July 1999. By September of 2000, participation was reduced to 57 offenders because offenders and judges preferred a drug sentencing option that we describe in the next

subsection (Washington State Department of Corrections FY2000 and 2001, Table 1-A).

B. Drug Sentences

The second change that reduced sentence severity involved drug sentences. The 1987 and 1989 increases in drug sentence severity, combined with a substantial increase in drug convictions, caused drug offenders in the prison population to increase from 16 percent of the prison population in 1990 to 25 percent in 1994. The political discussion about drug crimes reflected a growing awareness that heavy reliance on incarceration for these crimes was expensive and did not resolve some offenders' underlying problems of drug addiction.

In 1991, the Washington State Department of Corrections proposed legislation for a Drug Offender Sentencing Alternative. The legislation was originally supported by the governor as a means to counter the escalating prison population and respond more appropriately to persons with chemical dependencies. The bill was opposed by many people, including prosecutors and members of the sentencing commission, who were concerned that it violated the principles of determinate sentencing. Ultimately, the governor withdrew the proposal and requested that the sentencing commission prepare recommendations for the 1992 legislative session that "provide a renewed emphasis on alternatives to total confinement in jail or prison for non-violent offenders, particularly with respect to strengthening our ability to deal with nonviolent substance abusers whose criminal activity is limited to or caused by that abuse" (Gardner 1991, p. 2). A commission subcommittee spent several months considering options and ultimately proposed creation of a drug offender sentencing option; a separate subcommittee proposed a nonviolent offender option that included an expanded range of alternative sanctions (Sentencing Guidelines Commission 1992*a*, pp. 19–22).

The commission as a whole endorsed the proposals and submitted them to the 1992 legislature. The legislation was opposed by the prosecutors' association and did not move from the assigned legislative committee.

In late 1993 and 1994, the national experiments with drug courts attracted the interest of Washington criminal justice leaders. King County started a drug court in 1994 and was followed by other counties. The judge for King County's drug court, Ricardo Martinez, was a judicial member of the sentencing commission. Judge Martinez earlier

served as a deputy prosecutor in King County, where he headed the office's drug unit. Because of his background and his drug court experiences, Judge Martinez was a persuasive advocate for treatment alternatives.

By 1995, Norm Maleng agreed to promote a drug sentencing alternative and organized a diverse coalition of supporters, including law enforcement officials and the sponsors of the "three strikes" and "hard time" initiatives. The proposal for a "Special Drug Offender Sentencing Alternative," modeled loosely on the "Special Sex Offender Sentencing Alternative," combined a drug treatment option for those persons with drug addictions while retaining the concept of "prison sentences for dealers," a consistent feature of Maleng's sentencing priorities. The alternative authorized judges to waive the standard sentence for first-time drug offenders and impose a prison sentence of one-half of the standard range followed by one year of community-based drug treatment. Those who violated conditions of the community portion of the sentence could be returned to prison for the remaining one-half of the standard range (Wash. Rev. Code, title 9, chap. 94A, sec. 120 [2001]).

This alternative sentence was projected to reduce the prison population by 196 in its second year, 240 in its third, 258 in its fourth year, then stabilizing at a reduction of 275. More significant was that this was only the second change to the Sentencing Reform Act since 1984 to reduce the severity of sentences. In practice, use of the alternative initially fell far short of the projections; only 15 percent of eligible cases received the alternative sentence in 1995–96 (Engen and Steiger 1997, p. vii).

In 1999, the legislature modified the provision to expand its use. A sentencing commission study found that judges and prosecutors preferred the work ethic camp option over the drug treatment sentence because it was simple and flexible; defendants and their attorneys preferred it because it involved less confinement time (Du and Phipps 1997, p. 15). The 1999 amendments excluded defendants convicted of drug offenses from the work ethic camp and authorized judges to set conditions prohibiting the offender from using alcohol or controlled substances and requiring performance of other affirmative conditions. In doing so, the legislature created exceptions to several core policies of the Sentencing Reform Act, as had previously been done for first-time offenders and sex offenders. Drug offenders became the third category of offenses exempted from the just deserts philosophy. The

amendments immediately increased use of this alternative; in 2000, 895 offenders received this sentencing option.

C. Two Strikes

In 1996, the legislature extended the principle of the "three strikes" initiative to those convicted of a second serious sex offense. This action was not taken in response to a particular case but reflected instead the view that sex recidivists were particularly dangerous and intractable. In 1997, the listed sex offenses were expanded to include serious sex offenses against children. Upon the second conviction of these designated offenses, a mandatory sentence of life imprisonment must be imposed. The "two strikes" provision has been sparingly applied. One defendant received a "two strikes" sentence in 1997, two in 1998, four in 1999, and eight in 2000.

D. Local Discretion

In a little-discussed addition to a bill authorizing drug treatment sentences, the legislature relaxed the strictness of the Sentencing Reform Act on sentences of less than one year. Unlike Minnesota's guidelines, in which the presumptive sentence ranges applied only to prison sentences, Washington's applied to all felony sentences and thus regulated both jail and prison sentences.

The act had always authorized judges to convert any jail sentence (total confinement of one year or less) to partial confinement (work or an education release) and to convert up to thirty days of total confinement to community service at the rate of eight hours of community service for one day of total confinement. Local officials have long believed that the Sentencing Reform Act has caused upward-spiraling jail costs and have argued that meeting those financial obligations leaves them without resources to develop alternative sanctions.

The 1999 legislature added a cryptic but potentially powerful sentence to the provisions of the Sentencing Reform Act governing alternatives to total confinement: "For offenders convicted of non-violent and non-sex offenses, the court may authorize county jails to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.129" (Wash. Rev. Code, title 9, chap. 94A, sec. 380[3] [2001]).

