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# Testing the Responsiveness of Merit-Appointed and Elected Judges

Jerome O'Callaghan†

## I. Introduction

A judicial Merit Plan involves the appointment of state judges by the governor from a list of potential candidates supplied by a nominating committee.<sup>1</sup> The Merit Plan's origin lies in the desire to remove political considerations from the judicial selection process.<sup>2</sup> Its design follows a familiar blueprint in American government in that power is divided among key political decision makers, each of whom occupies a unique place in a complex selection machine.<sup>3</sup>

Since its adoption by several states, beginning with Missouri in 1940, the Merit Plan has continued to be the subject of intense debate.<sup>4</sup> The major argument on behalf of the Merit Plan is that merit-appointed judges are less apt to be influenced by public opinion than elected judges. Conversely, the advantage of

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1. See, e.g., MASS. CONST. pt. 1, ch. 1, § 1, Art. IX. This provision provides for judicial appointments by the governor. The merit-appointed judges serve for a fixed probational term set by statute. At the end of the term, the eligible voters decide whether the judge should remain in office for an additional prescribed term, at the end of which term another vote is taken. If the judge is not retained, the office becomes vacant and another judge is appointed by the same mechanism. For a history of the development of the Merit Plan, see Winters, *The Merit Plan for Judicial Selection and Tenure — Its Historical Development*, 7 DUQ. L. REV. 63 (1968). See also Exec. Order No. 228 of the Commonwealth of Massachusetts, March 11, 1983.

2. See Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges - Reconsidered*, 6 LAW & SOC. REV. 580 (1972), and J. CORSI, JUDICIAL POLITICS, AN INTRODUCTION 105-06 (1984).

3. Thus, various interests are served including the public's, with its veto power in the retention election; the political parties', who retain the power of patronage through the Governor's office; and finally, the lawyers' and judges', whose selection committee function sets the agenda for all the other players.

4. See, e.g., Feerick & Vance, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*, 9 PACE L. REV. 199 (1989).

elected judges is that they are more responsive to their constituency, the general public, than merit-appointed judges.

Research for this article began with the hypothesis that the sentencing patterns of merit-appointed judges differ from elected judges when the particular offense involved is one that causes substantial public concern or outrage. This hypothesis is based on the assumption that elected judges respond more swiftly to, and more in accordance with, public opinion. Thus, in the case of an offense that becomes less tolerable to the public over time, sentences imposed by elected judges should become tougher over time. Although merit-appointed judges should also show a response over time to public opinion, their reactions will be more restrained. Thus, while sentences imposed by merit-appointed judges may become harsher, the pace and degree of response to public opinion will be slower.

In an effort to test this hypothesis an offense which has become less and less tolerable to the public in recent years was used so that empirical data concerning sentencing patterns could be collected and analyzed. In the late 1970s and early 1980s, driving while intoxicated (DWI) stands out as an offense that has greatly alarmed the public. Over time, the public's demand has become increasingly clear — get tough on drunk drivers.<sup>5</sup> The development of public concern can clearly be seen both in terms of media attention and the growth of interest groups devoted to eliminating drunk driving.<sup>6</sup>

## II. Background

### A. *Previous Studies*

Empirical research has disappointed the proponents of the merit plan. Curiously, the relationship between judges and the public is rarely addressed in literature. Instead, most likely to be explored is the background characteristics of judges selected by different methods. The typical research question is whether the merit plan "prefers" one type of judge — for example, older or better educated — over another. Recent studies using different states, courts, and time periods, have revealed no evidence sug-

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5. See *infra* notes 38-68.

