ALASKA SENTENCING COMMISSION

1990 ANNUAL REPORT TO THE GOVERNOR

AND THE ALASKA LEGISLATURE

December 1990

Alaska Sentencing Commission
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The Alaska Sentencing Commission was created by the Alaska State Legislature, 1990 SLA Ch.73. Its purpose is to evaluate the effect of sentencing laws and practices on the criminal justice system and to make recommendations for improving criminal sentencing practices. The commission began work in August 1990 and is established until June 30, 1993. This report is submitted to the governor and the legislature as the annual report of its proceedings for the previous calendar year, as required by AS 44.19.561-.577.

The following 14 Alaskans served on the commission during the last half of 1990:

Chair: Susan Humphrey-Barnett, Commissioner of Corrections
Vice-Chair: James V. Gould, Nome, Academic Background in Criminal Justice Issues
Jayne E. Andreen, Homer, Crime Victim Advocate
Beverly W. Cutler, Palmer, Superior Court Judge
Steve Frank, Fairbanks, Alaska Senate
Dean Guaneli, Juneau, Assistant Attorney General, representing Attorney General Douglas B. Baily
JoAnn Holmes, Anchorage, Alaska Native Representative
Gayle Horetski, Juneau, Deputy Commissioner of Public Safety, representing Commissioner Arthur English
Warren W. Matthews, Anchorage, Supreme Court Justice
Gigi Pilcher, Ketchikan, Crime Victim Advocate
John Salemi, Anchorage, Public Defender
Duane S. Udland, Anchorage Deputy Chief of Police, Law Enforcement Representative
Fran Ulmer, Juneau, Alaska House of Representatives
Philip R. Volland, Anchorage, Background in Criminal Rehabilitation

Governor Hickel's cabinet will be represented by three new members: Commissioner of Corrections Lloyd Hames, Attorney General Charles E. Cole, and the new Commissioner of Public Safety. These new members will attend their first sentencing commission meeting in January 1991.

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EXECUTIVE SUMMARY

Across the country, governors, legislators, and corrections officials are trying to manage corrections systems that seem out of control. Prisons are overcrowded, incarceration rates are climbing, and corrections budgets are growing rapidly. Sentencing practices have come under increasing attack for being inequitable and inconsistent, and for making inefficient use of limited correctional resources. While the situation in Alaska has not yet reached the crisis stage that it has in other states, serious problems must be anticipated if current trends continue.

In response to these concerns, the Alaska State Legislature established the Alaska Sentencing Commission in 1990. The commission will provide a forum through which legislators, judges, corrections officials, and members of the public can discuss these issues equally and cooperatively. While an important impetus for creation of the commission was prison overcrowding, the legislature also emphasized the importance of re-evaluating and improving sentencing laws and practices. This report contains the commission's preliminary evaluation of these concerns and its plan to address them during 1991.

A. The Need for Sentencing Reform

During the last decade, Alaska has had the largest percentage increase in prison population in the country. It has used its oil wealth to keep pace with this increase by building new prison facilities, but it cannot continue to do so indefinitely. Other states have found that trying to build prisons fast enough to keep up with rising incarceration rates is a losing proposition.

Prison overcrowding points out the need to take a balanced approach to management of the corrections system. Offenders who present the most serious threat to public safety--the violent criminal and serious recidivist--clearly should be in prison. In fact, these offenders cost the state and the public more in terms of new crimes and new victims if they are released from prison than the admittedly high cost of keeping them in prison. On the other hand, prison is not the only means by which offenders can be punished. Limited prison capacity dictates the need to create a continuum of non-prison corrections programs tailored to the less serious offender. So-called "intermediate sanctions" are being widely investigated as a way to make more efficient use of limited resources while still heeding the public's demand for public safety and appropriate punishment.

In addition to intermediate sanctions, the Alaska legislature has required the sentencing commission to consider judicial sentencing practices, parole and probation, treatment and rehabilitation programs, and current crime and incarceration rates. The commission must take a number of policy considerations into account: the relative seriousness of each offense, the offender's prior criminal history, rehabilitation, protection of the public, deterrence of future criminal conduct, the effect of sentencing as an expression of community condemnation, and the elimination of unjustified disparity in sentences. The effect of sentencing laws and practices on Alaska's Native population is of particular concern. The commission must also consider the

resources available to criminal justice system agencies and the projected financial effect of changes in sentencing laws and practices.

B. The Growth of Alaska's Prison Population

Alaska's adult prison population has tripled since 1980. Prison populations have increased in every state, but Alaska has had the largest percentage increase of any state in the last decade. Alaska's general population has increased gradually while its crime rate has remained stable; the prison population has risen much faster than either of these two factors can account for.

Some of the increase can be attributed to a larger state budget which made possible a higher level of professionalism in law enforcement agencies. A number of laws have been enforced more vigorously in the last ten years, particularly for sexual offenses and violent crimes. Changes in sentencing statutes have also played a part, including mandatory minimum and presumptive sentencing laws.

At the end of 1989, the Alaska Department of Corrections housed 2556 offenders, mostly felons, in 15 correctional facilities around the state. Twenty-three percent of these offenders were being held for sexual assault or sexual abuse of a minor, 13% for probation or parole violations, 11% for murder or manslaughter, 11% for assault, 8% for burglary, and 6% for robbery. Violent offenders accounted for 55% of the population, property offenders for 14%, substance abuse offenders for 11%, and all other offenders for 20%.

C. Re-evaluation of Sentencing Policies and Practices

The legislature has asked the commission to address a broad range of policy issues relating to structured sentencing reform. The commission will consider:

1. Ranking the Seriousness of Different Offenses. The commission has tentatively decided to attempt to develop a consensus hierarchy of criminal activity, making a collective judgment about what crimes are most serious and therefore deserving of harsher sanctions. At a broad policy level, the rankings will reflect judgments about the harm or potential harm to the victim or community and the culpability of the offender.

2. Role of Criminal History. The commission plans to study the role of offender characteristics, such as prior criminal history and rehabilitative potential, and to determine how multiple convictions should be handled. The rankings of offense seriousness and offender characteristics may be displayed on a two-dimensional grid, yielding a matrix on which sentencing policy can be based.

3. Dispositional Policy. Based upon offense seriousness and offender characteristics, the commission will consider which offenders need to be incarcerated and which non-prison sanctions can be successfully employed without danger to the public.

4. Durational Policy. The commission may recommend specific confinement periods to the legislature or reform of parole and good time release. Re-examination of dispositional and durational policy may also be necessary if Alaska wishes to incorporate intermediate sanctions into its sentencing structure.

5. Departure from the Prescribed Sentence. Structured sentencing plans typically provide a means for judges to deviate from the prescribed sentence and order a more or less stringent sentence due to mitigating or aggravating circumstances. Examples of departure criteria already incorporated into the Alaska criminal code include deliberate cruelty, vulnerability of the victim, and cooperation with the investigation.

6. Related Policies and Procedures. The commission may eventually need to propose legislation to reallocate sentencing authority. This may require re-evaluation of the function of the parole board, changes in prosecutorial discretion as to charging and plea bargaining, evaluation of "benchmark" sentences set by the Court of Appeals, or altered standards for probation revocation. The commission must ensure coordinated procedures that reinforce the goals of sentencing equity and uniformity.

D. Data Collection

Little attention has been given to the collection of information for developing state criminal justice policy. Yet with declining revenues and increasing prison populations, there is a compelling need for information to aid legislators in making difficult resource allocation decisions. One of the commission's goals is to collect this information, either from existing databases or from a new collection system, and to compile it in a form which will enhance policy discussion.

In addition to data, the sentencing commission is investigating the development of a comprehensive model for simulating the impact of sentencing on the full range of sanctions, including prison, local jail, probation, and community programs. Several models are currently in use in other states and may be adapted for use here.

E. Public Participation

It is vital that the sentencing commission receive input from all three branches of government, members of the public, and various interest groups. People interested in sentencing issues are encouraged to contact commission members and staff with their comments and ideas for the commission's work in 1991.

INTRODUCTION

Across the country, governors, legislators and corrections officials are trying to manage correctional systems that seem out of control. Prisons are overcrowded, incarceration rates in most jurisdictions are climbing, and state and local corrections budgets are swallowing more and more dollars. Sentencing practices have come under increasing attack for being inequitable and inconsistent, and for making inefficient use of limited correctional resources. While the situation in Alaska has not yet reached the crisis stage that it has in other states, serious problems must be anticipated if current trends continue.

In response to mounting policy and budgetary concerns, legislatures across the country have recently appointed sentencing commissions to consider a structured approach to reform. The Alaska Sentencing Commission was established by the legislature in 1990 at the urging of a task force headed by the Commissioner of Corrections that included the Attorney General, the Judicial Council and representatives from the Alaska State House and Senate. While an important impetus for the commission was prison overcrowding, the legislature also emphasized the need to evaluate the effects of sentencing laws and practices on the criminal justice system and to recommend improvements in criminal sentencing practices. This report contains the commission's preliminary response to those concerns and its plans to address them over the next two and one-half years.

I. THE NEED FOR SENTENCING REFORM

A. Prison Overcrowding as an Impetus for Sentencing Reform

During the last decade, Alaska has had the largest percentage increase in prison population in the country. It has used its oil wealth to keep pace with this increase by building new prison facilities, but it cannot continue to do so indefinitely. Across the country, states are finding that they cannot afford to build prisons as fast as their rising incarceration rates require. Consider the following statistics:

- ★ Since 1980, the number of people held in state and federal penal institutions has increased 115%. In Alaska, the number has increased 230%. (The return of approximately 125 Alaskan felons from the Federal Bureau of Prisons and the state of Minnesota in 1988 had no impact on this increase since they were always counted as Alaskan prisoners.)

- ★ Approximately two percent of the adult U.S. population is under some form of correctional sanction, either prison, probation, or parole. The percentage in Alaska is 1.1%. However, the national distribution of offenders under correctional sanction averages 61% on probation, 28% incarcerated and 11% on parole, while in Alaska the distribution is 45% on probation, 45% incarcerated and 10% on parole.

- ★ States are incarcerating offenders at an increasing rate. The number of offenders sentenced to state prisons increased from 139 to 275 per 100,000 U.S. population between 1980 and 1990. The comparable figures in Alaska showed an increase from 183 to 354 prisoners per 100,000 population. Alaska has the fourth-highest incarceration rate in the country.[1]

- ★ Corrections expenditures have been one of the fastest rising components of state budgets for the past decade. State spending for corrections has grown faster than spending on education, public welfare, hospitals and health care, highways, or police protection. In Alaska, the 1990 operating budget for the Department of Corrections was four times the 1980 budget, while the 1990 overall operating budget was only slightly over two times the 1980 budget.

- ★ Facilities in three-quarters of the states are under court orders to remedy conditions in their prisons and jails. Alaska too, is subject to a court order in Cleary v. Smith, which requires the state to implement a wide range of prison reforms.

- ★ In some states, the sentence given by the court bears little or no relation to the sentence actually served by the defendant due to prison overcrowding and various

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[1] National figures are taken from the National Institute for Justice Construction Bulletin, August 1990. Alaska figures were supplied by the Alaska Department of Corrections, October 1990.

early release programs designed to relieve overcrowding. In Texas, for instance, felony defendants serve an average of 2 months in jail for every year of their sentence.[2] In North Carolina, the average misdemeanant serves 10% of the court-imposed sentence, non-violent felons serve an average of 15%, and violent felons serve an average of 40%. Offenders are currently refusing to be put on probation because they can be completely released from state custody sooner by waiting for early release.[3] While comparable Alaska figures are not available, Alaska has so far stayed closer to the goal of "truth in sentencing"[4] than some other states.

These statistics suggest that the corrections system in this country is seriously out of balance. Corrections planning has not been coordinated with sentencing policy or resource allocation, leading to crowded prisons, inappropriate placement of offenders, inadequate community corrections programs, and early release of prisoners to relieve the pressure on prison population.

A number of states have tried to build their way out of these problems by appropriating money for new prison construction. During the 1980s, Alaska spent $127.4 million for prison construction, renovation and repair. Unfortunately, trying to build prisons fast enough to keep up with rising incarceration rates seems to be a losing proposition. California, for example, projects that its prisons will be more crowded after its $6 billion construction program than they were before.[5]

Prison overcrowding points out the need to take a balanced approach to the administration and management of the corrections system. Offenders who present the most serious threat to public safety--the violent criminal and serious recidivist--clearly should be under the most intensive supervision, in most cases in prison. On the other hand, prison is not the only means by which people can be punished. It may be appropriate to create a continuum of non-prison correctional programs tailored to the less serious offender. So-called "intermediate sanctions" are being widely investigated across the country as a way to make more efficient use of limited resources, while still heeding the public's demand for public safety and appropriate punishments.

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2 Information provided by the Criminal Justice Policy Council, Austin, Texas, November 1990.

3 Information provided by the Criminal Justice Analysis Center, Raleigh, North Carolina, November 1990.

4 "Truth in sentencing" refers to the idea that the offender will actually serve the term imposed by the court rather than some fraction of it.