No definition of "county supervised community option" was provided, but there is a clear intent to maximize local discretion. Correctional resources at the county level are the fiscal responsibility of

county government, and no state funding accompanied the expansion of direction. To date, little implementation has occurred, but planning efforts are under way in several counties.

E. Risk-Based Supervision

The 1999 legislature adopted a more fundamental—and far-reaching—policy change addressing correctional supervision of offenders in the community. The "Offender Accountability Act" was proposed by Joseph Lehman, who became the secretary of the department of corrections after serving as the head of corrections in Pennsylvania and Maine. Motivated by the success of community policing in the United States, as well as calls by some correctional leaders for a "shift in the missions of correctional agencies" (Smith and Dickey 1999, p. 7), the corrections chief argued that public safety could be increased by altering the authority and focus of community corrections staff.

The Offender Accountability Act represents a major shift in policy, primarily by returning discretion to correctional officers, but it does not represent either a return to indeterminate sentencing or a total rejection of just deserts principles. First, no change is made in the term of confinement imposed at sentencing. It retains a determinate term, subject only to reductions based on "good time" calculations. Judges have no greater discretion over the length of confinement than previously under the Sentencing Reform Act, nor over the length of community custody; the judge must impose a sentence within the range of community custody established by the sentencing commission. Judicial discretion is expanded in setting conditions of supervision; conditions can now require affirmative conduct, although they must be "reasonably related to the circumstances of the offense" (Wash. Rev. Code, title 9, chap. 94A, sec. 715 [2001]).

The discretion of corrections officers was substantially increased. For the first time under the Sentencing Reform Act, they have authority to impose conditions without judicial approval, modify or delete conditions without judicial approval (although not with regard to judicially imposed conditions), and reduce, although not lengthen, the term of community custody and discharge the offender without judicial approval.

Coupled with this increase in discretion is a fundamental shift in the basis on which discretion is to be exercised. Prior to the Offender Accountability Act, the only explicit authority for considering risk for reoffending was in the context of exceptional sentences or sex offenders.

In 1991, the Washington Supreme Court had held that "if future dangerousness is to be considered an aggravating factor in determining the sentence for non-sexual offense cases, it is the Legislature's province to make such a decision" (*State v. Barnes*, 818 P. 2d 1088 [1991]).

The legislation directs the department of corrections to concentrate its nonprison resources on higher-risk offenders—those in the top quarter of the risk pool. In authorizing the use of "risk assessment," the legislature accepted the view of the department of corrections—supported by the sentencing commission—that risk prediction accuracy had sufficiently improved since the reform was enacted to warrant a reversal in state policy. The department testified during legislative hearings that actuarial risk prediction is far superior to informal judgments (Grove and Meehl 1996). The state's move toward risk assessment is one of the four conceptions of sentencing and corrections identified by Tonry (1999) as currently coexisting in the United States.

The department plans to implement its new authority aggressively. Pilot projects are under way in which community corrections officers work directly with police officers in a model based on community policing concepts. The department's intent—and the expanded authority granted by the legislature—are in accord with the "new penology" described by Lyons (1999) and Simon and Feeley (1992). At its core, this approach emphasizes surveillance and containment. Its purpose is public safety, not just deserts, although in Washington it will function within boundaries established by just deserts. The expanded discretion in the act will function primarily to increase sentence severity. By increasing the range and nature of allowable sentence conditions, the state also has expanded its authority to intervene when there are violations and impose consequences.

F. Prison Population and Sentence Length

Felony convictions continued to increase, reaching 24,391 in 1999, an 18.3 percent increase over 1995. The average prison sentence length decreased to 44.2 months (a 6.9 percent decrease from 1995), while the average jail sentence length increased slightly (from 2.7 months in 1995 to 2.8 months in 1999). Imprisonment rates increased by 18.4 percent, from 212 per 100,000 population in 1995 to 251 per 100,000 in 1999, slightly more than the 15.8 percent national increase from 411 per 100,000 in 1995 to 476 per 100,000 in 1999 (Sentencing Guidelines Commission 1999*b*, p. 9; Bureau of Justice Statistics 2000, p. 3).

VI. Reflections

In a democracy, resolution of policy issues is inherently political, and sentencing reform in Washington has been a political process in which the legislature reasserted its primacy. The initial reform, now almost two decades old, employed presumptive guidelines to "structure but not eliminate discretionary decisions affecting sentences" (Wash. Rev. Code, title 9, chap. 94A, sec. 010 [2001]). The structure remains intact, and the state continues to operate with a sentencing grid that weighs offense seriousness and an offender score, and produces an applicable sentencing range. Sentencing policies, however, have repeatedly been modified. The central issues do not change, but their resolution, by various decision makers, over time, does change.

Washington's experience has been one of continuous change, with every issue—and its resolution—potentially in political play. This, of course, is neither new nor unique to Washington. Sentencing has always been inherently political. What is distinctive about Washington—and we suggest other guideline states—is that legislative policy direction has shifted from the "big picture" issues to detailed particulars—with rules governing everything from the weight given to prior convictions to the conditions of supervision to determining eligibility for a boot camp.

Pragmatism has always trumped philosophical purity in this state. Washington's initial reform was radical for its time—it rejected the premises of the indeterminate model and adopted a system based on just deserts that significantly constrained the discretion of judges and correctional officials. Subsequent changes exhibit a more complex pattern. Many have resolved issues within the just deserts paradigm, while others have incorporated concepts from other models. However, the fundamental structure of the reform has been retained. Perhaps this approach had political advantages because it involved incremental adjustments and did not threaten institutional stability. Seen this way, the structure of Washington's sentencing guidelines is agnostic as to how fundamental issues of sentencing should be resolved, but it is powerfully effective at implementing whatever resolution is produced by the political process (Boerner 1993).