6. See *infra* notes 38-51 and accompanying text.

gesting that the method of selection has a clear impact on a judge's background characteristics.<sup>7</sup> Other studies have focused on differences in the decision-making behavior of merit-appointed and elected judges.<sup>8</sup>

For example, Atkins and Glick analyzed decisions from the highest courts of all fifty states.<sup>9</sup> The objective of their analysis was to test the theory that there is no relationship between systems of state selection and the decisions made by judges.<sup>10</sup> Relying on 1966 caseload data, the analysis focused on the rate of success of five types of appellants.<sup>11</sup> No statistically significant relationship was found between the selection system and the success of the appellants before the court.<sup>12</sup> They found no significant differences which could be attributed to the selection system<sup>13</sup> and concluded that the real impact of formal judicial recruitment was symbolic, not empirical, in nature.<sup>14</sup>

Schneider and Maughan examined decisions of the California Supreme Court both before and after the adoption of a merit plan. They, too, found no significant difference attributable to the selection system.<sup>15</sup> Their objective was to examine the impact of California's switch from an electoral judicial selection system to an appointive one in 1935. It was widely believed that the new system would produce a more conservative California Supreme Court.<sup>16</sup> Analyzing decisions on economic issues from 1923 to 1946, the authors found that those expectations were not borne out.<sup>17</sup> The percentage of so-called liberal decisions rendered by the justices did not change over the period. Thus, the

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7. See, e.g., Dubois, *The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California*, 8 JUST. SYS. J. 59 (1982); Flango & Ducat, *What Difference Does Method of Judicial Selection Make?*, 5 JUST. SYS. J. 25 (1979); NAGEL, *COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS* (1973).

8. See *infra* notes 9-22.

9. Atkins & Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427 (1974).

10. *Id.* at 434.

11. *Id.*

12. *Id.* at 445.

13. *Id.* at 440.

14. *Id.* at 448.

15. Schneider & Maughan, *Does the Appointment of Judges Lead to a More Conservative Bench?*, 5 JUST. SYS. J. 45, 54-55 (1979).

16. *Id.* at 49.

17. *Id.* at 54-55.

change in the selection system had no apparent impact on judicial behavior.<sup>18</sup>

In another study, Dubois examined the actual operation of several state judicial selection systems over a twenty-five year period.<sup>19</sup> His goal was to subject various criticisms aimed at judicial elections to careful empirical scrutiny.<sup>20</sup> The analysis was organized around two topics: (1) voter turnout and behavior in judicial elections; and (2) judicial behavior on the bench, particularly the relationship between party-line voting and the selection system.<sup>21</sup> He found that Democratic judges were more liberal in their decisions than Republican judges, no matter what selection system brought them to the bench.<sup>22</sup> Dubois also analyzed bloc-voting along party lines in eight states. Again the merit states did not distinguish themselves.

These studies each suffer the same defect; all three examined only the decisions from the states' highest courts. Thus an important question remains: Whether the same results would be evident at the trial court level. The nature of trial court jurisdiction presents the bench with different opportunities and constraints, particularly with regard to voters' perceptions. As one appellate judge noted:

Trial judges . . . are on the firing line. Their conduct in presiding over trials, their every decision and jury instruction are visible and audible to all. But appellate judges, excepting only the justices of the Supreme Court of the United States, are often no more visible or comprehensible to the citizen than the vapor-inhaling priestesses at the Oracle of Delphi.<sup>23</sup>

Only one study in recent years examined trial judges' behavior in relation to the public. In a survey of trial judges in Minnesota and another unnamed northeast state, Drechsel found strong support for his hypothesis that elected judges were more likely to cooperate with media requests concerning the courts.<sup>24</sup> He also found support for the hypothesis that elected

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18. *Id.*

19. DUBOIS, *FROM BALLOT TO BENCH* 178-218 (1980).

20. *Id.* at xii.

21. *Id.* at 34-35.

22. *Id.* at 232-33.

23. COFFIN, *THE WAYS OF A JUDGE* 4 (1980).

24. Drechsel, *Judicial Selection and Trial Judge-Journalist Interaction in Two*

judges are more likely to pay attention to media court coverage than are merit-appointed judges.<sup>25</sup> Drechsel concluded that "the real value of judicial elections may be that they lead judges to seek some sort of communication link with the public."<sup>26</sup>