5 Moreover, it is not clear that increasing incarceration will lower a state's crime rate. Alaska's prison population has increased rapidly since 1975 while its crime rate has remained stable. According to Linda Adams, Director of the National Jail and Prison Overcrowding Project:

> Look at the statistics in any state. Statistics show that incarceration as a sole response will not reduce crime, and lead us to question whether prison expansion can really have any substantial effect on crime prevention. Incarceration and crime rates go up and down irrespective of each other.

To deal with the immediate problem of prison crowding, states have adopted a variety of mechanisms including intermediate sanctions such as boot camps, intensive supervision with electronic monitoring, intensive treatment programs and policies adjusting length of stay, such as accelerating parole hearings and enhancing good time[6] provisions. While early release programs can have a substantial and immediate impact on prison crowding, they raise serious policy concerns. Public reaction to the use of such programs is often quite negative, although the limited evidence that exists suggests that early releases have little if any effect on crime. Early release programs also stray from the goal of "truth in sentencing," the principle that prisoners should serve the full terms to which they were sentenced. In addition, early release programs shift discretion for determining time served from the sentencing judge to the parole board, where the discretion is less public and less reviewable.

As Alaska considers new sentencing or corrections policies, it is important that lawmakers acknowledge the impact of any changes on the corrections system.[7] Corrections population forecasts and fiscal impact statements for sentencing legislation are critical tools in the development of criminal justice policies.

B. Policy Reasons for Sentencing Reform

In response to mounting policy and budgetary concerns, a number of state legislatures have recently appointed sentencing commissions to consider a structured approach to reform. The commission approach offers the advantage of managing some of the politics surrounding sentencing issues, while providing a vehicle through which all the necessary parties--legislators, judges, corrections officials, and members of the public--can participate equally and cooperatively. Once a sentencing policy is established, the commission's role often shifts to monitoring the effect of sentencing policy on correctional resources and to advising the

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[6] Good time is time credited for good behavior while in prison, awarded to the inmate simply for staying out of trouble. Accumulated good time is subtracted from the sentence imposed on the defendant, thereby allowing early release. Alaska currently allows one day of good time credit for every two days served, allowing a prisoner to reduce time served by 33%. AS 33.20.010. Good time is available to offenders serving both presumptive and non-presumptive sentences. Some other states also provide for "meritorious good time," allowing early release for successful participation in education, counseling or work programs.

[7] Legislative sentencing decisions are a critical determinant of prison population. It is up to the legislature to determine:

- ★ The kind of punishment - incarceration versus community corrections (probation, fines, restitution, etc.).
- ★ The duration of punishment - one week, 20 years, life imprisonment without parole.
- ★ Who gets punished - murderers, drunk drivers, shoplifters, car thieves, sex offenders.
- ★ Whether the sentence imposed will be actually served - or whether offenders will be released on good time, parole, or for emergency overcrowding.

See National Conference of State Legislatures State Legislatures and Corrections Policies: An Overview at 2 (May 1989).

legislature on necessary changes. The most common and most important goals of structured sentencing are to:

- ★ Insure uniformity in sentencing and eliminate insupportable disparities based on race, gender, or socio-economic factors.
- ★ Increase the severity of correctional sanctions in direct proportion to the seriousness of the offense and the criminal history of the offender.
- ★ Guide judicial decision-making while allowing for judicial discretion in cases where compelling circumstances exist.
- ★ Reassert legislative control over sentencing policy in a coordinated and comprehensive way, as opposed to a piecemeal approach.
- ★ Coordinate the full range of criminal sanctions from fines and probation to total confinement.
- ★ Coordinate sentencing policies with correctional policies and resources.[8]

Sentencing policy requires coordination among branches of government, built on appreciation for the unique role that each branch plays in sentencing. Constitutionally and practically speaking, statewide sentencing policy is established by the legislature. Judges have the most experience and direct involvement with the day-to-day application of sentencing policy to individual cases. The executive branch is responsible for implementing the decisions of the other two branches and is the first to feel the pinch of overcrowded conditions. The challenge for legislators interested in sentencing reform is to recognize and channel the institutional tensions creatively. Corrections administrators, prosecutors and defense lawyers, parole officials and the public also have real and vital interests in sentencing and in the commission process.[9] The Alaska commission has been structured to take all of these interests into account.

C. The Alaska Sentencing Commission

Recognizing the immediacy of the prison overcrowding problem and the importance of the policy considerations, the 1990 legislature established the Alaska Sentencing Commission. The stated purpose of the commission is to evaluate the effect of sentencing laws and practices on the criminal justice system, and to make recommendations for improving criminal sentencing practices. In so doing, the legislature has required the commission to consider:

(1) statutes and court rules related to sentencing of criminal defendants;

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[8] National Conference of State Legislatures, A Legislator's Blueprint to Achieving Structured Sentencing at 2 (August 1989).

[9] Id. at 2-3.

(2) sentencing practices of the judiciary, including the use of benchmark sentences;
(3) alternatives to traditional forms of incarceration;
(4) the use of parole and probation in sentencing criminal defendants;
(5) the adequacy, availability, and effectiveness of treatment and rehabilitation programs;
(6) crime rates, including the rate of violent crime, in this state compared to other states;
(7) incarceration rates in this state compared to other states; and
(8) the projected financial effect of changes in sentencing laws and practices.

AS 44.19.569.

The legislature has required the commission to solicit and consider information and views from a broad spectrum of interested constituencies. The commission is to base its recommendations upon the following factors:

(1) the seriousness of each offense in relation to other offenses;
(2) the effect of an offender's prior criminal history on sentencing;
(3) the need to rehabilitate criminal offenders;
(4) the need to confine offenders to prevent harm to the public;
(5) the extent to which criminal offenses harm victims and endanger the public safety and order;
(6) the effect of sentencing in deterring an offender or other members of society from future criminal conduct;
(7) the effect of sentencing as a community condemnation of criminal acts and as a reaffirmation of societal norms;
(8) the elimination of unjustified disparity in sentences; and
(9) the resources available to criminal justice system agencies.

AS 44.19.571.

The commission members began meeting in August 1990 and met four times before the end of the year. During this time, the commission hired staff[10], developed a mission

[10] The commission decided to exercise the statutory alternative of placing its staff under the executive director of the Judicial Council, to take advantage of the Judicial Council's expertise in sentencing work and to free the commission staff from administrative details. Commission staff consists of a half-time attorney, a full-time research analyst, and a full-time secretary. Its budget for FY1991 is $234,500, divided as follows:

Personnel	$121,100
Commission and Staff Travel	$ 18,500
Contractual	$ 73,900
Commodities	$ 5,000
Equipment	$ 16,000
Total	$234,500

statement[11], spent a full meeting discussing intermediate sanctions, spent another meeting discussing policy planning and analysis with a nationally recognized consultant on sentencing reform, reviewed a staff report on Alaska sentencing law and practice, and began to develop a procedure for seriousness analysis of offenses. In addition, five of the commissioners and the executive director of the Judicial Council attended a nationwide conference sponsored by the National Institute for Justice, focusing on the use of intermediate sanctions as a corrections tool.[12]

Commission members also developed a work plan for the early months of 1991. Acting upon the advice of the commission's consultant, the members tentatively agreed to start with a detailed analysis and rank ordering of the seriousness of the offenses in the criminal code.[13] At least the first half of 1991 is expected to be dedicated to this analysis.[14]

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[11] The commission's mission statement was developed after review of the enabling legislation. It provides:

> The purpose of the Sentencing Commission is to review sentencing practices in Alaska to see if any changes are appropriate. The Commission plans to analyze the existing system and evaluate possible changes. The Commission will attempt to answer the following questions:
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> 1. Are there Alaska sentences which are inappropriate and in need of change, as authorized, actually imposed or carried out?
> 2. Should Alaska adopt sentencing guidelines? For all offenses or only for certain offenses?
> 3. What intermediate sanctions (alternatives to traditional incarceration) should exist in Alaska?
> 4. What costs or cost savings result from any of the above?

[12] The National Institute of Justice solicited the participation of the Alaska contingent and paid most of the expenses of attending the conference.

[13] Sentencing commissions often begin their work by looking at their criminal codes in terms of the seriousness of offenses relative to each other. In Louisiana, for instance, the sentencing commission articulated and weighted three factors affecting seriousness:

> The interest protected, whether personal, property, public welfare, or governmental.
> The nature and extent of harm to the victim or society.
> The offender's culpability or intent.

After the Louisiana commissioners came to a consensus on these principles, they went through the criminal code offense by offense, attempting to reach an appropriate seriousness weighting for the typical example of each offense, and then grouping the offenses by seriousness. In most cases, the existing statutory range was appropriate; if not, the commission was able to recommend a different sentence structure. The commission used this weighting to recommend intermediate sanctions for various offenders or offenses.

[14] The Sentencing Commission, with its three new Commissioners appointed by Governor Hickel, will re-examine its work plan at its January 1991 meeting.

Data collection and analysis is also an integral part of sentencing reform, and is one of the primary functions of most state sentencing commissions.[15] With it, the commission can identify groups of offenders for whom adequate sanctions are lacking and should be developed, and can forecast how many program slots will be used at what cost. What types of offenders are in prison, when they get out, what programs are suitable for them--these are questions which the sentencing commission should be able to answer for the governor and the legislature when the study period is over. Accordingly, the commission has directed the staff to begin the process of data collection and to develop a model to forecast the financial and population implications of different sentencing options.

Sentencing commissions vary in their work product, but there are a number of possible results. The commission can provide data and analytical tools to use on an ongoing basis for policy planning, future fiscal notes, etc. The commission may produce guideline policies covering intermediate sanctions, use and length of prison terms, or both. The commission may recommend modification of specific sentences where they have been found to be inconsistent with the overall ranking of offense seriousness, or recommend modifications in the use of parole, or changes in resource allocation among treatment programs, or recommend modifications in the criminal code structure to allow for increased differentiation among offense categories. The legislation creating the Alaska Sentencing Commission leaves all of these possibilities open; because the commission is still in its early stages, it has not yet determined what its final work product will be.

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[15] In the opinion of Kay Knapp, consultant to the Alaska Sentencing Commission, commissions which have failed have done so in part because they never collected adequate or credible data about offenses and offenders. The process of coordinating sentencing policy with correctional resources demands current, accurate information.

II. ALASKA SENTENCING LAW AND PRACTICE

A. Criminal Sentencing in the United States

American sentencing practices have changed considerably since colonial days. With few jails in existence at the time, early penalties included physical punishment, fines, banishment, or (frequently) death. By the nineteenth century, reformers' demands for more humane punishment led to increased use of imprisonment.[16] State legislatures prescribed sentence ranges for crimes and gave judges discretion to select the specific sentence for each offender. Offenders served their entire sentence in prison, with no chance for early release. Although sentences were long compared to those currently imposed, they were viewed as a humane alternative to death.[17]

Prison overcrowding eventually occurred due to relatively lengthy sentences, improved law enforcement, population growth, and inadequate prison construction. To relieve crowding, corrections officials increased the use of pardons and developed good time, probation and parole to allow release of prisoners before their entire sentence was served. These factors influenced the advent of sentencing laws which transferred discretionary sentencing power from judges to corrections officials and parole boards. Judges sentenced offenders to prison either for a specific number of years or for a range of years; corrections and parole board officials then determined specific release dates by assessing the prisoner's behavior and progress toward reform.[18] Based upon the theory that imprisonment was for rehabilitation rather than punishment, the flexible indeterminate sentencing system became the predominant method of criminal incarceration in America by 1930. Widely supported by participants in the criminal justice system, it became entrenched in state, federal and model criminal codes.

The indeterminate sentencing system took shape in an era when utilitarianism was the philosophical perspective most commonly brought to bear on public policy matters. Retribution was expressly denounced and rehabilitation was endorsed as the primary goal of sentencing, focusing on the offender's amenability to treatment rather than the offense.[19] In the 1960s, however, many began to question whether this type of sentencing system was effective either to punish or to rehabilitate. The rehabilitative model was being questioned by social science researchers and the just deserts model began to assert itself as a more logical and measureable alternative. Some studies revealed that recidivism rates (the rate at which offenders return to prison for conviction of subsequent crimes) were high. Stories about released convicts who subsequently committed serious crimes caught the public's attention, and rising crime rates elevated public demands for tougher criminal sanctions. At the same time, modern day reformers

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[16] A. Blumstein, Research on Sentencing: The Search for Reform, Volume 1 at 58 (1983).

[17] See D. Rothman, Perspectives on the History of Sentencing, paper presented at National Research Council Conference on Sentencing Research (July 1981), cited in Blumstein, id.

[18] M. Torgerson, The Impact of Presumptive Sentencing on Alaska's Prison Population, House Research Agency Report 86-D at 1 (1986).

[19] Research on Sentencing at 62-63.

were observing racial disparity in the sentences given white and non-white offenders. Believing that this disparity was made possible by vesting too much authority in judges and corrections officials, reformers advocated the legislative enactment of sentencing laws to provide more fairness, justice and certainty.[20] The philosophical focus shifted from utilitarianism to an emphasis on retribution based on moral culpability and proportionality to the harm done.[21]

In the late 1970s and early 1980s, many states and Congress replaced their indeterminate sentencing structures with determinate and presumptive sentencing laws. Like the fixed sentencing used in the nineteenth century, these laws allow judges limited discretion to select a specific sentence within a legislatively prescribed range of sentence lengths. Under presumptive sentencing, the legislature sets a term which is presumed to apply to the average offense in the range.[22] Variation from this term is allowed only if the judge finds aggravating or mitigating factors which distinguish this offense from the average offense; even then the judge may not set a sentence lower or higher than the outer limits of the range set by the legislature.

