MANDATORY SENTENCING AND THE ABOLITION OF PLEA BARGAINING: THE MICHIGAN FELONY FIREARM STATUTE

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Increasing concern about the substantial discretion accorded prosecutors in plea negotiations and judges in sentencing decisions has led to a number of proposals to curtail both. In this paper, we assess the consequences of an attempt, simultaneously, to abolish plea bargaining and introduce mandatory sentencing. The Wayne County (Detroit) Prosecutor prohibited his subordinates from plea bargaining in any case in which a recently enacted state statute warranted a mandatory sentence. This statute imposed an additional two-year prison term if a defendant possessed a firearm while committing a felony. Using qualitative data collected from interviews with judges, prosecutors, and defense attorneys, and quantitative disposition data for the six-month periods before and after the law went into effect, we describe the effects of the new statute on dispositions in Detroit. Though there is some evidence that the law and the prohibition on plea bargaining may have selectively increased severity of sentences for certain classes of defendants, for the most part disposition patterns did not appear to have been altered dramatically. In many serious cases, sentences for the primary felony were adjusted downward to take into account the additional two-year penalty; in "equity" cases, in which defendants had not previously received prison time, other mechanisms, such as abbreviated bench trials, were often employed to circumvent the mandatory sentencing provision.

I. INTRODUCTION

Two features of the American criminal justice system most often criticized are unbridled prosecutorial and judicial discretion. Prosecutors engage in a wide variety of plea bargaining practices unencumbered by appellate court constraints, or any other formal control for that matter (see, e.g., *Bordenkircher* v. *Hayes* 434 U.S. 357, 1978). Judges similarly have a wide range

The research reported here was supported in part by a grant from the Office of the Vice President for Research of the University of Michigan and Grant 78NI-AX-0021 from the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice. Points of view or opinions stated are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice. We also received financial support from the Department of Sociology and the Institute for Public Policy Studies of the University of Michigan. The research could not have been completed had it not been for the herculean efforts of Janice Hartwell, Arthur Meyers, Tori Fairman, and Mark Vaitkus who did most of the coding. We also wish to acknowledge the enthusiastic cooperation we received from the Office of the Prosecuting Attorney of Wayne County, Michigan. The Prosecutor and his staff were helpful in every respect. Finally, we wish to thank Richard Abel, Jonathan Casper, and James Eisenstein for their comments on an earlier draft of this paper.

of sentencing options for any particular defendant or charge. Frequently, sentencing possibilities range from a suspended sentence or probation to a lengthy prison term or even life imprisonment.[1]

Critics of plea bargaining and indeterminant sentencing are quick to point out the shortcomings of the present system. On the one hand it is argued that undue leniency results from prosecutorial and judicial eagerness to grant concessions to the defendant who pleads; on the other hand, defendants who do not plead or who are "singled out" by the prosecutor or judge are subject—almost whimsically—to harsh treatment. What emerges—in the critic's eyes—is a system of wide disparities in charging and sentencing similarly situated individuals, a system that has lost sight of its goals in its eagerness to dispose of cases.

In this context, two reform proposals are currently fashionable. One calls for the abolition of plea bargaining for all crimes (National Advisory Commission, 1973: 41-49; *Iowa Law Review*, 1975) or for some subset of particularly violent or serious offenses (see Church, 1976). The second urges the introduction of mandatory minimum sentences, again either generally or for certain crimes.[2] Though these proposals, and variants on them, are justified in ways that differ depending on the advocate's ideology, the common theme is that discretion in the criminal justice system must and can be reduced.

The literature is not barren of admonitions, often supported by research, about the consequences of attempting these innovations. Several scholars have predicted that mandatory sentences would simply enhance the prosecutor's plea bargaining powers.

> While the judge can no longer select from a wide variety of sanctions after conviction, the prosecutor's powers to select charges and to plea-bargain remain. [Zimring, 1977:11]

> In the future, mandatory sentences or sentencing guidelines for judges probably won't decrease the overall discretion of judges and disparities of treatment that is [*sic*] experienced in trial courts. Instead, prosecutorial discretion will probably increase to provide the kind of substantive justice more difficult for the trial judge to give. [Sarat, 1978:326]

> The parts of the criminal justice system are so interdependent that benefits gained by altering one aspect of the system can quickly produce costs in another. If, for example, sentencing discretion is limited, prosecuting discretion will probably be enhanced. It is by no means clear that the latter is preferable to the former. Efforts to effect

[1] For a series of horror stories that result from this broad discretion, see Frankel (1972:5-11).

[2] For critical reviews of some of the more prominent proposals in this area, see Alschuler (1978) and Zimring (1977).

> planned change in the criminal justice system often flounder on such displacement effects. [Horowitz, 1977:232; see also Levin, 1977:187; Wilson, 1975:179]

Similarly, studies suggest that when an attempt is made to proscribe prosecutorial plea bargaining, judges take up the slack and either implicitly or explicitly become involved in sentence negotiations. For example, Thomas Church (1976:399) examined one such attempt and concluded:

> [w]hen the prosecutor stopped making the most prevalent form of concession to drug sale defendants—a reduced charge—the pressures to grant considerations in exchange for pleas moved to the judge. Those judges prepared to make sentence concessions to defendants had little trouble securing pleas.[3]

In short, mandatory sentences reduce judicial discretion but are handled by an increase in prosecutorial discretion; plea bargaining proscriptions reduce prosecutorial discretion but are handled by an increase in judicial discretion. Plug up the system at one point and analogous processes seem to emerge at another.

The question that concerns us in this paper is what happens if both reforms are introduced simultaneously, if mandatory sentences are coupled with a policy that forbids plea bargaining? Are the defendants left no option but to go to trial in every case? Does the system collapse under the sheer weight of these restrictions? Or, does the system adapt, does it somehow work things out so that the status quo is not dramatically altered, in spite of the seemingly major innovations? A new statute in Michigan and a Prosecutor's decision relating to its implementation in Detroit afforded us the opportunity to explore these questions.

II. THE MICHIGAN FELONY FIREARM STATUTE

The Michigan Felony Firearm Statute (hereinafter referred to as the Gun Law) went into effect on January 1, 1977. It mandates a two-year prison sentence in addition to the sentence for the primary felony for any defendant who possesses a firearm while engaging in a felony. This consecutive sentence cannot be suspended nor can an individual be paroled while serving it.[4]

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[3] Some judges in "Hampton County" refused to make these explicit sentencing concessions and the trial rate for defendants appearing before them increased somewhat. But it is important to recognize that even without explicit concessions defendants may still plead with the expectation of a reward. See Heumann (1978:157-58); *Iowa Law Review* (1975:1067).

[4] M.C.L.A. 750.227b; M.S.A. 28.424(2).

> (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violations

Most state action designed to reduce the illegal use of firearms also restricts legitimate use and thus tends to polarize the public and provoke conflict between organized political interests. Because the Gun Law is intended to reduce the illegal use of firearms without imposing additional costs on those who use them legally, it elicited less political opposition. Though questions can be raised about the assumptions concerning deterrence on which the law is based,[5] there is little question about its political popularity. Prior to its passage[6] and since implementation a wide variety of political interests have supported it, including groups such as the National Rifle Association and the United Auto Workers/Community Action Program that in the past have disagreed with each other over the appropriate policies for reducing firearm violence.[7]

The Michigan law differs from the widely publicized Bartley-Fox Law in Massachusetts, which imposes a one-year

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of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).

Note that upon a second or third conviction the mandatory sentence escalates. Since the time period for this paper is limited to the first six months of the statute's life, this provision will not be considered, though it is not impossible for a defendant to plead to several gun related felonies and receive the escalated penalty for the second charge. During the first six months this was highly unusual, but there was at least one well-publicized example. See *Detroit Free Press* (March 1, 1977, p. 12A).

[5] In this paper we are only concerned with whether the Gun Law in fact increased the certainty and severity of sanctions and not with the further question of deterrence—whether individuals changed their behavior in response to these changes in sanction. For a critique of the deterrence assumptions of stringent mandatory sentencing provisions for firearm offenders, see Yeager (1976).

[6] Though the bill was heatedly debated in the Michigan Senate and House, it passed by votes of 28-8 in the Senate and 100 to 5 in the House. See 7 *Mich. J. Senate* 96 (1976); 9 *Mich. J. House* 221 (1976). For a review of the questions raised about the bill in the respective chambers, see 54 *Mich. J. House* 1367-72 (1975); 4 *Mich. J. Senate* 50-51 (1976); 5 *Mich. J. Senate* 61-72 (1976); 7 *Mich. J. Senate* 95-97 (1976).

[7] For a list of the supporters of the Gun bill, see Representative Dennis Hertel's testimony in Hearings before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 94th Congress, First Session on Firearms Legislation, Part 3, Detroit, p. 920.

mandatory sentence upon anyone convicted of *carrying* a firearm in violation of the state's firearm laws.[8] In Michigan, the Gun Law does not apply to offenses such as carrying a concealed weapon or illegal possession of a firearm since these are considered to be included in the offense of "carrying or possessing a firearm at the time of committing or attempting to commit a felony." Thus the conduct to which the law applies is more serious but also more diverse: any felony in which the defendant used or possessed a firearm.[9]

The law itself does not impose any restrictions on prosecutorial plea bargaining.[10] A prosecutor is free to decide whether to charge the Gun Law and, if he does, to drop it subsequently in the interests of justice. Nothing in the law precludes the shifting of discretion from the judge to the prosecutor and, as we have seen, this is a common prediction of precisely what will happen when mandatory sentencing is imposed.

However, in Wayne County (Detroit and its environs), the Prosecutor publicly announced that his office would not engage in any plea bargaining in cases in which the Gun Law applied.

> Leave the gun at home if you set out to commit a felony after December 31, or count on at least two years in prison if you're caught and convicted. There will be no plea bargaining under a new law, no probation, and no parole. [*Detroit News*, December 1, 1976:3A][11]

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[8] The Michigan statute differs from the Massachusetts statute in at least one other important respect: the mandatory period of imprisonment in Massachusetts runs concurrently with the sentence the defendant receives for any other felony. For preliminary analyses of the Massachusetts Statute, see Beha (1977); Boston University School of Law, Center for Criminal Justice (1977). For an analysis of the statute's deterrent effect, see Deutsch and Alt (1977).

