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THE ROLE OF THE LEGISLATURE IN GUIDELINES SENTENCING IN "THE OTHER WASHINGTON"

David Boerner*

INTRODUCTION

Washington State's experience with sentencing guidelines as a sentencing reform mechanism provides a case study of a legislature's role in sentencing. In 1981, Washington's Legislature revoked a three-quarter century delegation of sentencing discretion to the judiciary and the parole board¹ by enacting a Sentencing Reform Act which abolished indeterminate sentencing and implemented presumptive and determinate guidelines for sentencing in Washington.²

Sentencing reform in Washington has been predominately accomplished by legislative reform. Exercising its inherent power to "define and fix the penalty for crime,"³ Washington's Legislature crafted a sentencing system which abolishes administrative discretion to release on parole and which "structures, but does not eliminate, discretionary decisions affecting sentences."⁴ Although it was shaped by the national sentencing reform movement, Washington's reform⁵ nonetheless contains a number of distinctive features which distinguish it from the reform efforts of both other states and the United States. Of these features, perhaps the most notable and most relevant for this symposium's purpose is the role played by Washington's Legislature in both the initial Sentencing Reform Act

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1. In 1899, the governor was given the power to "parole" certain prisoners. 1899 Wash. Laws 36 (repealed 1981). In 1905, judges were given the power to "suspend sentence." 1905 Wash. Laws 49 (repealed 1981). In 1907, the Washington Legislature adopted an indeterminate sentencing system in which judges did not "fix the limit or duration of the sentence." 1907 Wash. Laws 341 (repealed 1981).

2. WASH. REV. CODE ANN. § 9.94A.010 (West Supp. 1992).

3. *Ex parte* United States, 242 U.S. 27, 42 (1916); *State v. Ammons*, 713 P.2d 719, 723-24 (Wash.) (determining sentencing process is prerogative of legislature, not judiciary; "[t]he trial court's discretion in sentencing is that which is given by the [l]egislature"), *modified in part*, 718 P.2d 796 (Wash.), *cert. denied*, 479 U.S. 930 (1986).

4. WASH. REV. CODE ANN. § 9.94A.010.

5. Washington's reform was initially proposed in 1975 by King County (Seattle) Prosecuting Attorney Christopher T. Bayley. For a discussion of this proposal, see Christopher T. Bayley, *Good Intentions Gone Awry: A Proposal for Fundamental Change in Criminal Sentencing*, 51 WASH. L. REV. 529 (1976). The legislature first considered the reform in 1977. See H.R. 614, 45th Wash. Leg., 1st Extraordinary Sess. (1977). These reforms were enacted in 1981 as the Sentencing Reform Act of 1981. See WASH. REV. CODE ANN. § 9.94A (West Supp. 1992). The Act's history is detailed and placed in the national context in DAVID BOERNER, SENTENCING IN WASHINGTON ch. 2 (1985).

and its continued evolution. Although Washington has a Sentencing Guidelines Commission (Commission), the Commission's role in the formulation of sentencing policy, both in structure and practice, has been limited. The Commission has functioned as an agent of the Washington Legislature, not as an independent actor. Unlike other states⁶ and the United States,⁷ Washington's Sentencing Guidelines Commission does not possess the power to promulgate guidelines which would become effective unless vetoed by the legislature. Except for a narrow exception⁸ which has never been invoked, the Commission is limited to advising the legislature. Although the legislature initially followed the Commission's advice, it has increasingly initiated changes in sentencing policy on its own in recent years.

This article describes the role Washington's Legislature has played in the formulation and reformulation of sentencing policy and examines the effectiveness of Washington's guidelines system for translating legislative policy judgments into practice. This article begins with a description of the study's methodology. Part II then examines the policy determinations made in the initial sentencing reform act of 1981 and details the implementation of those policy determinations by the Commission. Part III examines the initial impact of the new guidelines. Finally, Part IV details a series of legislative changes in Washington's Sentencing Reform Act and considers their effect on sentencing in Washington.

This examination reveals that after the implementation of its guidelines in 1984,⁹ Washington experienced an abrupt improvement in the overcrowding of its prison system and for several years actually enjoyed excess prison capacity.¹⁰ The Sentencing Reform Act was proclaimed a "success," and Washington joined Minnesota as an example of the successful implementation of state sentencing reform.¹¹ By the early 1990's, however, Washington's prison population was increasing at a dramatic rate. From 1990 to 1991, the state's prison population increased 22.9%, and from 1991 to 1992, it increased another 10.1%.¹² A prison construc-

6. For an example of a typical state sentencing scheme which elevates the state sentencing commission to more than an advisory role, see 42 PA. CONS. STAT. ANN. §§ 2153-2155 (1981).

7. See 28 U.S.C. §§ 991-998 (1988) (establishing United States Sentencing Commission and delineating scope of its authority).

8. Upon a gubernatorial declaration that "an emergency exists" due to increasing prison population, the Commission is authorized to revise the sentencing guidelines without prior legislative approval. WASH. REV. CODE ANN. § 9.94A.160 (West Supp. 1992).

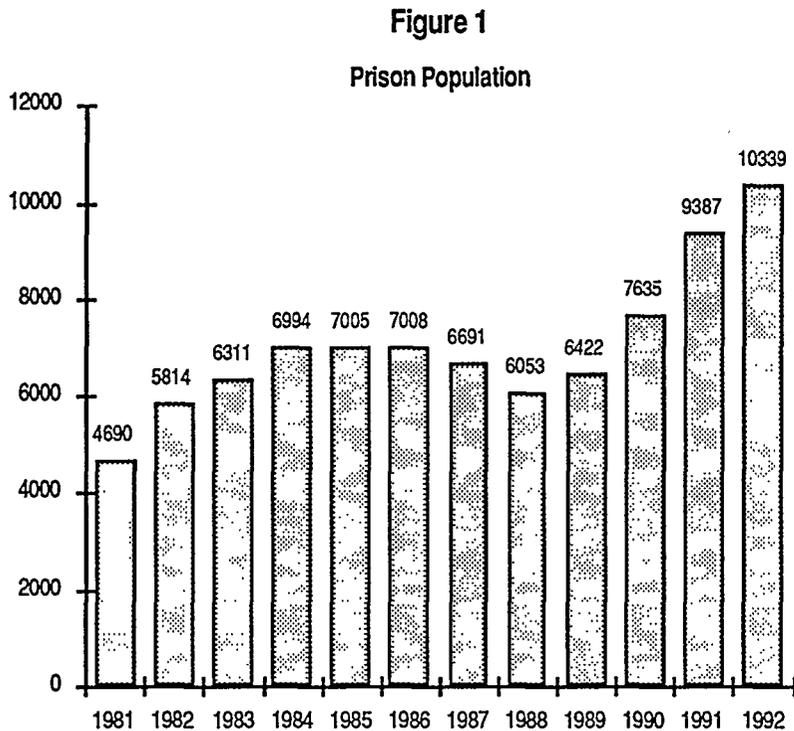
9. Washington's Sentencing Reform Act applied prospectively to all felony crimes committed on or after July 1, 1984. *Id.* § 9.94A.905.

10. From 1987 through 1989, Washington's Department of Corrections rented excess prison capacity to other jurisdictions.

11. See, e.g., Michael H. Tonry, *Sentencing Guidelines and Their Effects*, in *THE SENTENCING COMMISSION AND ITS GUIDELINES* 16, 25 (Andrew von Hirsch et al. eds., 1987).

12. WASHINGTON STATE SENTENCING GUIDELINES COMM'N, *A DECADE OF SENTENCING REFORM: WASHINGTON AND ITS GUIDELINES 1981-1991* 7 (1991) [hereinafter *A DECADE OF SENTENCING REFORM*].

tion program designed to double prison capacity was initiated.¹³ Figure 1¹⁴ depicts the growth of Washington's prison population over the past decade:



The cause of the sharp increases beginning in 1989 is uncertain. Perhaps Washington's sentencing guidelines, once thought to be very successful for alleviating prison overcrowding, are responsible for these massive increases in prison population.

Determining whether the state's sentencing guidelines are indeed responsible for these increases requires distinguishing causation from correlation. That a particular result follows a change in a legal standard which affects the result does not, of course, establish the responsibility of the change in the legal standard for the change in result.¹⁵ Although absolute proof is probably impossible,¹⁶ and certainly beyond this study's reach,

13. Washington's 1991-1993 biennial capital budget appropriated \$318 million for prison construction. By contrast, only \$260 million was spent on prison capital expenditures during the entire previous decade. DEP'T OF CORRECTIONS, STATE OF WASHINGTON, STATE AND LOCAL CRIMINAL JUSTICE CONFERENCE 2 (Feb. 12, 1993) (actual and projected costs) [hereinafter CRIMINAL JUSTICE CONFERENCE].

14. The data in Figure 1 was compiled by the State of Washington Dep't of Corrections.

15. JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 54-59, 80-81 (1985).

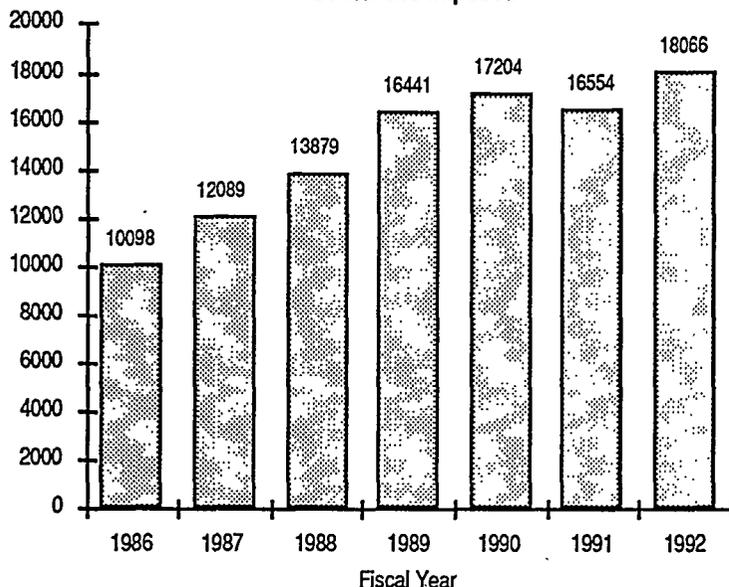
16. *Id.* at 80.

the circumstances of Washington's experience provide a series of natural experiments which strongly suggest that sentencing guidelines are a remarkably effective tool for translating legislative sentencing policy judgments into sentences reflecting those policies.

I. METHODOLOGY

Focusing on changes in prison population alone would produce a misleading measure of the impact of changes in sentencing guidelines. Such an approach is misleading because, although prison population is determined by a deceptively simple calculus (the number of persons sentenced to prison multiplied by the length of sentence served), the number of persons sentenced to prison is influenced by many factors other than sentencing guidelines. For instance, sentencing laws affect both variables of the prison population "formula": (1) the "in-out" choice between a prison sentence and a sentence involving other punishments and (2) the length of the "in" sentences. Sentencing laws do not, however, directly affect the number of sentences imposed. Instead, this variable, both in Washington and elsewhere, is determined by local criminal justice systems and involves a number of decisions by police, prosecutors, and courts. Because the number of persons convicted of felonies in Washington over the past decade has increased dramatically, analysis of the effect of legislative policy changes requires separating the impact of the increase in convictions from the effect of changes in the sentencing laws. Figure 2¹⁷ illustrates this increase:

Figure 2
Sentences Imposed



17. The data in Figure 2 was compiled by the State of Washington Dep't of Corrections.

The Sentencing Reform Act's structure, which the next section of this article describes, allows the Washington Legislature to vary each of the statutory variables which determine the presumptive sentence range. Washington's Legislature has used the structure of the sentencing guidelines to focus its changes on the particular crimes and offenders it intends to impact. These "targeted" changes in the guidelines occurred, however, during a period in which severity of sentences was generally increasing. This coincidence necessitates distinguishing between the effects of the specific legislative changes in the guidelines and the impact of general background trends produced by overall attitudinal changes in society toward crime, which undoubtedly influence the discretionary decisions regarding sentence severity which the sentencing guidelines permit judges to make.¹⁸

This article uses data collected by the Washington Sentencing Guidelines Commission. Since 1985, the Commission has collected information regarding all sentences imposed under the Sentencing Reform Act and prepared annual summary reports detailing the sentences imposed during each fiscal year.¹⁹ The reports provide summary data for each crime, including the number of sentences which are actually prison sentences,²⁰ the average length of those prison sentences, the number of nonprison sentences for each crime, and the average length of jail terms imposed, if any.²¹ These summary reports include all sentences imposed for each crime, regardless of whether they are within the presumptive standard range, outside of that range but justified as exceptional sentences,²² or outside of the presumptive standard range but authorized as "first-time offender sentences"²³ or "special sex offender sentencing alternatives."²⁴ All of these sentences are then combined into a composite average of all

18. All presumptive sentences are expressed in ranges. Exactly where, within the range, a particular sentence is set is left to the unstructured discretion of the sentencing judge. WASH. REV. CODE ANN. § 9.94A.120(1) (West Supp. 1992). Moreover, the length of an exceptional sentence, if justified, is left to the discretion of the sentencing judge. *Id.* § 9.94A.120(2).

19. WASHINGTON SENTENCING GUIDELINES COMM'N, FISCAL YEAR STATISTICAL SUMMARIES (1986-1992) [hereinafter STATISTICAL SUMMARIES]. This data is on file with the author and the Wake Forest Law Review and is available from the Washington Sentencing Guidelines Commission.