Unlike the old fixed sentencing laws, some presumptive and determinate sentencing schemes contain early release mechanisms like those included under indeterminate sentencing laws. Although most states using determinate sentencing systems have abolished discretionary parole, they have retained other early release mechanisms such as probation, pardons and good time. Because of these mechanisms, prisoners subject to determinate or presumptive sentencing still rarely serve the full sentence imposed.[23]

B. Development of Presumptive Sentencing in Alaska

Like other states, Alaska traditionally used a system of sentencing in which the judge had the discretion to select a sentence within a wide range prescribed by the legislature. Alaska also made use of early release mechanisms such as parole and good time. In 1975, a governor's task force on corrections recommended repeal of the state's sentencing law and adoption of presumptive sentencing for repeat offenders. In 1976, the Alaska Legislature created the Criminal Code Revision Subcommission to draft a new criminal code, including a revised sentencing law.

A major goal of the subcommission was to recommend a system that would eliminate unjustified disparity and uncertainty in sentencing. Studies by the Alaska Judicial Council revealed significant and apparently unjustified sentencing disparities in Alaska's courts between 1974 and 1976. The studies' most disturbing finding was that for some crimes, all other factors

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[20] Id. at 2.

[21] Research on Sentencing at 62.

[22] For example, the range of years set by the Alaska legislature on a first offense for first degree sexual assault is 4-30, with a presumptive term of 8. Eight years will be imposed on most offenders unless the court finds aggravating factors which justify increasing the sentence up to 30 years or mitigating factors which justify decreasing it down to 4 years.

[23] Impact of Presumptive Sentencing at 2.

being equal, the defendant's race was a significant factor affecting both the type of sentence imposed and its length. The studies also showed that a judge's personal sentencing philosophy, whether strict or lenient, was a critical factor influencing sentence length for some crimes.[24]

The subcommission therefore proposed a presumptive sentencing system derived from a recommendation of the 20th Century Fund Task Force on Criminal Sentencing, a system where guided discretion was divided between the legislature, the judiciary, and the parole board:

> The task force proposes a system under which the legislature would retain the power to make those broad policy decisions that can be wisely and justly made about crime and do not involve the particulars of specific crimes and criminals. The sentencing judge would have some degree of guided discretion to consider and weigh those pertinent factors that cannot be wisely evaluated in the absence of the particular crime and criminal. The parole board would have some degree of guided discretion to consider and weigh factors that were unavailable at the time of sentencing so that it could tailor its decision regarding release to the needs of the prisoner and society.[25]

The Alaska subcommission proposed a mix of indeterminate and presumptive sentencing, providing for judicial discretion within a range of sentences on all first time felony convictions and presumptive sentencing on second and subsequent convictions. The presumptive sentence was to be imposed in the "average" case, and the judge could vary from this sentence only if aggravating or mitigating factors were present.[26] The subcommission also recommended continued use of suspended sentences and probation, and wider use of restitution and community work service. The subcommission recommended the elimination of discretionary parole on presumptively sentenced cases, with good time the only available early release mechanism for

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[24] See Alaska Judicial Council, Alaska Felony Sentencing Patterns: A Multivariate Statistical Analysis (1974-1976) at 40-41, 43-44 (April 1977); Alaska Judicial Council, Sentencing in Alaska: A Description of the Process and Summary of Statistical Data for 1973 at 175, 139 (1975).

[25] A. Dershowitz, Fair and Certain Punishment: The 20th Century Fund Task Force on Criminal Sentencing at 19-22 (1976).

[26] The legislature identified a number of aggravating and mitigating factors which can be used by the trial court to adjust a presumptive term of imprisonment up or down within the statutory sentencing range, where the defendant's conduct has deviated from the typical offense. AS 12.55.155(c)-(d); Krasovich v. State, 731 P.2d 598 (Alaska App. 1987). Commonly used aggravating factors include causing physical injury, using a dangerous weapon, and engaging in conduct among the most serious included in the definition of the crime. Common mitigating factors include playing only a minor role in the crime and engaging in conduct among the least serious included in the definition of the offense. Voluntary drug and alcohol intoxication and addiction are specifically excluded from consideration as aggravating or mitigating factors. AS 12.55.155(g). If it would cause "manifest injustice" to impose the adjusted sentence, the sentencing court may refer the case to a panel of three judges with the authority to impose a different sentence if necessary. AS 12.55.165, .175.

second and subsequent offenders. It also proposed that good time credit be cut back to one day for every 10 days served.

C. The Revised Criminal Code

In 1978, the legislature enacted a new criminal code, effective January 1, 1980. The code generally reflected the proposals of the Criminal Code Revision Subcommission with a few major changes.

The revised offense structure (AS Title 11) created a small number of broad classifications (Unclassified felonies, Class A, B and C felonies, Class A and B misdemeanors), each encompassing a wide range of criminal behavior. The legislature then assigned a sentence range to each class of offenses.

The revised sentencing structure (AS Title 12) was similar to that favored by the subcommission, except that it expanded presumptive sentencing to apply to most first offense Class A felonies in which the defendant possessed a firearm or caused serious physical injury. In addition, the legislature established mandatory minimum sentencing for all murder and kidnapping convictions.[27] In terms of length, the legislature enacted presumptive sentencing ranges which generally exceeded those recommended by the subcommission. It eliminated parole for second and subsequent offenders, but allowed good time credit beyond the 10% recommended by the subcommission.

In drafting the new code, the legislature incorporated much of Alaska sentencing case law. It reiterated the mandate found in article I, Section 12 of the Alaska Constitution that "penal administration shall be based upon the principle of reformation and upon the need for protecting the public." The legislature also incorporated criteria for sentencing which had been followed by the Alaska Supreme Court since it was first granted sentence review authority, as set forth in State v. Chaney, 477 P.2d 441, 444 (Alaska 1970). According to AS 12.55.005, the sentencing court must consider:

(1) the seriousness of the defendant's present offense in relation to other offenses;
(2) the prior criminal history of the defendant and the likelihood of rehabilitation;
(3) the need to confine the defendant to prevent further harm to the public;
(4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;
(5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct; and

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[27] Prisoners subject to mandatory minimum terms cannot be sentenced to less than the minimum term prescribed in the code. However, they are eligible for discretionary parole after serving the greater of the mandatory minimum term or one third of the sentence imposed. AS 33.16.100. Presumptively sentenced offenders are not eligible for discretionary parole during the presumptive term. AS 33.16.090.

(6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms.

Although presumptive sentencing in general reflected a theory of "just deserts,"[28] judges remained authorized to incarcerate offenders based upon the nature of the offense and the background of the offender, when equitable in light of other offenders under similar circumstances, when imprisonment is necessary to protect the public, and when less severe sentences in the past have failed to deter the offender from continued criminal conduct. AS 12.55.015(b)(1)-(3).

Although presumptive sentencing was enacted at the same time as the criminal code, they were policies of different origins. The structure of offense classifications came from an analysis of the Model Penal Code and other states' codes, while presumptive sentencing came from the reform proposal of the 20th Century Fund Task Force. The author of that proposal argued quite specifically that the structure of the Model Penal Code was not suited to presumptive sentencing:

> The development of an effective presumptive sentencing system clearly requires careful definition of crimes and more thoughtful application of sentences to those crimes. Current sentencing laws and substantive criminal laws are often loosely organized according to outdated categorizations, e.g., robbery, arson, burglary. These labels often tell us little about a particular criminal offense beyond the technical elements that define it. Although many "modern" sentencing statutes (often adaptations of the Model Penal Code) develop gradations within the broad categories of offenses, these codes rarely contain the more detailed system of punishments that we believe is necessary.
>
> The proposed new federal criminal code...groups all offenses into only six categories for purposes of sentencing. The need, however, is not only for detailed definitions and categorizations of crimes, but also for very specific penalties for those crimes matching the relative degree of culpability and risk of harm represented by each offense.[29]

This mismatch between the offense classifications of the criminal code and the presumptive sentences of the sentencing code is common to a number of states. To some extent it forms the basis for the current trend toward imposition of more specific sentencing guidelines.[30]

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[28] The "just deserts" philosophy holds that criminal punishment should be based on the seriousness of the offense rather than the personal characteristics of the offender or the offender's potential for rehabilitation.

[29] Fair and Certain Punishment at 24.

[30] M. Tonry, Sentencing Guidelines and the Model Penal Code, 19 Rutgers L.J. 823 (1988). In 1979, the Alaska Supreme Court established a sentencing guidelines committee to explore the use of guidelines in areas not covered by presumptive sentencing and to develop a common law of sentencing. This committee

D. Legislative Changes Since 1980

Since 1980, the legislature has frequently amended the sentencing code. The amendments have generally required the courts to impose longer sentences, while transferring greater discretion to the parole board for early release. A 1982 amendment made all first offense Class A felonies subject to presumptive sentencing. It also raised all first-degree sexual assaults to the level of unclassified crimes and subjected them to an eight year presumptive sentence. First-degree drug offenses were also made unclassified offenses carrying a maximum 99 year term with a five year mandatory minimum sentence.

In 1983, the legislature added first-degree sexual abuse of a minor (an unclassified offense) to the list of crimes which are presumptively sentenced on the first conviction. It also made any Class A, B, or C first conviction subject to presumptive sentencing when the defendant "knowingly directed the conduct constituting the offense at a uniformed...peace officer" or other specified emergency responder. Since this amendment, first offense Class B and C felonies not directed at such officers are the only felonies not subject to either mandatory minimum or presumptive sentencing rules.

In 1985, the legislature increased "back end" discretion by increasing discretionary parole eligibility for inmates not subject to presumptive sentencing. In 1986, the legislature also increased the amount of good time credit which prisoners could accumulate from 25% to the current 33%. Table 1 shows the current statutory presumptive and mandatory sentencing structure for felonies by class of offense.[31] It shows only those sentencing and release provisions set by the legislature; judicial case law affecting this table is discussed in the text of this report.

In addition, the legislature has frequently amended the number of aggravating and mitigating factors which the court may consider when sentencing a defendant; the current list includes 26 aggravators and 15 mitigators. The legislature has also expressed a preference that except in limited circumstances, sentences of imprisonment should run consecutively when a defendant is convicted of two or more crimes.[32]

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drafted guidelines for Class B and C first offenders and for fish and game offenders, but neither set of guidelines was adopted by the Supreme Court. The committee also drafted guidelines which were used by the courts in sentencing drug offenders until the legislature made most drug offenders subject to presumptive sentencing in 1982. AS 11.71.010 et. seq. The committee ceased work in 1982.

[31] Table derived from T. Carns and J. Kruse, A Re-Evaluation of Alaska's Ban on Plea Bargaining, final draft at Table 28 (October 1990).

[32] AS 12.55.125(e). Consecutive and concurrent sentences will be discussed later in this report.

TABLE 1

STATUTORY FELONY SENTENCING AND EARLY RELEASE STRUCTURE IN ALASKA

Offense	Sentence Length (Years) First Felony Conviction	Second Felony Conviction	Subsequent Conviction	Good Time	Discretionary Parole Eligibility
Murder I	20 - 99	20 - 99	20 - 99	.33	Greater of 20 yrs. or 1/3 of term
Other Unclassified Felonies[c]	5 - 99	5 - 99	5 - 99	.33	Greater of 5 yrs. or 1/3 of term
Unclassified Sexual Offenses[d]	4 [8] 30	7.5 [15] 30	12.5 [25] 30	.33	None on presumptive term
Unclassified Sexual Offenses[a,d]	5 [10] 30	7.5 [15] 30	12.5 [25] 30	.33	None on presumptive term
Class A[e]	2.5 [5] 20	5 [10] 20	7.5 [15] 20		None on presumptive term
Class A[a,b,e]	3.5 [7] 20	5 [10] 20	7.5 [15] 20	.33	
Class B[f]	0 - 10	0 [4] 10	3 [6] 10		1st offense only
Class B[b,f]	0 [2] 10	0 [4] 10	3 [6] 10	.33	None on presump. term
Class C[g]	0 - 5	0 [2] 5	0 [3] 5	.33	1st offense only
Class C[b,g]	0 [1] 5	0 [2] 5	0 [3] 5	.33	None on presump. term

NOTE: Mandatory minimum terms are underlined and presumptive terms are in brackets. Statutory minimums and maximums have no underline or bracket. Under certain circumstances, a three-judge panel may reduce a term below the statutory minimum.

[a] Applies when a defendant possessed a firearm, used a dangerous instrument or caused serious physical injury, except for manslaughter.

[b] Applies when a defendant knowingly directed the conduct (crime) at a peace officer, correctional officer, or emergency medical responder engaged in the performance of official duties at time of offense.

[c] Other unclassified felonies include second-degree murder, attempted first-degree murder, selling hard drugs to minors, and kidnapping where the victim is not released safely.