[9] Recently Florida, Missouri, Connecticut, California, and Nebraska have also enacted some variant of mandatory sentences for firearm crimes (Fla. Stat. § 776-087 (2); Missouri Stat. § 559.225; Conn. P.A. 75-380; Cal. Penal Code §§ 12022-12022.5; Nebraska Rev. Stat. § 28-1011-31). These statutes differ from the Michigan law in (1) the amount of imprisonment mandated; (2) whether the sentence is to run consecutively or concurrently with the primary felony; (3) whether the presence of a firearm simply enhances the sentence for an offense or whether it is a separate offense; (4) the weapons to which they apply (e.g., knives); (5) the amount of discretion allowed the judge. To our knowledge the impact of none of these laws has been systematically analyzed.

In addition, the proposed revision of the federal Criminal Code includes a modified version of a mandatory sentence for possession of a firearm during the commission of a felony which differs from the Michigan statute in having more formal loopholes. See S. 1437, § 1823, 95th Congress, 1st Session.

[10] In contrast, the 1973 New York drug law formally proscribed plea bargaining in most cases. However, the law did allow two exceptions and these, plus resistance from court personnel, seemed to have undermined its implementation. See Association of the Bar of the City of New York (1977:3-5, 13-30).

[11] The Prosecutor in Oakland County (adjacent to Wayne County) was equally as enthusiastic about the law. In the same newsclipping he was quoted as saying that the Gun Law was "one of the most important pieces of legislation enacted in decades."

In addition to these media proclamations a widespread publicity campaign about the new law was mounted, replete with billboards and bumper stickers proclaiming: "One with Gun Will Get You Two."

The Prosecutor's intra-office behavior was quite consistent with his public posture. Shortly before the law went into effect, the following memo outlining the procedures to be followed in gun cases was sent to all assistant prosecutors working in the Wayne County Prosecutor's Office:

> 1. At the warrant stage, the Prosecutor will recommend warrants under the statute if the elements of said statute are present. This will be a second count in the charging documents, inasmuch as the underlying felony or attempt to commit a felony will also be charged. Said count will be charged even in those cases wherein a man is charged with possession of heroin and is found to possess a firearm at the same time.
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> In those cases wherein more than one defendant is arrested on the underlying felony, if there is any evidence that the co-defendants in said felony had knowledge that the possessor of the firearm had same, they will also be charged in the second count of possession of firearms in the course of a felony on the aider and abettor theory.
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> If there is no evidence that the other co-defendant knew of the gun; i.e., the gun was in the pocket of one defendant at all times, was never displayed nor were there conversations concerning same, the other defendants will not be charged with the second count of possession of a firearm.
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> 2. At the pretrial, no reduced plea will be accepted on the count of possession of a firearm during the commission or attempt to commit a felony. Pretrial prosecutors should exercise care, however, so that the underlying felony or attempt to commit a felony is not reduced to a crime which would not support the second count. [Intra-office Memorandum, Dec. 20, 1976]

The Prosecutor appeared determined to cast the net of the Gun Law as widely as possible at the warranting stage, and to stand firm on the charge once warranted. No room for exceptions was left in the memo or in public pronouncements. An unwavering proscription against plea bargaining was to be followed with the expectation that "every one who commits one with a gun" now would "do two."[12]

III. RESEARCH DESIGN

In this paper we deal exclusively with a selective evaluation of the impact of the Gun Law in the Detroit Recorder's Court. Several factors led us to limit our inquiry. First, the eschewal of plea bargaining by the Wayne County Prosecutor created an ideal situation in which to analyze a simultaneous

[12] The Wayne County Prosecutor's Gun Law policy was consistent with his general advocacy of wider use of mandatory sentences. For an interesting discussion of the importance that he attaches to the widespread application of these mandatory sentences, see Cahalan (1973).

reduction in judicial and prosecutorial discretion. Second, Detroit's contribution to the total number of crimes in Michigan and its nationwide ranking in various offense categories suggested that it would provide a vigorous test of the effectiveness of a policy of mandatory minimum sentences for firearm offenses—a setting in which the full range of related problems might arise.[13] Finally, after conducting some exploratory visits to Detroit, we learned that unraveling the impact of the law would be a complex matter. We decided that our limited resources would be better concentrated on one jurisdiction than dissipated in what would necessarily be a more cursory study of several jurisdictions.

Twenty-three interviews were conducted with court personnel (judges, prosecutors, and defense attorneys).[14] In addition, crime, defendant, and disposition data were collected for seven categories of offense (armed robbery, felonious assault, murder, criminal sexual conduct, assault with intent to murder, assault with intent to do great bodily harm, and assault with intent to commit armed robbery). The interviews were designed to elicit qualitative assessments of impact and guard against naïve interpretations of the quantitative data.

The quantitative data were collected from three sources. Our initial selection of all cases was done through the computerized information retrieval system (PROMIS) maintained by the Prosecuter. We also obtained a comparable printout on each case from the computerized information system of the court, which yielded further information about the defendant, case processing, and disposition, and allowed us to check consistency between the two systems. Finally, we coded some information on each case from the paper files in the Prosecutor's office.[15] This rather laborious process involved finding the paper files and reading the police reports but yielded information not otherwise available.

Table 1 presents a summary of the data collected thus far

[13] Both crime reports and victimization surveys show that Detroit has one of the highest levels of violent crime. Furthermore, more than fifty percent of violent "index" offenses in Michigan took place within the Detroit city limits. See Federal Bureau of Investigation (1975: Tables 3, 4, 6); U.S. Department of Justice (1975: Table 3).

[14] Eighteen were tape recorded. The interviews lasted an average of one and a half hours. The number in parentheses that follows a quotation from one of these interviews is the identification number we assigned to the respondent.

We also engaged in many less formal conversations about the Gun Law with other personnel at Recorder's Court. These included some rather lively discussions in the prosecutors' lounge, the judges' chambers, and the hallways outside the courtrooms.

[15] These include the defendant's prior record, the type of weapon used in the offense, the amount of injury inflicted, and the victim-offender relationship.

for the project as a whole. This paper analyzes offenses that fall within the four categories of assault, and armed robbery, in which a firearm was involved, and which were disposed of during the six months prior to and the six months after the Gun Law went into effect.[16]

TABLE 1

TOTAL NUMBERS OF CASES DISPOSED AS OF JULY 1977
BY OFFENSE YEAR AND DISPOSITION YEAR
(Seven Sample Felonies)

Felony Type	Offense Year/Disposition Year 1976[a]/1976	1976[a]/1977	1977/1977	Total
Murder	122	235	53	410
Criminal sexual conduct	119	209	108	436
Armed robbery	343	351	207	901
Assault with intent to commit murder	66	145	45	256
Assault with intent to commit great bodily harm	52	86	39	17
Assault with intent to commit armed robbery	29	45	23	97
Felonious assault	138	171	96	405
Total	869	1,242	571	2,682

a. Some cases actually entered the system before 1976

Because our present analysis is confined to the first six months of the law, our conclusions are necessarily very tentative. It is possible, for example, that cases processed during that period differ from those that had not been disposed at the end of it.[17] The Gun Law was also experiencing its "birth pangs," generating more than a little confusion about its application in certain complex cases;[18] defense attorneys may have

[16] Presently we are expanding the study design to include another six months before and after the Gun Law's enactment. Upon completion of the data collection, a more detailed examination of the Law's direct and indirect effects will be undertaken.

[17] Also, a "crash program" was begun in early 1977 to reduce the backlog of cases in Recorder's Court. Its effects on the disposition of cases in 1977 are unclear but suggest further caution in interpreting our data.

[18] A host of questions were raised about the applicability of the Gun Law to various situations and about its constitutionality. These included whether an actual firearm had to be used (yes), whether aiders and abettors could be charged (participants in a crime in which another defendant carried a firearm), whether it applied to possessory crimes (e.g., a defendant arrested for possession of heroin who had a firearm in his pocket), whether it constituted double jeopardy to sentence a defendant to prison for a felony such as armed robbery and then give him a separate sentence for the Gun Law charge, and whether defendants could escape the Gun Law if they were sentenced under the Youthful Trainee Act. The statute was also challenged on some very technical grounds dealing with the power of the legislature to amend the criminal code indirectly by passing the Gun Law. These issues are still winding their way up

attempted to delay cases in the hope that these matters would be resolved in a way favorable to their clients.[19] On the other hand, there is a special value in looking at this initial six-month period. If we are interested in how a system copes with mandatory sentencing and no plea bargaining, it is likely that these policies will be most ardently supported when the law is most in the public eye.[20] Thus the strongest test for how a court system handles a ban on plea bargaining may occur when the policy is new, when the pressures on the prosecutor not to make exceptions are greatest, and before slippage sets in. Though it is doubtless too early to make any definitive conclusions about the Gun Law based on six months' experience, we certainly can learn a lot about the broader picture of how a court system adjusts to a seemingly firm no plea bargaining posture even, and perhaps, especially, by looking at these first six months.

IV. THE PROSECUTOR'S POLICY: RHETORIC OR REALITY?

We have seen that the Wayne County Prosecutor adopted a firm public and intra-office policy with regard to the Gun Law. In some jurisdictions, this sort of prosecutorial policy would be greeted with great skepticism by those familiar with the criminal justice system. Typically, assistant prosecutors have wide latitude: as professionals, they are free to make judgments about the strength of the case and the reasonableness of a negotiated disposition (see Heumann, 1978:99-114). One would expect them to resist constraints on their discretion, and perhaps even suspect that the Prosecutor's posture was more a rhetorical display than an attempt to secure compliance.

However, long before passage of the Gun Law, the Wayne County Prosecutor had taken steps to bureaucratize the disposition process and had instituted policies for certain cases (see Eisenstein and Jacob, 1977:151-54; Nimmer and Krauthaus, 1977:10-11). The office was divided into warranting, pretrial,

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the appellate ladder and no definitive rulings have yet been handed down. For a general discussion of several of the possible constitutional objections to the Gun Law, see Hall (1976); for the decisions of the Massachusetts Supreme Court on comparable issues raised by the Bartley-Fox Law, see *Commonwealth* v. *Jackson* (344 N.E.2d 166, 1976); *Commonwealth* v. *McQuoid* (344 N.E.2d 179, 1976).

[19] Some attorneys in New York apparently employed delaying tactics in the hope that portions of the drug law would be repealed. See Association of the Bar of the City of New York (1977:107-8).