20. Except for three exceptions, Washington's sentencing guidelines are presumptive, not mandatory. A judge may depart from the presumptive sentence and impose a sentence of greater or lesser severity upon finding that there are "substantial and compelling reasons justifying an exceptional sentence." WASH. REV. CODE ANN. § 9.94A.120(2). All sentences over one year are served in the custody of the Washington Department of Corrections. *Id.* § 9.94A.190(1).

21. All sentences of one year or less are served in county jails. *Id.* § 9.94A.190(1). Such sentences are commonly known as "jail" sentences. The Sentencing Reform Act uses the term "total confinement." *Id.* § 9.94A.030(31). Except for the purpose of allocating responsibility for confinement between counties and the state, the Sentencing Reform Act does not distinguish based on the site of confinement.

22. For a discussion of the "exceptional sentence" option, see *supra* note 20.

23. See WASH. REV. CODE ANN. § 9.94A.120(5).

24. See *id.* § 9.94A.120(7).

sentences for that crime, expressed in months of confinement. This average reflects all of the guidelines variables²⁵ that influence the severity of sentences. Relying on the average sentence length for a given crime over time permits the assessment of all influences on sentences for that crime. Although average sentence lengths reflect many nonstatutory influences, they nonetheless permit comparison of sentences imposed during the same time period under both the preexisting and the changed guidelines. This comparison is possible because all changes to the Sentencing Reform Act are prospective only and, therefore, for a period of time following each legislative change, sentences will be imposed under both the old and the new sentencing guidelines.

Assuming that all nonstatutory influences equally impact sentences imposed during the same time period by the same judges for the same crimes, variations in average sentence length between sentences imposed under the old and new guidelines can be considered the result of changes in the guidelines. Furthermore, because the legislative changes in the sentencing guidelines were directed at specific crimes, it is possible to compare changes in average sentence length for those crimes with changes in average sentence length for other crimes which were not the subject of legislative guideline revisions. This approach roughly differentiates between increases produced by general attitudinal shifts affecting discretionary decisionmakers and increases attributable to legislative direction.

Conventional social science wisdom posits that legal changes are largely ineffective in changing the behavior of decentralized decisionmakers. This consensus is drawn from the results of impact studies which examine whether the behavior of discretionary decisionmakers in the criminal justice system changes in response to changes in externally imposed legal commands. This prevailing theory suggests that such discretionary decisionmakers have come to act the way they do because they believe that the decisions they make are "right" since they best accommodate the local variables which the decisionmakers feel obligated to balance. In the context of sentencing, these local values produce a "going rate"—a locally established sense of how to appropriately dispose of typical cases. The studies conclude that this "going rate" is very resistant to externally mandated change and reveal that local decisionmakers employ a variety of strategies to adapt to legal change without sacrificing the results called for by local values.

This process of adaptation undoubtedly has occurred and continues to occur in Washington. The criminal justice system in Washington, through sentencing, is local. Both prosecutors and judges are locally elected officials who are not restrained by central administrative authority. The "going rates" prevailing in different areas of the state differed significantly before the sentencing guidelines existed. Although the sentencing guidelines have significantly reduced the disparity in sentences,²⁶

25. For a discussion of these variables, see *infra* notes 51-63 and accompanying text.

26. DAVID L. FALLEN, STATE OF WASHINGTON SENTENCING GUIDELINES COMM'N, SENTENCING PRACTICES UNDER THE SENTENCING REFORM ACT: FISCAL YEAR 1987 23-29 (undated).

inequalities continue to persist. Evidence indicates that the process of adaptation to maintain local norms has occurred since the beginning of sentencing reform in Washington.²⁷

This local adaptation process, however, is beyond this article's scope. Instead, this study examines the extent to which legislatively imposed changes in sentencing guidelines, which are always generally applicable, influence the decisions of decentralized decisionmakers. This examination is based on two comparisons: (1) comparison of sentences imposed before and after legislatively imposed changes in the sentencing guidelines and (2) comparison of sentences for specific crimes "targeted" for legislative guideline changes with other contemporaneous sentences not subject to guidelines changes.²⁸

II. THE SENTENCING REFORM ACT OF 1981

The initial Sentencing Reform Act of 1981 was the product of a bipartisan Select Committee on Corrections of Washington's House of Representatives. This committee achieved consensus on many of the issues involved in the sentencing debate which had attracted the legislature's attention since 1976.²⁹ Although it proposed creating a sentencing guidelines commission as an implementing mechanism, the committee nonetheless resolved many of the key policy issues which were left in other states to be resolved by guidelines commissions. Perhaps most importantly, the committee preserved the legislature's primary role by limiting the Commission to serving in a purely advisory capacity.³⁰ The legislature adopted the committee's judgment that legislative authority over sentencing was desirable when it enacted the Sentencing Reform Act of 1981,

As time passes, however, the pattern appears to be returning to previous levels of county-to-county disparity. Conversation with David L. Fallen, Executive Officer, Washington Sentencing Guidelines Comm'n (Jan. 25, 1993).

27. For a discussion of a possible manifestation of this local adaptation process, see *infra* note 74 and accompanying text.

28. The use of aggregate data does not control the possibility that local adaptation operates in various directions in different local jurisdictions and that these local differences cancel each other out when combined into aggregate data. Accounting for this possibility would require a county-by-county analysis which is beyond this article's scope. Furthermore, although the use of aggregate data precludes a comprehensive statistical analysis, the availability of sentence means, standard deviations, and group sizes does allow limited bivariate comparisons. Significantly, the statistical comparisons offered must be viewed as tentative because they do not incorporate adjustments for other potentially relevant covariates, such as the county, age, and race of the defendant and the identity of the sentencing judge. Multivariate analysis which would include these factors is not possible in the absence of individual sentence level data.

29. For a discussion of the early history of sentencing reform in Washington, see *supra* note 5.

30. The only instance in which the Commission's actions can become effective without passage of legislation is pursuant to a gubernatorial declaration of a prison capacity emergency. Upon such a declaration, the Commission is empowered to adopt revisions to the guidelines which take effect immediately. WASH. REV. CODE ANN. § 9.94A.160 (West Supp. 1992). This authority has never been exercised.

and this allocation of authority has remained a central precept in Washington's experience ever since.

Washington's prison system was severely overcrowded in 1981, and its two largest institutions were subject to federal court-ordered population restrictions.³¹ The Washington Legislature, recognizing that the new guidelines system would directly affect prison population, directed the Commission to "conduct a study to determine the capacity of the correctional facilities and programs which are or will be available" and dictated that if "implementation of its recommendations would result in exceeding such capacity . . . the commission shall prepare an additional list of standard sentences which shall be consistent with such capacity."³² The legislature, therefore, ensured that it would retain the final judgment regarding whether increases in prison population, with the concomitant consequences of increased capital and operating expenses, were to be permitted.

The legislature also made a number of the policy choices which other states delegated to a commission. Possibly the most fundamental decision made by the legislature was to replace Washington's indeterminate sentencing system with the requirement that all sentences be determinate.³³ The initial legislation established the guidelines as presumptive rather than mandatory by allowing judges to "impose a sentence outside the standard sentence range,"³⁴ but limited the judges' discretion by requiring written findings of fact and conclusions of law supporting that judgment³⁵ and by providing for appellate review.³⁶ Rehabilitation-oriented sentences were authorized only for "first-time offenders"³⁷ and for certain sex offenders,³⁸ both categories defined by the legislature.

The Commission's major tasks were to "devise a series of recommended standard sentence ranges for all felony offenses and a system for determining which range of punishment applies to each offender based on the extent and nature of the offender's criminal history, if any,"³⁹ and to "[d]evise recommended standards to govern whether sentences are to be

31. See *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985); *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1981) (overcrowding of Washington State Penitentiary); see also *Collins v. Thompson*, 679 F.2d 168 (9th Cir. 1982) (overcrowding of Washington State Reformatory).

32. WASH. REV. CODE ANN. § 9.94A.040(6). The Washington Legislature also authorized the Commission to make periodic recommendations in future years for revisions or modifications to the sentencing guidelines but required that "[i]f implementation of the revisions or modifications would result in exceeding the capacity of correctional facilities, then the commission shall accompany its recommendation with an additional list of standard sentence ranges which are consistent with correction capacity." *Id.* § 9.94A.040(7).

33. The power to defer or suspend the imposition or execution of sentences was prospectively abolished. *Id.* § 9.94A.130.

34. *Id.* § 9.94A.120(2).

35. *Id.* § 9.94A.120(3).

36. *Id.* § 9.94A.210(2).

37. *Id.* § 9.94A.120(5).

38. *Id.* § 9.94A.120(7).

39. *Id.* § 9.94A.040(2)(a).

served consecutively or concurrently."⁴⁰ The Commission was directed to "emphasize confinement for the violent offender and alternatives to total confinement for the nonviolent offender."⁴¹ Each of the recommended standard ranges were required to "include one or more"⁴² of a series of defined sentence components: "total confinement,⁴³ partial confinement,⁴⁴ community supervision,⁴⁵ community service,⁴⁶ and a fine."⁴⁷ The legislature also prescribed the width of the standard sentencing ranges.⁴⁸

Although the Commission had a large amount of work to do, the contrast between the structural charge given to Washington's Commission and the broad grant of discretion which Minnesota's Legislature gave to its Sentencing Guidelines Commission⁴⁹ is striking. The difference between the two states' approaches apparently lies in the political origins of sentencing reform in each state. In Washington, a legislative consensus was achieved and the Commission's role was to implement that consensus. In Minnesota, on the other hand, the legislative consensus only extended to the replacement of indeterminate sentencing with determinate sentencing, the articulation of required procedures for sentencing, and the authorization of appellate review of sentences. All other issues were delegated to its commission.⁵⁰ As each commission began its work, its task

40. *Id.* § 9.94A.040(2)(c).

41. *Id.* § 9.94A.040(5).

42. *Id.* § 9.94A.040(3).

43. *Id.* Total confinement is "confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for [24] hours a day." *Id.* § 9.94A.030(31).

44. *Id.* § 9.94A.040(3). Partial confinement is "confinement for no more than one year in a facility or institution operated or utilized under contract by the state . . . [and] includes work release, home detention, [and] work crew." *Id.* § 9.94A.030(23).

45. *Id.* § 9.94A.040(3). Community supervision is a "time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed pursuant to this chapter by a court." *Id.* § 9.94A.030(7).

46. *Id.* § 9.94A.040(3). This term was not defined in the original act. The act now defines community service as "compulsory service, without compensation, performed for the benefit of the community by the offender." *Id.* § 9.94A.030(6).

47. *Id.* § 9.94A.040(3). A fine is defined as "the requirement that the offender pay a specific sum of money over a specific period of time to the court." *Id.* § 9.94A.030(19).

48. *Id.* § 9.94A.040(4)(a), (b). This section reads in part:

In devising the standard sentence ranges of total and partial confinement under this section, the commission is subject to the following limitations:

(a) If the maximum term in the range is one year or less, the minimum term in the range shall be no less than one-third of the maximum term on the range, except that if the maximum term in the range is ninety days or less, the minimum term may be less than one-third of the maximum;

(b) If the maximum term in the range is greater than one year, the minimum term in the range shall be no less than seventy-five percent of the maximum term in the range

Id.

49. See MINN. STAT. ANN. § 244.09 (West 1992) (establishing Minnesota sentencing guidelines commission and delineating scope of its authority).

50. DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 28 (1989).

was therefore fundamentally different from the other's. In Washington, the Commission's task was to implement the legislature's conceptual and policy choices, whereas the Minnesota Commission was responsible for much of the conceptual work.

The "system"⁵¹ developed by Washington's Commission determined the presumptive sentence range by using a grid for which the vertical axis measures the "offense seriousness level"⁵² of the crime of conviction and the horizontal axis represents the "offender score."⁵³ Pursuant to the legislature's direction, the assigned offense seriousness levels rank property crimes in the lower levels and crimes against persons in the upper levels.

The "offender score" is determined by a series of "offender score rules"⁵⁴ which convert the offender's "criminal history"⁵⁵ into points by assigning variable weights based on the nature of the conviction,⁵⁶ the relationship between prior convictions and the conviction for which a sentence is currently being imposed,⁵⁷ the length of time intervening between a prior conviction and the offense for which a sentence is currently being imposed,⁵⁸ and whether the defendant was previously convicted as an adult or as a juvenile.⁵⁹ Whether sentences for multiple current convictions are served consecutively or concurrently was resolved by creating a system which, with one exception,⁶⁰ mandates that all sentences imposed at the same time are served concurrently, but that each additional conviction is used as if it were a prior conviction for determining criminal his-

51. For a further discussion of the system used in Washington, see *supra* notes 39-48 and accompanying text.

52. WASH. REV. CODE ANN. § 9.94A.310. The most common felonies were classified into 14 seriousness levels. *Id.* § 9.94A.350. A fifteenth level was added in 1990. *Id.* § 9.94A.320. A residual category for unmarked crimes was also created.

53. *Id.* § 9.94A.360. There are 10 possible offender scores, ranging from 0 to 9+. *Id.* § 9.94A.310. Combining 10 possible offender scores with 14 possible offense seriousness levels creates a grid of 140 squares.

54. *Id.* § 9.94A.360.

55. *Id.* § 9.94A.030(8).

56. Only felony convictions are included in the offender score. *Id.* § 9.94A.360.

57. Variable weights from zero to three points are assigned based on whether the prior conviction is similar to the conviction for which the defendant is currently being sentenced. *Id.* § 9.94A.360. For example, if the present conviction is for a serious violent offense such as murder, then prior convictions for other serious violent offenses receive three points. *Id.* § 9.94A.360(10). For a further discussion of these variable weights and the rationale underlying them, see BOERNER, *supra* note 5, §§ 5.9-5.15.