The effects of so much change have produced a sentencing system far more complex than the original proposal. Changes have focused on particular crimes or groups of crimes and were largely, at least originally, consistent with the legislature's original direction to "emphasize

confinement for the violent offender" (Wash. Rev. Code, title 9, chap. 94A, sec. 040[5] [2001]).

A. Prison Population Changes

Since the 1984 guidelines took effect, felony convictions increased by 206.7 percent, from 7,953 in 1985 to 24,391 in 1999. Average prison sentence length remained essentially level (43.9 months in 1985 compared with 44.2 months in 1999), while the percentage of convicted felons receiving prison rather than jail sentences went from 16.6 percent in 1985 to 29.1 percent in 1999, an increase of 75.3 percent. The rate of imprisonment per 100,000 population also increased, but at a lower rate. From a level of 156 per 100,000 population in 1985, imprisonment rates reached a level of 251 per 100,000 in 1999, an increase of 60.9 percent (Sentencing Guidelines Commission 1999*b*, p. 9).

The significance of these increases becomes apparent when the data are compared with national trends. The national imprisonment rate increased by 138 percent, from 200 per 100,000 population in 1985 to 476 per 100,000 in 1999. Washington's increase was less than one-half of the national average increase. The political climate in Washington was not significantly different from that in the rest of the country. Passions ran high and the public mood became increasingly punitive. What was different, we submit, was that the structure of the guidelines focused those punitive instincts on specific categories of crime. Not once during the entire period was there an across-the-board increase in sentence severity. Washington's guidelines thus seem to have moderated the public's punitive passion, not by attempting to deny it, but by channeling it more narrowly than would otherwise have happened. The policy changes aimed at increasing prison use did so, but primarily for the targeted offenses, as figures 3 and 4 show. Figures 3 and 4 display the state's prison admissions over time and the forecasted changes attributed to each sentencing amendment enacted through 1998.

Evaluations of sentencing guidelines nationally have found similar effects in guideline states in which prison populations were explicitly considered (Marvel 1995, p. 707; Reitz 2001, pp. 12–13). Washington's experience, however, is even more striking when compared with its fellow early guideline states, Minnesota and Pennsylvania. The imprisonment rate in Minnesota increased 123 percent from 1985 to 1999 (from 56 per 100,000 population in 1985 to 125 per 100,000 in 1999). In Pennsylvania, the rate increased by 156 percent (from 119 per 100,000 in 1985 to 305 per 100,000 in 1999) (Bureau of Justice

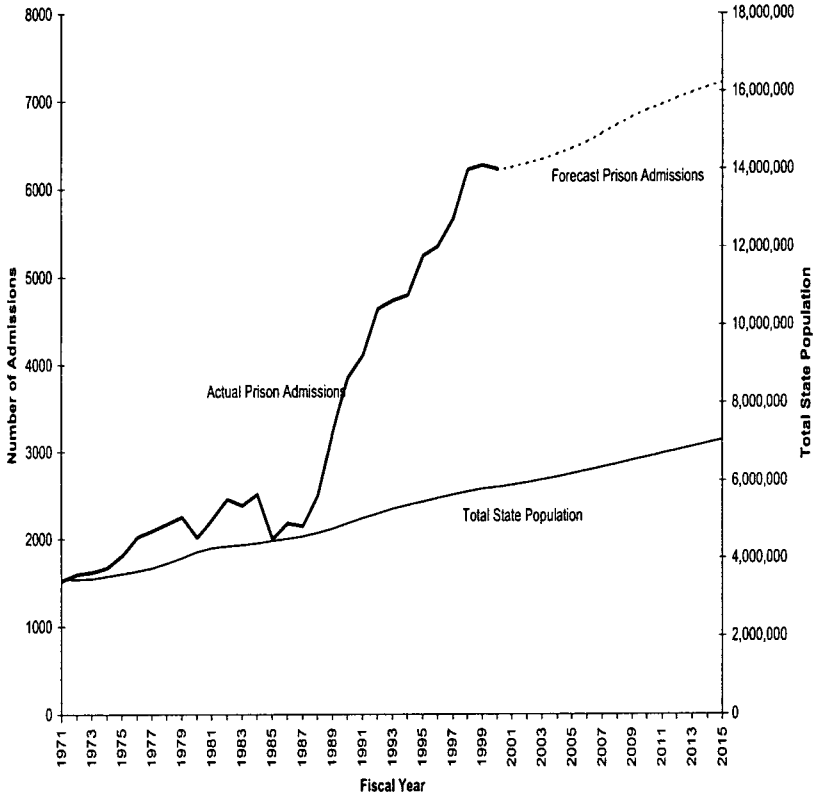

FIG. 3.—Historical and forecast prison admissions

Statistics 1998, p. 491). We do not know why Washington's experience is so different from that of Minnesota and Pennsylvania, but it seems clear that the Washington guidelines have been more effective at channeling the public's passion for punishment.

B. Changes in Discretion

The initial reform altered decision-making authority over sentencing, eliminating parole release, restricting the use of probation conditions, narrowing judges' discretion, and shifting power to prosecutors. The reformers' revised allocation of discretion was not stable, and those parties who lost discretion have pursued legislative avenues to have it returned. The following table outlines the shifts in the allocation of sentencing discretion in Washington (see table 2).