While Drechsel's study did not examine the behavior of merit-appointed judges, its conclusion regarding the behavior of elected judges is particularly instructive in relation to the research objectives of this article. For, if any feature should distinguish elected judges from merit-appointed judges, it is the relationship between a judge and the public. The elected judge should have, under standard democratic theory at least, some commitment to the will of his constituency. That commitment should entail following the will of the public where circumstances permit. The merit-appointed judge on the other hand faces a retention election which is a much more constrained form of the electoral process with extremely limited potential as a positive judicial mandate. In fact, the retention election is notorious for the difficulty associated with losing it. "Voters play a very small and generally insignificant part in the Missouri plan. . . . National surveys of [retention] elections have shown that less than one to two per cent of merit selected judges are voted out of office . . . . Turnout is low and voter acceptance of incumbents is routine."<sup>27</sup>

## B. *The Study*

### 1. *The Subject Areas*

This research relies on data from the trial courts of Onondaga County, New York, and Hampden County, Massachusetts. The choice of these particular jurisdictions was based on several factors. New York State has relied on partisan election of judges

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*States*, 10 JUST. SYS. J. 6, 10 (1985). The objective of this study was to examine the impact of two selection systems on off-bench judicial behavior. The analysis explored news-media use and interaction with journalists, and compared judicial selection systems in two states, one electoral and one appointive. *Id.* at 9-10. The results supported the theory that judges from these two systems would deal with the media in noticeably different ways. *Id.* at 10-12. Thus judicial selection systems appeared to have an impact on off-bench judicial behavior.

25. *Id.* at 12.

26. *Id.* at 15.

27. GLICK, COURTS, POLITICS AND JUSTICE 85 (1983).

for more than a century.<sup>28</sup> Onondaga County has a relatively large number of judges handling DWI cases. Aside from the Syracuse City Court, there are twenty-six town and village courts.<sup>29</sup> The Syracuse City Court is staffed by six judges, while the town and village courts employ another forty-six judges.<sup>30</sup> Onondaga County also has a computerized court-disposition data base, compiled under the auspices of the statewide STOP DWI program. Finally, Onondaga County has a high volume of DWI cases; in 1985 alone 1900 DWI arrests were made.<sup>31</sup>

A number of factors also favor the selection of Hampden County, Massachusetts, for this study. In Massachusetts, the merit plan has been in use, pursuant to Executive Order, for over a decade. The plan went into effect in 1968.<sup>32</sup> DWI cases in Hampden County are filed in any of the county's five district courts. These courts are staffed by a roster of thirteen judges.<sup>33</sup> Thirty judges have disposed of DWI cases in the time period under consideration.<sup>34</sup> Approximately 2200 DWI cases were disposed of each year during the 1980s.<sup>35</sup>

Hampden County, however, lacks a centralized data archive in the area of DWI data. As a result of this limitation, it was necessary to visit each court, take a sample from its DWI files or docket book, and then visit the local probation department to locate each defendant's record.

A systematic random sample of the DWI files was used in the district courts. The sampling ratio was 1:10. Because the Massachusetts Probation Department has published annual figures on the arraignment and disposition of DWI cases in each district court, the size of the sample was known in advance. This random sample produced a data set that included decisions of both merit-appointed and elected judges.<sup>36</sup>

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28. DUBOIS, *supra* note 7, at 3.

29. See J. O'Callaghan, *DWI Sentencing and Public Opinion: A Comparison of Commission-Plan and Elected Judges* 42 (Ph.D. Dissertation, Syracuse University, 1988).

30. 1986 figures.

31. O'Callaghan, *supra* note 29, at 43.

32. Vandenburg, *Voluntary Merit Selection: Its History and Current Status*, 66 JUDICATURE 265, 266 (1983).

33. O'Callaghan, *supra* note 29, at 47.

34. *Id.*

35. *Id.*

36. Cases where the identity of the presiding judge was unclear, or where the presid-

Hampden County and Onondaga County are similar in many respects, and thus are comparable.<sup>37</sup>

## 2. *DWI as the Subject Offense*

National and local indicators support the proposition that DWI has become a topic of increasing public concern. Three key gauges reflect that concern: (1) media coverage; (2) interest group development; and (3) public opinion polls.