58. Convictions for Class B or Class C felonies are not counted if the defendant has spent ten or five crime-free years in the community, respectively, since the prior convictions. WASH. REV. CODE ANN. § 9.94A.360(2). Class A convictions, however, are always counted. *Id.*

59. Juvenile convictions receive different scores than adult convictions for the same crime. *Id.* § 9.94A.360(4). This special scoring is used only for crimes committed before age 15 and only if the offender is less than 23 at the time of the current offense. *Id.*; see also *id.* § 9.94A.030(12)(b) (excluding certain juvenile convictions from definition of "criminal history").

60. Two or more convictions for "serious violent offenses" always receive presumptive consecutive sentences. *Id.* § 9.94A.400(1)(b). In those cases, the other current convictions are not counted as criminal history. *Id.*; see also *id.* § 9.94A.030(27) (defining "serious violent offense").

tory.⁶¹ Through this process, offenders with multiple convictions are sentenced more severely than those with single convictions, but the multiple conviction sentences are still confined within the sentencing grid's structure.

Although this system is considerably complex, it is designed to translate specific policy judgments into discrete impacts on the presumptive sentence ranges. The legislature accepted and enacted the Commission's initial proposals⁶² and has since used these variables to focus different policy judgments on their intended targets.⁶³

III. THE INITIAL IMPACT OF THE NEW GUIDELINES

The guidelines apply to crimes committed on or after July 1, 1984.⁶⁴ Sentencing practices under the new guidelines changed consistently with the legislature's direction. On a cumulative basis, imprisonment rates for violent offenses⁶⁵ increased from 48.8% in 1982⁶⁶ to 65.1% in 1985⁶⁷ while imprisonment rates for nonviolent offenses decreased from 13.3% in 1982 to 8.8% in 1985.⁶⁸ Imprisonment rates for the most common violent and nonviolent crimes are presented in Table 1.⁶⁹

Violent:	1982	1985
Statutory Rape	16%	53%
Robbery 1°	79%	94%
Burglary 1°	35%	98%
Nonviolent:		
Burglary 2°	19%	16%
Forgery	16%	3%
Theft 1°	11%	3%

These results are consistent with the legislature's direction to "emphasize confinement for the violent offender and alternatives to total confinement for the nonviolent offender."⁷⁰

With respect to "alternatives to total confinement for the nonviolent

61. *Id.* § 9.94A.400(1)(a). The process is analyzed in BOERNER, *supra* note 5, § 5.8.

62. 1983 Wash. Laws 546.

63. For an in-depth discussion of this legislative practice, see *infra* notes 76-169 and accompanying text.

64. WASH. REV. CODE ANN. § 9.94A.905.

65. *Id.* § 9.94A.030(33) (defining "violent offense").

66. DAVID L. FALLEN, STATE OF WASHINGTON SENTENCING GUIDELINES COMM'N, PRELIMINARY EVALUATION OF WASHINGTON STATE'S SENTENCING REFORM ACT 6 (1986).

67. *Id.*

68. *Id.*

69. *Id.* at 49.

70. WASH. REV. CODE ANN. § 9.94A.040(5). For further discussion of the Washington Legislature's directions to the Commission, see *supra* notes 30-48 and accompanying text.

offender,"⁷¹ however, the impact of the new guidelines was less certain. Although the average length of jail sentences decreased, jail sentences reflect "total confinement" as defined by the legislature.⁷² The sentencing guidelines did not break new ground in developing alternatives to incarceration. The guidelines permitted conversion of total confinement into partial confinement (work release) and the conversion of up to sixty days of total confinement to community service; the guidelines did not authorize day fines, home detention, day reporting, or other alternatives.⁷³

The changes in imprisonment rates following the implementation of the new guidelines were accompanied by a shift in the distribution of convictions between the violent and the nonviolent categories. The percentage of all convictions which were for violent crimes decreased from 19.5% in 1982 to 14.0% in 1985.⁷⁴ Although this redistribution was not an explicit objective of the Sentencing Reform Act and may be due to the adaptive responses of local criminal justice officials to maintain "going rates," it nonetheless contributed to the prison population stabilization which followed the implementation of the new guidelines.

The net effect of these changes on prison population was dramatic. Washington's once overcrowded prisons soon enjoyed excess prison capacity, a condition remedied by the "rent-a-cell" program which rented the excess prison capacity to other states suffering from overcrowded prisons. As Figure 1 demonstrates, Washington's prison population remained constant in 1985 and 1986 and actually declined in 1987 and 1988. This was primarily responsible⁷⁵ for the perception that Washington's sentencing reform was a success. At a time when prison populations across the United States were exploding, Washington's stability was remarkable. Only in 1989 did prison populations renew their upward movement and, as the next section discusses, this reversal was at least partially attributable to changes in legislative direction.

IV. SUBSEQUENT LEGISLATIVE CHANGES AND THEIR EFFECTS

The Sentencing Reform Act was not intended to be static legislation.⁷⁶ That intent has been realized. The Washington Legislature has

71. WASH. REV. CODE ANN. § 9.94A.040(5).

72. For the definition of "total confinement," see *supra* note 43.

73. In 1991, the Commission concluded that the goal of emphasizing alternatives to total confinement for the nonviolent offender "has not been achieved." A DECADE OF SENTENCING REFORM, *supra* note 12, at 13.

74. FALLEN, *supra* note 66, at 5.

75. Washington's new guidelines also significantly reduced disparity, as gauged by variations between the sentences received by defendants with the same criminal history who are convicted of the same offense. Moreover, the guidelines stimulated the development of a rich body of case law addressing the circumstances justifying exceptional sentences. Although these achievements are substantial, they are beyond this article's scope.

76. The Act provides that "[t]he commission shall study the existing criminal code and from time to time make recommendations to the legislature for modification." WASH. REV. CODE ANN. § 9.94A.040(8) (West Supp. 1992). Originally, the Act provided that the Commission was to meet every other year for this purpose. 1981 Wash. Laws 523.

amended the Sentencing Reform Act every year since its implementation in 1984.

Some of these legislative changes are technical and merely reflect the continuing evolution and "fine tuning" of the original principles of Washington's sentencing reform. Although these technical modifications (which were recommended by the Commission) affected sentences imposed under the Sentencing Reform Act,⁷⁷ they did not represent changes in the Commission's initial policy judgments. Other amendments to the Sentencing Reform Act, however, reflect a shift in policy rather than a technical refinement. These policy-driven legislative revisions are the subject of this article's analysis. These amendments, which narrowly focus on particular crimes, reflect the judgment that more severe sentences are appropriate for the targeted crimes.

This article will examine five significant legislative amendments: (1) the 1987 amendment of the sentencing guidelines for drug offenses, (2) the 1989 amendments for drug offenses, (3) the 1989 amendments for burglary offenses, (4) the 1988 guideline amendments for sex offenses against children, and (5) the 1990 guideline amendments for sex offenses in general.⁷⁸ This series of guideline revisions presents an opportunity to explore the degree to which these legislatively imposed shifts in sentencing policy affected actual sentencing practice.

Because each of these amendments applied only prospectively to sentences for crimes committed after their effective dates, a period existed following their implementation during which sentences governed by the prechange guidelines continued to be imposed simultaneously with sentences governed by the new guidelines. Prospective application therefore creates the opportunity to compare sentences imposed under different sentencing guidelines provisions, but imposed by the same judges, during the same time period, on offenders who have committed the same offenses. Differences in such sentences, arguably, can be attributed to the legislative changes in the sentencing guidelines. This argument is considerably strengthened if the differences occur consistently over a series of changes. As this article demonstrates, such a pattern does emerge.

77. The most important of these modifications was a series of changes in the weight assigned to prior convictions for determining the offender score. 1986 Wash. Laws 905. The Commission initially suggested these changes in 1985 to produce convictions consistent with its original scheme. However, the changes significantly increase the offender score and, consequently, the presumptive sentence range for repeat offenders. The Commission's proposal was not adopted during the 1985 legislative session, primarily because of concern over its projected effect of increasing the prison population by 600. The proposal was enacted, however, a year later during the 1986 session. Roxanne Lieb, *Washington State: A Decade of Sentencing Reform*, OVERCROWDED TIMES, July 1991, at 1, 5-8 (Roxanne Lieb was the Executive Officer of the Sentencing Guidelines Commission from 1982 through 1990).

78. 1990 Wash. Laws 12; 1989 Wash. Laws 2144; 1988 Wash. Laws 561; 1987 Wash. Laws 1968.

A. *The 1987 Amendment of the Sentencing Guidelines for Drug Offenses*

The initial version of the Sentencing Reform Act enacted in 1981 contained a statutory alternative to the standard sentence range, subject to the sentencing judge's unstructured discretion, which was available to all who qualified as "first-time offenders."⁷⁹ Unlike the rest of the Sentencing Reform Act, this option retained, within limits, the premises of the "rehabilitative ideal" which had been the dominant philosophy of Washington's former indeterminate sentencing system. Instead of a standard range sentence, a defendant sentenced under this option can receive a sentence which includes many of the elements of a probationary sentence under prior law, including a requirement to participate in treatment programs or perform other affirmative conduct such as remaining employed or attending school.⁸⁰ This option permitted total confinement but limited it to not more than ninety days.⁸¹

Upon its initial implementation in 1984, all first-time drug offenders were eligible for this optional sentence. During calendar year 1985, 77.7% of all those convicted of drug offenses were eligible for the option,⁸² and judges used it in 61% of the eligible cases.⁸³ Eligibility for the first-time offender option did not substantially affect sentence severity for drug offenses in most situations.⁸⁴ For the offense of delivery or possession with intent to deliver Schedule I or II drugs, however, the first-time offender option allowed a significantly less severe sentence than the presumptive prison sentence range of twelve to fourteen months.⁸⁵

In 1987, the Washington Legislature responded to concerns that this option allowed overly lenient sentences for traffickers in heroin and cocaine⁸⁶ ("dealers," as they are commonly called) by denying eligibility for the first-time offender sentencing option to those convicted of delivery or possession with intent to deliver heroin or cocaine.⁸⁷ This reform applied

79. WASH. REV. CODE ANN. § 9.94A.120(5); *see also id.* § 9.94A.030(20) (defining "first-time offender").

80. *Id.* § 9.94A.120(5).

81. *Id.*

82. Five hundred forty-nine of the 707 offenders convicted of drug offenses were eligible. FALLEN, *supra* note 66, at 26.

83. *Id.* Three hundred thirty-five of the 549 eligible offenders received the first-time offender option. *Id.*

84. For all drug offenses other than "[m]anufacture, deliver[y,] or possess[ion] with intent to deliver heroin or narcotics from Schedule I or II," the presumptive sentence range authorized sentence included 90 days of total confinement or less. WASH. REV. CODE ANN. §§ 9.94A.310-.370.

85. *Id.* § 9.94A.370 (assuming a defendant with an offender score of zero).

86. This concern was expressed by prosecutors, led by Norm Maleng, King County (Seattle) Prosecuting Attorney and Vice-Chair of the Sentencing Guidelines Commission. *Minutes of the Sentencing Guidelines Comm'n*, at 11 (Nov. 14, 1986). The proposal to deny eligibility was not endorsed by the Commission.

87. The "manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug" was exempted from the definition of "first-time offender." 1987 Wash. Laws 1999. This revision was the

to offenses committed on or after July 26, 1987.⁸⁸ Although available data does not permit the separation of sentences involving heroin or cocaine from sentences for other Schedule I or II drugs, the reform's impact can nonetheless be gauged from the dramatic increase in severity of sentences imposed for all Schedule I and II drugs.⁸⁹ The percentage of such offenders receiving prison sentences increased from 40.7% in fiscal year 1986 to 55.4% in fiscal year 1987, to 64.1% in fiscal year 1988, and to 91.7% in fiscal year 1989.⁹⁰ The corresponding average sentence lengths increased from 10.6 months in fiscal year 1986 to 12.3 months in fiscal year 1987, to 14.5 months in fiscal year 1988, and to 17.9 months in fiscal year 1989.⁹¹

This correlation alone, however, does not prove causation. The increases may not have been caused by the guideline changes, but rather by some other cause such as the changing public attitudes which led to the change in the guidelines and which possibly also influenced judges to exercise their discretion⁹² and withhold the first-time offender provision for dealers in heroin and cocaine, independent of the changed guidelines. From this perspective, a shift in the public's mood may have prompted both the legislature's decision to revoke first-time offender eligibility for heroin and cocaine dealers and the imposition of more severe sentences on these offenders.

This possibility, to some extent, can be tested by comparing changes in sentencing patterns for comparable crimes over the same period. Perhaps the closest comparable sentences are those imposed for possession of Schedule I and II drugs on offenders who remained eligible for first-time offender treatment. The length of these sentences increased only twenty-two percent from fiscal year 1987 to fiscal year 1989, whereas lengths for those affected by the change in first-time offender eligibility increased forty-six percent over the same time period. Figure 3⁹³ illustrates this increase:

first substantive legislative amendment to the guidelines adopted without a request from the Sentencing Guidelines Commission.

88. Legislation enacted without an emergency clause becomes effective 90 days after the end of the legislative session. WASH. CONST. art. II, § 1. Laws enacted in the 1986 regular session of the legislature therefore became effective on July 26, 1987. 1987 Wash. Laws ii.