As can be seen in table 2, the legislature did not "structure" all dis-

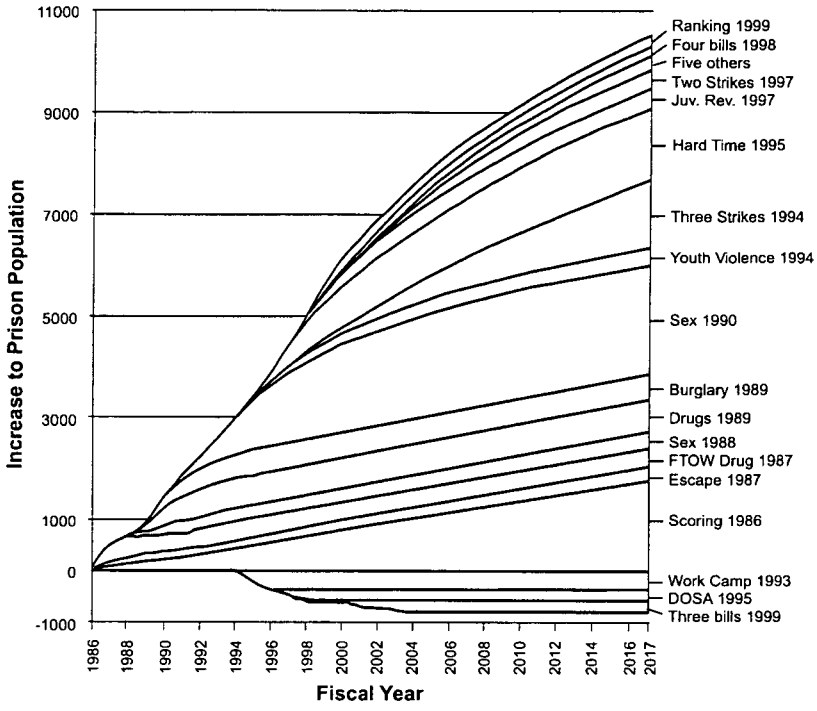

FIG. 4.—Cumulative effects of criminal justice legislation, 1986–2000 sessions

cretionary decisions affecting sentencing in the same manner. In this concluding section, we address Washington's experience in constraining prosecutorial, judicial, and correctional discretion.

1. *Prosecutorial Discretion.* Washington sentencing reformers in the 1970s and early 1980s recognized that prosecutorial discretion was a major portion of the "discretionary decision affecting sentences" that the 1981 act sought to "structure but not eliminate" (Wash. Rev. Code, title 9, chap. 94A, sec. 010 [2001]). Washington's prosecutors were not granted additional discretionary authority, but the restrictions on judicial discretion and elimination of correctional discretion significantly increased the relative power of prosecutors. The legislation took account of this by directing the sentencing commission to "devise recommended prosecuting standards in respect to charging of offenses and plea agreements" (Wash. Rev. Code, title 9, chap. 94A, sec. 040[2][b] [2001]).

The commission took this task seriously and developed the most

TABLE 2

Discretionary Authority

Locus of Discretion	Pre-1984	1984	2000
Legislature	Authority delegated except maximum terms and mandatory minimums for firearms, deadly weapons, and habitual criminal	Delegation revoked; all judicial and correctional discretion subject to legislative decisions	Limited discretion granted to judges and corrections for designated crimes
Prosecutors	Charging and bargaining decisions	Same; however, charging decisions now significantly influence sentence length	No change
Judges	Unguided (except for statutory maximums and mandatory minimums) as to: prison/jail/probation, length of jail, and conditions of probation/revocation. Authorized to impose prison term, but no control over duration.	Limited to length within presumptive range, departure from range if justified, decisions to impose first-time offender waiver and sex offender sentencing options for eligible persons within parameters, and impose sanction for failure to perform sentence conditions	Discretion expanded for certain drug offenders and work ethic camp; more latitude allowed in setting conditions for supervision
Parole board	Unguided (except for mandatory minimums) as to length of prison term, conditions of parole, and revocation of parole	Discretionary authority revoked; directed to take sentencing guidelines into account in setting minimum terms	No change
Corrections	Significant authority to set probation and parole terms and respond to violations	Probation authority greatly restricted; role in parole eliminated	For post-release supervision, granted discretion to impose additional conditions, reduce length, and impose sanctions for violation of conditions

comprehensive set of prosecutorial guidelines ever proposed for legislative adoption. The commission chose to make the guidelines voluntary. Not surprisingly, the courts held that a claim that a prosecutor had not followed the prosecutorial guidelines was not subject to judicial review (*State v. Lee*, 847 P. 2d 25 [Wash. App. 1993]). This meant that the guidelines were effective only insofar as prosecutors chose to follow them. Since the guidelines grew out of earlier collective efforts by prosecutors to articulate policies to guide their own discretionary decisions, that the guidelines were voluntary did not mean they were ignored. The decentralized nature of prosecution in Washington—each of the thirty-nine counties has an independently elected prosecutor and the attorney general has no supervisory or general enforcement powers—meant, however, that regional differences developed, particularly over time, as different prosecutors adopted different policies.