[20] And the Wayne County Prosecutor made sure the law remained in the public limelight. For example, he held a news conference to announce the first conviction under its provisions (*Detroit Free Press*, February 16, 1977, p. 13B).

trial, and appellate divisions, and specific guidelines also structured their operation.[21] In short, the probability of compliance with the ban on plea bargaining in Gun Law offenses was higher in Detroit than it would be in other large jurisdictions that are frequently unaccustomed to stringent organizational constraints.[22]

Nonetheless, we cannot assume automatic compliance with the directive. Given the size of the Prosecutor's staff (approximately 110 assistant prosecutors), the volume of business handled annually (approximately 13,000 felony warrants), and the impossibility of constant supervision, it is still possible that the policy was circumvented in practice. There are several points at which assistant prosecutors could undercut the Prosecutor's policy. They could refuse to authorize a warrant if they felt the equities did not justify a two-year penalty, or could authorize only a misdemeanor, not a felony, warrant.[23] Similarly, they could ignore the firearm and simply warrant on the primary felony. During the preliminary examination and at subsequent hearings prosecutors could silently acquiesce in a judge's dismissal of the charge. Finally, during the pretrial conference, the assistant prosecutors have the same options as the warranting prosecutors: to drop the gun count, reduce the felony to a misdemeanor, or drop the whole case.

The interview and quantitative data lend qualified support to a conclusion that in fact the Prosecutor was successful in obtaining the compliance of his subordinates. Consider, for example, the comments of a defense attorney who initially feared that the prosecutors would use the Gun Law as a plea bargaining tool only to learn that it was being used in what he viewed as an even more dangerous way—*not* as a plea bargaining tool.

> Well, I was involved in . . . an attempt to stop the law from being passed in the sense of any law that has mandatory minimums. . . . There wasn't too much of a lobby to stop the law, but our main concern working in Recorder's Court was that it was simply gonna be used as a

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[21] In Michigan, charges cannot be filed against a defendant by the police alone. They must bring the complaint to the warranting prosecutor who then decides whether formal charges are to be filed. In Recorder's Court, after the warrant is ratified at arraignment, a preliminary examination is held several days later. Cases not dismissed are then scheduled for a pretrial conference, in essence a structured plea bargaining session. For an excellent discussion of case processing in the Detroit Recorder's Court, see Eisenstein and Jacob (1977:126-71).

[22] Compare, for example, courts in Baltimore and Chicago, which have an organizational climate less favorable to policy directives (Eisenstein and Jacob, 1977:67-125).

[23] A decrease in the number of cases warranted appears to be a fairly common response to policies proscribing plea bargaining. See Church (1976:390); *Iowa Law Review* (1975:1068-69).

> plea bargaining tool. And that simply they would add that count and when it came time to plea bargain, they would knock that count out.
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> Q. That comports exactly with my expectations.
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> That was my understanding of what happened in Florida, and, it hasn't happened in Wayne County. My understanding is that just about in every case, if there's a gun, they're charging it . . . even some ridiculous circumstances. We had a case . . . where the person was robbed. Thought it was a gun. They caught the people around there, a few blocks away, I don't know, it was a half an hour later or something, and found a toy gun on them. The prosecutor still brought the charge because the prosecutor claimed: "Well, they could have used a real gun which they got rid of."[17][24]

Other defense attorneys echoed these views, frequently pointing to extreme situations in which the law was charged and subsequent prosecutorial unwillingness to reduce the felony or trade off the Gun Law charge.

> [B]asically what they've done over there in Recorder's Court is the Prosecutor's office has adopted a very rigid policy. They charge people with the Gun Law, it seems like they charge it every time they possibly could, whenever there's a gun, they charge felony firearm. And they never drop it as part of pleading, no matter what the circumstances are, who the client is and what kind of equities there are . . . so [they are charging it] for first offenders who ordinarily would be absolutely a candidate for probation, and somebody like that comes with a felony firearm and they've got nowhere to move, and it doesn't make sense to send someone like that to jail for two years. . . . Or a F.A. [felonious assault] when it's not necessarily a serious crime involved, but if there's a gun used, then that's it. And that person's options are gone . . . I mean, sometimes, you'll have an individual prosecutor in the courtroom, the courtroom prosecutor who doesn't want to try the case. They may not want to try the case at all. But the policy comes from upstairs and they're helpless to do anything about it. [20]
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> I have a motion in now on a case where the prosecutor would have recommended a high misdemeanor, but he can't recommend it, since they're applying the felony firearm all over the place. . . . It's ludicrous. [16]

Most of the assistant prosecutors we interviewed agreed with the general goals of the Gun Law and the Prosecutor's support of it but objected to his rigid policy. Their comments and sense of frustration about their inability to make exceptions in particular cases provide further evidence of the "successful" implementation of the policy.

> For a long time I absolutely wanted them [mandatory minimum sentences] on every single offense. I now have some reservations about that. I'll tell you what's happened, the experience with the Gun Law. I mean if this were a wise office, if every prosecutor's office were a wise office, I would absolutely believe in mandatory minimums for everybody and I would allow discretion to be in the prosecutor to take out those 5% of the cases where it shouldn't be charged, and it wouldn't be charged. But [this office] has drawn lines, and we rigidly impose them. As a result I see judges put in incredible pressure situations. [5]

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[24] As noted earlier, the Gun Law only applies to offenses in which an operable firearm was used. This is not true of crimes such as armed robbery, in which a feigned or inoperable gun is sufficient to justify the charge.

> I personally disagree with the office policy of across-the-board recommending felony firearm where warranted by the investigation of the police. There are many cases of equity, certainly, where we should be permitted to exercise our discretion whether or not we recommend it. Because I think you could easily imagine all sorts of domestic and neighborhood squabbles, we have people with otherwise perfect criminal records, who might technically commit a felony while he possessed or used a firearm. Certainly equity indicates that the felony and felony firearm should not be taken in. I don't like to be boxed in to that type of across-the-board policy. But I don't make the policy. . . . See, my feeling is I'm a prosecutor and if I'm allowed to exercise my discretion then we have a perfect system. Now I'm confident that I can properly exercise my discretion. I'm confident and I know, generally speaking, that the office is confident that the greater majority of these people could exercise their discretion. I think I should be permitted to. But, I can't in the face of office policies. I'm boxed in. What many of us would want is to be able to do so and so, and be held accountable for it. Certainly I'm not going to give the store away. [11]

This grudging willingness to abide by the Prosecutor's policy was not simply a result of institutional loyalty. The Prosecutor ordered his administrative staff to keep close tabs on all cases in which the felony firearm charge was dropped and to monitor carefully all plea bargaining by assistant prosecutors of such charges.[25] When deviations from the policy were uncovered, they were quickly called to the attention of supervisory personnel.

> In fact I think we had two or three blow-up type cases that came to our attention very shortly after the statute was enacted, where judges on their own motions did it [dismissed felony firearm], and we ordered transcripts of those cases, just to find out how the prosecutor responded. And in one of those cases a very experienced trial attorney, who was scheduled for a much more responsible job in this office, did not object. We have reason to believe after looking at the transcript, that in fact, he and the judge had worked it out sort of in chambers, and then the judge had gone out and reduced an assault with intent to do great bodily harm to an aggravated assault [a high misdemeanor]

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[25] In addition to using the PROMIS system to track Gun Law cases, assistant prosecutors were required to file a form with the Prosecutor's Appellate Division every time a gun charge was dismissed by a judge. That office was expected to challenge these dismissals wherever any appealable question could be raised. A preliminary review of their briefs indicates that they were, in fact, quite active in appealing judicial dismissals.

More informal means of monitoring the behavior of subordinates also proved quite useful, as the following comments from an administrator in the Prosecutor's office suggest.

Q. How do you know that assistant prosecutors aren't dropping the felony firearm count?

A. I . . . you can tell. Things come to your attention. When I was in the trial section I was always amazed that, how an administrator knew things, knew how an assistant was doing in court or what their level of expertise was or what happened in any given case. But sitting here now, I also know. I mean, it just sort of filters around, and if you walk around the office or walk down into the courts just randomly, you pick up things and you get a sense and then you make an inquiry. You can tell. Sometimes it's a judge kind of shooting off his mouth on how he beat the system by doing thus and so in a given case, and then you go back and check on it and find out who did what and why. But I do not get the sense that we are dumping these cases. I'm sure that there are a few here and there but . . . [15]

> and as a result let the felony firearm go. And, I mean, what happened is the influence, or shall we say the stock of that trial assistant went measurably down, and I think people generally on the staff knew about it. It was not publicized as such, but there was grousing. [5]

> I have discretion on most cases but not on the ones with felony firearm. Take the ____ case, a FA [felonious assault] and a gun charge. I reduced it to simple assault after speaking to the cop, and he said "O.K." The defendant had just raised a gun at the cops. Well, higher up in the office the case blew up and . . . [7]

Assistant prosecutors might be more immune from administrative monitoring at the warranting stage. Though the office policy calls for warranting the gun charge whenever dictated by the facts, a warrant prosecutor's decision not to authorize the charge or to authorize only a misdemeanor would never get into the system and thus would be less likely to blow up at a later stage. Our quantitative data do not allow us to measure decisions not to warrant because our case sampling, using the PROMIS system, assumed warranting and began tracing cases at that point. Interviews, however, suggested some slippage at this stage, though the consensus seemed to be that exceptions were relatively infrequent and made only in borderline cases.[26]

> As far as I can determine they've been charging it any time they can. You get uttering and publishing [bad checks] with the felony firearm, possession of heroin and felony firearm. The only time I've seen it not charged was, I had a case of a security guard who used a club against a guy. Of course, he also had a gun on him. The prosecutor knew that if the gun was charged that it might lead to an appeal, and he didn't want that kind of case making appellate law, so they didn't charge it. [14]

> Well, I think if there were a large number which were not being warranted, I think the police department would scream, because they, of course, have some interest in protecting their interest in a case. And I'm sure that we'd get some indication from them. . . . I know that there is some disagreement among the assistants [prosecutors] to the policy but I think for the most part, it is being adhered to. Since I usually see the ones that probably shouldn't have been charged, or at least borderline cases, they come up the pipeline for a decision as to whether we should change the policy or deviate from it in a given case. Generally we do not. I cannot think of one where we have allowed it. [15]

Though the warranting prosecutors themselves[27] maintained that they adhered to the policy in the overwhelming majority of cases and, indeed, accorded it the widest possible

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[26] After completing the coding of the felony cases for a two-year period, we will select a sample of misdemeanor cases to crosscheck these conclusions. Basically, we will be interested in determining whether there has been a marked increase in the proportion of gun-related crimes warranted as misdemeanors.