[d] Unclassified sexual offenses include first-degree sexual assault (forcible rape) and first-degree sexual abuse or assault of a minor (sexual penetration with anyone under 13, daughter or son under 18).

[e] Class A felonies include manslaughter, robbery using a deadly weapon, selling heroin to an adult, arson with risk of physical injury, kidnapping where the victim is released safely, and first-degree assault.

[f] Class B felonies include robbery not using a deadly weapon, theft over $25,000, selling cocaine or marijuana to minors, burglary in a dwelling, arson with no risk of injury, bribery or perjury, second-degree assault, sexual penetration with a person aged 13, 14 or 15, and sexual contact with anyone under 13, daughter or son under 18.

[g] Class C felonies include negligent homicide, burglary not in a dwelling, second-degree assault, theft over $500, check forgery, possessing heroin or cocaine, and bootlegging.

E. The Prosecutorial Role in Sentencing

The Department of Law plays a significant part in Alaska sentencing procedures. The Criminal Division is responsible for screening cases referred by law enforcement officers, reducing or dismissing charges where appropriate, trying cases, and making sentencing recommendations to the court where appropriate. Prosecution practices therefore have a marked effect on the number of people the state incarcerates and for what length of time. It is important to note that, to an extent, prosecution policies are driven by legislative intent. For example, in response to increasing public concern about sexual offenses, the legislature actively encouraged more vigorous prosecution of these offenses by providing training funds for law enforcement and prosecution of sexual assault and abuse cases as well as increasing the penalties for these offenses.

1. Case screening. Under the Alaska Constitution and statutes, the decision to pursue criminal charges lies with the prosecutor. When the police have investigated a crime and believe that a certain person is legally responsible, their investigative report is referred to the district attorney's office for prosecution.[33] The prosecutor analyzes the available evidence and applicable laws for each charge the police have referred to determine if the charge can be proven beyond a reasonable doubt. If there is insufficient evidence to support the referred charge but enough to support another, the prosecutor can substitute the second (usually less serious) charge; the prosecutor may also decline the charge or the entire case for prosecution. The screening process often requires extensive investigation and is a time-consuming part of the prosecutor's job.

In FY 1990, out of 3918 cases referred for prosecution as felonies, 60% were accepted for prosecution with felony charges. Another 11% were accepted for prosecution as misdemeanors, and 27% were declined for prosecution altogether.[34] Although there are variations between types of offenses and regions of the state, the statewide felony declination rate of 25-30% has held steady for many years.[35]

2. Charge reduction and dismissal. Prosecutors may also reduce or dismiss charges after the case has been filed in court. In 1975, the Attorney General banned plea bargaining, forbidding prosecutors from negotiating a recommendation on the defendant's sentence in exchange for an agreement to plead guilty, and prohibiting changes in the charge done to obtain a plea of guilty.[36] However, a recent Judicial Council study found evidence of the increasing

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[33] In rural areas, the initial charging decision may still be made by law enforcement officers.

[34] Figures provided by Alaska Department of Law, Criminal Division (October 1990).

[35] There are several reasons why 25-30% of cases are declined for prosecution. The fact that an investigative report was referred to the Department of Law for screening does not necessarily mean that an arrest was made or that the police were convinced that one should be made. The investigation may have failed to turn up enough evidence to justify a prosecution, a key witness may have refused to testify, or the defendant may already be under arrest for other, more easily proven offenses.

[36] Plea Bargaining Report at 1.

frequency of charge bargaining, where prosecutors reduce or dismiss one or more charges in exchange for a guilty plea.[37]

In 1987, 48% of guilty or nolo contendere pleas in felony cases statewide were associated with dismissal or reduction of one or more charges.[38] While binding sentence negotiations were not common, negotiations in some form appeared to have an effect in approximately one-half the felony cases.[39] Since charge reductions often reduced a presumptive offense to a nonpresumptive offense or a felony to a misdemeanor, they affected the likelihood that a term of imprisonment would be imposed.[40]

3. **Sentencing recommendations**. Before the ban on plea bargaining, prosecutors had the discretion to recommend a sentence for a specific length of time, including conditions of probation and treatment. The judge was bound to impose either the sentence negotiated or one more favorable to the defendant.[41]

The Judicial Council study found that sentencing recommendations continued to exist after the ban in a limited form which did not reach the same level of specificity and commitment. While prosecutors no longer recommend a specific term in exchange for a plea agreement, they may agree not to recommend a finding of aggravating factors or not to oppose concurrent imposition of multiple sentences.[42] In cases where no negotiations have occurred, prosecutors remain free to recommend sentence length and conditions to the court. Prosecutorial discretion has gradually increased since 1980.

Table 2 is a summary of case outcomes during selected years for Anchorage, Fairbanks and Juneau, showing the eventual disposition of those cases which were referred to the Department of Law for prosecution as felonies and which had been closed at the time of review.[43] In 1987, in 30% of the cases prosecutors screened out all of the original charges and rejected the case for prosecution; all charges were dismissed in another 13% of the cases. Half of the defendants pled guilty or no contest, 24% to reduced charges and 26% to the original charges. Seven percent of the defendants went to trial; one in seven was acquitted. The rate of convictions obtained to arrests made and charges filed has improved considerably since 1974, most likely due to improved police and prosecutorial practices.

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[37] Id. at 60.

[38] Id. at 65.

[39] Id. at 76. During the study period, only 8.9% of convictions were the result of trials; the rest were the result of guilty or nolo contendere pleas. Id. at 84-a. Charge bargaining therefore had the potential to affect a large number of cases.

[40] Id. at 62-63.

[41] Id. at 127; Alaska Rule of Criminal Procedure 11(e)(3).

[42] Id. at 130-34.

[43] Table derived from Table 2, id.

TABLE 2

OUTCOME OF CASES REFERRED FOR PROSECUTION AS FELONIES AND COMPLETED
Number of Cases and Percentage Distributions
Anchorage, Fairbanks and Juneau

	1974-1975		1975-1976		1984		1985		1986		1987	
	N	%	N	%	N	%	N	%	N	%	N	%
All Charges Screened Out	94	8%	125	11%	630	31%	536	29%	535	30%	497	30%
All Charges Dismissed	449	39%	452	40%	443	22%	395	21%	314	18%	208	13%
Plea to Reduced Charge	271	24%	203	18%	385	19%	349	19%	356	20%	406	24%
Plea to Original Charge	254	22%	254	22%	439	23%	433	23%	465	26%	439	26%
Trial Conviction	44	4%	77	7%	122	6%	130	7%	105	6%	95	6%
Trial Acquittal	31	3%	29	3%	21	1%	25	1%	19	1%	20	1%
	1,143	100%	1,140	100%	2,040	100%	1,868	100%	1,794	100%	1,665	100%
Conviction Rate Per 100 Cases Referred and Completed*		50%		47%		46%		49%		52%		56%
Conviction Rate Per 100 Cases Filed and Completed*		55%		53%		65%		68%		74%		80%

* Cases open because of an outstanding warrant or for other reasons were not included in the database.

F. Judicial Interpretation of Presumptive Sentencing

In 1969, the legislature gave the Alaska Supreme Court statutory authority to review the length of sentences given by the trial courts. This authority was extended to the Alaska Court of Appeals upon its creation in 1980. Since the new code went into effect the same year, the court of appeals has taken an active role in its interpretation, deciding a large number of individual cases and setting precedents affecting the outcome of many more.[44]

Although first-time Class B and C felony offenders are not subject to presumptive sentencing, the court of appeals has used the same principles to ensure that such first offenders will be sentenced in a manner consistent with the statutory scheme for subsequent offenders. In Austin v. State, 627 P.2d 657, 657-58 (Alaska App. 1981), the court held that a first offender should normally receive a more favorable sentence than the presumptive sentence for a second offender.

The court of appeals has guided sentencing in non-presumptive cases through the use of benchmark sentences. Benchmarks are judicially-created sentencing ranges derived from the court's review of past sentencing decisions dealing with similar offenders convicted of similar offenses.[45] The purpose of the benchmark is to "focus the attention of the trial court and the parties on individual cases and insure that typical cases would receive a typical sentence." Benchmarks insure "that those defendants receiving atypical sentences would be sentenced on the basis of objective aggravating factors, not factors idiosyncratic to a specific judge."[46] The court of appeals has articulated benchmarks for first felony offenders sentenced for Class B felonies, aggravated Class A felonies, serious sexual offenses, second-degree murder, and for consecutively-imposed sentences. Although the court has said that the benchmarks are flexible, sentences outside the ranges set by the court of appeals are scrutinized carefully.[47]

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[44] Sentence appeals constituted 32% of the case filings in the court of appeals in FY 1990.

[45] One commentator has noted that the court of appeals has adopted the role envisioned by the original proponents of appellate review:

> It routinely reduces excessive sentences to bring them in line with sentences given in comparable cases, and has created an extensive body of case law articulating appropriate sentencing principles, establishing benchmark terms for many classes of offenses and types of cases, and establishing standards and benchmarks for the extent to which sentences can be increased in aggravated cases. In addition, the court of appeals has moved to close a "major loophole" in the presumptive sentencing scheme by regulating the total aggregate terms that may be imposed for offenders who are sentenced consecutively. By virtue of the volume and completeness of the sentencing law that it has created, the Alaska Court of Appeals is one of the most active sentence review courts in the nation.

S.D. Di Pietro, The Development of Appellate Sentencing Law in Alaska, at 295.

[46] Page v. State, 657 P.2d, 850, 855 (Alaska App. 1983).

[47] Appellate Sentencing Law at 283.

The court of appeals has interpreted the legislative mandate regarding consecutive and concurrent sentences and has substantially restricted trial judges' consecutive sentencing discretion. The new criminal code originally provided that a defendant convicted of two or more crimes at the same time could be required to serve the sentences for those crimes either consecutively or concurrently, as the court provided. AS 12.55.025(e). In 1982, the legislature amended the law to provide that an offender convicted of two or more crimes before the judgment on either has been entered should be sentenced consecutively, with six exceptions. AS 12.55.025(g)(1)-(6). These exceptions were interpreted by the court of appeals in State v. Andrews.[48] The trial judge still has the discretion to sentence concurrently if the crimes violate similar societal interests, if the crimes are part of a single continuous criminal episode, or if there is not a substantial change in the objective of the criminal episode, including a change in the parties to the crime, the property right offended, or the persons offended. Concurrent sentences may also be given so long as the crimes were not committed while the defendant was trying to escape, or so long as the sentences are not for homicide, assault, kidnapping and sexual offenses, or not for crimes of robbery or extortion resulting in physical injury. In 1988, the legislature added AS 12.55.025(h) to clarify that where offenses against minor victims are involved, the court shall impose some consecutive period of imprisonment for each conviction.

While the Andrews court recognized the legislative preference for consecutive sentences, it nevertheless interpreted the exceptions to that preference to permit imposition of concurrent sentences in almost every case.[49] The basic test used by the court of appeals for evaluating the appropriateness of consecutively-imposed sentences focuses not on the length of the consecutive increments but on the total aggregate term, which must be justifiable under the Chaney criteria.[50] The court will also examine whether the total sentence, including consecutive increments, exceeds the presumptive term for the single most serious offense, and whether such a term is warranted under the "totality of the circumstances."[51] Finally, the court of appeals follows the supreme court's general rule that the maximum sentence generally should not be imposed unless the court determines that the offender is a "worst offender" for that class of crime.[52] Thus, the court of appeals generally affirms consecutive sentences equal to the

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48 State v. Andrews, 707 P.2d 900, 908 (Alaska App. 1985), aff'd 723 P.2d 85 (Alaska 1986).

49 Appellate Sentencing Law at 290.

50 Contreras v. State, 767 P.2d 1169, 1174 (Alaska App. 1989). The Chaney criteria are incorporated into presumptive sentencing through AS 12.55.005 and are set out in Section C above.