A striking example concerns drug enforcement. The sentencing guidelines call for a presumptive sentence of twenty-one to twenty-seven months for a first offense sale of heroin or cocaine and zero to ninety days for first-offense possession. In King County, Norm Maleng has consistently maintained a policy that drug sales charges are not reduced from sale to possession, even to reward a plea of guilty. As depicted in table 3, of the 1,866 drug cases in King County in 1998, 1,131 (61 percent) were convictions for dealing. This contrasts with only 30 percent in the rest of the state. Now, of course, it may be that this contrast to some degree reflects different behavior patterns, with dealers congregating in King County. However, as prosecutors readily acknowledge, the difference is due to different enforcement, charging,

TABLE 3

Type of Drug Convictions by County

County	Dealing Convictions	Nondealing Convictions	Total
King	1,131 (61%)	735 (39%)	1,866
Pierce	428 (27%)	1,159 (73%)	1,587
Clark	134 (26%)	381 (74%)	515
Snohomish	130 (28%)	339 (72%)	469
Thurston	71 (17%)	340 (78%)	411
Other counties	1,005 (34%)	1,947 (66%)	2,952
Total	2,899 (37%)	4,901 (63%)	7,800
Total less King County	1,768 (30%)	4,166 (70%)	5,934

and plea bargaining policies. In adjacent and demographically similar Pierce County, where prosecutorial policies allow a reduction of dealing charges to possession in return for a guilty plea, of 1,587 drug cases, 428 (27 percent) were convictions for dealing. Policies in both counties are explicit and are publicly defended by the prosecutors who adopted them.

The effect of these policy differences is significant (table 3). Were King County to have adopted the policies followed in the rest of the state, 503 fewer drug offenders would have been committed to prison in 1998. Were King to have followed Pierce County's policy, there would have been 556 fewer prison admissions. However, King County's policies appear more accurately to follow the prosecutorial guidelines adopted by the legislature. They call for prosecutors to "file charges which adequately describe the nature of the defendant's conduct" (Wash. Rev. Code, title 9, chap. 94A, sec. 440 [2001]) and that "a defendant will normally be expected to plead guilty to the charge . . . which adequately describe the nature of his or her conduct or go to trial" (Wash. Rev. Code, title 9, chap. 94A, sec. 450 [2001]).

Were the rest of the state's prosecutors to follow King County's—and the legislature's—policies, however, the effect would have been even more dramatic. Rather than 1,768 drug offenders convicted of dealing—and thus receiving prison sentences—3,572 would have been convicted, an increase of over 1,800 prison admissions. Since the median sentence imposed on dealers in Washington in 1998 was 27.6 months, this shift would significantly have increased the prison population.

The geographical disparity raises significant policy issues. Washington's drug laws are enacted by the state legislature and, in the words of the Sentencing Reform Act, are to be "applied equally throughout the state." However, disparity of this type is the product of Washington's allegiance to local control, with prosecutors being politically accountable only to their local electorate.

Washington's prosecutors' practices (with the exception of Maleng's in King County) demonstrate what Stuart Scheingold termed "policy moderation at the local level," by which he means that symbolic politicization of crime is strongest when furthest removed from the application of the symbolic policies (Scheingold 1991, p. 83). Prosecutors are inherently pragmatists in that they fashion policies that work in their local contexts. Commitment to the principle that every defendant ought to be convicted of what he or she has done, and no less, is much

easier when it is disconnected from the reality of managing scarce resources. Maleng, not surprisingly, given his long commitment to sentencing reform, seeks to implement the policies he helped forge. His colleagues do not share his viewpoint. The legislature was, of course, quite aware of the decentralized autonomy of Washington's prosecutors when it chose to make the prosecutorial guidelines aspirational rather than binding. It chose to sanction local decision making and the inevitable geographical disparity it produces (Boerner 1995, pp. 196–200).

What Washington's experience leaves unexplored is whether judicial review could effectively have enforced prosecutorial guidelines. Certainly Washington's experience with judicial review of departures from the sentencing guidelines, which we discuss next, demonstrates the efficacy of judicial review. Prosecutorial decision making, however, involves issues not present at sentencing, when the crime of conviction is set, and defines the starting point. Judicial review of a sentence that departs from the guidelines considers whether the reasons given by the judge for sentencing outside the presumptive range are legally sufficient; there is no review as to whether the starting point was correctly determined. Prosecutorial decision making, however, operates in an environment in which the crime of conviction has not been determined but is the central issue for determination. This determination involves evidentiary sufficiency, so its subjective nature is apparent.

Washington's prosecutorial guidelines recognize that one circumstance that may justify a plea bargain—euphemistically termed a "plea agreement"—is "evidentiary problems which make conviction on the original charges doubtful" (Wash. Rev. Code, title 9, chap. 94A, sec. 450[2] [2001]). The myriad factors that influence a judgment related to likely conviction of a particular crime or crimes, to say nothing of their relative weights, involves polycentric decision making not readily susceptible to judicial review. There is no meaningful external standard against which to measure the subjective discretionary decision. Review of judges' decisions to depart from guidelines, by contrast, involves the comparatively clear-cut question of whether a particular reason justifies an exception.

Reviewing a departure from the prosecutorial guidelines that is said to be justified by "evidentiary problems" would require an intrusive and time-consuming examination of all aspects of the prosecutor's case. This examination can be done—supervisors in prosecutors' offices do it every day—but judges are ill suited to the task. The basis

for the determination is subjective—involving the quality of witnesses and the persuasiveness of inferences—and involves the confidential work product of the prosecutor.

In addition, this review must occur in a nonadversarial environment. Once a plea bargain is struck, both the prosecutor and the defense attorneys share an interest in its acceptance. Neither would argue against a position to which they just agreed. Thus, judges would be denied the adversarial testing present in appellate review of judges' sentences, and in nearly all other instances of judicial review. They would be forced to become active investigators of circumstances rather than passive evaluators of arguments—a role most judges are reluctant to undertake.