[27] In addition to those prosecutors assigned to warranting, the other assistant prosecutors serve in the warrant division on a rotational basis during weekends. Their presence may introduce a bit more noise into the consistent application of the Gun Law.

interpretation in unusual situations,[28] they conceded that they might take an extra hard look at the facts in a small number of cases to determine if the gun charge could be avoided.

> Oh, you know, there are going to be cases where I'm going to be disinclined to do it [charge the Gun Law]. But then I see as my only, you know, as a practical matter my recourse then is to take an extra close look at the felony aspects of it, okay, now that's the only way that I see right now that I have discretion in the area of the firearm statute. [4]

> In other words, insofar as our office is concerned, I will confess to you that there are times where I wouldn't want to recommend that particular second count because I feel that the equities and the ends of justice would be satisfied if that second count wasn't employed, and it's too harsh and too severe of a thing. However, our local individual policy is that we don't have any discretion in that area and that we must recommend that second count. . . . But let me say this to you, that where the equities come into play, I will search like hell to find a legal impediment which thereby permits me to deny the recommendation of the warrant. I may stretch it, okay? And most of the times you'll find that even the police officers are most compatible and cooperative in that area unless they're new and naïve and just so narrow-minded that they can't see, but an experienced man, they pretty much get the feel of it. But mind you, we are talking about an isolated case, and I've already told you the rationale for the strictness of the policy in general. [24][29]

It is impossible for us to gauge the number of cases in which the gun charge could have been warranted but was not. Nevertheless we can examine all armed robberies, felonious assaults, and other assaults prosecuted after January 1, 1977, and disposed by June 30, 1977, to determine whether the Gun Law was in fact charged in the warranted cases whenever it could have been, judged by information coded from the police reports. Table 2 presents the outcome of this analysis. It is plain that in the overwhelming majority of cases the prosecutor did

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[28] For example, while observing warranting, we saw a prosecutor charge the Gun Law in a case in which an unarmed defendant broke into a home and stole a gun, among other things. The prosecutor argued that since fleeing the crime was a felony, and since the defendant was in possession of a firearm, the Gun Law applied.

[29] As an example of such an isolated case the respondent discussed a family dispute in which he felt that the felony charge probably could not be established without the complainant's testimony and the case would be dismissed. Prosecutors commented several times about the disinclination of complainants to pursue these intrafamilial felonious assaults and the serious consequences that might follow.

> I know of a lot of cases in Detroit that I've had where we've charged a husband with assault with intent to do great bodily harm to his wife, because this is the thirteenth time he's beaten her up, and this time he knocked all her teeth out. And this time for 24 hours she's upset. So, I've charged felony firearms in those situations. And what always happens in those cases, was that later on, two months later, the wife decides she loves her husband again, no matter what he'd done to her. And she refuses to prosecute, and the case is dismissed, and bingo, he'll be out the door. And what happens when he gets out the door is generally we end up with a much better case in about a year, because generally he kills her. And, in homicide cases, you don't have to worry about whether the complainant shows up. [1]

indeed charge the gun count. Furthermore, we have reexamined the cases in which it was not charged and no clear pattern of evasion appears.[30]

TABLE 2

CASES WHERE GUN LAW WAS CHARGED
AS PROPORTION OF CASES IN WHICH DEFENDANT OR CODEFENDANT
WAS IN POSSESSION OF GUN (1977)

Felony Type	Cases in which defendant or co-defendant was in possession of gun	Cases where Gun Law was charged
Felonious Assault (FA)	45	39 (86.7%)
Other Assaults (OA)	55	53 (96.4%)
Armed Robbery (RA)	142	136 (95.8%)

In sum, with the exception of cases not warranted or warranted as misdemeanors and the handful of cases in which a felony was warranted but the gun count was not, it appears that the Prosecutor succeeded in proscribing plea bargaining by his subordinates. They "stuck to their guns" and defendants faced a mandatory two-year sentence in addition to their sentence on the primary felony. The following section examines the impact, if any, of the two innovations on the eventual disposition of felonious assaults, other assaults, and armed robberies.

V. FIREARM OFFENSES: 1976 VERSUS 1977

The questions that we explore here are whether the Gun Law together with the Prosecutor's policy have increased the certainty of sentences delivered by the court and whether the

[30] For the six armed robberies and one of the other assaults in which the Gun Law could have been charged but was not, there was some ambiguity in the police report and in the complainant's testimony as to whether the defendant really had possession of the gun; in each a codefendant had a gun, but the defendant had to be shown to know this before the Gun Law could be charged. Since there was considerable ambiguity about this fact in each case, failure to charge the gun count does not appear to constitute evasion of the Prosecutor's policy. Though similar ambiguities explain three of the felonious assaults, failure to charge the Gun Law in three other felonious assault situations and in one of the "other assaults" do appear to reflect the exercise of warranting discretion contrary to the letter of the office policy. In the "other assault" case the defendant shot in the direction of a police officer who had come to his home in response to the defendant's report of a breaking and entering. In one of the three felonious assaults, an off-duty officer who was drunk stopped the two complainants and threatened them with his gun. In the second, the defendant pointed his gun at police officers who had come to his home to question him but failed to identify themselves; and in the third, a gas station attendant aimed a shotgun at the plaintiff who, the defendant claimed, had put $5 worth of gas in his car but failed to pay for it. Technically, it is clear that the gun count could have been applied in each of these cases; but equitably it is easy to understand why it was not, except, perhaps, in the "other assault" case.

increase in the severity of sentences is approximately two years. We will be examining only a subset of the cases we will eventually want to evaluate in estimating the impact of the law. Our analysis relies on two major comparative dimensions: (1) the type of offense, and (2) whether it was committed before or after the law went into effect. We compare three major felonies—armed robbery, felonious assault, and other assaults—in which the defendant or a co-defendant possessed a gun while committing the offense. Therefore, when we refer to robbery or assault in subsequent discussion, we will always be referring to those gun robberies or gun assaults unless we explicitly state otherwise.

In designating cases as representing one of these three offense types we ignore some of the complexities of the cases. We have used the following conventions to create the offense categories by abstracting what seems to be a reasonable set of common elements:

1. a case was designated an "armed robbery" if the defendant was arraigned on such a charge and there was no charge of murder or criminal sexual conduct;
2. a case was designated as a "felonious assault" if the defendant was arraigned on such a charge and there was no charge of another type of assault, armed robbery, criminal sexual conduct, or murder.
3. a case was designated as an "other assault" if the defendant was arraigned on a charge of assault with intent to commit murder, assault with intent to do great bodily harm, or assault with intent to commit armed robbery and there was no charge of murder, criminal sexual conduct, or armed robbery.

The category of offense in all subsequent discussions refers to original charge and not the charge on which the defendant was convicted.

The second major comparative dimension is the time period during which the offense was committed. In this paper we examine only the twelve-month period bracketing the intervention of the Gun Law—six months before and six months after January 1, 1977. We have divided all the cases in the sample into two time groups: Segment One consists of cases committed any time before January 1, 1977, and disposed of by the court during the twelve-month period; Segment Two consists of cases that were both committed and disposed of during the last six months of the study period.

Although there are many reasons why the first six months under the law might be atypical, most derive from the process of organizational adjustment to the law and are of substantive interest to us. They pose a problem to the interpretation of our data only in the sense that the behavior of the court may change over time. One possible difference between Segment One and Segment Two is problematic for the interpretation of our data because it derives from a constraint on Segment Two cases that is not shared by those in Segment One. Offenses in Segment Two must have been committed and disposed of by the court in the same six-month period. No such time constraint exists for Segment One cases; they could have been disposed of any time during the twelve-month study period and committed at any time prior to January 1, 1977. A consequence of this is that Segment Two cases, on the average, spend less time in the system.[31] Other consequences of the difference in the sampling process are unknown. In the analysis that follows we will compare Segment One cases with Segment Two cases and interpret the difference as an effect of the Gun Law. This procedure will provide reasonable estimates if the segments are not systematically different with respect to factors that influence sentencing other than the law or variables associated with it. Because of the possible selectivity of cases in Segment Two, this assumption is made warily and our conclusions remain subject to revision when cases that move through the system more slowly have been examined.[32]

Table 3 provides a summary of the sanctions imposed by the court for armed robbery, felonious assault, and other assaults in Segment One and Segment Two. Since we are interested in the impact of the law on both the certainty and severity of punishment, we include cases in which the charges were dismissed or the defendant acquitted as well as those in which the defendant was convicted. This is a decision of some importance which requires justification. The concept we want

[31] The median interval between the date of offense and the date of disposition for the cases is about three times greater in Segment One than in Segment Two. For felonious assaults, other assaults, and armed robberies in Segment One the median numbers of days in the system are 150, 212, and 164; for Segment Two the comparable medians are 54, 50, and 57.

[32] It would be possible to match the cases so as to make the time segments unrelated to time in the system, but such a procedure would lead to new complications by changing the relationship between the segment and other variables. For a discussion of this problem see Blalock (1967).

TABLE 3

FREQUENCY AND PERCENTAGE DISTRIBUTION OF SANCTIONS BY OFFENSE TYPE AND TIME SEGMENT (GUN CASES ONLY)

		Dispositions as a Percentage of Total Cases by Offense Type in Time Segment							
					Imprisonment				
Offense Type	Time Segment	Dismissed at or before pretrial	Dismissed or acquitted after pretrial	Convicted but no prison sentence	Less than 1 year	1 year to 2 years	2 to 5 years	5 or more years	Total
Felonious Assault	One (1976)	24%	31	31	7	3	4	0	100%
		(35)	(45)	(45)	(10)	(4)	(6)	(0)	(145)
	Two (1977)	26%	26	31	5	0	13	0	101%
		(10)	(10)	(12)	(2)	(0)	(5)	(0)	(39)
Other Assaults	One (1976)	12%	24	28	11	4	10	12	101%
		(28)	(57)	(67)	(26)	(10)	(24)	(28)	(240)
	Two (1977)	26%	24	9	2	6	23	10	100%
		(14)	(13)	(5)	(1)	(3)	(12)	(5)	(53)
Armed Robbery	One (1976)	13%	19	4	2	6	22	34	100%
		(60)	(90)	(19)	(12)	(26)	(106)	(158)	(471)
	Two (1977)	22%	17	2	2	3	14	41	101%
		(30)	(23)	(2)	(2)	(4)	(19)	(56)	(136)

Percentages may not add to 100 due to rounding error.
Numbers in parentheses are absolute numbers of cases.

to measure is the expected value of the sanction. Such a concept clearly includes the probability of conviction as well as the severity of the sentence. An alternative measure would have been the conditional probability of a sentence, given conviction. This can be derived from Table 3 by excluding the first two columns and recalculating the percentages, but we prefer a measure that gives weight to all of the cases processed by the court, not just those in which the defendant is convicted.[33]

Let us look at armed robberies, the prototype offense for the Gun Law. The typical armed robbery involves a predatory offense by a young male who uses a gun to threaten a victim and take property. It is the most frequent of the felony gun offenses that we examined and consumes more judicial resources than any other. If the sentences for armed robbery did not change as a consequence of the Gun Law, it would be fair to conclude that the law failed to achieve its explicit objectives.