51 Farmer v. State, 746 P.2d 1300, 1301 (Alaska App. 1987); Clifton v. State, 758 P.2d 1279 (Alaska App. 1988).

52 To arrive at a finding of worst offender status, the court looks to the manner in which the crime was committed and to the character and background of the defendant. Factors include the defendant's prior convictions, age, employment history, substance addiction, dangerous propensities, and psychological profile. Hintz v. State, 627 P.2d 207, 210 (Alaska 1981); State v. Wortham, 537 P.2d 1117, 1120 (Alaska 1975).

maximum term for the single most serious count only where the offender is designated a worst offender.[53]

Active appellate review is necessary to maintain uniformity among sentences, one of the goals of presumptive sentencing. However, appellate review cannot shape the law prospectively, nor can it take allocation of the state's correctional resources into account. Formation of a legislative sentencing commission has been necessary to consider the future direction of sentencing policy.[54]

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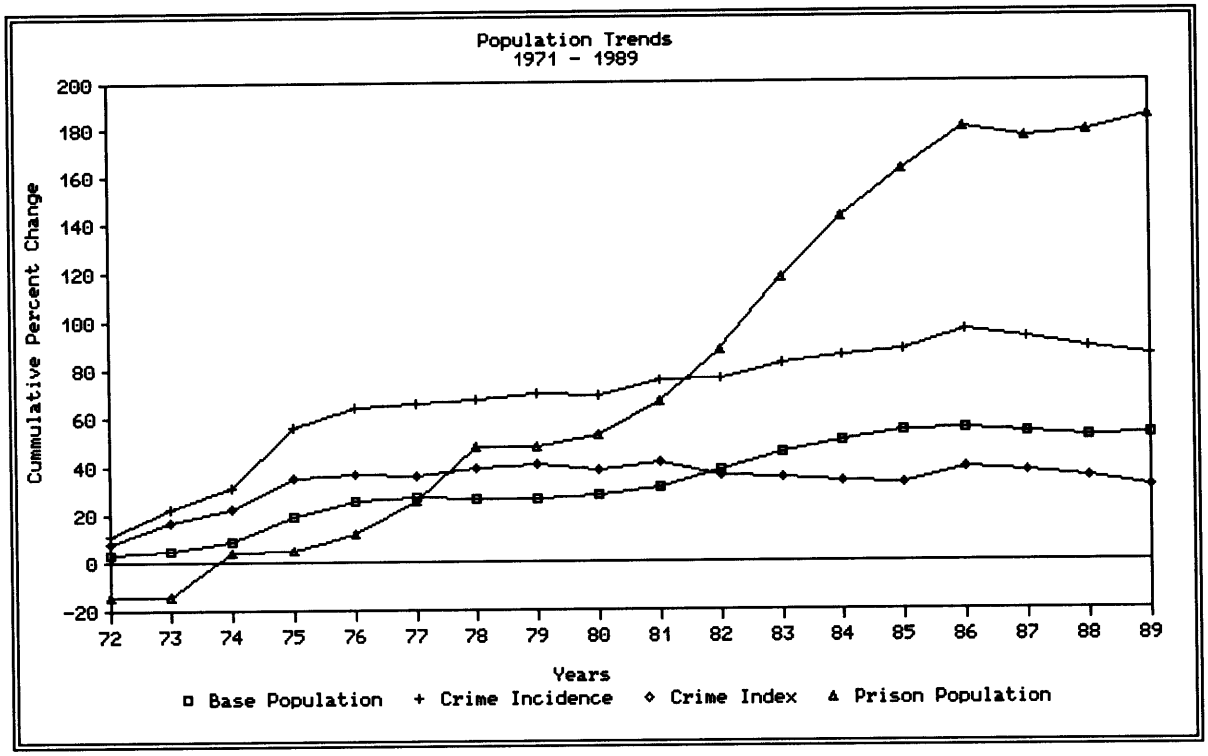
[53] DeGross v State, 768 P.2d 134, 140 (Alaska App. 1989); Heacock v. State, 762 P.2d 503, 505 (Alaska App. 1988).

[54] Id. at 52.

III. CHANGES IN PRISON POPULATION SINCE 1980

A. Prison Population and its Relation to Population Growth

Alaska's adult[55] prison population has tripled since 1980. For the years 1980-1988, Alaska had the largest increase in prison population in the country (230%) for prisoners with one year or more to serve. In 1988, it had the fourth highest incarceration rate for this same group of offenders. [56] The prison population has grown at a much faster rate than either the general population or the crime rate during these years. Figure 1 shows the changes in Alaska's population, reported crimes, crime rate, and prison population. In order to view the different curves comparably, cumulative percent change was selected as the measurement. Each point on the graph represents the summation of the percent change from the previous year.



In the text, the base population is called the square data series; the crime incidence is called the plus data series; the crime index is called the diamond data series and the prison population is called the triangle data series.

The square data series shows Alaska's general population growth from 1971-1990, from 319,600 to 534,400. For the most part population grew steadily during this period, with growth spurts from 1974-1977 and 1981-1986, each followed by leveling-off periods.

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[55] Juvenile confinement and probation falls within the Department of Health and Social Services, and is not addressed in this report. Very few juveniles are tried as adults: only seven on average each year. Division of Family and Youth Services, Youth Corrections Data: Calendar Year 1989 at 38 (May 1990).

[56] Alaska Department of Corrections, Fiscal Year 1989 Report at 22-23.

The plus data series shows the reported crime rate. It is essentially the same picture as the general population. There was a relatively substantial increase (70%) between 1972 and 1976, but then only a slow, relatively stable growth through 1986.

The diamond data series shows Alaska's crime index or crime rate (number of crimes committed per 100,000 population) during the same period. In the absence of other changes, the crime rate should remain unchanged as population increases. In other words, if 200,000 people commit 2,000 crimes per year, one would expect 400,000 people to commit 4,000 crimes per year, so that the rate at which crimes are committed would stay the same. This is essentially what happened in Alaska: the crime rate increased from 1971-1975, but has remained stable since then. The 67% increase in the general population therefore accounts for only a small proportion of Alaska's increase in prison population.

The triangle data series shows Alaska's prison population from 1971-1990. The prison population increased some from 1972-1980, from 482 to 770. It more than tripled from 1980-1986, rising to 2428. Since then the rate of prison population increase has slowed; the 1989 year end population was 2556. Several reasons may account for the recent flattening of the curve, including statutory revision increasing the allowance of good time credits in 1986, a plateau in the general population of the state, and the fact that misdemeanants sometimes wait to serve their sentences until a space becomes available.

Prison populations were not merely rising in proportion to the general population, but in fact were rising much faster than one would expect when the general population and the crime rate are taken into account. The incarceration rate has increased from 183 prisoners per 100,000 population in 1980 to 354 prisoners per 100,000 in 1990. This figure does not include the prisoners serving time in local jails or in community beds (halfway houses and residential treatment programs), so the incarceration rate is actually somewhat higher than it appears.

B. Reasons for Growth of the Prison Population

The 1980s were a time of rapid prison expansion across the country. In Alaska, the prison population has grown at a much faster rate than either the general population or the crime rate during these years, suggesting that other factors have triggered the rise in the number of prisoners.[57]

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[57] Other factors affecting prison population growth include demographic changes and the state of the economy. For instance, the 20-34 year old population is often cited as the age group which commits a disproportionate percentage of crimes relative to the general population. This group is significantly larger in Alaska than in the United States as a whole, and may explain Alaska's generally higher crime rate. However, since this group has remained relatively stable as a percentage of Alaska's population, it would not appear to be an important factor in the rise of Alaska's prison population.

Economic factors such as the unemployment rate may also be viewed as affecting crime rates. The 1980's were a period of great economic instability in Alaska and the unemployment rate fluctuated greatly during this period. However, there was no clear correlation during this time between the unemployment rate and the crime rate. Impact of Presumptive Sentencing at 25-26.

1. **Changes in Reporting, Enforcement and Prosecution of Offenses**. The budgets of the various state agencies responsible for criminal justice administration have grown rapidly over the last ten years. Much of the increase has been consumed by inflation and the need to serve a larger population, but the increases in police, prosecution, defense and corrections budgets have outpaced those factors. From 1980 to 1986, the increase in arrests exceeded the general population growth and the change in crime rate, suggesting that arrests were more closely linked to agency resources than to changes in population, crime rates or sentencing policies.[58]

Laws regarding sexual offenses were enforced more vigorously after 1980 than before. The number of sexual abuse of a minor cases accepted for prosecution between 1980 and 1984 increased by 25%. Sexual abuse of a minor cases constituted only 2% of 1980 felony convictions but rose to 11.3% of the 1984 convictions.[59] By late 1985, offenders convicted of adult or child sexual offenses constituted 26% of the sentenced population in Alaska prisons.[60] The Judicial Council study reporting these findings concluded that whether or not the incidence of child and adult sexual abuse changed significantly in these years, the willingness to report such abuse may have increased.[61]

Conviction rates for serious offenses also increased between 1980 and 1984.[62] The 1980 rate of homicide convictions to reported cases was 41%, while the 1984 rate was 57%. Similar increases occurred for robbery and serious sexual offenses. The increased conviction rate may suggest that law enforcement agencies began to prosecute more serious offenses more vigorously,

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58 Plea Bargaining Report at 7.

59 Alaska Judicial Council, Alaska Felony Sentences: 1984 at 58-59 (March 1987).

60 Alaska Department of Corrections, Annual Report 1985 at 51.

61 Plea Bargaining Report at 8.

62 The sentencing of misdemeanants has received comparatively little attention, although the Alaska Judicial Council has done several misdemeanor studies. A study for the years 1974-76 showed the same racial disparities revealed in felony sentencing, although these disparities were no longer apparent by 1981. Alaska Judicial Council, Statistical Analysis of Misdemeanor Sentences in Anchorage and Fairbanks: 1974-1976 (November 1979). Other studies focused on DWI and fish and game offenses. Alaska Misdemeanor Sentences 1981, Special Report on DWI Sentences (March 1984); Alaska Fish & Game Sentences: 1980-81. The former study revealed that DWI offenders accounted for about one-third of the misdemeanor jail days served (estimated 28,000-37,500 jail days/year).

A 1981 study showed a direct relationship between alcohol consumption and misdemeanor offenses: 86.6% of misdemeanants with prior alcohol problems also had prior convictions. Alaska Judicial Council, Alaska Misdemeanor Sentences: 1981 at i (December 1983). There were more alcohol and drug offenses in smaller communities, more vehicular offenses in Anchorage and Fairbanks, and more violent offenses in Bethel and Nome. Id. at 6. 65.2% of all misdemeanor offenders spent at least a day in jail, and all DWI offenders spent at least three. Id. at ii.

In FY 1990, there were 25,221 misdemeanor filings in the Alaska Court System, compared to 2718 felonies and 52,999 traffic violations. Misdemeanants made up 9% of the prison population in 1989; they also comprised a significant proportion of the contract jail population. Contract jails are generally run by local police departments under contract with the Alaska Department of Public Safety.

that they became more experienced and skillful in doing so, and/or that they had more resources available to devote to the task. [63]

Another factor which may have played a part in increasing the prison population was the Attorney General's 1975 ban on plea bargaining, which forbade prosecutors from negotiating a recommendation on the defendant's sentence in exchange for an agreement to plead guilty. Charge negotiations also were prohibited. The ban relied on increased screening of police charges, both to prevent overcharging and to keep prosecutors' case loads manageable.[64] A recent study by the Alaska Judicial Council concluded that the more rigorous screening policy resulted in greater professionalism and improved quality of police work, as well as sharpened trial skills for assistant district attorneys.[65] This study concluded that the likelihood of imprisonment increased for most offenses after the plea bargaining ban. While sentence length also changed for most offenses, the direction of change was not consistent.[66] While the ban on plea bargaining has evolved over time, to some extent it remains in effect today.[67]

2. **Changes in Sentencing Patterns**. Alaska's move to presumptive sentencing was accompanied by a complete overhaul of its criminal code and the introduction of mandatory incarceration for certain crimes. The introduction of presumptive sentencing also coincided with a national emphasis on non-rehabilitative sentencing policies, with increased enforcement against sexual offenses, and with very substantial demographic and economic changes within the state.[68] This makes it difficult to sort out the interaction of presumptive sentencing with the increase in prison population.

In general, it can be said that any sentencing structure can affect prison populations in two ways: (1) it can change the number of crimes which result in imprisonment, or the incarceration rate; and (2) it can change the amount of time a given offender must spend in prison, or time served. An increase in either will result in an increase in the prison population.

Since 1980, incarceration is required for crimes subject to mandatory sentencing and for a number of crimes subject to presumptive sentencing. Under prior law, judges had discretion to impose a non-jail penalty for all crimes except first-degree murder. Under the new law, there is mandatory incarceration for first and second-degree murder, kidnapping, and first-degree drug offenses. Although presumptive terms can be mitigated to lesser sentences, some imprisonment

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[63] Plea Bargaining Report at 8.

[64] Id. at 1.

[65] Id. at 45-55.

[66] Id. at 119.

[67] Id. at 17-18.

[68] Id. at 108.

almost invariably results upon conviction of first-degree sexual assault, first-degree sexual abuse of a minor and the Class A felonies.[69]

Prison population is also affected by the length of time served by each prisoner. A recent Judicial Council study concluded that presumptive sentencing generally appeared to increase the length of the sentence for both first felony offenders and repeat offenders subject to presumptive sentencing. Sentences for non-presumptively sentenced offenders also increased, making the relationship between presumptive sentencing and sentence length less certain.[70] A 1987 Alaska Judicial Council study showed that presumptive sentencing, especially the legislative changes to presumptive sentencing in 1982 and 1983, accounted for an estimated 41.6% of the 100% increase between 1980 and 1984 in total prison time sentenced.[71]

Time served is also affected by changing the mechanisms for early release, good time credit and discretionary parole. Before 1980, most felons were eligible for discretionary parole release after serving one-third of their sentence, although not all of those eligible were in fact released. Current law restricts parole eligibility to those non-presumptively sentenced, generally Class B and C first offenders.[72] Prisoners serving presumptive sentences are not eligible for parole during the presumptive term,[73] although they remain eligible for good time. AS 33.16.090. Those subject to mandatory sentencing provisions are eligible for either good time or parole release, depending on the length of the sentence imposed. AS 33.16.100.

C. Growth of the Corrections Budget

The growth in Alaska's prison population has been accompanied by the growth of its corrections budget. According to a study recently released by the Bureau of Justice Statistics, spending for civil and criminal justice by federal, state and local governments has increased all across the country.[74] Spending for corrections has increased the most, especially spending for incarceration. Much of the money spent on corrections has gone to the capital expenditure of building prisons.