Media attention to DWI increased dramatically in the early 1980s. A survey of the New York Times Index reveals that drunk driving stories increased by 365% between 1978 and 1985.<sup>38</sup> The most dramatic increase in a single year, 202%, occurred between 1982 and 1983. Local newspaper coverage of DWI also increased. A survey of the DWI stories compiled in the reporter's library of the Syracuse Post Standard revealed a 400% increase in volume of stories between 1981 and 1985, the largest increase occurring between 1981 and 1982.<sup>39</sup> In Springfield, a random sample of DWI stories in the Daily News showed an increase of 700% between 1978 and 1985.<sup>40</sup> The biggest jump occurred between 1980 and 1981.<sup>41</sup>

The dramatic increase in DWI news stories is partially explained by the emergence of interest groups devoted to an anti-DWI campaign. The most prominent of these groups is Mothers Against Drunk Driving (MADD). MADD was founded by Candy Lightner in 1980 after her daughter was killed by a drunk driver

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ing judge was not appointed by the merit plan, were not used in this analysis.

37. Both counties have populations of roughly 450,000, each with one major urban area. Hampden has a population of 444,900 and Onondaga has a population of 463,200. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 237 & 354 (1986). The city of Springfield has a population of nearly 152,000. *Id.* at 658. The population of Syracuse is 170,000. *Id.* at 690. In addition to being comparable in population, both counties are roughly equal in size. Hampden is the smaller at 618 square miles; Onondaga measures 780 square miles. *Id.* at 237 & 354. Hampden County's annual household income is approximately \$18,600, while for Onondaga County the figure is approximately \$20,100. BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, CENSUS TRACTS: CENSUS OF POPULATION AND HOUSING PHC80-2-341 and PHC80-2-346 (1980).

38. The survey was conducted by the author in 1986. See O'Callaghan, *supra* note 29, at 43.

39. *Id.* at 118-19.

40. *Id.* at 119-20.

41. *Id.*

who had a long list of prior DWI arrests.<sup>42</sup> Lightner's first goal was the reform of California's DWI laws.<sup>43</sup> Relying on relatives of victims to organize new chapters, MADD spread rapidly. By 1982, MADD had seventy chapters nationwide.<sup>44</sup> The number of chapters had risen to 320 by late 1984, and MADD claimed 600,000 "volunteers and donors."<sup>45</sup> MADD's annual reports show public contributions of \$10 million and \$7 million in 1984 and 1985 respectively.<sup>46</sup> In October of 1985, the number of chapters had risen to 360.<sup>47</sup>

Given that MADD placed 46 million pieces of mail in the U.S. postal system in 1984 alone, and that it has contacted roughly 60% of all American households,<sup>48</sup> its impact on public awareness cannot be underestimated. In the case of DWI, and some other similar issues, a rise in public awareness translates quickly into a rise in public concern. After all, greater awareness of the DWI death toll is enough to raise most people's concern. The loss of 25,000 lives each year makes drunk driving "a much more common cause of death than intentional violence."<sup>49</sup> Awareness of the annual economic loss to the nation caused by drunk driving is also likely to be a key cause of concern. Recent estimates put the figure at \$24 billion.<sup>50</sup>

MADD is not the only citizen's group organized to combat DWI. Some groups were formed earlier, others are best described as spin-offs. Such groups include Prevent Alcohol Related Killings in Tompkins County (PARKIT), Students Against Drunk Driving (SADD), Concerned Citizens Against Drunk Driving (CCADD), Remove Our Adolescent Drunk Drivers

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42. Friedrich, *Seven Who Succeeded*, TIME, Jan. 7, 1985, at 41.

43. *Id.*

44. Vejnoska, *Citizen Activist Groups*, 7 ALCOHOL HEALTH AND RESEARCH WORLD 17 (1982).

45. Friedrich, *supra* note 42, at 41.

46. Mothers Against Drunk Driving, MADD Annual Report 1984-85 9 (1985) (available from Mothers Against Drunk Driving, 669 Airport Freeway, Suite 310, Hurst, Texas 76053).