More than a third of the armed robbery defendants processed by the court received no prison sentence at all in both segments and, though there is some variation between the segments in the components of this general disposition, there is little net change. The total who "walked" (received no prison time) in Segment One was 36 percent. In Segment Two, the proportion of armed robbery cases dismissed at or before the pretrial conference increased by 9 percentage points so that, despite a slight decrease in the other two categories, the proportion of the defendants who received no prison sentence went up slightly to 41 percent.

Since it is the increase in cases dismissed at or before pretrial conference that explains the decline in the probability of incarceration, it might be reasonable to attribute it to the disproportionate number of dismissals among cases that move through the system quickly. However, this interpretation loses some credibility because such a pattern is lacking in felonious assaults and is actually reversed in armed robberies committed without a gun (not shown in Table 3).[34]

Among the armed robbery defendants who are imprisoned there is a slight increase in the proportion of cases in which the

[33] We recognize, of course, that both segments include innocent defendants and cases where the evidence does not merit conviction. If the law were to increase the proportion of convictions in such cases, it would be an undesirable change. We do not attempt to evaluate this problem here. Our analysis presumes that the two segments have equal proportions of these cases.

[34] We do not present a detailed analysis of felonies committed without a gun in this paper, but the percentage of armed robberies, committed with a weapon other than a gun, that were dismissed prior to the pretrial conference was 13.3 in Segment One and only 5.5 in Segment Two.

sentence is five years or more, but no dramatic increase in the proportion of sentences equalling or exceeding the two-year minimum. The strongest statement that can be made is that for every 100 robbery cases, an average of seven defendants who would have received a two- to five-year sentence in Segment One now receive a sentence of five years or more. We could increase this figure to 18 if we limit our comparison to defendants who were convicted, but this would ignore dismissals and it is unlikely that these are ignored by potential offenders.

Of the offenses that we consider, felonious assault is furthest from the model Gun Law offense in terms of the characteristics of the offender and the crime. Although the presence of a gun certainly qualifies all of them as serious, many of these cases grow out of disputes among acquaintances or relatives and are, by conventional standards, less predatory than armed robberies and other assaults. This is reflected in the fact that the vast majority of convicted defendants do not receive time (more than 80 percent in both segments). Although the number of cases in Segment Two is small (only 39), it seems clear that there is little difference between the two segments in the proportion of defendants who receive no time. In particular, Segment Two does not display an increase in the proportion of the cases dismissed before the pretrial conference. There is an increase in the proportion of defendants who receive sentences of two years or more, which clearly seems to be an effect of the Gun Law, but again it is small. For every 100 defendants charged with felonious assault an average of 9 received a sentence of two years or more in Segment Two who would have received a less severe sentence in Segment One. If we keep in mind that all of these cases involved possession of a gun, it is evident that the law had not had much of an impact on the sentencing of felonious assault cases at the end of the first six months.

The category of other assaults occupies an intermediate position between armed robbery and felonious assault with respect to seriousness, which is reflected in the length of sentences and the proportion of cases dismissed. Dismissals at or before the pretrial conference increase, but this is offset by a decrease in convicted defendants who receive no prison sentence, so that the total proportion of defendants who "walk" is virtually the same in both segments. The number of cases in this category is somewhat larger than for felonious assaults, but it is still small enough (N=53 in Segment Two) to suggest caution. The proportion of defendants who receive a sentence

of two years or more increased from 22 percent to 33 percent, the largest increase among the three offenses; an average of 11 defendants per hundred who would have received a lighter sentence in Segment One received a sentence of two years or more in Segment Two. Yet it is certainly not the dramatic increase in certainty and severity of punishment that some might have hoped for.

We expected the minimum mandatory sentence law and the ban on plea bargaining to have an impact on the process of case disposition as well as the outcome. One consequence that might be anticipated is a reduction in the proportion of defendants who plead guilty. Table 4 summarizes our information on

TABLE 4

MODE OF DISPOSITION OF CASES NOT DISMISSED AT OR BEFORE PRETRIAL CONFERENCE, BY OFFENSE TYPE AND TIME SEGMENT

			Disposition Mode			
			No Trial	Trial		
Offense Type	Time Segment	N	Total %	Total %	Bench %	Jury %
Felonious Assault	One (1976)	110	84	16	9	7
	Two (1977)	29	59	41	21	21
Other Assault	One (1976)	212	67	33	15	18
	Two (1977)	39	72	28	20	8
Armed Robbery	One (1976)	411	70	30	9	21
	Two (1977)	106	76	24	8	16

Percentages may not sum correctly due to rounding error.

trials in each segment, for those cases that were not dismissed at or prior to the pretrial conference. The fact that cases in Segment Two have, on average, spent less time in the system probably results in an underestimate of the proportion of cases tried since these will generally take longer to complete. Such a bias probably explains why there are small reductions in the proportions of armed robberies and other assaults tried. Nevertheless, the proportion of trials for felonious assaults tried rose substantially.

If we distinguish between jury trials and bench trials we

obtain a more detailed view of these changes. In felonious assaults and other assaults, but not armed robberies, the proportion of cases disposed of by bench trials is greater in Segment Two. In felonious assaults, but not other assaults and armed robberies, the proportion of jury trials was also greater in Segment Two. All of these trends stand in marked contrast to the uniform decrease in the proportion of trials in those felonious assaults, armed robberies, and other assaults that did not involve the use of a gun.[35]

One possible reason for this apparent adjustment in the proportion of trials for assaults becomes evident when one asks what the relationship is between the mode of disposition (bench trial, jury trial, or no trial) and the severity of sentence (see Table 6). Because the number of cases is very small we present frequencies rather than percentages. The data suggest that trials are associated with relatively light sanctions. Of the 68 assaults (felonious and other) in Segment Two, only 2 out of the 23 defendants tried received the mandatory sentence of two years or more, whereas 20 out of the 45 defendants whose cases

[35] The corresponding data for felonies committed without a gun are presented in Table 5.

TABLE 5

PERCENT OF CASES NOT DISMISSED AT OR BEFORE PRETRIAL CONFERENCE BY TYPE OF DISPOSITION MODE (NO GUN PRESENT)

			Disposition Mode			
			No Trial	Trial		
Offense Type	Time Segment	N	Total	Total	Bench	Jury
Felonious Assault	One (1976)	125	79	21	14	6
	Two (1977)	36	94	6	3	3
Other Assault	One (1976)	129	70	30	21	9
	Two (1977)	33	94	6	0	6
Armed Robbery	One (1976)	146	67	33	11	22
	Two (1977)	50	72	28	18	10

Percentages may not sum correctly due to rounding error.

were disposed of without a trial received that sentence.[36]

TABLE 6

NUMBER OF CASES NOT DISMISSED AT OR BEFORE PRETRIAL CONFERENCE RECEIVING A SENTENCE OF TWO YEARS OR MORE, BY OFFENSE TYPE AND MODE OF DISPOSITION

Felony Type	Sentence Category	Bench Trial (1976) Segment One	Bench Trial (1977) Segment Two	Jury Trial (1976) Segment One	Jury Trial (1977) Segment Two	No Trial (1976) Segment One	No Trial (1977) Segment Two
Felonious Assaults	Less than 2 years	10	6	8	6	86	12
	2 years or more	0	0	0	0	6	5
Other Assaults	Less than 2 years	25	7	26	2	109	13
	2 years or more	6	1	13	1	33	15
Armed Robberies	Less than 2 years	22	6	42	7	83	18
	2 years or more	15	2	44	10	205	63

In sum, the experience with cases completed during the six months after the intervention of the Gun Law indicates that

[36] Though there was no increase in the proportion of armed robberies that went to trial, it is important to note that trials, especially bench trials, were also less likely to result in a sentence of two years or more for armed robberies in both 1976 and 1977.

More generally, it is apparent that some of the richness of what is happening to these cases is invariably lost when one uses summary statistical measures. It is instructive to look at a set of these cases in somewhat greater detail in order to gain an appreciation of the complex dynamics by which the court handles them.

Consider the thirty-nine felonious assault cases in which the Gun Law was charged. Fourteen were dismissed: eight at the preliminary examination, two at the pretrial conference, two during motion hearings, and two on the day a bench trial was scheduled; these dismissals often result from the failure of witnesses to appear or the unwillingness of the complainant to pursue the case. Of the twenty-five cases that remained, five were handled by a reduction of the felony to a misdemeanor and three by a dismissal of the gun count; none of these received any jail time. These reductions probably resulted not from prosecutorial plea bargaining but from judicial action in response to a defense motion or from the same problems with witnesses and complainants that led to the dismissals. Of the seventeen defendants still charged with felonious assault and the gun charge, six opted for a jury; five were acquitted and one convicted of a misdemeanor on which he received no jail sentence. Six more defendants opted for a bench trial, one of whom was acquitted. The other five were convicted of misdemeanors with the result that the gun charge disappeared; three received no jail sentence, one received a sentence of fifteen days, and one received a sentence of 3 months (time already served prior to trial). The only defendants sentenced on the gun charge were the five who pled guilty to the felonious assault and the Gun Law. Two received a suspended sentence on the felony and two years on the gun charge; one received three months and two years; the other two defendants received two years on each count, for a total consecutive sentence of four years.

In short, the gun charge fell by the wayside in all but the five cases in which the defendants pled guilty. We will have more to say about the system's adaptation to the Gun Law in the following sections.

there has been only a slight upward shift in the average sentence. Clearly there has been no massive increase in the number of cases that receive a sentence of two years or more. Furthermore, the only increase in the proportion of cases that go to trial is in felonious assaults and these trials are associated with light sentences.

VI. THE SYSTEM'S ADAPTIVE POSTURE: HOW TO MANAGE MANDATORY SENTENCES

Our review of the comparative disposition data was necessarily couched in very tentative language; as we have cautioned repeatedly there are several sources of bias in the Segment Two sample that make us reluctant to offer any definitive conclusions about the effects of the Gun Law on the distribution of outcomes. Nonetheless, the interview data suggest several dominant responses of the system to the double innovation, which are important to consider because they explain the outcomes of some of the cases we examined and indicate the capacity of the system to cope with reductions in discretion. These adaptive mechanisms are not unique to Detroit but can be expected wherever similar policy innovations are introduced.