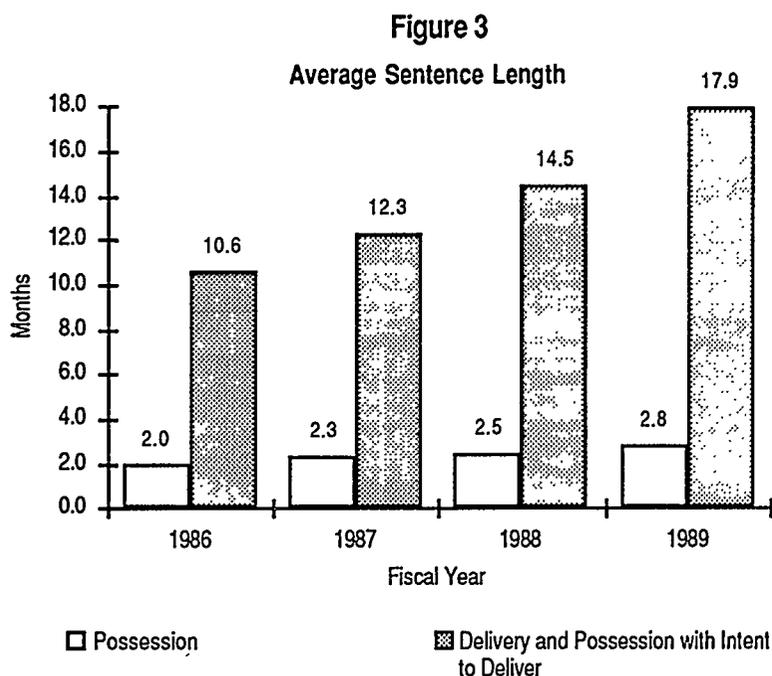
89. Data available from the Commission does not permit the comparison of simultaneously imposed sentences on eligible dealers (pre-July 26, 1987 crimes) and ineligible dealers (post-July 26, 1987 crimes). This comparison, which will be used for subsequent guidelines changes, obviously would measure the effect of guidelines changes on sentencing practices more accurately.

90. STATISTICAL SUMMARIES, *supra* note 19.

91. *Id.*

92. The sentencing guidelines do not regulate judicial discretion to use the first-time offender provisions. WASH. REV. CODE ANN. § 9.94A.120(5) (West Supp. 1992).

93. The data in Figure 3 was compiled by the State of Washington Sentencing Guidelines Commission.



Although they are certainly not conclusive,⁹⁴ these disparate rates of increase in sentence severity support the thesis that the legislative change of the sentencing guidelines, rather than changed public attitudes, caused sentencing practices to change in accordance with the Washington Legislature's intent.

B. The 1989 Amendments for Drug Offenses

In 1988, the Sentencing Guidelines Commission revisited the guidelines for drug offenses and recommended changing the guidelines in two ways: (1) increasing the offense seriousness ranking for delivery or possession with intent to deliver heroin, cocaine, or methamphetamine from Level VI (twelve to fourteen months, assuming an offender score of zero) to Level VIII (twenty-one to twenty-seven months, assuming an offender score of zero);⁹⁵ and (2) increasing the offense seriousness ranking for possession of phencyclidine (PCP) from Level I (zero to sixty days, assuming an offender score of zero) to Level II (zero to ninety days, assuming an offender score of zero).⁹⁶ These recommendations became part of the Om-

94. Shifts in public attitude were possibly focused on heroin and cocaine dealers but not users. Under this hypothesis, the patterns shown in Figure 3 may reflect a judicial response to shifting public moods. The data available cannot exclude this possibility.

95. *Minutes of the Sentencing Guidelines Comm'n*, at 5 (Nov. 10, 1988) (Motion 88-615).

96. *Id.* at 6 (Motion 88-616).

nibus Alcohol and Controlled Substances Act (OACSA), a comprehensive set of revisions to the state's response to substance abuse which was developed by a bipartisan task force of senators and representatives.⁹⁷ The OACSA implemented a wide variety of responses, including early childhood education⁹⁸ and community mobilization programs,⁹⁹ expanded investigative powers and state-funded enforcement units,¹⁰⁰ and expanded treatment programs.¹⁰¹ The OACSA also included a series of amendments to the Sentencing Reform Act, all of which increased sentence severity for drug dealers.¹⁰² This legislation used the Sentencing Reform Act's structure¹⁰³ to target the increases on those crimes which the legislature intended to affect. Specifically, the legislature increased the offense seriousness score (the sentencing grid's vertical coordinate) for delivery or possession with intent to deliver heroin, cocaine, or methamphetamine from Level VI to Level VIII¹⁰⁴ (as recommended by the Sentencing Guidelines Commission)¹⁰⁵ and increased the weight assigned to prior adult or juvenile drug convictions for calculating the offender score¹⁰⁶ (the sentencing grid's horizontal coordinate).¹⁰⁷

The OACSA also increased the applicable sentence range by twenty-four months if the delivery or possession with intent to deliver occurred within one thousand feet of a school or a school bus stop.¹⁰⁸ All of the increases were directed at dealers of heroin, cocaine, and methamphetamine. The guidelines for delivery or possession with intent to deliver drugs other than heroin, cocaine, or methamphetamine and the guidelines for simple possession of heroin or cocaine were not changed, with the single exception of the OACSA's adoption of the Sentencing Guidelines Commission's recommendation regarding phencyclidine.¹⁰⁹

97. Omnibus Alcohol and Controlled Substances Act, 1989 Wash. Laws 1266.

98. *Id.* at 1323-26 (codified at WASH. REV. CODE ANN. § 28A.120 (West Supp. 1992)).

99. *Id.* at 1326-30 (codified at WASH. REV. CODE ANN. § 43.270 (West Supp. 1992)).

100. *Id.* at 1289-1313.

101. *Id.* at 1284-85, 1313-23.

102. *Id.* at 1267-84.

103. For a discussion of system's structure and mechanics, see *supra* notes 51-63 and accompanying text.

104. 1989 Wash. Laws 1266, 1269-73 (codified at WASH. REV. CODE ANN. § 9.94A.320 (West Supp. 1992)).

105. See *supra* note 86 and accompanying text.

106. 1989 Wash. Laws 1266, 1273-75 (codified at WASH. REV. CODE ANN. § 9.94A.360 (West Supp. 1992)). The weight given to prior drug convictions if the current offense was a drug offense was increased from two points to three points for prior adult convictions and from one point to two points for juvenile convictions. While the Commission did not propose this change, it did endorse it during the legislative session. *Minutes of the Sentencing Guidelines Comm'n*, at 6 (Feb. 10, 1989) (Motion 89-631).

107. For a discussion of system's structure and mechanics, see *supra* notes 51-63 and accompanying text.

108. 1989 Wash. Laws 1266, 1267-69, 1282-84 (codified at WASH. REV. CODE ANN. §§ 69.50 & 9.94A.310 (West Supp. 1992)).

109. The offense seriousness level for possession of phencyclidine (PCP) was raised from Level I to Level II. *Id.* at 1269-73 (codified at WASH. REV. CODE ANN. § 9.94A.320 (West Supp. 1992)). This change is not analyzed because only one sentence for possession of PCP

An example illustrates the changes' effect. Suppose an offender with a prior juvenile conviction for simple possession of marijuana and a prior adult conviction for simple possession of cocaine is convicted of delivery of cocaine (the quantity delivered is legally irrelevant). Before the 1989 changes, the applicable presumptive sentence range for this offense under the guidelines would be twenty-six to thirty-four months.¹¹⁰ After the changes, the applicable sentence range for the same offense increased to forty-six to sixty-one months,¹¹¹ a seventy-eight percent increase in presumptive sentence length (measured from the midpoint of each range). If the same offense occurred within 1,000 feet of a school, the applicable sentence range increased to seventy to eighty-five months,¹¹² a 158% increase. These increases are in the *presumptive* sentence range, however, and judges may mitigate the impact of these changes by exercising their discretion to grant exceptional sentences. Furthermore, the negotiated plea process of case disposition may strive to maintain the previously determined "going rate" by adjusting the offense of conviction. Social science research suggests that this process of maintaining "going rates" is a common response to legislatively imposed sentence changes.¹¹³

Figure 4¹¹⁴ displays average sentence lengths for drug offenses before and after the 1989 legislative changes.¹¹⁵

was imposed in 1991, and only two were imposed in 1992.

110. WASH. REV. CODE ANN. §§ 9.94A.310-.370 (West Supp. 1987), amended by 1989 Wash. Laws 1266, 1267-75.

111. 1989 Wash. Laws 1266, 1267-75 (codified at WASH. REV. CODE ANN. §§ 9.94A.310-.360 (West Supp. 1992)).

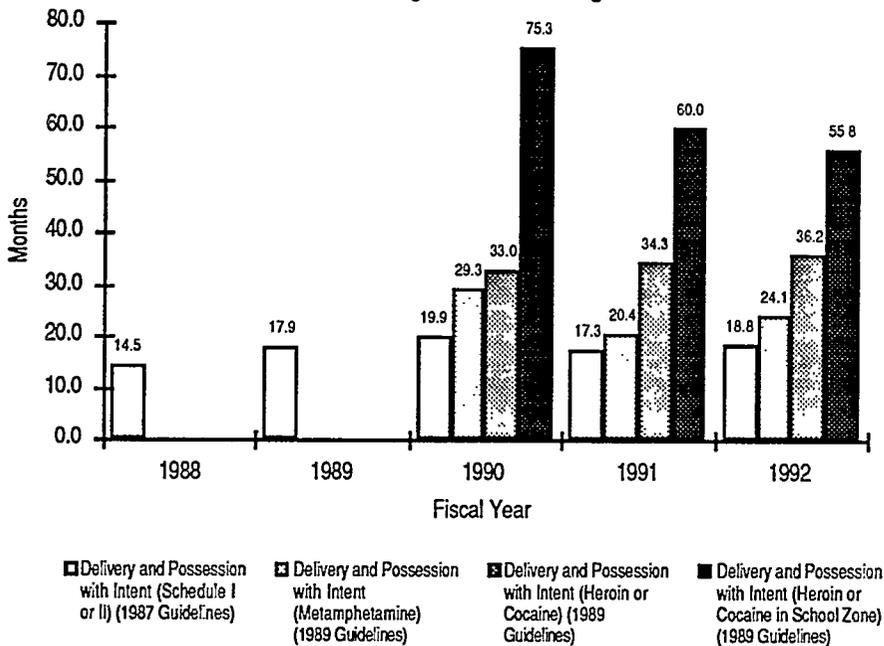
112. *Id.* at 1267-75, 1282-84 (codified at WASH. REV. CODE ANN. §§ 69.50 & 9.94A.310-.360 (West Supp. 1992)).

113. See, e.g., Jacqueline Cohen & Michael H. Tonry, *Sentencing Reforms and Their Impacts*, in II RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 305, 438-41 (Alfred Blumstein et al. eds., 1983).

114. The data in Figure 4 was compiled by the State of Washington Sentencing Guidelines Commission.

115. The legislative sentencing guideline changes applied to crimes committed after May 7, 1989. 1989 Wash. Laws 1266, 1342. Because of the inevitable time interval between the commission of a crime and the imposition of a sentence for that crime, it is unlikely that any sentences imposed in fiscal year 1989 (which ended on June 30, 1989) were affected by the new law. Indeed, many of the sentences imposed in fiscal year 1990 were still governed by the old law.

Figure 4
Average Sentence Length



Although a general upward trend in severity for all drug sentences (caused in part by the previously discussed 1987 changes) existed during the years before the 1989 changes became effective, a striking change in severity occurred after the 1989 amendments took effect. Sentence length for offenders targeted by the 1989 legislature increased dramatically, while those for offenders who were sentenced under the pre-1989 guidelines remained essentially level. Because these sentences were imposed during the same time period, by the same judges, on offenders whose crimes involved essentially the same behavior, the differences in sentence length between sentences imposed under the original and revised guidelines support the thesis that the guideline changes produced the increases in sentence severity.

C. *The 1989 Amendments for Burglary Offenses*

Legislative guideline changes for burglary offenses provide another opportunity to examine the effectiveness with which the legislature's policy judgments are transmitted to sentencing practice. In 1989, the Washington Legislature¹¹⁶ divided the existing crime of burglary in the second

116. The Commission did not make a recommendation to the legislature regarding these changes to the sentencing guidelines for burglary. Commission staff did, however, tes-

degree¹¹⁷ into the new crimes of residential burglary¹¹⁸ and a residual category of nonresidential burglary in the second degree,¹¹⁹ and increased the offense seriousness levels for both new crimes.¹²⁰ The legislature simultaneously extended eligibility for home detention¹²¹ (an alternative to total confinement) to those convicted of nonresidential burglary in the second degree, but denied such eligibility to those convicted of residential burglary.¹²² Table 2¹²³ depicts the resultant differences in the presumptive sentence ranges:

Table 2

Seriousness Level	Offender Score									
	0	1	2	3	4	5	6	7	8	9 or more
IV	6m 3-9	9m 6-12	13m 12+-14	15m 13-17	18m 15-20	2y2m 22-29	3y2m 33-43	4y2m 43-47	5y2m 53-70	6y2m 63-84
III	2m 1-3	5m 3-8	8m 4-12	11m 9-12	14m 12+-16	20m 17-22	2y2m 22-29	3y2m 33-43	4y2m 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	2y2m 22-29	3y2m 33-43	4y2m 43-57

These changes were projected to significantly impact prison population¹²⁴ because the changes resulted in presumptive prison sentences for

tify concerning the impact of the proposal on prison population.

117. Burglary in the second degree was defined, before the 1989 changes, as follows: "A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle." WASH. REV. CODE ANN. § 9A.52.030 (West 1988) (amended 1989).