47. FACTS ON FILE, INC., FACTS ON FILE YEARBOOK 1985 767 (1986).

48. Jaffee, *Revamped MADD Now Targets Renewals by Phone and Mail*, 15 FUND RAISING MANAGEMENT 46 (1985).

49. Holden, *Rehabilitative Sanctions for Drunk Driving: An Experimental Evaluation*, 20 J. OF RESEARCH IN CRIME DELINQUENCY 55 (1983).

50. GOLDEN, *DRIVING THE DRUNK OFF THE ROAD* 140 (1983).

(ROADD), and Truckers Against Drunk Driving (TADD).<sup>51</sup> The existence of these organizations, and the phenomenal growth of MADD itself, is a clear indication of a rise in public concern about the issue.

Finally, there are the results of public opinion polls. National polls reveal that, in 1977, 82% of the public agreed that there should be stricter DWI laws; by 1982 that figure had climbed to 89%.<sup>52</sup> In 1982, 91% of the public agreed that drunk driving was a major problem.<sup>53</sup> Most significant is the response of the public to one of the most intrusive anti-DWI policies, the spot-check, or random police roadblocks on the highway. A 1982 survey<sup>54</sup> found 36% in favor and 62% opposed spot-checks.<sup>55</sup> In 1985, the same survey found 51% in favor and 44% opposed to spot-checks.<sup>56</sup>

Increased public concern is also evident at the local level. In a survey conducted for this research, it was clear that the vast majority of respondents considered DWI to be either a "serious" or a "very serious" problem.<sup>57</sup> In Hampden County, 98.6% reported holding that opinion, while in Onondaga, 95.0% were of the same mind.<sup>58</sup> Respondents were then asked to rank DWI with other criminal acts — for example, speeding, mugging, and murder — in terms of offense severity. In both counties, 30% of the respondents believed that DWI is equivalent to murder.<sup>59</sup>

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51. Foley, *Case Study in DWI Countermeasures*, SUCCESSFUL COMMUNITY RESPONSES TO DRUNK DRIVING (Foley, ed. 1986).

52. The first poll was conducted on over 1500 respondents between June 17-20, 1977. See THE GALLUP OPINION INDEX 27 (Oct. 1977). The second poll was conducted March 12-15, 1982, by personal interview of 1580 respondents. It is available from the Roper Center for Public Opinion Research, P.O. Box 440, Storrs, Connecticut 06268.

53. Roper Poll, conducted February 12-27, 1982, by personal interview of 2000 respondents. Poll is available from the Roper Center. See *supra* note 52.

54. Gallup Poll, conducted March 12-15, 1982, by personal interview of 1580 respondents. Poll is available from the Roper Center. See also *supra* note 52.

55. Gallup Poll, conducted March 12-15, 1982, by personal interview of 1580 respondents. Poll is available from the Roper Center.

56. ABC News/Washington Post Poll, conducted May 8-13, 1985, by telephone interview of 1503 respondents. Poll is available from the Roper Center. See *supra* note 52.

57. The survey was conducted by telephone in the spring and summer of 1986. Working from a list of 3000 randomly selected phone numbers, 413 surveys were completed: 200 in Hampden County and 213 in Onondaga County. See O'Callaghan, *supra* note 29, at 125-26.

58. See O'Callaghan, *supra* note 29, at 127.

59. *Id.* at 128.

Further, when the roadblock question was asked in both counties, the results were surprisingly positive. A total of 76.5% of the Onondaga group were "somewhat" or "very much" in favor of roadblocks;<sup>60</sup> in Hampden County the figure was 87.5%.<sup>61</sup> These figures suggest that the level of concern about DWI in these counties is great enough to overcome the fear of police roadblocks.