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69 There are 15 unclassified and Class A offenses under the revised code; all are subject to presumptive or mandatory sentencing on the first conviction. These crimes comprised 49% of all time to be served by offenders jailed in 1984. Id. at 17.

70 Plea Bargaining Report, addendum at IV(A)(3)(i).

71 Alaska Felony Sentences: 1984 at III.

72 In making its release decisions, the parole board employs a guideline system which compares a prisoner's social and criminal history with the crime committed and with similar cases. Based upon the crime category and risk score, the parole guidelines suggest a range of months that should be served. Absent substantial mitigation or aggravation, the board makes a release decision within this range; otherwise, it provides written reasons for the departure. Corrections FY 1989 Report at 4.

73 Offenders who were sentenced to an aggravated presumptive term or whose total sentence included a presumptive sentence and consecutive amounts beyond the presumptive term are eligible for discretionary parole during the aggravated or consecutive portion of their sentence.

74 Alaska Justice Forum, Volume 7 No. 2, at 3-4 (summer 1990).

In order to accommodate the greatly increased number of inmates, Alaska has spent approximately $127.4 million for prison construction, renovation and repair since 1980. The corrections operating budget has also increased over fourfold, from $21.6 million in FY 1980 (2% of the entire state operating budget) to $98.7 million in FY 1990 (4.6% of the entire operating budget).[75] Alaska ranked second in the country, behind the District of Columbia, in the amount of state and local criminal justice expenditures per capita ($540.53).[76]

The average cost per inmate per day varies by level of supervision. Offenders housed in institutions cost an average of $80.01 per day in FY 1989, those in community residential and restitution centers averaged $54.14, and those on probation and parole averaged $4.81.[77]

D. Overview of the Current Prison Population

The Department of Corrections currently operates 15 correctional facilities around the state, serving six different security classifications of offenders. It also has custody of certain offenders being held on contract with the Federal Bureau of Prisons and the State of Minnesota.

As of December 31, 1989, 2556 offenders were housed in these various facilities. Ninety-one percent of these were felons and 9% were misdemeanants.[78] Twenty-three percent of these offenders were being held for sexual assault or sexual abuse of a minor, 13% for probation or parole violations, 11% for murder or manslaughter, 11% for assault, 8% for burglary, and 6% for robbery. Violent offenders accounted for 55% of the population, property offenders for 14%, substance abuse offenders for 11% and all other offenders for 20%.[79] The Department of

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[75] The FY 1990 operating budget allocated $69.4 million to institutional operations, $5.6 million to parole and probation, and $23.7 million to general programs. Figures provided by Alaska Department of Corrections (October 1990).

[76] However, this is also a reflection of the fact that governmental costs in Alaska are high, since Alaska's direct expenditure for justice activities ranked only 20th when calculated as a percent of total state government spending (6.1%). Id.

[77] Corrections FY 1989 Report at 23. These costs did not include the cost of statewide services for major medical care, contract education and supplies, mental health and psychiatric care, chaplaincy and special rehabilitative programs, all of which cost an average $11.30 per day per inmate. Among the services offered by the Department of Corrections are substance abuse treatment, mental health services, sex offender treatment, various educational programs ranging from life skills to post-secondary courses, health care services and the opportunity to work in prison industries. Id. at 18-19.

[78] Corrections 1989 Inmate Profile.

[79] Id. Among the 13% of prisoners serving time for probation and parole revocation are offenders whose original offense was a violent offense. If these were identified, the total percentage serving time for violent offenses would be greater than 55%. Offenses included in the "violent" category are: murder, manslaughter, criminally negligent homicide, assault 1-4, kidnapping, sexual assault 1-3, sexual abuse of a minor 1-4, incest, robbery 1 and 2, arson 1 and 2, misconduct with weapons 1-3, attempt to commit a felony and solicitation to commit a crime.

Corrections holds offenders who are awaiting sentencing as well as offenders who are serving their sentences. As of the end of 1988, 21% of the prison population was awaiting sentencing.[80] Figure 2 shows Alaska's distribution of prisoners by crime category.

Misdemeanor and felony offenders, both sentenced and unsentenced, are also housed in 19 jails located in smaller communities across the state. These jails are generally run by local police departments on contract with the Department of Public Safety. These jails provided 182 beds in FY 1990, incarcerating 9,465 offenders.[81]

Table 3 presents a summary of the 1990 Corrections Yearbook, comparing Alaska to the national average in various categories.

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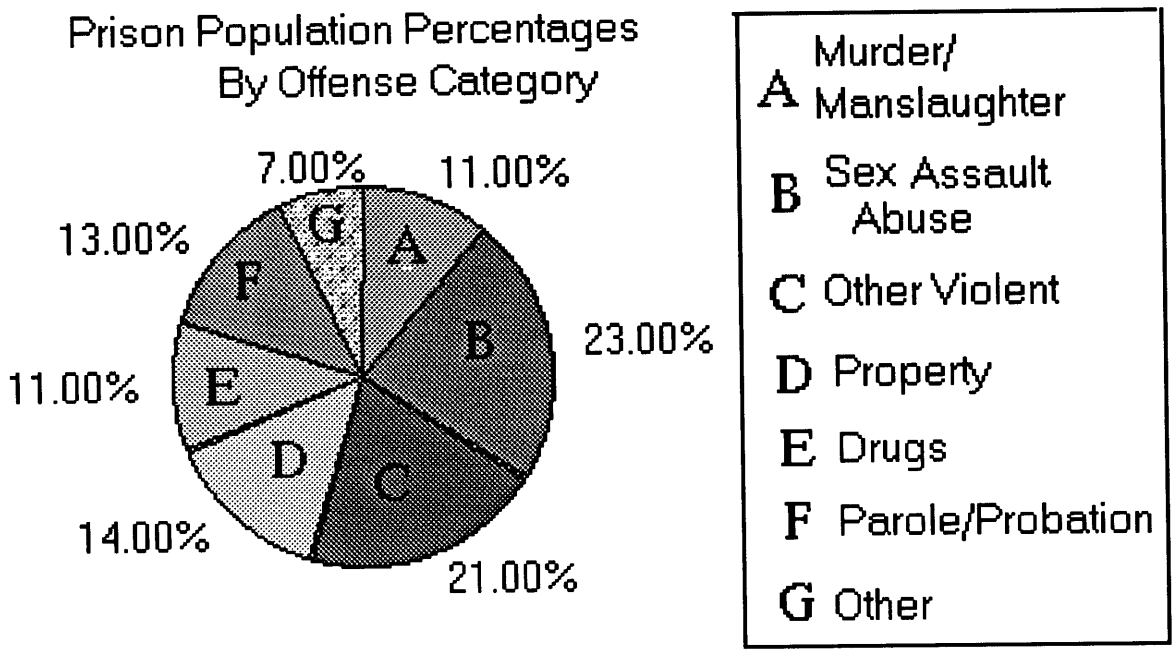
[80] Corrections FY 1989 Report at 54.

[81] Figures provided by the Alaska Department of Public Safety (October 1990).

FIGURE 2


Prison Population Percentages
By Offense Category
7.00%
11.00%
13.00%
23.00%
11.00%
14.00%
21.00%
A
B
C
D
E
F
G
A Murder/ Manslaughter
B Sex Assault Abuse
C Other Violent
D Property
E Drugs
F Parole/Probation
G Other

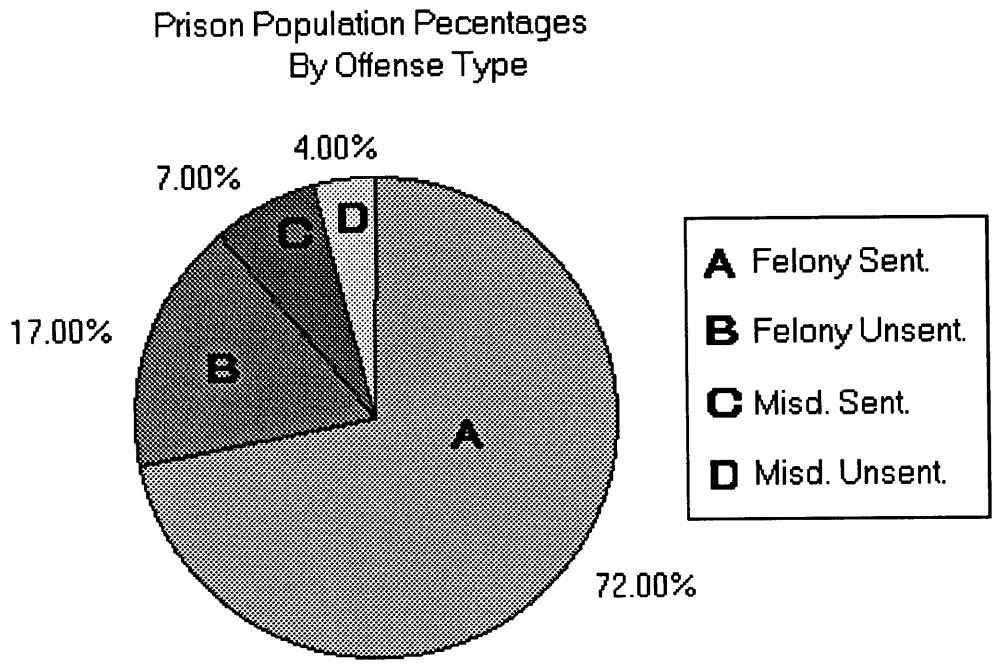

Prison Population Pecentages
By Offense Type
4.00%
7.00%
17.00%
72.00%
A
B
C
D
A Felony Sent.
B Felony Unsent.
C Misd. Sent.
D Misd. Unsent.

TABLE 3

ALASKA/NATIONAL
CORRECTIONAL DATA COMPARISON

	Alaska	National Avg.
# Inmates in Prison	2,556	12,953
In Jail		1,696
Other	180	809
# Per 100,000	354	240
1989 Average	2,435	12,583
1989 Admissions	1,028	8,985
1989 Releases	951	7,427
% Inmate Pop.	---	---
Male	94.5	94.4
Female	5.5	5.6
White	53.5	50.9
Native American	30.6	3.6
Black	10.8	35.7
Hispanic	2.3	9.6
Average Age	33.5	29.6
Ave. Sentence		85.5
Ave. Stay		25.5
% Overcrowding	1.6	16.2
Cost, Capitol	3,000,000	35,873,529
Cost, Operating	98,678,700	267,522,840
Cost/Inmate/Day	83.66	46.43
# Employees	1,257	5,488
# Parole Employees	100	136
Distribution %	---	---
Prisoners	45.1	28.5
Probationers	45.4	60.9
Parolees	9.6	10.7

This table presents a summary of comparative data found in the 1990 Corrections Year Book. It may be helpful to know that Alaska's general population is 77.6% White, 16% Native American, 3.4% Black and 2.9% Other, according to The Alaska Economic and Statistical Review: 1984, Department of Commerce and Economic Development.

IV. INTERMEDIATE SANCTIONS

There are two basic ways to reduce prison overcrowding caused by the sharp rise in prison population: accommodate the increase by building more prisons, or implement intermediate sanctions to punish appropriate offenders in settings other than traditional incarceration.

The legislature chose the construction option during the first half of the 1980s. The resulting prison construction tripled the state's present capacity and roughly kept pace with prison population. However, the cost to operate this new capacity has resulted in a fourfold increase in the Corrections operating budget since 1980. The combined effect of declining state revenues and the high cost of prison construction and operation makes this alternative difficult to sustain.[82]

Less expensive alternatives to prison construction and operation are available, and lately there has been a great deal of interest in exploring them. Generally, the less restrictive the alternative, the lower the cost. Providing a wider range of intermediate sanctions may also result in a greater ability to arrive at an appropriate punishment for a given crime.

A. Reducing Time Served

The most obvious way to reduce time served is by decreasing the length of sentence imposed, thereby increasing the number of prisoners who can be incarcerated for a shorter period of time. This alternative is consistent with the objectives of presumptive sentencing: "truth in sentencing," uniformity, and certainty of punishment in jurisdictions where sentences have been reduced after the fact by mechanisms designed to reduce jail overcrowding. It also maintains authority for sentence length at the "front end" of the system, with legislators and judges.

The experience in other states suggests that increasing sentence length may not necessarily result in more punishment for the offender in the long run because eventually the overcrowding of jails and prisons results in increased use of parole release and early release mechanisms designed to reduce the overcrowding. In Texas, for example, the average sentence imposed has increased from 5 years to 8.3 years since 1970. At the same time, the average time served has decreased from 2.7 years to 1.6 years. Texas currently incarcerates offenders for an average 19% of their imposed sentence.[83] Respect for the system breaks down when the public and offenders realize that the court-imposed sentence bears little relation to a sentence the state can afford to enforce.

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[82] Some construction is ongoing. The Department of Corrections intends to add 46 minimum security beds at Palmer in the summer of 1991. It also plans to request 78 new beds for 1993, 207 for 1994, and 150 for 1995. $5.3 million has been appropriated by the legislature for facility construction and replacement in FY 1991.