118. The new residential burglary crime is the same as the original crime of burglary in the second degree with the exception that "dwelling" is substituted for "building." *Id.* § 9A.52.025 (West Supp. 1992).

119. The new residual crime of burglary in the second degree excludes both "dwellings" and vehicles from its scope. *Id.* § 9A.52.030.

120. Before the 1989 changes, burglary in the second degree was assigned offense seriousness level II (resulting in a 0-90 day sentence for an offender score of zero). The new crime of residential burglary is classified as Level IV (resulting in a three to nine month sentence for an offender score of zero) and the new residual crime of burglary in the second degree is reclassified as Level III (resulting in a one to three month sentence for an offender score of zero). *Id.* §§ 9.94A.310-.370.

121. Home detention is "a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance." *Id.* § 9.94A.030(36).

122. 1989 Wash. Laws 2144-49. This distinction was eliminated in the 1990 session of the legislature. WASH. REV. CODE ANN. § 9.94A.030(36).

123. FALLEN, *supra* note 66, at 44.

124. The fiscal note predicted that these changes would increase prison population as follows:

1990	1991	1992	1993	1994	1995	1996	1997
218	335	430	488	501	502	502	502

Fiscal notes are projections prepared by affected state agencies which estimate the impacts

offenders with fewer prior convictions and because those presumptive sentences would be longer for defendants with the same offender score.

The legislature was aware of the impact the changes would have on prison population and sought to mitigate it, at least temporarily, by providing a July 1, 1990, effective date.¹²⁵ The projected prison population increase nevertheless prompted the Governor to veto the portions of the legislation which increased the offense seriousness levels. The Governor's veto message focused on the population impact the changes were predicted to have and suggested that the legislature had failed to consider adequately these impacts.¹²⁶ The legislature persisted, however, and overrode the veto by substantial margins in both the Senate and the House of Representatives.¹²⁷

of the proposed legislation. This fiscal note was prepared by the State of Washington Sentencing Guidelines Commission and Department of Corrections.

125. 1989 Wash. Laws, 2987, 2991.

126. The Governor's veto message stated, in part:

Section 3 of this measure increases the seriousness level of second degree burglary from range II to range III and ranks the new crime of residential burglary at an even higher level, range IV. These rankings have significant fiscal impacts on both state and local governments that are not fully addressed. Although the [Washington] Legislature included funds in the Omnibus Budget for the purposes of this act, they fall far short of meeting the Department of Correction's needs. In addition, no funds were provided to address the impacts on local jails.

I am retaining the new definition of residential burglary created by this bill and the instructions in section 1 requiring the Sentencing Guidelines Commission to consider residential burglary as a more serious offense than burglary in the second degree. Because the provisions of the bill do not take effect until July 1990, I believe this veto allows us to more fully consider the ramifications of this sentencing change.

The long-term financial impact on the state adult and juvenile systems will mandate significant additional commitment of both capital and operating funds. I am concerned that the full financial reality of passing this bill has not settled upon the [l]egislature. The [l]egislature should also consider the consistency of punishment level in this bill related to punishment for other criminal offenses.

Particular attention must also be paid to the effect these changes have on our local jail system. We can no longer continue to ignore the overcrowding and potentially dangerous conditions facing these facilities. At the same time the [l]egislature was enacting a measure extending eligibility for home detention programs to burglars, it was removing over [50%] of the eligible inmates by the definition change included in this bill. The Sentencing Guidelines Commission is the proper place to consider these system-wide impacts.

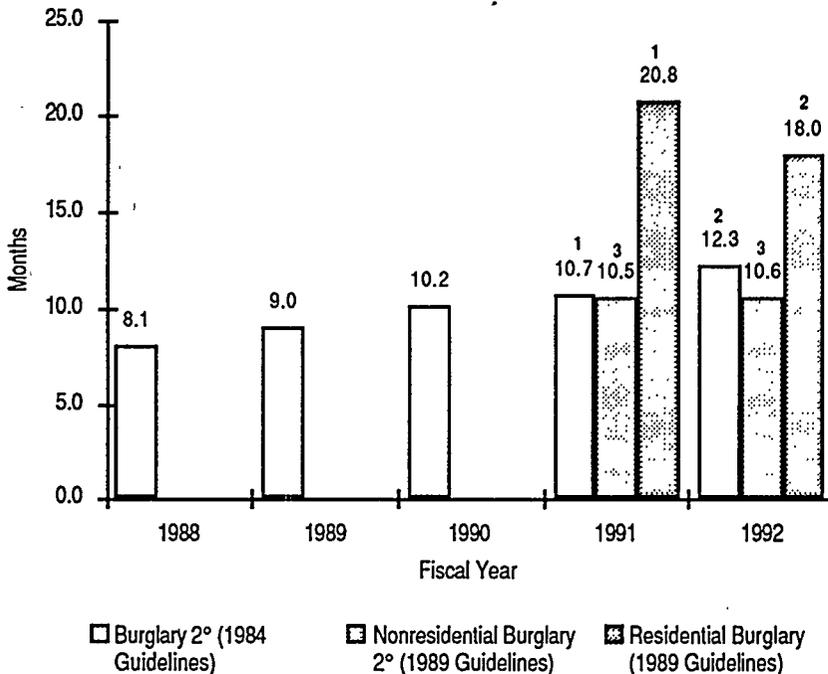
I am asking the Sentencing Guidelines Commission to take up this issue for the purpose of recommending a solution to the 1990 Legislature. The commission will review the relative rankings of these crimes and will explore the possibility of reordering the sentencing grid in such a way as to allow courts greater flexibility in determining appropriate sanctions. In addition, the Commission will review the potential for changing sentencing practices associated with rank changes, and the relationship of deadly weapons enhancements to these two offenses.

1989 Wash. Laws 2991-92.

127. The Senate vote to override was 38 to 9, and the vote in the House of Representatives was 71 to 9. 1989 Wash. Laws 2992.

Figure 5¹²⁸ depicts average sentence lengths before and after the 1989 changes:

Figure 5
Average Sentence Length



1. $t=8.5, p<0.05$.
 2. $t=8.6, p<0.001$.
 3. Not statistically significant.

These results initially appear to demonstrate that the increase in offense seriousness levels resulted in statistically significant increases in sentence length for residential burglary but not for nonresidential burglary. Assuming, however, that residential burglary has always been viewed by sentencing judges and legislators as more serious than nonresidential burglary, the composite sentence lengths for sentences issued before the 1989 guideline changes include longer-than-average sentences for burglaries involving residences and shorter-than-average sentences for burglaries involving nonresidences. If this assumption is correct, both new categories of burglary received longer sentences than the same crimes did under the old law.

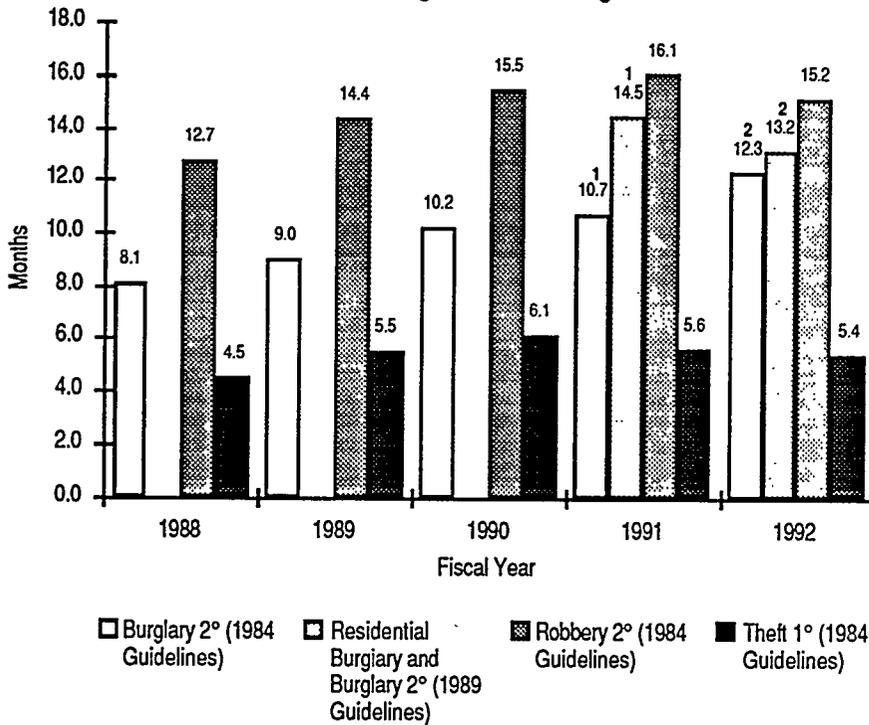
This thesis can be tested by combining both new categories of burglary for 1991 and 1992 and contrasting the average sentence length imposed for both new categories with the average sentence length for sentences imposed during the same time period under the old guidelines.

128. The data in Figure 5 was compiled by the State of Washington Sentencing Guidelines Commission.

Figure 6¹²⁹ presents this comparison:

Figure 6

Average Sentence Length



- 1. t=4.8, p<0.01.
- 2. Not statistically significant.

The results for sentences imposed during fiscal years 1991 and 1992 reflect the differences in sentences imposed by the same judges, during the same time period, on offenders committing essentially similar crimes.¹³⁰

The influence of the legislatively imposed changes in the sentencing guidelines can be differentiated from the impact of background attitudinal shifts influencing all sentences by comparing burglary sentences with sentences for comparable crimes which were not the subject of guideline changes. Robbery in the second degree (unarmed robbery) and theft in

129. The data in Figure 6 was compiled by the State of Washington Sentencing Guidelines Commission.

130. The decrease in the differences in 1992 relative to 1991 may be an example of adaptation. However, one method of adaptation, the use of exceptional sentence authority to impose sentences less severe than the standard range, did not occur. The percentage of all residential burglary sentences which were exceptional sentences below the presumptive range remained constant at 16.5% from 1991 (68/413) to 1992 (118/715). The diminishing disparity evident in 1992 may also be attributable to the relatively small number (68) of 1992 sentences for burglary in the second degree committed before July 1, 1990. This relatively small number of sentences may not be comparable in criminal history to the large group of defendants (1,906) sentenced for crimes occurring after July 1, 1990.

the first degree (thefts of over \$1,500) are most comparable to burglary in the second degree (burglary not involving assault or the presence of firearms) before the 1989 changes. Figure 6 reveals that average sentence lengths for second-degree robbery and first-degree theft trended downward from 1990 to 1992, in contrast to average sentence lengths for burglary, which increased. This difference is consistent with the thesis that the legislatively imposed guideline changes, rather than background attitudinal shifts, affected sentencing practice.

D. *The 1988 Guideline Amendments for Sex Offenses Against Children*

In 1986, after a proposal providing explicit authorization for imposing exceptional sentences on sex offenders who victimized children by abusing a position of trust failed to pass, the Washington Legislature directed the Sentencing Guidelines Commission to consider the issue and make recommendations to the 1987 legislature.¹³¹ The Commission responded with a detailed set of proposals which revised the definitions of sex offenses involving children and increased the offense seriousness levels for those crimes. The proposals did not pass the legislature in 1987 but were enacted in 1988 following revision by a bipartisan interim working group composed of legislators, criminal justice professionals, and community leaders.¹³²

The legislation modified the age ranges for sexual offenses involving children,¹³³ relabeled the crime of statutory rape as rape of a child,¹³⁴ cre-

131. Specifically, the legislature declared:

The sentencing guidelines commission shall consider methods of increasing sentence ranges for offenders who commit a series of physical or sexual abuse offenses. The consideration shall include, but not be limited to, the addition of an aggravating factor under RCW 9.94A.390, changes to the offender scoring rules under RCW 9.94A.390, and amendments to the criminal code. The commission shall consult with organizations concerned with child and sexual abuse as well as the Washington defender association, Washington association of prosecuting attorneys, and the superior court judges association. The commission shall present its recommendations to the 1987 legislature.

1986 Wash. Laws 905, 948.

132. 1988 Wash. Laws 561 (codified at WASH. REV. CODE ANN. §§ 9.94A, 9A.44, 9A.66, 9A.88, 13.40, & 40.125 (West Supp. 1992)).

133. In Washington, both before and after the 1988 changes, sexual behavior with a child is a crime only when disparity of age exists. Before the 1988 amendments, for instance, statutory rape in the first degree criminalized sexual intercourse by a person "over [13] years of age" with "another person who is less than [11] years old," WASH. REV. CODE ANN. § 9A.44.070 (West 1988) (repealed); statutory rape in the second degree applied to sexual intercourse by a person "over [16] years of age" with a person "[11] years of age or older," *id.* § 9.44.080 (repealed); and statutory rape in the third degree applied to sexual intercourse by a person "over [18] years of age" with a person "who is [14] years of age or older, but less than [16] years old," *id.* § 9.44.090 (repealed).

The 1988 amendments modified the age ranges so that rape of a child in the first degree applies to sexual intercourse with a person "less than [12] years old" by a person "at least [24] months older than the victim," *id.* § 9A.44.073 (West Supp. 1992); rape of a child in the second degree applies if the victim is "at least [12] years old but less than [14] years old" and "the perpetrator is at least [36] months older than the victim," *id.* § 9A.44.076; and

ated new crimes applying to sexual molestation of children,¹³⁵ and increased the offense seriousness levels for all sexual offenses involving children.¹³⁶ Because these changes applied only prospectively to crimes committed on or after July 1, 1988,¹³⁷ it is possible to compare sentences imposed under the old and new sentencing guidelines in order to once again examine the impact of legislative guideline changes on sentencing practices.