A. Constitutional Challenges and the Question of Legislative Intent

It is beyond the scope of this paper to review systematically the lengthy list of constitutional issues and questions of legislative intent that have been raised about the Gun Law.[37] But it is important to stress that the ambiguity of the law, coupled with the broad interpretation adopted by the Prosecutor, led defense attorneys to make numerous claims of "unconstitutionality" and misapplication. Judges, passing upon such motions, could dismiss the gun count as unconstitutional or inappropriate, thus providing a "loophole" in the application of the Gun Law. Though their dismissals could be appealed (and the Prosecutor's policy was to appeal them), the short-run effect was partially to undermine the law.[38] Presumably, once

[37] See footnote 18, *supra*. A subsequent paper will deal with these issues in a more systematic fashion.

[38] The ambiguity of the legislature's intent and the resultant legal challenges create their own constitutional problems, particularly with regard to equal protection. If judges are applying the Gun Law differently, then a defendant fares worse if he is unfortunate enough to be assigned to the judge who is not challenging the law. For example, compare the views of the following two judges on the constitutionality of charging an aider or an abettor under the Gun Law.

the uncertainties are resolved, judicial flexibility in this area will be more narrowly circumscribed.

B. Waiver (Bench) Trials

If constitutional challenges and questions about legislative intent yielded some short-run relief from the reduction in discretion, waiver trials represent a more permanent mechanism for modifying the law. The waiver, or bench, trial is simply a "trial" in which the defendant waives his right to a jury and elects to go to "trial" before a judge alone. The judge's verdict (unlike his decision on a legal motion) is not readily attacked on appeal.

The waiver trial was employed, and will continue to be, to avoid the mandatory two-year sentence in cases where the judge felt that the "equities" did not warrant it. Such "trials" are attractive to the judge because he retains control over the fact finding process and because they do not entail a substantial expenditure of judicial time.

> Q. A jury trial would take, on that case, a day or two?
>
> A. A day, if you move the people.
>
> Q. And a plea of guilty?
>
> A. Fifteen minutes.
>
> Q. And a waiver trial?
>
> A. Half an hour. They won't make any opening arguments, both sides waive opening arguments, examination of witnesses is very brief, no tricks are done because there's no jury there. The whole thing just goes in rapidly and half the time they don't make any closing arguments . . . and there's no time spent for jury selection which at a minimum takes an hour and a half or two hours. Every time you start with a jury you're talking about the better part of a morning or an afternoon to pick a jury. [12]

Several types of waiver trial are employed in handling Gun Law cases. In one, the judge is alleged to give the defense attorney, prior to the trial, some explicit indication about the disposition of the gun charge. The following comments are

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> [I]f you apply my rule [the felony firearm can only be sustained if there is an overt act and not in cases such as possession of heroin] there is no serious objection to charging the Gun Law here, that is, charging B with aiding and abetting A in an armed robbery. They can both be charged with the felony firearm count. [6]
>
> I have refused to apply the Gun Law in instances . . . where the liability is vicarious. Thus if two people are engaged in a common enterprise, one with the gun and other not with a gun, I have consistently held that the Gun Law applies only to the actual gun toter. . . . I just held that the legislature intended that it only applied to the actual carrier, and that no vicarious liability, no aiding or abetting or any business like that. [13]

illustrative (the first two are from prosecutors, the third from a defense attorney).

> You get a lot of waiver trials. Not a whole lot, but you get a significant, I think, number of waiver trials, wherein, it's just one of those walk-through numbers—the judge finds the defendant is not guilty of the principal felony, in fact, he's guilty of a misdemeanor and since he becomes guilty of a misdemeanor, a felony firearm is naturally dismissed and the guy gets, you know, sixty days in the House [Detroit House of Corrections] or whatever. But it's just another way of subverting. . . . And it's a waiver, too, understand. I mean, it's all arranged really between the judge and the defense attorney beforehand. [8]

> Q. If a judge dismisses the gun count you'll appeal?
>
> A. Right, if he dismisses before trial.
>
> Q. But, if he takes it to trial on waiver. . .
>
> A. And finds the guy not guilty on the gun charge?
>
> Q. Right. I mean, is that a big thing for defense attorneys, a waiver?
>
> A. No, in what terms?
>
> Q. I mean in terms of preparation and . . .
>
> A. Not if he knows in advance. First of all they're not going to take that kind of a chance without some kind of communication with the judge. But if he's gone to the judge, I mean what would happen if I were to draw a model of that case it would be as follows: the defense attorney would go to [the trial prosecutor] at pretrial and try to get him to dismiss the felony firearm charge. [The trial prosecutor] would say no, can't do it. Okay, go to the pretrial judge. The judge would put pressure on his trial prosecutor to dismiss the felony firearm. The trial prosecutor would say I can't do it. Then there would be a private communication between the defense attorney and the judge, waive the jury, I'll find the guy guilty of A and B [assault and battery], that will be a misdemeanor, the felony firearm charge drops by the wayside. [4]

> A. Waiver trials, that's the way he beat it [Gun Law]. The judge doesn't have to give a reason when he dismisses it, and the prosecutor can't appeal. I go talk to him and tell him it's a ridiculous case. I'll talk to the judge.
>
> Q. With the prosecutor present?
>
> A. I'll talk to the judge anytime. Fuck the prosecutor. [14]

A second form of waiver trial is less explicit. In this model the defense attorney does not, or cannot, obtain explicit assurances from the judge but, based on the judge's prior sentencing behavior, he expects that the judge will deal reasonably with the gun charge or the underlying felony. He knows, for example, that the judge will be strongly disinclined to convict and impose the mandatory minimum sentence when the equities favor the defendant.

> In quote equity type situations, [when there is a] a felony firearm [and] they waive the jury, the judges know what the story is. I mean sometimes they make an agreement beforehand. Hey listen, you waive

> the jury, I won't find them guilty of the F.A., or I won't find him guilty of the firearm but I won't make any promises as to what I'm gonna do with the felony. Or sometimes they just say "take your chances, you know, but I in particular think that the Gun Law shouldn't apply in this type of case, but you can do what you want." [10]

> Well, [the decision to opt for waiver trial] it's either something the defense attorney has spoken to the court about, they've gone out to lunch or something, and the defense attorney speaks to the court, and they have an understanding, or it's just an educated risk that the defense attorney evaluates the court, evaluates the case, and just hopes that it's one of those cases where he has the equities, where he's ready to gamble on the judge. [11]

> I got a case which is in front of [a judge]. The complainant, he lives upstairs, he and my client have been having words, my client he, he's taking out the garbage one night, and my guy, according to the complainant's testimony, takes a gun out of his back pocket, puts it at his side, never points it at him, says, "Come on down here, I'll deal with you, you mother fucker." Now they charged F.A. off that. I think it's a questionable F.A. But they charged the gun. And the pretrial division is telling me this case, they'll take this case to trial. Now if that would have been assault and battery and I would have, because of my client's record, probably would have pled him to assault and battery. But you know, ninety days, and I'm sure he wouldn't have done any time. You know, but I can't do anything. If we take this case to trial, I mean, can you imagine wanting to put some guy in prison for two years on a case like that?
>
> Q. What are you going to do with it?
>
> A. I'm not sure. . . . I mean, it does make me think a little about waiving a jury. I mean there's definitely an effect that I know it's had on everybody here with a decent judge. I mean usually with a decent judge you still have, I mean you've got to have a good reason to waive a jury here because juries are good. And I think we do good jobs in front of juries. But that might be a good reason, you know, the chance, just the chance [of two years]. So you know, that is really one of the things we're coming up against. [17]

We do not mean to suggest that waiver trials invariably provide a definite out for defense attorneys and their clients. Not all judges will make explicit prior agreements nor can all judges be counted on to work something out during the waiver trial. Some judges may view the two-year sentence as inappropriate in a particular case but believe that they cannot ignore the statute when a defendant is technically culpable. They are torn between their obligation to the law and their desire to individualize justice. These judges concede that they would consider every possible defense and require strong evidence of every element of the charge such as the presence of an operable firearm; but when the case is technically there, they feel trapped by the law and left with no option but to apply it. In the following excerpt a judge, who told us that he had not yet sentenced anyone to two years in an equity type of case because, during waiver trials, he had managed to find justifiable reasons to lower the felony or dismiss the gun charge, then

speculated on the dilemma if no such reasons had been available.

> It would've put me in a very difficult position and I guess what I'm saying is that one of the reasons I don't like it is that we all recognize as judges that we have to make accommodations that I regard as corrupted, I find that a very uncomfortable position to be in, one I don't want to be in. I know there are judges who will take waiver trials on felony firearms and find the person not guilty on the felony firearm even though the evidence is present of the felony firearm and I just will not be in that position. So I guess my answer to your question is, fortunately I haven't been in that position yet, I've always been able to find a way that comports with my sense of law. But my real point is, that like every other prosecutorial policy there should be discretion used and to the extent it's not used, it's bad, it has bad effects throughout the system, and has bad effects on the bench, has bad effects on individual prosecutors because they can't exercise their own discretion. And everybody is involved in a kind of conspiracy to undermine it without getting caught. [12]

These comments indicate that some judges find limits in the use they can make of the waiver trial as a means to mitigate the inflexible policy. It may be these limits that explain the increase in jury trials for felonious assaults during Segment Two. Defense counsel, unable to count on some judges in the waiver trial, may gamble that the equities will play before the jury. This approach is riskier but perhaps worth the gamble in some situations.[39]

But, notwithstanding these limits, the waiver trial has been an important adaptive mechanism in Detroit and, we believe, is likely to be employed in other jurisdictions facing similar policies. There is evidence in the literature that some jurisdictions rely on waiver "trials" to dispose of many cases. These "trials" resemble slow pleas of guilty far more than any standard conception of a trial.[40] If Detroit, which historically relied on waiver trials less than some other jurisdictions,[41] "discovered"

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[39] When defense attorneys opt for a jury trial they are counting on the jurors' awareness (as a result of the Prosecutor's publicity campaign) of the mandatory sentencing provisions of the Gun Law. They also try to discuss these provisions and the "true meaning" of the law during the trial. Thus several defense attorneys told us of "throw-in lines" (e.g., "and you all have heard of 'one with gun gets you two' ") and of arguments such as "what the legislature *really* meant was use of a gun." Additionally, the defendant's chances before a jury are somewhat better when charged with a felonious assault and the Gun Law than they would be if charged with a felonious assault and carrying a concealed weapon. In the latter case a jury could return a verdict on either or both charges; in the former, if the jury acquits the defendant of felonious assault *but* convicts him of the gun charge the judge must dismiss the case, since the gun charge must be attached to a felony.