Respondents were also asked about the likelihood of arrest and conviction for DWI. In both counties the majority of respondents reported that the chances of arrest were less than 10%.<sup>62</sup> Of Onondaga respondents, 62.8% believed that the chances of arrest were 10% or less, while in Hampden, 51.3% of those surveyed held that view.<sup>63</sup> In both counties, the majority, over 70%, believed that the likelihood of arrest had increased in the previous two years.<sup>64</sup> Similarly, the majority, 75-80%, stated that the likelihood of conviction also had increased over the previous two years.<sup>65</sup>

Regarding the public's view of the appropriate DWI policy, the most significant question required the respondents to choose the single most effective way of reducing DWI.<sup>66</sup> Both groups surveyed were in agreement on the priority given to various policies.<sup>67</sup> Approximately 35% suggested tougher penalties, 25% suggested tougher law enforcement, and 18% suggested better public information programs.<sup>68</sup> The clear priority given to "tougher penalties" by the respondents suggests that trial judges do have a mandate to apply the more severe punishments allowed by law.

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60. *Id.* at 129.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 130.

65. *Id.* at 131.

66. *Id.*

67. *Id.* There were no statistically significant differences between the counties.

68. *Id.*

### III. Analysis

#### A. *DWI Sentences in the Two Counties*

Ideally, a direct comparison involving two sets of data, each identifying the same variables over the same time period, should be used to compare sentencing trends. However, such a comparison is impossible for two reasons. First, the key variable is the sentence itself. Because each state law provides for a different range of penalties, the significance of one specific sentence depends entirely on its position relative to the alternatives available in that state.

A second obstacle to direct comparison of the data lies in the nature of the data sources. The Onondaga County data is formatted according to the needs of a statewide prosecutorial research program.<sup>69</sup> The Hampden County data is essentially a duplicate of the court records in each individual case. Thus, it is possible to distinguish between those defendants in Hampden County who attended the alcohol-education program and those who were required to attend a residential hospital program. That kind of distinction does not appear in Onondaga's STOP DWI data. Nevertheless, examination of the DWI caseload in both counties can lead to some general conclusions about the responsiveness of the bench to public opinion on that topic.<sup>70</sup>

The data in Table 1 requires some explanation. In Hampden County, there appears to have been a significantly large dismissal rate in 1982. In fact, most of these dismissals were the result of a procedure called "Continued Without A Finding" (CWOFA).<sup>71</sup> This procedure allowed a judge to prolong a case while a defendant was supervised by the probation department and assigned to a driver alcohol education program.<sup>72</sup> As-

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69. *Id.* at 42-43.

70. The caseload data from Onondaga County was a 10% sample of a computerized record of all county DWI cases, maintained by the District Attorney's office. The data from Hampden County, again a 10% sample, was collected by hand from the public records available in court offices in the county.

71. OFFICE OF THE COMMISSIONER OF PROBATION, TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTES, DRIVING UNDER THE INFLUENCE OF LIQUOR: DISPOSITIONS AND PLACEMENTS IN DRIVERS ALCOHOL EDUCATION PROGRAMS 1977-1980 2 (1981).

72. *Id.*

**TABLE 1**  
**Conviction Rates: Hampden and Onondaga Counties**

<b>Hampden</b>	<b>1982</b>	<b>1983</b>	<b>1984</b>	<b>1985</b>
<b>Disposition:</b>	<b>N=140</b>	<b>N=152</b>	<b>N=138</b>	<b>N=170</b>
Guilty	30.0	71.7	81.2	94.1
Dismissed	66.4	25.0	15.9	2.9
Not Guilty	2.1	3.3	2.9	2.9
Warrant Issued <sup>78</sup>	1.4	0	0	0
Adjusted Guilty Rate	82.1	92.8	92.8	94.1
Adjusted Dismissal Rate	14.3	4.0	4.4	2.9
<b>Onondaga</b>				
<b>Disposition:</b>	<b>N=111</b>	<b>N=190</b>	<b>N=187</b>	<b>N=194</b>
Guilty Pleas	92.8	93.2	93.7	95.4
Guilty After Trial	0	1.1	.5	1.0
Total Conviction Rate	92.8	94.3	94.2	96.4

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<sup>78</sup> In cases where the defendant does not appear for a scheduled hearing, a warrant is issued for his arrest.