Examining the differences between sentences for statutory rape and rape of a child is relatively straightforward because the behavior covered

rape of a child in the third degree applies if the victim "is at least [14] years old but less than [16] years old" and the "perpetrator is at least [48] months older than the victim," *id.* § 9A.44.079.

The 1988 amendments also created the offense of sexual misconduct with a minor to apply to situations where the perpetrator is more than five years older than a victim who is between the ages of 16 and 18, and the perpetrator "is in a significant relationship to the victim and abuses a supervisory position within that relationship" to engage in sexual intercourse or sexual contact with the victim. *Id.* §§ 9A.44.093-.096.

Before the 1988 amendments, sexual behavior with children not involving sexual intercourse constituted the crime of indecent liberties. *Id.* § 9A.44.100 (West 1988) (amended 1988). The crime of indecent liberties applied to "sexual contact" with a person "less than [14] years of age" or with a person "less than [16] years of age" by a person who "is more than [48] months older than the person and is in a position of authority over the person." *Id.* "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire." *Id.* § 9A.44.010(2) (West Supp. 1992). The crime of indecent liberties also applied to "sexual contact" between adults if by "forcible compulsion" or with a person "incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless." *Id.* § 9A.44.100 (West 1988) (amended 1988).

The 1988 amendments removed sexual contact with juveniles from the indecent liberties statute and created the new crime of child molestation. Child molestation in the first degree applies to "sexual contact" with a child "who is less than [12] years old" by a person "at least [36] months older than the victim," *id.* § 9A.44.083 (West Supp. 1992); child molestation in the second degree applies if the victim is "at least [12] years old but less than [14] years old," and "the perpetrator is at least [36] months older than the victim," *id.* § 9A.44.086; and child molestation in the third degree applies where the victim is "at least [14] years old but less than [16] years old," and the "perpetrator is at least [48] months older than the victim," *id.* § 9A.44.089.

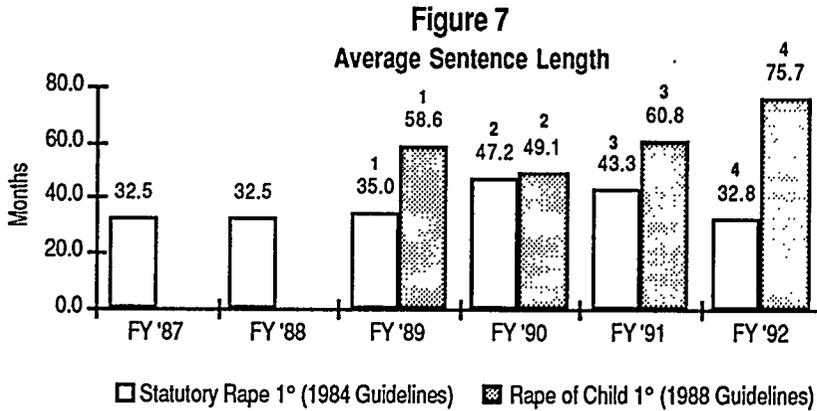
134. 1988 Wash. Laws 561, 562 (codified at WASH. REV. CODE ANN. §§ 9A.44.073-.079 (West Supp. 1992)).

135. *Id.* at 562-63 (codified at WASH. REV. CODE ANN. §§ 9A.44.083-.089 (West Supp. 1992)).

136. *Id.* at 584 (codified at WASH. REV. CODE ANN. § 9.94A.320 (West Supp. 1992)). Although the eligibility criteria for the special sex offender sentencing alternative, which authorizes a suspended prison sentence on condition of treatment in the community were not changed, eligibility for the alternative is restricted to offenders with sentences of six years or less. WASH. REV. CODE ANN. § 9.94A.120(7) (West Supp. 1992). The increases in offense seriousness level mandated by the 1988 amendments therefore curtailed the alternative's availability by shifting offenders convicted of rape of a child or child molestation in the first or second degree into a presumptive sentence range more likely to exceed six years for lower criminal history scores. This effect also increases sentence severity because it calls for prison sentences under circumstances which warranted jail sentences, suspended sentences, or treatment in the community before the changes. Using average incarceration length to gauge sentence severity measures this effect as well as all others.

137. 1988 Wash. Laws 561, 584.

by a given degree of either offense is essentially the same.¹³⁸ The increased offense seriousness levels for rape of a child are one level higher than the existing levels for the comparable degree of statutory rape. Figures 7, 8, and 9¹³⁹ present the relevant data:

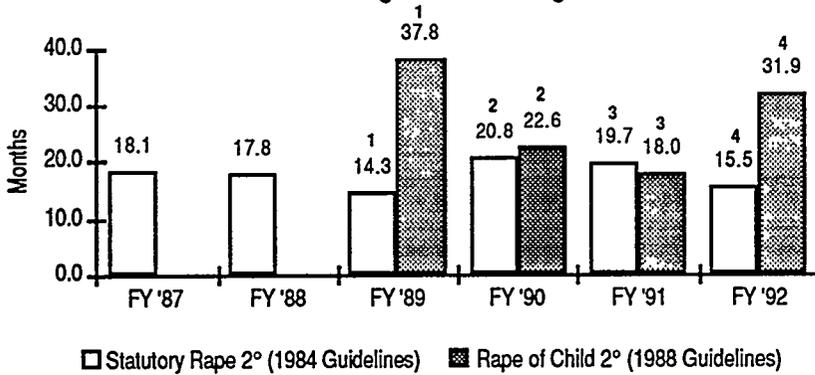


1. $t=1.93, p<0.10$.
2. Not statistically significant.
3. $t=1.76, p<0.10$.
4. $t=2.31, p<0.05$.

138. Rape of a child in the first degree applies when the victim is 11 years of age or younger, WASH. REV. CODE ANN. § 9A.44.073 (West Supp. 1992), while statutory rape in the first degree applied to victims who were 10 and under. WASH. REV. CODE ANN. § 9A.44.070 (West 1988) (repealed). It is unlikely that this one-year age difference would significantly affect sentence severity.

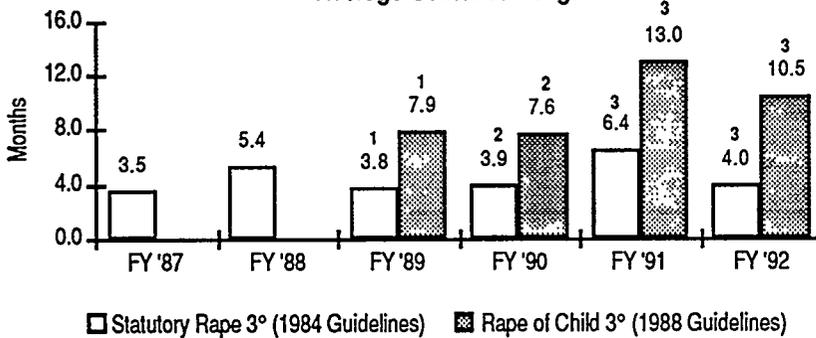
139. The data in Figures 7-9 was compiled by the State of Washington Sentencing Guidelines Commission.

Figure 8
Average Sentence Length



- 1. $t=2.35, p<0.05$.
- 2. Not statistically significant.
- 3. Not statistically significant.
- 4. Data limitations preclude test of statistical significance.

Figure 9
Average Sentence Length



- 1. $t=2.38, p<0.05$.
- 2. Not statistically significant.
- 3. Small number of samples precludes test of statistical significance.

The figures reveal statistically significant differences for sentences imposed during fiscal year 1989. For fiscal year 1990, however, the differences shrink and become statistically insignificant: Sentences imposed for rape of a child in the first and second degree are only slightly more severe than sentences imposed for the comparable categories of statutory rape, which retained their seriousness level rankings one level below the levels

for the same degree of rape of a child. In fiscal years 1991¹⁴⁰ and 1992, however, differences reappear. Changes in judicial behavior, unregulated by the sentencing guidelines and possibly influenced by a significant event in May 1989, may, at least partially, explain this apparent anomaly.

On May 20, 1989, Earl Shriner, a convicted sex offender who had recently been released from prison, raped and mutilated a young boy. The enormous public outrage which followed this act¹⁴¹ led to additional legislative changes in the sentencing guidelines for sex offenders.¹⁴² Judges were undoubtedly influenced by both Shriner's crime and the community outcry it produced.

The sentencing guidelines permit one area of unregulated discretion in sentencing for sex crimes: the judge's decision whether to suspend a prison sentence and impose an alternative sentence requiring the sex offender to receive treatment in the community.¹⁴³ Such alternative sentences could not include more than six months of incarceration,¹⁴⁴ which is considerably less time than that prescribed by the guidelines for first and second degree statutory rape. Judges' decisions to use this discretionary alternative were possibly influenced by the change in public mood following Shriner's crime.

In fiscal year 1990, which began on July 1, 1989, the ratio of prison sentences to nonprison sentences for first degree statutory rape increased to 64.6% up from 46.9% in fiscal year 1989, and the same ratio for second degree statutory rape increased from 44.0% to 52.8%. If the 1989 ratio of prison sentences to nonprison sentences for these crimes continued in 1990, the average length for all 1990 sentences for first degree statutory rape would be 35.3 months, which is significantly less than the 49.1-month average for 1990 sentences for first degree rape of a child. This pattern also exists for statutory rape in the second degree.¹⁴⁵ The apparently anomalous reappearance of significant differences for fiscal years 1991 and 1992 therefore appears to support, rather than undermine, the thesis that sentencing guidelines constrain judicial behavior even when other influences strongly push for different results.

It is more difficult to compare sentences for the new crime of child molestation with sentences for its predecessor, indecent liberties, because

140. In fiscal year 1991, the average sentence length for rape of a child in the second degree is less than for statutory rape in the second degree. The data does not offer an explanation of this fact. In fiscal year 1992, the previous relationship reappears.

141. For a discussion of Shriner's crime and the outcry it produced, see David Boerner, *Confronting Violence: In the Act and In the Word*, 15 U. PUGET SOUND L. REV. 525, 525 (1992).

142. *Id.* at 538. For a discussion of the additional changes, see *infra* notes 147-69 and accompanying text.

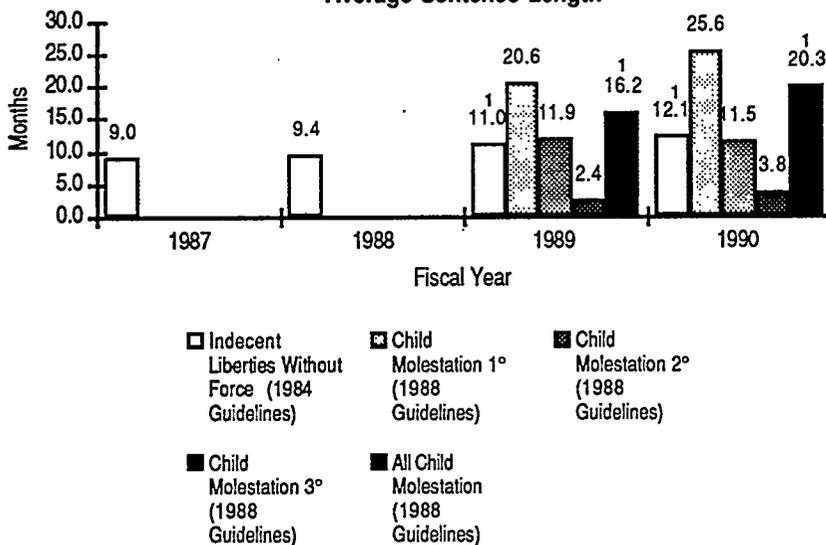
143. WASH. REV. CODE ANN. § 9.94A.120(7) (West Supp. 1992).

144. *Id.*

145. For second degree statutory rape, the average sentence length in 1990 would have been 18.4 months, assuming the ratio of prison sentences to nonprison sentences remained at its 1989 level, whereas the average sentence length for second degree rape of a child was 22.6 months.

the crime of indecent liberties includes offenses against both adults and children and is not subdivided into degrees. Although the second difference can be compensated for by combining all child molestation sentences into a composite average, the first difference is more problematic because the available data does not segregate sentences for indecent liberties by the victim's age. The data does, however, subdivide indecent liberties sentences depending on the use of force, and this categorization provides a close approximation of the child-adult distinction because force is not an element of indecent liberties for victims less than fourteen years old. Figure 10¹⁴⁶ compares the average sentence length for indecent liberties committed without force to average sentence lengths for the new crimes of child molestation and also to the composite average for all child molestation sentences:

Figure 10
Average Sentence Length



1. Aggregate data precludes test of statistical significance.

This comparison reveals the same pattern previously noted by this article: Sentences imposed under the new sentencing guidelines are significantly longer than those simultaneously imposed under the old guidelines.

E. The 1990 Guideline Amendments for Sex Offenses in General

In 1990, another legislative response was prompted by the massive public outcry arising from the sexual assault and mutilation of a young boy by a former sex offender and by the recommendations of a gubernational

146. The data in Figure 10 was compiled by the State of Washington Sentencing Guidelines Commission.

torial Task Force on Community Protection.¹⁴⁷ The Washington Legislature unanimously enacted the Community Protection Act of 1990, a comprehensive array of responses to sexual violence.¹⁴⁸ The Community Protection Act used the Sentencing Reform Act's structure to increase significantly sentence severity for most sex offenses. Specifically, sentence severity for sex offenses was increased by four modifications to the sentencing guidelines.