There may be resolutions to these issues, but Washington's experience does not provide them. Washington's prosecutorial guidelines remain voluntary and thus, as Hobbes put it, "mere words" (Hobbes 1946). The statutory requirement that "the court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and the prosecuting standards" is routinely satisfied by a preprinted judicial finding in the standard sentencing form that "the agreement is consistent with the interests of justice and the prosecuting standards" (Wash. Rev. Code, title 9, chap. 94A, sec. 090 [2001]).

2. *Judicial Discretion and Appellate Sentencing Review.* Recognizing that the solution to what was perceived as excessive judicial discretion was not to reject discretion entirely, the reformers sought instead the right mix of rule and discretion, the proper balance between the need for articulated principles governing sentencing and for flexibility to depart from the consequences of those principles when necessary to achieve a just result.

The guidelines provide the external standard necessary to constrain discretion. Yet the Washington reformers' intent was to structure, not eliminate, judicial discretion, and thus the guidelines were made presumptive, not mandatory. Departures were permitted when justified by "substantial and compelling reasons" (Wash. Rev. Code, title 9, chap. 94A, sec. 120[2] [2001]). The challenge was to determine which reasons met this standard and which did not. The commission developed, and the legislature adopted a list of aggravating and mitigating factors to guide judicial discretion, but both recognized that they could not anticipate every individual situation deserving a departure. The listed factors were prefaced with the statement that they were "illustrative only and not intended to be exclusive reasons for exceptional

sentence" (Wash. Rev. Code, title 9, chap. 94A, sec. 390 [2001]). The intent was for substantive appellate review eventually to develop a "common law of sentencing within the state" (Wash. Rev. Code, title 9, chap. 94A, sec. 210[6] [2001]).

This promise has been realized. A rich body of reported decisions, now numbering in the hundreds, construe and apply the legislative directions. The cases are not all consistent, to be sure, and no single reader will agree with every decision, but the cases are a model of the common law process, an amalgam of principle and policy that brings rationality and consistency to sentencing decisions. An example is illustrative. Sentencing based on predictions of offenders' future behavior was a hallmark of the prior indeterminate sentencing system. Judges sought to protect the public by imposing sentences designed to prevent future criminal behavior through the effects of rehabilitation, deterrence, and incapacitation. Inherent was the problematic practice of prediction. Criticisms of the accuracy of such predictions were at the core of the arguments that led to the adoption of the Sentencing Reform Act (e.g., Morris 1974).

Basing a predictive judgment on past criminal history, which is the most accurate of available predictors, runs afoul of two central precepts of the Sentencing Reform Act—the principle that factors, such as criminal history, used to determine the sentence range cannot be used again as a basis for departing from that range, and the prohibition on use of prior criminal behavior that had not resulted in conviction (Wash. Rev. Code, title 9, chap. 94A, sec. 370 [2001]). In addition, the predictive nature of the enterprise embodies a central tenet of the rejected rehabilitative ideal, that predictions of defendants' future acts can be made.

In the early years, the courts of appeals grappled with these issues in a series of contradictory decisions. In the first, the court stated, "We would uphold an exceptional sentence for one who demonstrates a pattern of predatory sexual offenses upon particularly vulnerable victims, yet who cannot be treated for the deviancy" (*State v. Wood*, 709 P. 2d 1209 [Wash. App. 1985]). The next year, the court of appeals held, without analysis, that "the defendant's lack of amenability to treatment and likelihood of reoffending . . . is a substantial and compelling reason justifying an exception sentence" (*State v. Harp*, 717 P. 2d 282 [Wash. App. 1986]).

Later that year, an aggravated exceptional sentence based solely on "the defendant's propensity to reoffend" was reversed (*State v. Payne*,

726 P. 2d 997 [Wash. App. 1986]). Responding to the argument that exceptional sentences furthered the legislative purpose "to protect the public," the court stated that it "was not persuaded that the Legislature intended preventative detention to further that purpose" (*State v. Payne*, 1000). The court observed that "reliance on a psychologist's prediction of future dangerousness, without any history of similar acts or other corroborating evidence, not only allows wide latitude for abuse, it also undermines those general objectives of proportionality and uniformity" (*State v. Payne*, 1000). Relying on the legislature's direction that the sentencing guidelines be applied without discrimination as to any element not relating to the crime or the defendant's criminal history, the court held that "an offender's personality or predicted dangerousness, standing alone, is not a proper basis for a durational departure" (*State v. Payne*, 1000).

In the next case, however, the court of appeals distinguished *Payne* as holding only that a court should not rely solely on the offender's personality or predicted dangerousness without any history of similar acts or other corroborating evidence and concluded, "given a history of similar acts or other corroborating evidence, the court may enhance the sentence on the basis of a considered assessment of future dangerousness" (*State v. Olive*, 734 P. 2d 36 [Wash. App. 1987]). The court of appeals required that a finding of future dangerousness include both a history of similar acts and proven nonamenability to treatment.

In 1990, the issue first reached the supreme court that affirmed the court of appeals' requirement that "both a history of similar acts *and* lack of amenability to treatment" were necessary (*State v. Pryor*, 779 P. 2d 244 [Wash. 1990]). The court saw the dual requirement as fulfilling "two important considerations. First, it ensures that a defendant's criminal history, which has already been taken into account in determining the appropriate standard sentence range, will not be used again to further enhance the same sentence without further proof of dangerousness. . . . Second, amenability to treatment, or lack thereof, is crucial in assessing the likelihood an individual may pose to the public in the future" (*State v. Pryor*, 248–49).