suming the defendant stayed out of trouble and attended the program, he then returned to court, usually three months later.<sup>74</sup> The case was then "dismissed."<sup>75</sup> In fact, the defendant had been effectively convicted and sentenced: if the defendant was later convicted of a second offense, the earlier CWOFF "dismissal" was treated as a prior conviction and the sentence was adjusted accordingly. In 1982, the Massachusetts legislature changed the sentencing system, replacing the CWOFF procedure with a new sentence commonly called the "24D."<sup>76</sup> While the 24D is almost identical to the CWOFF sentence,<sup>77</sup> it does result in an official "conviction" in the record. CWOFF was very popular with Massachusetts judges until 1983. According to the state's Department of Probation, 73% of all the DWI dispositions in 1976 fell under the CWOFF label.<sup>78</sup> The adjusted guilty rate in Table 1 is the result of reclassifying CWOFF cases as convictions.

The data from both counties indicates that an increasing proportion of DWI defendants faced conviction as the 1980s progressed. In both counties, the conviction rate was very high; the only unusual figure is an 82% conviction rate in 1982 in Hampden. The increasing conviction rate might be interpreted as a judicial response to the public outcry over DWI. However many other factors, including more sophisticated and consistent police methods, may also have been responsible. At this point, sentencing practices must be examined to see if any change of strategy occurred in either county.<sup>79</sup>

The data on sentences handed down in this period is quite complex, largely because of the number of variables involved: probation, suspended sentences, license revocation, mandatory

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74. *Id.*

75. *Id.*

76. See O'Callaghan, *supra* note 29, at 58.

77. 24D adds mandatory license suspension. See, OFFICE OF THE COMMISSIONER OF PROBATION, TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, AN EVALUATION OF DRUNK DRIVING IN MASSACHUSETTS, AN EVALUATION OF DRUNK DRIVING IN MASSACHUSETTS UNDER CHAPTER 373, ACTS OF 1982 i (1984).

78. *Id.* at 8.

79. Of course, in both counties, plea bargaining was the dominant method of resolving DWI prosecutions. The District Attorney's office in Onondaga appeared to exercise a great deal of control over the sentencing outcome. See O'Callaghan, *supra* note 29, at 56. In Hampden, the Probation Officer was very influential in the sentencing process. Nevertheless, in both counties, judges remained free to reject sentence recommendations and to apply the sanctions they believed most appropriate.

treatment programs, and fines. Nevertheless some patterns are evident (see Table 3). For example, in Hampden, probation became more frequent for both first-time and repeat offenders. Probation accounted for 85% of sentences for first-time offenders in 1982, and reached 95% by 1985.<sup>80</sup> For repeat offenders, the figures were 46% and 82%, respectively.<sup>81</sup> In both offender categories, the use of fines decreased; 16% of first offenders were fined in 1982, only 7% were fined in 1985.<sup>82</sup> For repeat offenders the figures were 71% and 18%, respectively.<sup>83</sup> The only suggestion of increasing sentence severity was in the repeat offender category. Hospitalization was an ingredient in 49% of DWI sentences in 1985, up from 23% in 1983.<sup>84</sup> Jail sentences were increased to 21% in 1985, up from 17% in 1982.<sup>85</sup> Finally, suspended sentences increased from 33% to 52% of the cases in the same period.<sup>86</sup> The Hampden data suggests that probation is the increasingly dominant feature in DWI sentences. Only in the case of repeat offenders,<sup>87</sup> was there some evidence of a more severe sentencing policy in the 1980s.

As for Onondaga the data is quite similar. Fines were less prominent in 1985, especially in the first offender category, than in 1982. At the same time, "conditional discharges,"<sup>88</sup> which act, in effect, like short probation sentences, were more popular in 1985. Prison sentences were rarely imposed, even to repeat offenders, and there is no pattern to prison sentencing in this period. The raw data from Onondaga reveals slight variation in DWI sentences from year to year — the only substantial change

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80. Details of Hampden sentences were collected by hand in 1986 in various probation offices in the county. See O'Callaghan, *supra* note 29, at 84-88.

81. The frequency of probation sentences is the byproduct of the increasing emphasis on treatment programs as an ingredient in DWI sentences.