First, the offense seriousness levels for sex crimes were increased.¹⁴⁹ Table 3¹⁵⁰ depicts those increases and the resulting presumptive sentence ranges for an offender with an offender score of zero:

Table 3

	Pre-1990 Seriousness Level	Post-1990 Seriousness Level
First Degree Rape	X (51-68)	XI (78-102)
First Degree Rape of a Child	X (51-68)	XI (78-102)
Second Degree Rape	VIII (21-27)	X (51-68)
Second Degree Rape of a Child	VIII (21-27)	X (51-68)
First Degree Child Molestation	VIII (21-27)	X (51-58)
Indecent Liberties with Forcible Compulsion	VII (15-20)	IX (31-41)
Second Degree Child Molestation	VI (12-14)	VII (15-20)
Indecent Liberties without Forcible Compulsion	VI (12-14)	VII (15-20)
Third Degree Rape of a Child	IV (3-9)	VI (12-14)
Third Degree Child Molestation	III (1-3)	V (6-12)
First Degree Sexual Misconduct with a Minor	III (1-3)	V (6-12)

Second, the weight assigned to prior convictions for violent¹⁵¹ sexual offenses for determining the offender score (the sentencing grid's horizontal component) was increased from two points to three,¹⁵² all juvenile convictions for sex offenses were included in the offender score,¹⁵³ and prior juvenile convictions for violent offenses adjudicated on the same day were to be counted separately if they involved different victims.¹⁵⁴

147. For a discussion of the circumstances leading to the creation of the Task Force and the resulting legislation, see Boerner, *supra* note 141.

148. 1990 Wash. Laws 12.

149. *Id.* at 73-77 (codified at WASH. REV. CODE ANN. § 9.94A.320 (West Supp. 1992)). For a discussion of these increases, see Boerner, *supra* note 141, at 573 n.149.

150. 1990 Wash. Laws 12, 73-77 (codified at WASH. REV. CODE ANN. § 9.94A.320 (West Supp. 1992)).

151. "Violent offense" includes the following sex offenses: rape in the first degree, rape of a child in the first degree, rape in the second degree, rape of a child in the second degree, indecent liberties if committed by forcible compulsion, and child molestation in the first degree. WASH. REV. CODE ANN. § 9.94A.030(33) (West Supp. 1992).

152. 1990 Wash. Laws 12, 87-90 (codified at WASH. REV. CODE ANN. § 9.94A.360(17) (West Supp. 1992)).

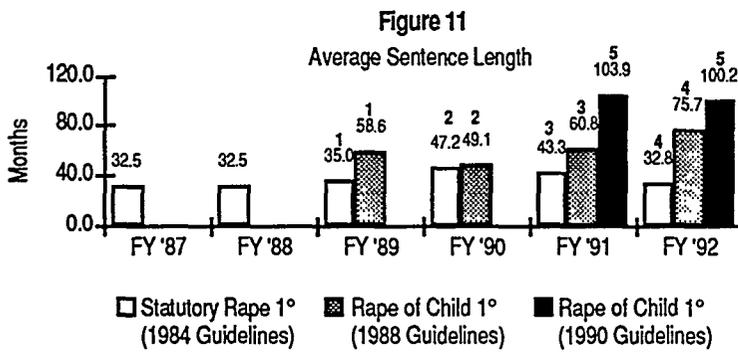
153. WASH. REV. CODE ANN. § 9.94A.360(4).

154. *Id.* § 9.94A.360(6)(b). Under earlier versions of the sentencing guidelines, all juvenile convictions adjudicated on the same day were counted "as one offense, the offense that

Third, the modification requires all sentences for multiple convictions of rape in the first degree¹⁵⁵ to run consecutively.¹⁵⁶

Fourth, the change reduced the maximum amount of "earned early release time"¹⁵⁷ available to an offender convicted of rape in the first or second degree or rape of a child in the first or second degree from one-third of the sentence to fifteen percent of the sentence.¹⁵⁸

These four legislative modifications all applied to crimes committed on or after July 1, 1990.¹⁵⁹ Figures 11, 12, and 13¹⁶⁰ augment Figures 7, 8, and 9 with the average sentence lengths for sentences imposed for rape of a child during fiscal years 1991 and 1992 which were governed by the 1990 changes:



1. $t=1.93$, $p<0.10$.

2. Not statistically significant.

3. $t=1.76$, $p<0.10$

4. $t=2.31$, $p<0.05$

5. Data limitations preclude test of statistical significance.

yields the highest offender score." *Id.* § 9.94A.360(6)(b) (West Supp. 1989) (amended 1990).

155. Rape in the first degree requires sexual intercourse by forcible compulsion which involves a deadly weapon, a kidnapping, the infliction of serious physical injury or a burglary. *Id.* § 9A.44.060 (West 1988).

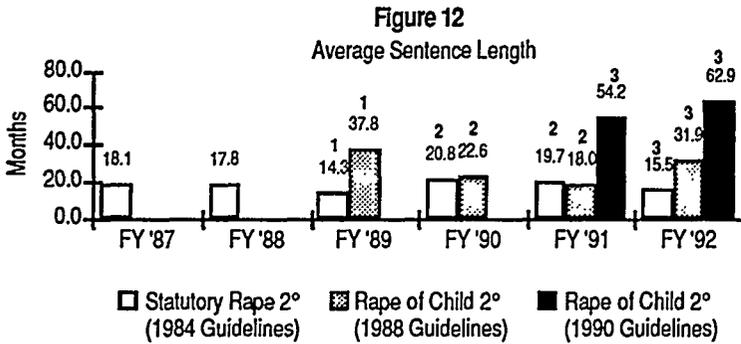
156. 1990 Wash. Laws 12, 74-83 (codified at WASH. REV. CODE ANN. § 9.94A.400(1)(b) (West Supp. 1992)). Before the 1990 changes, only those convicted of three or more first degree rape offenses received presumptively consecutive sentences. WASH. REV. CODE ANN. § 9.94A.400(1)(b) (West Supp. 1989) (amended 1990).

157. An offender's sentence "may be reduced by earned release credits in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction. The earned early release time shall be for good behavior and good performance . . ." WASH. REV. CODE ANN. § 9.92.151 (West Supp. 1992).

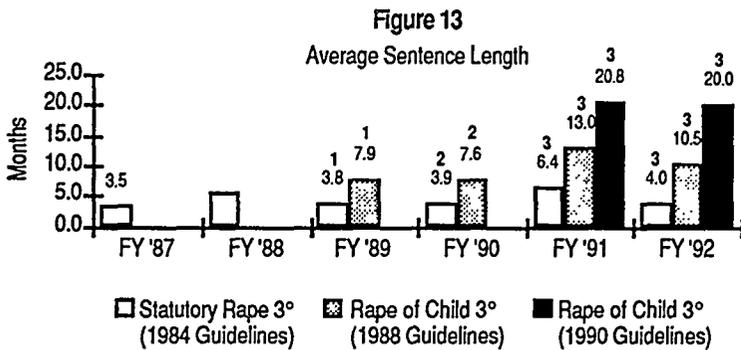
158. *Id.*

159. 1990 Wash. Laws 12, 113.

160. The data in Figures 11-13 was compiled by the State of Washington Sentencing Guidelines Commission.



1. $t=2.35, p<0.05$.
 2. Not statistically significant.
 3. Data limitations preclude test of statistical significance.
- Source: Sentencing Guidelines Commission

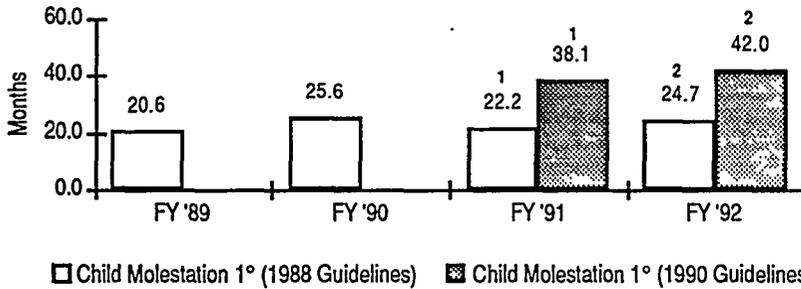


1. $t=2.38, p<0.05$.
2. Not statistically significant.
3. Data limitations preclude test of statistical significance.

These sentences can be compared with sentences imposed before the 1988 guideline changes and can also be compared with sentences imposed under the 1988 changes. The same pattern exists for child molestation. Figures 14, 15, and 16¹⁶¹ expand Figure 10 to display average sentence lengths for child molestation in the first, second, and third degrees under the 1990 guidelines:

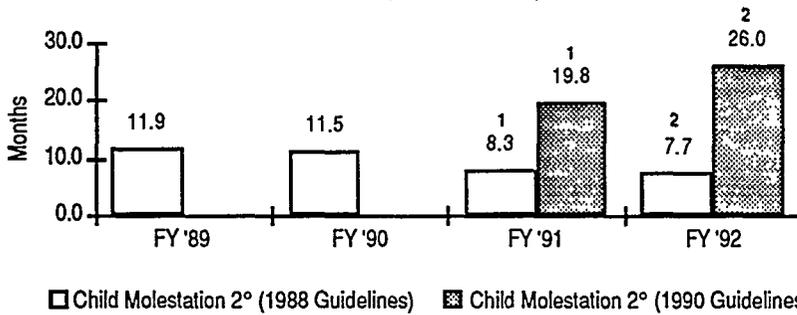
161. The data in Figures 14-16 was compiled by the State of Washington Sentencing Guidelines Commission.

Figure 14
Average Sentence Length

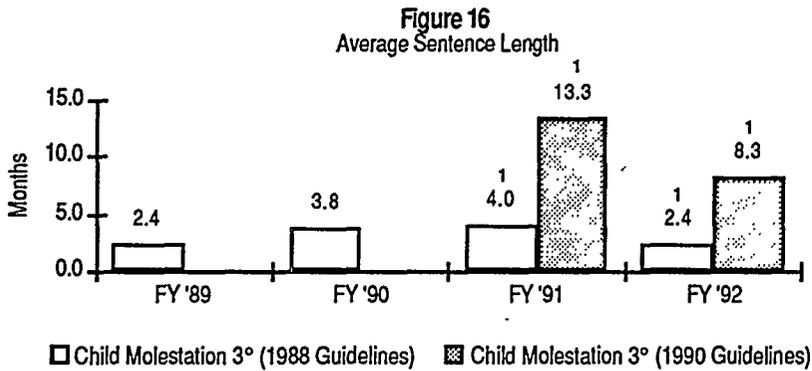


1. $t=3.49, p<0.001$.
2. $t=2.57, p<0.05$.

Figure 15
Average Sentence Length

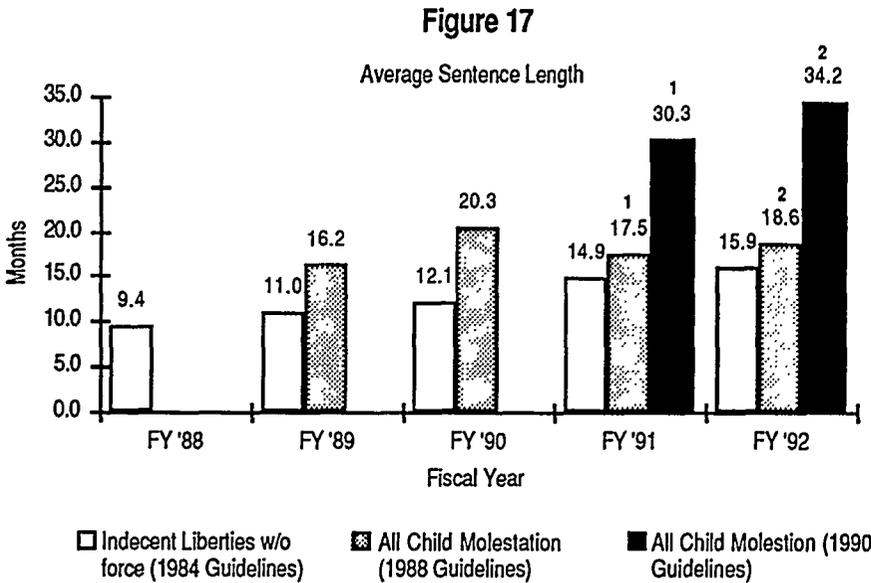


1. $t=2.97, p<0.01$.
2. $t=2.12, p<0.05$.



1. Small number of samples precludes test of statistical significance.

Figure 17¹⁶² combines all child molestation sentences to permit a comparison with sentences imposed for indecent liberties without force:



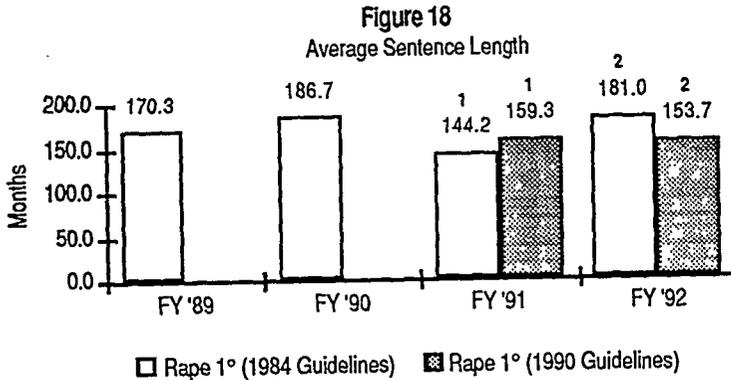
1. $t=3.84, p<0.001$.
 2. $t=3.07, p<0.01$.