The supreme court revisited the issue the following year in a review of several cases, not involving sex crimes, where future dangerousness was used to justify an aggravated departure. A three-judge plurality opinion reviewed the goals and structure of the Sentencing Reform Act and found that allowing consideration of future dangerousness generally violated both the principle that factors used in determining the

standard range could not be used again and the prohibition on using facts that had not resulted in conviction. Considering the legislative history of the Sentencing Reform Act, the plurality found the different fundamental assumptions governing sentencing of sex offenders provided "authority for this court to consider a defendant's amenability to treatment in sexual offense cases" (*State v. Barnes*, 818 P. 2d 1088 [Wash. 1991], p. 1091) but not others. The plurality stated "if future dangerousness is to be considered an aggravating factor in determining the sentence for non-sexual offense cases, it is the legislature's province to make such a decision" (*State v. Barnes*, 1093). Three concurring justices agreed that extending consideration of future dangerousness to non-sexual offense cases "lies properly within the province of the Legislature" (*State v. Barnes*, 1094).

Subsequent decisions have been faithful to the principles enunciated in *Pryor* and *Barnes*. A series of cases has applied those strictures regardless of the labels used by sentencing judges. Courts have held that findings of "protection of the public" (*State v. Post*, 826 P. 2d 172 [Wash. 1992]), "lack of amenability to treatment and the extraordinary danger the defendant presents to women" (*State v. Ross*, 861 P. 2d 473 [Wash. 1992]), "threat to the community" (*State v. George*, 834 P. 2d 664 [Wash. App. 1992]), and "a strong proclivity to commit these kinds of crimes" (*State v. Hicks*, 888 P. 2d 1235 [1995]) are all functional equivalents of a future dangerousness finding and thus subject to the limitation to sexual offenses required by *Barnes* and the two-prong objective justification required by *Pryor*.

The cases cited above typify the approach taken by Washington's appellate courts in reviewing exceptional sentences. While one can quibble with the result in a particular area, the methodology and the overall results demonstrate that law has come to sentencing in Washington.

3. *Judicial Discretion and Racial Disparity.* There remains the issue of disparity. One main argument in support of guidelines was that they would reduce disparity in general and racial disparity in particular. Here the promise has been achieved, at least in part. While in Washington, like most jurisdictions, members of minority groups, on average, receive more severe sentences than whites, the differences are accounted for by differences in legally relevant variables—the offense of conviction and prior criminal record. There are no significant differences in sentences imposed under the guidelines for those convicted of the same crime with the same offender score (Fallen 1987, pp. 62–64;

TABLE 4

First-Time Offender Departures

	Below Sentence Range	Within or Above Sentence Range	Total
White	408 (33%)	827 (67%)	1,235
Black	26 (15%)	143 (85%)	169
Other	30 (22%)	108 (78%)	138

SOURCE.—Fallen 1987, p. 68.

Sentencing Guidelines Commission 1997, p. II-1; Engen, Gainey, and Steen 1999, p. 2).

Similarly, judicial authority to impose exceptional sentences under the court's departure authority shows little evidence of disparity correlated with race. "Whites and blacks have virtually the same exceptional sentence rates; other minorities are less likely to receive an exceptional sentence" (Fallen 1987, p. 65).

However, significant racial disparity has been found in the use of other alternatives to the presumptive sentence range (i.e., the first-time offender and sex offender sentencing alternatives). Table 4 depicts differences by race in 1987 among eligible defendants who received first-time offender sentences.

Whites were more than twice as likely as blacks to receive sentences less than the presumptive range when such a downward departure was authorized. The pattern is similar, although not as pronounced, for other minorities. Sentences imposed under the sex offender alternative show the same disparities. This alternative authorizes substitution of a community treatment sentence with not more than six months in jail for a prison sentence. Table 5 depicts the differences.

TABLE 5

Sex Offender Alternative Sentences

	Percentage of Eligible Receiving Alternative
White	56
Black	34
Other	38

SOURCE.—Fallen 1987, p. 68.

Data reported by the Sentencing Guidelines Commission in 1997 revealed the same disparities (Sentencing Guidelines Commission 1997, pp. 11-1 to 11-9). In 1998, 37 percent of eligible white offenders received first-time offender sentences, while only 25 percent of eligible black offenders and 22.5 percent of eligible members of other minority groups received such sentences (Sentencing Guidelines Commission 2000*a*, p. 7).

A study of drug sentences imposed between July 1, 1995, and December 31, 1998 demonstrates the same pattern. Both black and Hispanic defendants were found less likely to receive first-time offender sentences than whites (Engen, Gainey, and Steen 1999, p. 51), and the authors concluded that "significant differences by race and ethnicity in the use of alternative sanctions exist even controlling for legal and extra-legal characteristics" (Engen, Gainey, and Steen 1999, p. 3).

What can we learn from these conclusions? Clearly, sentencing guidelines can effectively structure judicial discretion so as to eliminate the influence of race and ethnicity as a variable. Imposing sentences within the presumptive range and granting exceptional sentences are decisions that are constrained by the guidelines. The applicable sentence range is determined solely by the crime of conviction and prior criminal history. Exceptional sentences must be justified by explicit findings of "substantial and compelling circumstances" and are subject to substantive appellate review. The act retains unstructured and unreviewed discretion for sentencing judges in cases in which the offender is eligible for the first-time offender and the sex offender sentencing alternatives. No criteria for use are provided, and the exercise of judicial discretion is not subject to review. In these circumstances, and only in these circumstances, racial disparity emerges. The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion.