[83] Information provided by the Criminal Justice Policy Council, Austin, Texas, November 1990.

A second method of reducing time served is by amendment of early release provisions, executive order,[84] good time credit, and parole release. However, the goals of presumptive sentencing are theoretically incompatible with an extended system of early release, which allows for "back end" discretion and the opportunity for disparity in sentences served by offenders committing similar crimes. Furthermore, as a result of presumptive and mandatory minimum sentencing there has been a gradual decrease in the percentage of inmates eligible for parole, and eventually fewer than one-half of the inmates in correctional facilities will be eligible for discretionary release.[85]

B. Intermediate Sanctions Used in Alaska

Prison overcrowding may also be addressed by decreasing the number of offenders who are required to go to prison. There are a number of other sentences possible that still impose a significant sanction, but which reduce prison admissions and are generally less expensive than incarceration in a state institution. These alternatives are geared either to low risk offenders, who are the least likely to commit a new offense, or to non-violent offenders, who pose no physical risk to the public. Although a number of these alternatives are already in use in Alaska, they are usually combined with a term of imprisonment and are seldom used by themselves.

In some cases, the sentencing judge may impose a sentence which effectively sentences the offender to the time already served in jail while awaiting trial, or may impose a term of probation without any jail time at all. In non-presumptive cases, the court also has the option to suspend imposition of sentence, a procedure which allows a conviction to be set aside after a certain period of time if the offender in the meantime is able to meet the conditions of probation (which may include some incarceration). The court may also impose a term of community service, such as picking up trash, working with a non-profit community group, or performing a service in some way related to the offender's crime.

The court has several monetary sanctions available to it, which again are generally imposed in conjunction with other sanctions. Fines in varying amounts are imposed in a number of cases and are mandated by statute for most driving offenses.[86] Restitution may be ordered when a crime victim has been deprived of something tangible or has incurred medical or counseling expenses. As a third economic sanction, the court may order, in specific cases where forfeiture is provided by law, an offender to forfeit any profit from the crime or the means used (plane, boat, gambling paraphernalia) to commit it.

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[84] Emergency release provisions are used in a number of states, allowing the executive branch to release prisoners before they serve their full sentence when state prisons exceed capacity levels. Governor Sheffield implemented such a system by executive order in 1983, allowing the parole board to select eligible inmates from a low-risk group which had already served one-half of their sentence. Only 194 prisoners were granted early release under this executive order. Impact of Presumptive Sentencing at 34. As part of the settlement in Cleary v. Smith, a law suit challenging conditions in Alaska's prison system, the Department of Law is currently drafting a new emergency release bill at the request of the Department of Corrections.

[85] Corrections FY 1989 Report at 5.

[86] The Court System keeps track of fines collected but not fines imposed. In FY 1990, fines of $4,213,392 were collected, including traffic fines.

Alaska courts may also require that the offender obtain some form of treatment, such as participation in a sex offender or substance abuse program. Offenders participate in treatment programs either while incarcerated or while on probation or parole; failure to participate may be considered a violation of probation or parole conditions. Many in-patient treatment programs require the offender to stay at the treatment facility or to remain under program staff supervision at all times. Deprivation of liberty is sufficiently comparable to incarceration that, by law, the offender is credited with time served in the program.

Up to this point, the Alaska Court System has not kept consistent records on how frequently judges impose these punishments. Outside of Anchorage and Fairbanks, there are computerized records for each felony and misdemeanor which show jail times imposed and suspended, suspended impositions of sentence, fines and fines suspended, license revocations, probation length, alcohol screening, and orders of restitution. The Anchorage and Fairbanks courts expect to be computerizing this information by mid-1991. In the meantime, there is no statewide information on how often these measures are imposed; even afterward, it will not be clear whether the measures are successfully enforced.

The most widely used form of non-incarcerative punishment is the probation/parole system, administered for adults by the Department of Corrections. These services generally consist of monitoring a convicted offender's progress for a specified period following release from prison. Parole and probation officers are responsible for the supervision of felony probationers sentenced by the Alaska Court System (3,024 cases in 1988) and for enforcing the conditions of their release. They are also responsible for parolees released by the Alaska Board of Parole and for monitoring their conduct for a specified period following their release from prison.[87] In addition, these officers provide court-ordered presentence investigations of offenders awaiting sentencing (1251 in 1988), and prepare evaluations of parole plans for individuals seeking early release from prison. An intensive probation and parole supervision program exists in Anchorage only, and serves a limited number of offenders.

Prison terms may be imposed or lengthened if an offender violates probation or parole. An offender's probation may be revoked for commission of a new crime or for a technical violation of probation conditions. A new sentencing hearing will follow where the judge considers the same criteria as for the initial conviction of the underlying offense, although imposition of jail time is not necessarily required.[88] Where an offender violates conditions of parole, the matter is returned for hearing to the parole board, which may revoke all or part of the offender's parole or may change the conditions of release.[89]

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[87] In 1988, an average of 169 discretionary parolees and 203 mandatory parolees were under supervision at any given time. A one year follow up study of discretionary parolees released in 1987 revealed that only 2% had their parole revoked for conviction of a new felony offense, a rate considerably lower than the national average of 8 to 15%. However, 22% of discretionary parolees had their parole revoked for misdemeanors or technical violations. Corrections FY 1989 Report at 4.

[88] Kanipe v. State, 620 P.2d 678 (Alaska 1980); see AS 33.05.070.

[89] AS 33.16.220.

The Department of Corrections contracts for the operation of community residential centers (CRCs). CRCs may be used for furloughed offenders as a transition between confinement and release to the community, for placement of offenders to provide restitution, for placement of sentenced, non-violent misdemeanor offenders and for temporary placement of probationers or parolees in need of increased supervision. CRCs provide a limited incarceration setting for all of these groups.

As inmates near the end of their sentences, they may be furloughed to a CRC where they participate in work, education and counseling activities during the day and are confined to the center at night. CRCs may include therapeutic programs such as residential substance abuse treatment, although there are generally more offenders than treatment programs available.

Inmates eligible for restitution center placement need not be furloughed from state correctional centers in order to be housed. Referrals to restitution centers are limited to non-violent, non-sex offender inmates (such as drunk drivers) who are placed there specifically to engage in outside employment or community service work projects. As the name implies, when ordered by the court, residents must pay restitution to the victims of their crimes from the earnings they make while at the center. CRCs and restitution centers are available in five communities across the state. In 1988, 275 such community beds served 3,683 offenders.[90]

The Department of Corrections operates New Start Centers to assist ex-offenders in obtaining employment, shelter, health care, food or other assistance. Since the greatest risk of recidivism occurs in the period immediately following release from incarceration, the idea behind the New Start program is to assist offenders during that critical time and thereby to lower recidivism. New Start routinely interviews and evaluates all felony offenders about to be released to encourage pre-release planning. In 1988, New Start contacted 3,741 inmates: 286 were placed on jobs, 308 were helped toward education or skill training, and 1,486 were referred to private or public service agencies for help with housing, food, clothing and medical care.[91] In Anchorage, Fairbanks and Juneau, New Start Centers also monitor court-imposed community work service.[92]

From 1978 - 1986, Alaska had a pilot pretrial intervention program designed to divert certain first offenders from the criminal justice system. The program was designed to provide prosecutors with an alternative to formal processing for adult first offenders (both felony and misdemeanor) who would otherwise be subject to prosecution. It was also designed to provide rehabilitative services to encourage the payment of restitution. Participation was limited to property offenses in which no one was endangered, assaultive behavior in a family setting, and possession or sale of a small amount of drugs. Pretrial intervention counselors screened the cases

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[90] Id. at 5,6.

[91] Id. at 9.

[92] The Department of Corrections will also release an appropriate offender to Camp Sivuniigvik, a program for Native offenders in the Kotzebue region sponsored by the Maniilaq Native Corporation. A small number of offenders are taken out of town to a subsistence setting, where they receive training in cultural values, as well as alcohol treatment where necessary.

for referral to the prosecutors, who made the ultimate decision on whether to allow diversion. The program was terminated in 1986 for budgetary reasons.[93]

Misdemeanants generally remained in the program for six months and felons for a year. Thirty percent of the participants were required to pay restitution, and most made at least partial payments, although the overall amount imposed was considerably more than the amount collected. Eighty percent were required to participate in community service, and a high percentage of the hours assigned were completed. Forty-five percent were required to participate in alcohol or drug treatment, and about 60% of those did so successfully. The recidivism rate for the program was 33% during the follow-up period (two to four years after release), which is comparable to the national average for general recidivism.[94]

C. Intermediate Sanctions in Use in Other Places

During the past few years, many states have convened sentencing commissions and have listened to public debate concerning the prison situation in attempts to formulate proposals for policy changes. Policy makers and managers across the country are looking for "intermediate" or alternative sentencing options that are tougher than traditional probation but less stringent--and less expensive--than imprisonment. These options reflect the realization that prisons and jails have become overcrowded with all kinds of offenders, without considering the different risks they pose to the community.[95]

Proponents of intermediate sanctions believe that while non-violent offenses must be taken seriously, a prison term is not necessarily required to meet the punitive objectives of sentencing. They think properly structured, intermediate sanctions can achieve just deserts and incapacitation, while allowing offenders to remain in the community, thereby saving expensive prison beds for violent and repeat offenders who need to be isolated from the community. A review of some of the most popular alternatives follows.

1. Intensive supervision in probation (ISP). Intensive supervision programs are used as an alternative to incarceration or as a management tool for high risk probationers. ISP probationers are subject to strict and frequent reporting requirements to a probation officer with a limited caseload. ISP candidates are usually those offenders who are deemed too serious for routine probation, but not so serious that they can be controlled only in prison. ISP participants usually pay victim restitution, perform community service, hold a job, submit to random drug and alcohol testing, and pay a probation supervision fee.

The overriding rationale for ISPs is the diversion of offenders from prison to alleviate prison crowding. Most observers believe that ISPs are also socially cost-effective, in that probation can prevent the breakup of an offender's family and loss of employment after

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93 N. Schafer, Evaluation of the Alaska Pretrial Intervention Program at 12-14 (UAA Justice Center 1988).

94 Id. at 30-35.

95 J. Petersilia, Expanding Options for Criminal Sentencing, Rand Corporation Report at 5 (1987).

conviction. In addition, while rehabilitation is not the primary goal of ISP programs, most of them offer psychological and substance abuse counseling.

ISP programs are popular with the judiciary because they offer an alternative for people who are not likely to do well on probation but who do not really require imprisonment either. As long as an ISP program has stringent supervision requirements, judges can put offenders in the program without appearing to be "soft on crime." However, it is important to the success of the program that supervision indeed be more intensive than regular probation. For this reason, substantial budgets are required. Probation staffing must be increased to allow the probation officer a large number of face to face contacts with offender, collateral contacts with employers and family, curfew monitoring, and referral to employment and counseling services.

In implementing an ISP program, states must consider how program participants will be selected (whether high or low risk, by court or corrections), how the effectiveness of the program will be judged, how violations of probation conditions will be handled, and whether to devote the resources which will be necessary for a successful program.[96]

2. **House arrest**. House arrest is a sentence imposed by the court ordering offenders to remain confined in their own residences for the duration of their sentence. House arrestees may be allowed to leave their homes for medical reasons, employment, and approved religious services. They may also be required to perform community service and to pay victim restitution and probation supervision fees. In selected instances, electronic monitoring equipment may be used to monitor an offender's presence in the residence.

House arrest is designed to ease prison overcrowding. It serves offenders who would otherwise be incarcerated and is more punitive than ISP programs. It is designed to be the last chance before imprisonment, and revocations often lead automatically to prison. It can be used in a flexible manner, covering particular times of day when a certain offender (such as a drunk driver) is more likely to be dangerous.

Electronic monitoring is often used in conjunction with house arrest. In some programs, a probationer is required to wear a small transmitter which is riveted on and cannot be removed without triggering an alarm. This transmitter allows either probation officers or police officers to monitor whether or not the probationer is actually home.[97] The constitutionality of electronic monitoring has not been settled and litigation may be expected.[98] States considering house arrest must also realize that these sentences should be kept fairly short, since there is a limit to how long offenders can tolerate the monitors. They should also expect to increase probation or police staffing for monitoring at night. Certain mechanical malfunctions should also be

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[96] Id. at 28.

[97] Id. at 32-35.

[98] Id. at 58-59.

expected.[99] However, this option has gained acceptance in many jurisdictions and is currently one of the most widely used intermediate sanctions.

3. **Shock incarceration/boot camp**. Shock incarceration refers to programs in which the sentencing judge may release an offender from prison after he has served some portion of his sentence and place him on probation or parole. The rationale for such programs is that an offender who is "shocked" by a brief prison or jail experience will be deterred from returning to crime. "Boot camps," a variation on this theme, are facilities in which young first offenders are confined for short periods under rigid standards and strict military discipline.

Both shock incarceration and boot camps provide a means for courts to impress offenders with the seriousness of their actions without a long prison sentence. They purport to save money without appearing to be soft on crime.[100] Operating costs for shock incarceration are at least as expensive as for regular imprisonment because of the high level of supervision required. Nevertheless, substantial savings are often realized because offenders are diverted from longer prison terms. It should be noted that substantial debate exists about the merits of these programs in the states that have them.