The same pattern is evident for sexual offenses involving adult victims. Figures 18, 19, and 20¹⁶³ depict average sentence lengths for rape in the

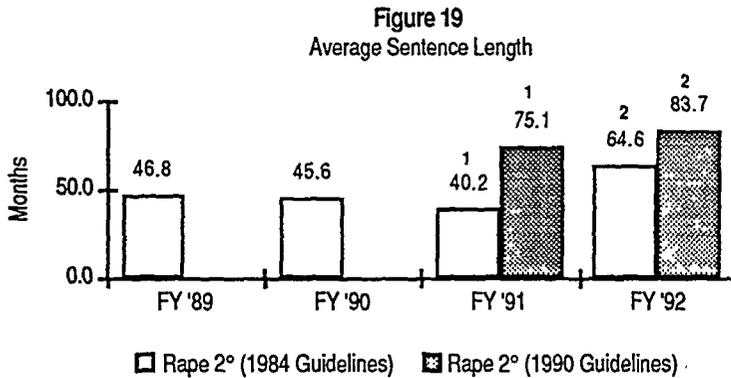
162. The data in Figure 17 was compiled by the State of Washington Sentencing Guidelines Commission.

163. The data in Figures 18-20 was compiled by the State of Washington Sentencing Guidelines Commission.

first and second degrees, and for indecent liberties with force, both before and after the 1990 legislative guideline changes.¹⁶⁴



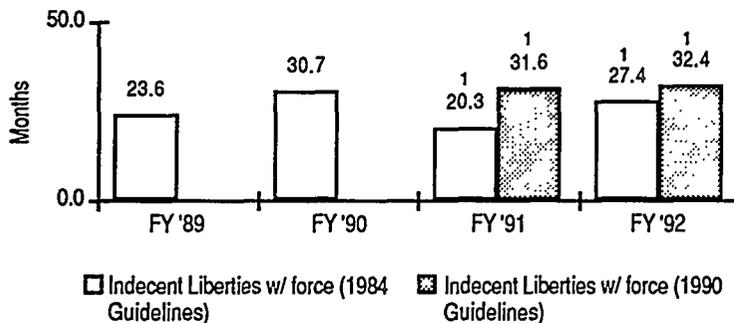
1. Not statistically significant.
2. Small number of samples precludes test of statistical significance.



1. $t=6.98, p<0.001$.
2. Small number of samples precludes test of statistical significance.

164. The guidelines for rape in the third degree (nonconsensual sexual intercourse which does not involve force or fear) were not changed.

Figure 20
Average Sentence Length



1. Data limitations preclude test of statistical significance.

The comparisons are striking: For every category of crime, average sentence lengths vary depending on the applicable guidelines. With one exception, each successive change in the guidelines increased average sentence length even though all sentences were imposed by the same judges, during the same time period, and for the same crimes.¹⁶⁶ The only variable factor is the applicable version of the sentencing guidelines.

These are the sentences which were actually imposed. Allowances for "good time,"¹⁶⁶ however, significantly reduce the amount of time which is actually served. Under the Sentencing Reform Act, offenders historically earn eighty-nine percent of potentially available "good time" and therefore actually serve approximately seventy-two percent of the sentence originally imposed.¹⁶⁷ The legislature's 1990 reduction of the maximum amount of good time available for those convicted of the most serious sex offenses (rape in the first and second degrees and rape of a child in the first and second degrees) from one-third to fifteen percent¹⁶⁸ magnifies the increases in actual sentence length for those crimes.

Figure 21¹⁶⁹ depicts the anticipated length of time that actually will be served for sentences imposed in fiscal year 1991, assuming that good time is earned at the historic rate of eighty-nine percent:

165. Although the small number of sentences imposed for some crimes precludes a conclusion that all of the differences are statistically significant, the pattern revealed by that data is nonetheless consistent with the thesis that legislative changes in the guidelines changed judicial sentencing behavior.

166. For an explanation of "good time," see *supra* note 157.

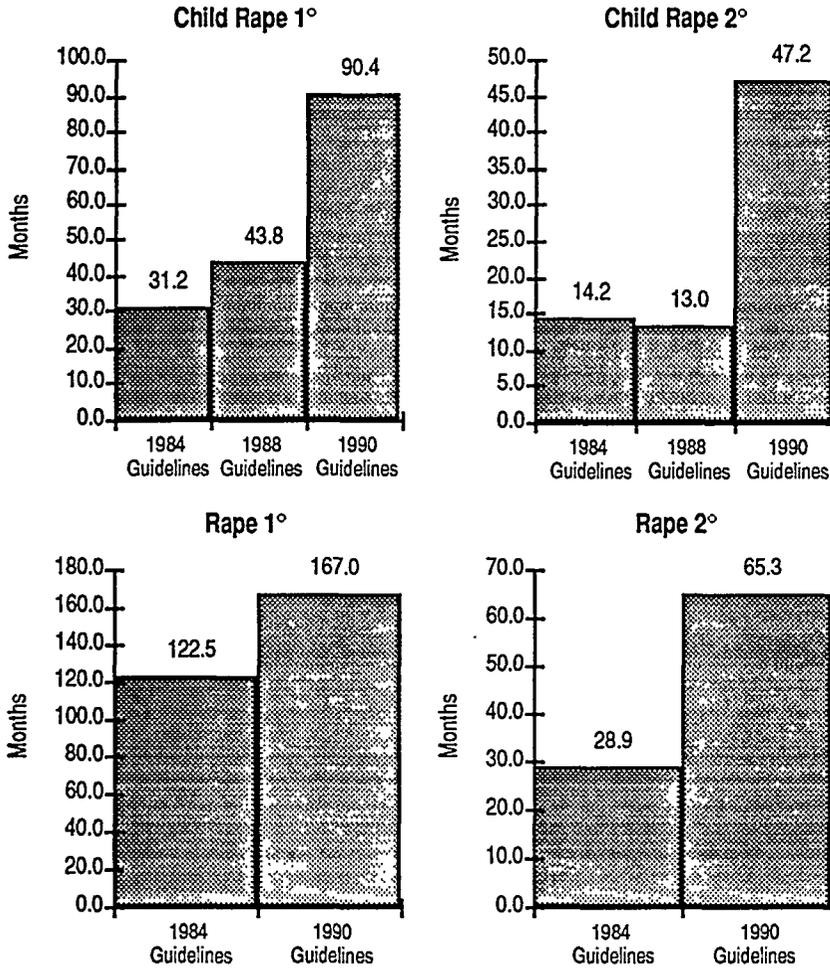
167. Conversation with David L. Fallen, Executive Officer, Sentencing Guidelines Comm'n (Mar. 10, 1993).

168. For a discussion of this modification, see *supra* notes 133-38 and accompanying text.

169. The data in Figure 21 was compiled by the State of Washington Sentencing Guidelines Commission.

Figure 21

Average Sentence Length Served
FY '91 Sentences
(Adjusted for good time)



The differences portrayed by Figure 21 are consistent with the trends observed throughout this article: Sentences imposed pursuant to sentencing guidelines which the legislature rendered more severe are, in fact, more severe than sentences imposed by the same judges, during the same time period, on offenders committing the same crimes but subject to the previously existing guidelines.

CONCLUSION

Although correlation does not prove causation, the natural experiments facilitated by prospective application of changes in Washington's sentencing guidelines nevertheless strongly suggests that sentencing guidelines are an effective means of translating the legislature's policy choices into sentences which effectuate those choices. Washington's sentencing guidelines "worked" when they were initially implemented in 1984, and they continue to "work" today. The policy judgments they implement, however, have changed.

The majority of the national debate over sentencing guidelines involves normative issues rather than pragmatic issues. Judges and academics, almost without exception, rail against the guidelines and declare them a "failure." This article suggests, however, that in Washington sentencing guidelines have translated legislative policy judgments into practice very successfully. The "failure" of Washington's guidelines, if any, is not a lack of effectiveness but rather the opposite—those who disagree with the policy judgments inherent in the legislative commands blame the guidelines for the very success with which they implement those commands.¹⁷⁰ If there is indeed a "failure" associated with sentencing reform, it is the political "failure" of those who believe in a different sentencing philosophy to persuade elected legislators that their beliefs deserve to be adopted. The debate is really between those who believe sentencing guidelines should be a force for restraining legislative judgments and those who view guidelines as a means for implementing legislative judgments.¹⁷¹

This article evaluates the effectiveness of a tool but does not consider the wisdom of those who employ the tool. The sentencing reform movement has been and remains a *reform* movement, fueled by dissatisfaction with previous sentencing practices. Washington would not have sentencing guidelines if the public was satisfied with the sentences imposed by judges and parole boards exercising the essentially unstructured discretion allowed by the prior indeterminate sentencing system. Legislative revocations of prior delegations of sentencing policy to "experts" (judges and parole boards) reflect the popularization of sentencing policy. Legislators all across the political spectrum no longer trust elite decisionmakers to formulate sentencing policy.

170. The very vehemence of the objections to the federal sentencing guidelines apparently supports the thesis that the federal guidelines, like Washington's, are "working" to change judicial sentencing behavior.

171. Characteristically, Franklin Zimring identified this issue before any of the presumptive sentencing guidelines systems were adopted. In 1977, he pointed out that "reallocating power to the legislature means gambling on our ability to make major changes in the way elected officials think, talk, and act about crime. Once a determinate sentencing bill is before a legislative body, it takes not more than an eraser to make a one-year 'presumptive sentence' into a six-year sentence for the same offense." FRANKLIN E. ZIMRING, OCCASIONAL PAPERS FROM UNIVERSITY OF CHICAGO LAW SCHOOL, MAKING THE PUNISHMENT FIT THE CRIME: A CONSUMERS' GUIDE TO SENTENCING REFORM 3, 13-14 (1977). Zimring revisits this issue in FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 169-71 (1991).

Washington has sentences of the severity it has because it chose, through its elected legislators, to have them. Once sentencing policy is viewed as the legislature's province (and there is no legal question that in our system of government sentencing policy is a legislative prerogative),¹⁷² then sentencing reform is simply politics all the way down. Although the negative reaction of the "experts" to their diminished role is understandable, their criticism is unlikely to be effective unless they engage the issues in the political forums in which such issues are decided.

Attacks on the "messenger" who delivers these legislative choices (the sentencing guidelines) only direct attention away from the real issues. Sentencing guidelines have proven to be an effective tool for implementing the legislative intent underlying each successive reform, and successful tools are rarely discarded. There is apparently no reason to believe that sentencing guidelines would function less effectively as a tool for legislative policy directions of a different normative content. Indeed, Washington's guidelines appear equally capable of reducing sentence severity (as they did when they were first implemented) should Washington's legislators make a policy judgment to reduce rather than increase sentence severity for certain crimes.

Politics, however, is not just a policy debate. In a world of scarcity, the politics of sentencing involve the allocation of resources. All of the legislative decisions which this article studies were made between January 1987 and February 1990. During this period, Washington's prison population was at or below 1984-1987 levels and was well within existing capacity. Furthermore, state revenues were increasing during this period. The Washington Legislature was fully aware of the impact the guideline changes would have on prison population¹⁷³ and funded a massive prison construction program.¹⁷⁴ Prison capacity has kept pace with the increases in prison population, and Washington's prison system is currently pro-

172. For authority supporting this proposition, see *supra* note 2.

173. The impact of the proposed changes to the sentencing guidelines was presented to the legislature as each change was considered. The projected cumulative impact of the changes which this study considers is as follows:

Subject	Year	Increase to State Prison Population for Fiscal Year										
		1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
Drugs	1987	364	364	364	364	364	364	364	364	364	364	364
Sex	1988		28	87	153	221	243	251	255	256	258	260
Drugs	1989			130	382	489	544	570	585	594	597	599
Burglary	1989				218	335	430	488	501	502	502	502
Sex	1990					83	221	443	699	968	1203	1396
Total		364	392	581	1117	1492	1802	2116	2404	2684	2924	3121

WASHINGTON SENTENCING GUIDELINES COMM'N, CUMULATIVE FISCAL IMPACT ANALYSIS (Apr. 30, 1990).

174. The 1990 legislature appropriated \$318 million for prison construction in the 1991-1993 biennial capital budget. One thousand one hundred new prison beds were added in 1992, and another 2,800 beds are scheduled to open in 1993. CRIMINAL JUSTICE CONFERENCE, *supra* note 13, at 5 (major additions to system capacity).

jected to have excess capacity through June 1995.¹⁷⁵

Washington is currently facing a downturn in its economy which is projected to result in a budget deficit of over \$1.8 billion for the 1993-1995 biennium. The 1993 session of the legislature is accordingly considering a series of proposals to amend the sentencing guidelines, all of which would reduce sentence lengths. On January 25, 1993, the lead story on the front page of Washington's largest newspaper carried the following headline: "High Price of Prison Pushing State to Take a New Look at Sentencing."¹⁷⁶ Although the purpose of the proposals being debated in the 1993 legislative session is to reduce sentence length (the opposite purpose of the proposals adopted during the 1987-1990 period), the 1993 proposals share a common characteristic with their predecessors. They employ the structure of Washington's sentencing guidelines to accomplish their purpose.

None of the current proposals repeal or structurally change Washington's guidelines. This is the real message of Washington's experience. The success of Washington's guidelines for transmitting the legislature's sentencing policy judgments into reality ensures that they will be a feature of Washington's sentencing landscape for some time to come.

175. *Id.* at 4 (total population compared to available capacity).

176. Barbara A. Serrano, *High Price of Prison Pushing State to Take a New Look at Sentencing*, SEATTLE TIMES, Jan. 25, 1993, at A1. The operating budget for the Department of Corrections is projected to increase from \$552 million in 1991-1993 to \$731 million in 1993-1995 as the newly constructed prisons are opened. The short term intent of the legislative proposals is to delay opening a new 1,000 bed prison for two years and thus save \$28 million in operating costs.