4. *Correctional Discretion.* Initially, Washington's reform addressed correctional discretion by its partial abolition; parole and probation were prospectively repealed, and correctional officials could vary length or conditions of sentence only by granting or denying good time while in the institution. This decision was, and has remained, deeply resented by many in corrections. Arguing that it is denied the necessary authority to protect the public, the department of corrections has repeatedly pursued the reinstatement of its authority. The 1999 legislature, persuaded by these arguments, returned authority to corrections officials to assess individual risk and to tailor conditions

and supervise offenders in the community pursuant to their risk assessments.

The explicit authority in the Offender Accountability Act to use risk predictions in determining the conditions, intensity, and duration of postrelease supervision raises a series of issues about how the new authority will be exercised. Initially, there is the challenge of implementation. The department of corrections has been granted authority to supervise over 20,000 offenders each year, on the basis of individual assessments of risk, with a staff that for almost two decades has played a comparatively passive role. Converting community corrections officers into the proactive agents of surveillance and intervention contemplated by the "community justice" model presents formidable management challenges (see, e.g., Smith and Dickey 1999). The challenge is greater because essentially no new resources have been provided. Increased surveillance and intervention with high-risk offenders will be possible only by shifting resources from lower-risk offenders. Inevitably, an offender assessed to be medium or low risk will commit an atrocious crime. Retrospective scrutiny, influenced by hindsight bias, will reveal that more intensive supervision was allowed but not undertaken.

The authors of the risk assessment instrument that will be used in Washington are candid about their assessment of its accuracy. False-positive predictors (estimates of failures that do not occur) occur in 30 percent of cases, while false-negative predictions (a risk exists but is not predicted) occur in only 2 to 3 percent of the cases (Andrews and Bonta 1995, p. 49). Such a bias is justified on public safety grounds; it is preferable to overpredict rather than underpredict if the goal is public safety alone. From a just deserts perspective, however, taking control over a person beyond what is deserved for the crime on the basis of a prediction of future behavior is unjust (Morris 1974, pp. 80–84). To do so on the basis of an inaccurate prediction is even more unjust.

This tension is increased when risk is determined, in part, by subjective criteria which are susceptible to racial disparity. Assessments of offender attitudes, both current and past, are part of the determiners of risk. We know that subjective assessments are quite likely to be racially disparate. A recent Washington study illustrates this. In a review of 233 narrative reports from juvenile probation officers, researchers found that probation officers consistently portray the cause of black offenders' delinquency as negative attitudinal and personality traits, while the environment is more frequently used to explain delinquency by white youths. These attributions are not benign; they were found

to influence assessments of future dangerousness and served a key role in sentence recommendations (Bridges and Steen 1998, p. 567). We see no reason to believe that similar disparities will not be found in the continuing assessments of risk called for by the Offender Accountability Act.

There remain the consequences of the myriad decentralized discretionary decisions inherent in supervising thousands of offenders. Given the inevitability of scarce supervisory resources, how will those resources be allocated? Will, for example, geographical concentrations of high-risk offenders be targeted for surveillance? Considerations of public safety and efficiency will argue strongly to do so. Surveillance of equal numbers of offenders of equal risk who are dispersed widely through the community would consume significantly greater resources. The choice is obvious, is it not? But, of course, we need not guess; we know the race of those concentrated high-risk offenders just as we know the race of those dispersed equally high-risk offenders. And, we know the race of those offenders who will be found in violation of the conditions of their supervision. We do not suggest that this result is the intended consequence of the grant of discretionary authority. Yet, it is foreseeable and our experience counsels caution (Tonry 1994, pp. 104–15).

Washington's experience with sentencing reform demonstrates that techniques exist that can effectively "structure but not eliminate" discretion. Policy choices can effectively be translated into individual sentencing decisions consistent with those policy choices. Whether these techniques can be applied effectively beyond sentencing is an open question. Certainly, Washington's experience with external constraints on prosecutorial discretion does not offer much hope. Perhaps Washington's correctional administrators will develop techniques to structure and constrain the discretion that has been returned to them. And, of course, there remains the issue of whether constraining discretion is a good idea. For those who see sentencing as an inherently individualized human process, this entire enterprise will remain flawed. For those, however, who see discretion as both inevitable and troubling, Washington's experience has been instructive, and will continue to be.

C. Conclusion

Any evaluation of a sentencing reform must begin with the recognition of its transitory nature. There are no new issues in sentencing, only provisional resolutions of age-old issues. The enduring question is, When will each resolution itself be reformed? As we reflect on the

past quarter century of sentencing reform in Washington, we see a continuous process, informed by principle but tempered by pragmatism, with each stage reflecting the consensus of the moment.

This perspective arises from viewing sentencing as a process, not an end, a continuing attempt to reconcile the multiple inconsistent purposes of sentencing and apply them to individual cases in a manner seen as fair by all. The process is collective; sentencing is done in all our names. Since we do not all agree on these issues, the incentive for change is always present. Perhaps not surprisingly, since we were active participants at the time, we favor the consensus of the mid-1980s over that which currently exists, but we also believe the current status to be preferable to that which existed in 1980. These are subjective judgments, of course, and our views are entitled to no more weight than those of any other citizen.

What we believe there can be no doubt about, however, is that the process by which sentencing policy is determined and applied has become visible, resolved for the major part by public debate and not by low-visibility decision makers. Law has come to sentencing in Washington, and law evolves by public, not private decision making. Law's inevitable partner, politics, is a part of that process and inevitably means that there will be winners and losers, step by step, issue by issue. The process is not elegant, and the results are not fully consistent, but the alternatives, in our judgment, are worse. Our experience with sentencing when it was a series of low-visibility discretionary decisions, informed mainly by the values of the decision makers, leaves us with the firm belief that Washington's current sentencing system is more just than the one that preceded it. We are equally firm in our belief that it can be made more just. And so we continue to work.

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