4. **Day fines**. Unlike standard fines, so called "day fines" are linked to the offender's daily income, so that poor and affluent offenders are sentenced equitably. A judge using a day fine approach first sentences an offender to a certain number of fine units (often taken from guidelines) which reflect the degree of punishment appropriate for the offense. The judge then calculates the monetary value of each unit according to the income and economic resources of the particular offender being sentenced. The fine which results is generally much higher than fines ordinarily imposed in American court systems. In western Europe, the day fine is widely used as the sole penalty for recidivist offenders; as a matter of policy, fines are imposed as the major alternative to short terms of imprisonment.[101] The day fine is punitive in purpose. It is relatively inexpensive to administer, can be financially self sustaining, and can provide revenue for related social purposes such as victim compensation. It also does not act to destroy the offender's ties to family and community. However, to be effective it must be geared to the financial means of the offender.[102] States contemplating day fines should be prepared to make the financial commitment necessary for rigorous enforcement. Jurisdictions currently using the day fine as a sanction, find that it serves as a mechanism to break through offenders' denial as well as giving them useful work and budgeting skills.

5. **Other Options**. There are a number of other innovations in intermediate sanctions which are less well explored. Some jurisdictions have established police-probation cooperative teams in which the police perform the surveillance functions necessary to a working ISP program.

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[99] Id. at 60.

[100] Id. at 61.

[101] S. Hillsman and J. Greene, Tailoring Criminal Fines to the Financial Means of the Offender, Judicature, Volume 72, Number 1 at 38 (June, July 1988).

[102] Id.

Other jurisdictions recruit volunteer community sponsors, who work with probation officers to help insure that offenders are meeting their probation conditions. Some programs attempt to set offender-specific sanctions, where case workers spend a large number of hours creating a plan tailored to the punishment and supervision needs of the individual offender.[103]

None of these programs have been so long or so consistently developed that it can be said with any assurance whether they incapacitate offenders from committing new offenses. In general, their in-program recidivism rates are quite low, and most revocations have been for technical violations rather than for new crimes. However, at this point it is unclear whether the lower recidivism rate is attributable to the success of the programs or to the fact that participants have been carefully selected for participation in them.[104]

One of the attractions of intermediate sanctions is their low cost relative to imprisonment. If offenders are truly prison-bound, intermediate sanctions can reduce the pressure to build new cells and can allow offenders to pay fees which reduce the cost of their supervision. However, if intermediate sanctions are used as add-ons to prison sentences, then they simply add to the total bill for handling these offenders. The same is true if they represent "net widening," that is, if they are used to extend control over offenders who might otherwise have received traditional probation. Table 4 shows the relative cost of the various options.

TABLE 4

ANNUAL COST OF SENTENCING OPTIONS[105]
(exclusive of construction costs)

Option	Annual National Cost	Annual Alaska Cost*
Routine Probation	$300 - $2,000	$1,800
Intensive Probation	$1,500 - $7,000	$3,500
House Arrest Without Electronic Monitoring With Electronic Monitoring	 $1,350 - $7,000 $4,500 - $8,500	
Local Jail	$8,000 - $12,000	$30,000
Local Detention Center/Community Bed	$5,000 - $15,000	$20,000
State Prison	$9,000 - $20,000	$30,000

* Figures are approximate.

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103 Expanding Options for Criminal Sentencing at 66-77.

104 Id. at 78-80.

105 Table adapted from Expanding Options for Criminal Sentencing at 83.

Finally, it should be noted that cost effectiveness is not the only criterion for a successful program. If intermediate sanctions create a sentencing option appropriate to an individual offender which was not available before, it has achieved a measure of success even if it has widened the net to take in an offender who would otherwise have received less supervision. Success can be judged on the basis of recidivism rates, community protection, restitution to victims, and ability to impose an appropriate level of punishment. Depending on the extent to which these goals are met, intermediate sanctions may be worthwhile even if they add to the overall cost of corrections programs.[106]

[106] Id. at 89.

V. DATA COLLECTION

A. The Practical Necessity for Data Collection

Across the country, substantial resources have been directed toward criminal justice information systems, yet significant problems remain. The data gathered have generally proven inadequate to answer such basic questions as: how many assault convictions during a year involved use of a weapon? how many involved a domestic dispute? how many offenders are required to pay restitution as part of their sentence? how much restitution is actually collected? Alaska is no different from most states in its inability to compile basic information.

Little attention has been given in Alaska or elsewhere to the collection of information for developing state criminal justice policy. Yet with declining revenues and increasing prison populations, there is a compelling need for information to aid legislators in making difficult resource allocation decisions. One of the goals of the Alaska Sentencing Commission is to collect this information, either from existing databases or from a new collection system, and to compile it in a form which will enhance policy discussion.

Appropriate data are essential to planning and policy development in the complicated areas of sentencing and correctional policy. Good data do not make the value choices any easier, but they are essential in laying out the choices, in establishing what it will take to implement the policies chosen, and in anticipating unintended consequences that might accompany specific choices.

The major cost associated with establishing this type of planning process is the staffing for research design, data collection, and data and policy analysis. Existing automated information will need to be supplemented by information collected by hand from paper files, and may take one year to collect. The data collected during 1991 should be available for incorporation into the ongoing work of the sentencing commission during 1992 and 1993.

Collecting criminal justice data in Alaska (or any state) presents several general problems. First, even if a database nominally collects a type of information, it was not necessarily filled in consistently or accurately during the collection process. Verification of the data is a time-consuming but necessary process. Second, the collection software differs between the various packages, so it is no simple matter to combine information from the independent systems into an aggregate. Finally, since total population numbers from one agency may include a group or groups that another agency did not include, different reporting agencies frequently end up with different results, again requiring verification.

Both historical and legal factors have contributed to the lack of attention given to criminal justice information systems. Despite the central role the courts play in criminal justice processing, they do little data collection and analysis. Historically, executive branch law enforcement interests have dominated the field, geared to the collection of operations information for local law enforcement, offender based tracking systems for prison management, and generic crime information for national reporting. The Alaska Department of Law has also gathered information for case management by prosecutors. These systems were designed at different times

for different purposes and have never been integrated into a uniform offender or case tracking system.[107]

Among other pieces of information, sentencing commissions often gather information as to:

(1) case processing, including initial charges, conviction offense, and plea or sentence bargain;

(2) nature of offense, including number and vulnerability of victims, physical and emotional injury, amount of property loss, victim relationship to offender, and type of weapon;

(3) offender characteristics, including criminal record, chemical dependency, and role of drugs or alcohol in the offense;

(4) sentence information, including type of sanction, supervision conditions, length of confinement or supervision, consecutive sentences, and treatment; and

(5) compliance with sentence conditions, including violations and revocations, payment of fines and restitution, and recidivism.

Surprisingly, much of this information is not consistently recorded in any of the state databases currently available. One of the tasks facing the Alaska Sentencing Commission is to determine how this information can conveniently be collected and to obtain a large enough sample for meaningful policy analysis.

In addition to data, the sentencing commission may develop a comprehensive model for simulating the impact of sentencing policy and practices on the full range of sanctions, including prison, local jail, probation, and various community programs. It must assess the size of the program in institutional populations that result from various sentencing alternatives, as well as which offenders will be affected. Several models are currently available and in use in other states, and staff of the Alaska Sentencing Commission will be considering them for adaptation here.

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[107] There are four primary state databases currently maintained by different departments for different reasons. The Alaska Public Safety Information Network (APSIN) is the largest online database and is maintained by the Department of Public Safety. The Prosecutors Management Information System (PROMIS) is maintained by the Department of Law. The Offender Based State Correctional Information System (OBSCIS) is maintained by the Department of Corrections. The Alaska Court System maintains a loosely connected database designed for each court to monitor its own caseload.

There are also some good secondary sources. The Judicial Council, in conjunction with the Institute for Social and Economic Research, recently merged several years of OBSCIS, PROMIS, and APSIN data to create an Offender Based Transaction System (OBTS) for the years 1984-87.

CONCLUSION

The legislature has asked the Alaska Sentencing Commission to address a broad range of policy issues relating to sentencing reform. The possible work products of the Sentencing Commission include:

- ★ Ranking offenses by degree of seriousness.
- ★ Determining the role of criminal history as a factor in sentencing.
- ★ Defining a dispositional policy that determines which offenders are confined in prison and which are sanctioned in other ways.
- ★ Recommending changes in sentence length to the legislature, and the interchangeability of other sanctions.
- ★ Recommending procedures governing when a judge may depart from these sentences.
- ★ Recommending changes in parole eligibility.
- ★ Recommending changes in resource allocation among offender treatment programs.
- ★ Structuring policies and procedures (for example, plea bargaining agreements or parole decisions) to ensure consistency in all aspects of sentencing policy.
- ★ Recommending modifications in the criminal code structure to allow for increased differentiation among offense categories.

A brief discussion of some of these points follows.

1. **Ranking the Seriousness of Different Offenses**. A commission may develop a consensus hierarchy of criminal activity. It makes a collective judgment about what crimes are least serious or most serious and therefore deserving of harsher sanctions. At a broad policy level, the rankings reflect judgments about harm or potential harm to the victim or community, the culpability of the offender, and the injury to the victim.

2. **Role of Criminal History**. Commissions typically develop a scoring system to assign a numerical weight to offender characteristics, including prior felony and misdemeanor convictions, juvenile record, and probation or parole status at the time of the offense. Commissions also consider how multiple convictions arising out of a single incident should be handled.

The rankings of offense seriousness and defender characteristics are usually displayed on a two-dimensional grid, yielding a matrix on which sentencing policy can be based. Next, the commission must deal with the two major policy issues that drive prison populations and other

correctional resources: (1) the dispositional policy, or what type of sentence (prison, probation, or intermediate) is most appropriate for which offender, and (2) the durational policy, or how long a sentence should be for an offense and particular offender.

3. **Dispositional Policy**. A commission must make fundamental philosophical judgments about how much weight to give to offense seriousness and criminal history when choosing a sentencing option. A "just deserts" policy emphasizes offense seriousness and mandates a sentence based on the offense with little regard to prior criminal activity. A policy aimed at incapacitating repeat offenders gives much greater weight to criminal history. As a practical matter, the developing dispositional policy does not usually deviate from past judicial sentencing practices in most cases. Where there is a deviation from past practice, however, there may be a great deal of debate.

4. **Durational Policy**. A commission may recommend specific confinement periods or the extent of recommended intermediate sanctions. Because structured sentencing substitutes shorter "real time" sentences for symbolically longer sentences subject to parole and good time release, the durational policy attracts controversy, even when it closely resembles current practice. Re-examination of dispositional and durational policy is necessary if a state wishes to incorporate intermediate sanctions into its sentencing structure. Sentences must be refined to include different levels of probationary sentences and a system of exchanges or equivalences among non-imprisonment sanctions.

For example, Oregon's proposed sentencing guidelines established three probation levels for which a maximum number of jail days can be ordered (30, 60, or 90 days) and a maximum amount of time (measured in custodial units) which can be required in other programs. The guidelines also establish equivalent custodial units: e.g., one day of jail time or residential treatment is considered equal to two days of house arrest or 24 hours of community service. Depending upon the availability of local resources and the circumstances of the offender, a judge could order any combination of jail confinement, community service, custodial treatment, work release, or restitution within the number of custodial units specified for the offense. In Oregon, the judge is not limited in imposing additional conditions of probation that do not involve custody of the offender.

5. **Departure from the Prescribed Sentence**. Structured sentencing plans typically provide a means for judges to deviate from the prescribed sentence and order a more or less stringent sentence due to mitigating or aggravating circumstances. Examples of departure criteria include mental capacity, deliberate cruelty, extreme vulnerability of the victim, the offender's role in the crime, and cooperation with the investigation. A commission may also wish to develop a list of factors, primarily demographic and socioeconomic, which should not be used as a basis for departures. The departure criteria used in most states track the aggravating and mitigating circumstances already set forth in the Alaska presumptive sentencing statutes.

6. **Related Policies and Procedures**. A commission may need to propose additional legislation to reallocate sentencing authority. For instance, the Kansas legislature specifically directed its sentencing commission to determine whether there was a continued need for the Kansas parole board. Washington's guidelines include statutory standards to limit the discretion of prosecutors on charging and plea bargaining. Minnesota's guidelines outline how probation

revocation is to be coordinated with the sentencing guidelines. In sum, the commission must ensure coordinated procedures that reinforce the goals of sentencing equity and systemwide uniformity.

The Alaska Sentencing Commission has tentatively determined that it will tackle the first two of these policy issues, seriousness ranking and the effect of criminal history, in the first half of 1991. In the latter half of the year, following the legislative mandate and its own mission statement, the commission will go on to re-evaluate dispositional and durational policy as currently applied. The commission is also extremely interested in exploring the increased use of intermediate sanctions in Alaska. Whether the commission eventually promulgates formal guidelines putting these policies into effect has yet to be determined.

Input from all branches of government is an important component of the commission's work and is greatly encouraged. Input from members of the public and various interest groups is also vital. People interested in sentencing issues are encouraged to contact the members and staff of the sentencing commission with their comments and ideas for the commission's work in 1991.

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