[40] For discussions of bench "trials" functioning as equivalents to pleas, see Levin (1977:80-81); Eisenstein and Jacob (1977:250-51); Mather (1973:195). Mather argues that "trials" on submission of the preliminary hearing transcripts in Los Angeles are really nothing other than "slow pleas of guilty."

[41] See Eisenstein and Jacob (1977:233) for a comparison of bench trial rates in Detroit, Chicago, and Baltimore.

waiver trials to cope with inflexible policies, then other jurisdictions are likely to make a similar discovery, and those that already rely on waiver trials would have even less difficulty adjusting. We will consider the implications of this resort to waiver trials in our concluding comments.

C. Sentence Bargaining and Sentence Adjustments

The fact that most of the interview comments about waiver trials focused on felonious assaults and other cases that raised issues of equity was a function neither of chance nor of our selectivity. Prior to the Gun Law, defendants in these cases typically received probation or a relatively mild sentence. In the overwhelming majority "time" (in prison) was not at issue (as we saw in the 1976 data); defendants walked in most cases. Thus the introduction of the mandatory minimum sentence threatened a radical departure from previous practice, and the waiver trial, along with various constitutional challenges, emerged as mechanisms employed to preserve the going rate.

With respect to more serious offenses, such as armed robberies and some of the other assaults, the Gun Law posed a different, and in some ways less complex, problem. Recall that in 1976, of the armed robbery defendants not screened out at the preliminary examination or pretrial stage, 73 percent received time. Let us assume that some of the other cases involved equity matters (first offenders, mitigating circumstances, etc.) and were handled in Segment Two much like cases of felonious assault. What we are left with is a court norm or going rate that imposes periods of imprisonment upon many of the remaining armed robbers.

Put slightly differently, it appears that defendants in these cases will plead in the expectation of incarceration (most "time" sentences followed guilty pleas) as long as the alternative clearly is a longer prison term after trial (see Heumann, 1978:156-57; Church 1976:396-400). That a mandatory two-year sentence in and of itself would drive defendants to demand jury trials is a simplistic hypothesis, ill-grounded in the literature and easily refuted by the data we have presented.

An alternative hypothesis would be that the probability of trial increases when defendants who would have pled to the old going rate learn that the ante is upped to the going rate plus two, thus narrowing by two years the difference between what they get by pleading and what they hope for at trial. Again, because our disposition data for Gun Law offenses only represent

the first six months and some of the uncompleted cases probably went to trial thereafter, we cannot speak conclusively to this hypothesis. However, the interviews address this question, if only suggestively.

Essentially, the respondents agreed that the Gun Law would not lead to a substantial increase in the "going rates." Most respondents claimed that judges adjusted their prior going rate to take into account the two years added by the new law. These adjustments were made through sentence bargaining: as the prosecutor's input into the plea bargaining process was eliminated, judges took up the slack and increasingly made explicit sentence bargains with defense attorneys. And even those judges who did not actively enter into these agreements communicated, through their sentences, a willingness to adjust the time for the primary felony, thus implicitly sending out a message about the discount for a plea. The latter pattern gives the defendant and his attorney less assurance about the eventual outcome but still allows them to make a reasonably reliable guess. In serious cases, it is often precisely this reduction of uncertainty that appears to contribute to the defendant's willingness to plead (see Casper, 1972:67, 87).

When judges simply subtract the two years for the gun charge from the sentence for the primary felony (the pattern reported most frequently) there is in fact a slight increase in the time defendants will serve because the two years are "hard time"—there can be no reduction for "good time" served. Some defense attorneys report that they mention this and urge the judge to reduce the sentence for the primary felony by more than two years to compensate for the loss of good time. The illustrative interview excerpts that follow convey the flavor of the sentence adjustment process.

> I have a feeling that I decide what the sentence is and then take the Gun Law into account later. Thus if I think that a man needs to go to prison for seven years, I'm more likely to make it five and two, five for the principal charge and the other two into the Gun Law. I'm not so certain that the Gun Law has thus enhanced the length of sentence for persons who were going to get two years or more in the first place. [13, judge]

> Yeah, first time armed robbery with a gun, if it's a street robbery, that's five years. If he pulls a gun out and points it at someone, give me your money, that's five to fifteen, to ten. And as I indicated most defendants are not concerned about the maximum anyway. They're only concerned about the minimum.
>
> Q. Now, if you had that same guy with the gun law?
>
> A. Three and two. Yeah. So you're really back to this. Except, see, he has, if I give him five to fifteen on a straight armed robbery, you're only really talking about three years at the most. Whereas I give him five, three plus two, you're really talking about four years because he's

got to do the two first, you see. Then he's probably got to do two more you see before he's up for parole.

Q. Have defense attorneys come to you and tried to get two and a half or something?

A. Oh yeah, they come to me with that, and it depends . . . [19, judge]

[Y]ou know, when you look at the facts in a case like that there is no question that a guy did in fact rob somebody, and he pulls up at a stop sign and jumps in and robs someone, he could get life, okay, for that crime. And you look at that and you say, "Well, he would have gotten four years. Now he'll get two years on the robbery and two years on the gun." By the time you balance your alternatives, you still might say, "Well, look, I think our chance of winning this case is remote and you get two years on the robbery, two years on the gun, you might as well, my advice to you would be to go ahead and take the cop." Because he has so much to lose. [3, defense attorney]

I think the application of the felony firearm rule is a complete failure in this building. The judges use it in sentence bargaining. They're normally gonna give a guy seven and a half to fifteen, for example, and they give them five and a half to fifteen and two for the gun. So they get absolutely no more time for the gun. And if they were gonna get, on offenses where they were gonna get, two years let's say, let's say on an attempt with great bodily harm, the judge would normally have given two to ten, they've given probation on the felony and two years on the gun, so it comes out the same thing. And it happens all the time in this building. I've yet to hear of an instance where the judge looked at a case and said, "this guy deserves seven and a half to fifteen, that's what I'm giving him. And then I'm giving him two in addition to that because he has a gun." Never heard it yet. [10, prosecutor]

Several respondents qualified this generalization that sentences were simply adjusted to comport with the old norms. They argued that in certain circumstances the Gun Law did influence the time the defendant received, and such cases may partially explain the somewhat higher sentences on armed robberies and the other assaults in Segment Two. In particular, some felt that in the "less serious of the serious" armed robberies and assaults, the Gun Law marginally increased the sentence. For example, a defendant convicted of armed robbery in Segment One could receive as little as one year from some judges, two from others.[42] In Segment Two the minimum would be three years (one year for the armed robbery, two for

[42] There is disagreement among court personnel about what sentence must be given to a defendant convicted of armed robbery. The statute says the defendant must receive "a term of years;" some judges interpret this to mean at least a year and a day; others believe it means a minimum of two years. Until October 1976 the Prosecutor's Office routinely lowered armed robbery charges to assault with intent to commit armed robbery. Both charges carry a maximum sentence of life imprisonment, but the latter does not have the mandatory minimum. When the Prosecutor stopped reducing armed robbery in most cases judges who used to give a two-year minimum may have "reinterpreted" the armed robbery statute to require only one year when a case fell under the Gun Law. If so, the effective minimum term would be three years (one plus two); if judges continued to believe that armed robbery mandates two years, then the minimum term would be four (two plus two).

the Gun Law).[43] It is possible that an increase at the bottom of the scale produces some "trickle-up" effect on more serious armed robberies: a judge who gave two years for armed robbery before and now must give at least three, might raise the norm for more serious armed robberies from perhaps four years to five.

Unraveling these speculative propositions and obtaining a firm grasp of the extent of sentence recommendations and adjustments must await the collection of more data over a longer time. Those data, for example, will allow us to make comparisons among judges over time and determine whether an individual judge's going rate has been affected by the Gun Law. But it is clear, even now, that the Gun Law has caused neither a dramatic increase in the frequency of trial for serious cases nor a uniform two-year increase in sentence length. Instead, the judge has frequently supplanted the prosecutor as an actor in the bargaining process and has been able to continue sentencing defendants to a term of years consonant with his own going rate and with the defendant's (and defense attorney's) expectation of what constitutes a reasonable sentence.

VII. CONCLUSIONS

What lessons can be learned about the implementation of mandatory sentencing when a prosecutor opts to abdicate his discretion? Was plea bargaining really abolished in Detroit? Does a mandatory sentencing statute ensure mandatory sentences? Can these hard and fast lines drawn by legislatures be translated into reality in the complex labyrinth of the criminal court?

These questions, of course, are central to the ongoing debate about plea bargaining and sentencing reform, and our responses to them are necessarily tentative. Nonetheless, we do urge caution in expecting any sweeping changes as a result of a proscription on plea bargaining, a mandatory sentencing statute, or the simultaneous introduction of both.

Was plea bargaining abolished in Detroit? The answer

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[43] Similarly, the sentences of the "lenient" judges would be raised somewhat:

> My guess would be that for a number of judges the felony firearm assures time that was not previously there. In other words, there were judges who were going down as low as three years and two years, or lower. . . . So the felony firearm and the clear political trend that I think I see in this community, which is pressuring judges toward increased sentences does assure that there's going to be across the board two years for each judge. And maybe a little more, maybe another year. [12]

must be: "sort of." If by plea bargaining one means the prosecutor's reduction in charge in return for the defendant's plea of guilty, then the Prosecutor, by exercising constant vigilance over his subordinates, prevented such reductions where the Gun Law was charged and was reasonably successful in ensuring that the warranting prosecutors charged the Gun Law consistently. Though there is good reason to be generally skeptical about the efficacy of prosecutorial policies (see Alschuler, 1978:575 n.73), a willingness to penalize subordinates who deviated, an ability to detect deviation, and an office accustomed to policies and organized bureaucratically combined to facilitate implementation of the Prosecutor's policy in Detroit. There was probably slippage at warranting, and somewhat less at other stages. Furthermore, we cannot know whether assistant prosecutors were ever half-hearted in resisting a defense motion to quash the felony or the gun count, thus tacitly subverting the spirit of the policy.

But let us assume (as the data tentatively suggest) that these were rare and the policy was actually implemented. As noted earlier, other mechanisms came into play which we feel constitute "functional equivalents" of prosecutorial plea bargaining. In serious cases (armed robberies, some of the assaults) sentence bargaining and sentence adjustments allowed defendants to plead with as much assurance about the outcome of their cases as they had before the innovations—and sometimes with more. Sentence bargaining, which had been less frequent in Detroit than in other jurisdictions, has become a common practice, partially as a result of the Gun Law.[44] And

[44] In 1972-73, when Eisenstein and Jacob conducted their research, there was very little explicit sentence bargaining in Recorder's Court (1977:160). Since that time several factors have led to greater judicial (and to a lesser extent prosecutorial) involvement in sentence bargaining. One of these factors, ironically, was the establishment of a career criminal division (PROB) within the Prosecutor's Office. Established to prosecute "career criminals" aggressively, PROB expected a high proportion of trials. Instead, defendants still pled but their attorneys sought sentencing assurances from judges. PROB prosecutors eventually became involved in these discussions, either directly or by making sentence recommendations in court. Furthermore, the "crash program" (see note 17 *supra*) increased judicial involvement in sentence negotiations, and may have also drawn more prosecutors into the process. The Gun Law can be viewed as further accelerating the movement toward sentence negotiations for, as we have seen, judges seemed willing to discuss adjustments in their sentences. We suspect that, as more and more cases are negotiated between the defense and the judge, prosecutors will want to participate. Indeed, the Prosecutor's Office is currently reevaluating its position that assistant prosecutors must remain outside the sentencing process. An unanticipated consequence of the Gun Law, then, may be to involve prosecutors in sentence bargaining, a far more important type of negotiation than charge reductions which are precluded by the Prosecutor's policy.

sentence bargaining differs from charge bargaining (the traditional procedure in Detroit) in only one important respect: it is a far more important form of negotiation since defendants have an even better idea about outcome in advance of their pleas.

A comparable argument can be made about the "walk through" waiver trials employed in cases of felonious assault (and some other assaults) where the equities militated against a two-year sentence. The proceeding was perfunctory, resembling a guilty plea hearing more than a trial. The defense attorney had either reached an explicit agreement with the judge or was taking a calculated gamble that the latter would be disinclined to sentence the defendant to the mandatory two years and thus would search for an out. It is almost as if a guilty plea is prohibited in these cases because a two-year sentence is so far out of line with the going rate that the defendant simply cannot plead.[45] And it is interesting that in Contintental legal systems in which defendants literally are not allowed to plead, two observers have found what they call "the analogue of the guilty plea: the uncontested trial" (Goldstein and Marcus, 1977:264-67). In these Gun Law equity cases we come full circle: the waiver trial is an analogue of the European trial, which itself is often an analogue of the American guilty plea. Call these procedures trials, if you like, but the functions they serve and the manner in which they are held resemble our plea bargaining processes (or the European trial) far more closely than they do a full-fledged trial.

By a mix of constitutional challenges, motions to quash the charge, sentence negotiations and adjustments, waiver trials, and other techniques, the system managed to digest the two policy innovations without a radical alteration in its disposition patterns. Court personnel suspected as much: time and again in the interviews they indicated that somehow the system would accommodate itself, that things would work themselves out without any major departures from past practice.[46]

> What's really happening I think is that judges are bargaining down the armed robbery charge as a concession because the person has to do

[45] We do not mean to imply that all felonious assaults fit this equity class. Obviously there will be some where the facts of the case or the defendant's prior record might militate in favor of a plea even if time is involved. What we are referring to are those sorts of equity matters discussed in the text and in the interview excerpts (e.g., a minor family squabble; a confused homeowner who points a gun at police officers).

[46] Church reaches a similar conclusion in his study of the attempt to abolish plea bargaining for certin crimes in "Hampton County." As one of the judges he interviewed commented: "When faced with an unpleasant policy, resourceful attorneys, assistant prosecutors, and judges will generally find acceptable ways to get around it" (1976:400).

> two straight years on the felony firearm. In those serious cases the two years has proven not to be too much, the system has accommodated itself to that. The cases in which I think it is too much, and my experience, what my experience has suggested to me is that there are instances in which the universal recommendation of felony firearm by the prosecutors is incorrect as a matter of policy, and these cases are putting pressure on the system and ultimately in my view will put a lot of pressure on the law. I think it's, assuming that you think the felony firearm is a good law, you jeopardize the law by running cases through the system that are inappropriate for felony firearm and that's become the real problem as far as I'm concerned as a judge. [12, judge]

> Somehow, some way, those judges invent ways of bypassing that particular thing, and you can get into the mechanics with them. Believe me, for things that we come up with, there's always some way of circumventing it and I'm suggesting to you that no one wrongfully, unnecessarily for the most part, I mean we're dealing with imperfect creatures, gets screwed with two years when he shouldn't. Take it on faith if you can't take it on anything else. I'm telling you that it'll work itself out, believe me. [21, prosecutor]

> I've had judges call me and ask for a dispensation; when I say "no," and they may even go beyond me, and they get the same answer, and I check and find out that, you know what happened to the case, and I know they found a way around it. And, there's so many, we have so many fingers to put in the dike and they're just very inventive, some of them. And the word gets out. When one gets away with it, and the word gets out then it becomes part of a pattern. [15, prosecutor]

There is a serious problem hinted at in these comments that transcends the Detroit case and is inherent in the introduction of mandatory sentencing and proscriptions on plea bargaining. Essentially these rigid policies force criminal court actors into making adjustments that are unstructured, ad hoc, sometimes contrary to the letter of the law, and sometimes unsuccessful. Most defendants may be accommodated but some are not. A judge may not agree to a waiver trial arrangement, a prosecutor may refuse to acquiesce in a motion to quash, a judge may not negotiate the time on an armed robbery.

Policies, both no plea bargaining and mandatory sentences, champion orderliness, consistency, equal treatment. Ironically, they promote disorder, unequal and sometimes inequitable treatment, and even lawlessness. The movement to open up plea bargaining has been a healthy one for it has made public practices that previously were conducted in a climate of uncertainty about their legitimacy;[47] consistency is enhanced and the

[47] See *Blackedge* v. *Allison* (431 U.S. 63, 1977) for evidence of the importance the Supreme Court attaches to opening up the plea bargaining process. The Court lauds the "commendable procedures" (431 U.S. at 79) adopted by North Carolina in 1975, while criticizing its earlier procedures.

It is also interesting to note that the Court makes an argument similar to ours concerning the secrecy of plea bargaining practices in the past. "Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. Indeed, it was not

product of these negotiations is increasingly made an explicit part of the court record. The introduction of the policies discussed in this paper moves the system a step backward—they promote the same piecemeal, ad hoc adjustments that have been the subject of so much criticism in the plea bargaining literature.

One problem with these policies, of course, is that they do not allow for exceptions. They are intended to reduce discretion by establishing general rules. But as several astute observers of the criminal justice system have noted, it is one thing to speak about policies for general categories of crime and quite another to confront the almost infinite variety of factual circumstances in particular cases (Alschuler, 1978:556-58; Zimring, 1977:10-11). The pressure to make exceptions is almost irresistible but they introduce the problem of unequal treatment and begin to undermine the policy itself. Exceptions in the criminal court have a way of quickly becoming expectations; one exception becomes a precedent to justify others (see Heumann, 1978:157-62).

In its conception, the Prosecutor's ban on plea bargaining was designed to guard against this snowballing of exceptions.

> [W]e believe that the percentage of those cases which we would honestly like to get rid of in another way is so low that we're willing to take the heat on those few cases in order to preserve the concept and the viability of our principle that we want to get rid of guns and we want certainty of punishment. . . . Well, if we allow . . . [the judge to make an exception] we have 25 other judges in the building who are going to want an exception in their given case, and there's no way that you can do it equitably. [15]

> Because there are many prosecutors working here, and we're not sure what their judgment will be. And pretty soon, it's the easy way out, and you start giving this away and that, and before you know it, you wake up to the fact that now you've given all this statute away. And for the few cases where I may want to, where I, I am personally concerned about it and so on, I can live with those and I think that's the price we've got to pay. We're not talking about completely innocent people; we're talking about 85 percent guilty people getting 100 percent shot in the ass. If that's what we need to make this town habitable again that doesn't bother me. [22]

But in practice, as we have seen, exceptions developed nonetheless. Judges and defense attorneys found a way to accommodate the cases to ensure that the court norms in 1977 did not deviate too much from those of 1976. And it is at least arguable that the open and covert behaviors adopted to accommodate some of the equity cases were expanded to include cases in which the claims of equity were borderline.

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until our decision in *Santobello* v. *New York* . . . that lingering doubts about the legitimacy of the practice were finally dispelled" (431 U.S. at 76).

We are therefore pessimistic about effecting radical change in the criminal justice system. On one hand, we are arguing that if a policy is not rigidly conceived it is likely to be overwhelmed by the proliferation and expansion of exceptions. On the other hand, if the policy is rigid, the system will accommodate itself by developing other means to attain flexibility. In the first instance, at least the claims to exceptional treatment are visible and subject to some review; in the second, the court's actors are forced to rely on more piecemeal accommodations and their actions are less open to scrutiny. Neither approach ensures equal application of the law to all defendants guilty of a specific crime; both run the risk that some defendants will be unable to escape the application of the policy even when the equities are strongly on their side and will receive a sentence disproportionate to the gravity of the offense while the policy is being evaded in similar cases.

Perhaps we are unduly pessimistic. There may be some sort of middle ground between a rigid policy and one whose exceptions quickly become the norm. Presumptive sentences might be an example and so might a more structured plea bargaining process. A prosecutor could be required to explain why he is plea bargaining just as a judge must explain deviations from a presumptive sentence. One of the assistant prosecutors we interviewed strongly favored the Prosecutor's policy but felt that it ought to allow exceptions in about 5 percent of the cases. The assistant prosecutor would take immediate responsibility for such deviations and communicate them in writing to a superior, who would bear ultimate responsibility. Guidelines for these exceptions could be developed over time and the ceiling on their number carefully guarded. Similarly, one could imagine a board of overseers, composed of prosecutors, defense attorneys, and judges, who administered the implementation of the innovations, collected the data on exceptions, and gradually articulated criteria for them. Such a scheme would increase the probability that the momentum of the reform was not lost while allowing for structured deviation. The result might be a more open, more equitable process by which "some with a gun get none, one, or two" in proceedings that were neither as whimsical as those without any guidelines for sentencing or plea bargaining nor as rigid as those governed by rules that purported to be absolute.

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