82. See O'Callaghan, *supra* note 29, at 87.

83. *Id.*

84. Hospitalization (i.e., mandatory residential treatment in a hospital facility) was introduced by legislation passed in 1982.

85. See O'Callaghan, *supra* note 29, at 88.

86. *Id.*

87. 24% of the cases

88. Here the court discharges the defendant on condition that he attend, within a short time, an alcohol-evaluation program. The defendant must comply with the rules and recommendations of the program. This sentence is technically different from probation as New York allows a minimum of *three years* probation for DWI offenders. See N.Y. PENAL LAW § 65.00 (3)(d) (McKinney 1991); O'Callaghan, *supra* note 29, at 55.

is the increase in conditional discharges for first-time offenders from 50% in 1982 to 75% in 1985.<sup>89</sup>

The difficulty encountered when comparing sentence severity is that different sentence scales apply in each state. However, in each state's DWI laws, maximum and minimum sanctions are readily apparent in each scale.<sup>90</sup> Using these categories, comparisons of sentences from both states over a number of years will be possible, and may provide an understanding of the changes in sentence frequency in each state. Regarding the drunk driving laws in both states, Table 2 presents the penalty ranges which fall under the heading of maximum and minimum penalties.

There is one important consideration to bear in mind when examining the definition of minimum and maximum sentences. Given the traditional reluctance of judges to apply the maximum prescribed penalties, the definitions have been skewed in order to increase the likelihood of discovering maximum sentences. Thus, the research definition of maximum penalty has a broad range, while the research definition of minimum penalty has a close fit to the law's minimum provisions.

The results of sorting the data according to this classification are presented in Table 3. Two of the three listed penalties (Table 2) are necessary for a sentence to qualify as either maximum or minimum.<sup>91</sup> Clearly the preference of judges in both counties is to stick close to the minimum statutory penalties for most offenders. The maximum sentence rate speaks for itself. Even using a very liberal definition of a maximum sentence, the sentencing pattern remains dominated by minimum penalties. Further, the anticipated sentencing trend toward more severe sentences has not materialized. Indeed, the Onondaga data suggests that severe sentences became less frequent in this period.<sup>92</sup>

Finally, regression analysis was applied to both sets of

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89. See O'Callaghan, *supra* note 29, at 107.

90. See, e.g., MASS. GEN. LAWS ANN. ch. 90, § 24 (1)(a)(1) (1989); N.Y. VEH. & TRAF. § 1193 (McKinney 1991).

91. The data produced three variations of the minimum sentence rate. The rate used in Table 3 is the lowest of the three results; thus, it is the most narrow interpretation of the minimum sentence rate.

92. See Table 3.

**TABLE 2**  
**Minimum and Maximum DWI Penalties**

<u>State and Offense</u>	<u>Minimum Penalty</u>	<u>Maximum Penalty</u>
<b>New York:</b>		
<b>First Offense</b>		
Fine	\$250 or less	\$350 or more
Jail	None	7 - 14 days
License Revocation	90 days or less	180 days or more
<b>Massachusetts:</b>		
<b>First Offense</b>		
Fine	\$300 or less	\$500 - \$1,000
Jail	None	7 days - 2 years
License Revocation	30 days or less	180 days or more
<hr/>		
<b>New York:</b>		
<b>Second Offense</b>		
Fine	\$350 or less	\$450 or more
Jail	None	60 days - 4 years
License Revocation	180 days or less	1 year or more
<b>Massachusetts:</b>		
<b>Second Offense</b>		
Fine	\$300 or less	\$750 - \$1,000
Jail	Under 7 days/R.T. <sup>93</sup>	60 days - 2 years
License Revocation	180 days or less	1 year or more

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<sup>93</sup> R.T. refers to a residential treatment program of two weeks or less.

**TABLE 3**  
**Minimum and Maximum Sentences:**  
**Hampden and Onondaga Counties**

County, Offense, Sentence	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>
<b>Hampden County:</b>				
<b>First Offense</b>				
Minimum sentence	99.0	96.4	97.9	97.6
Maximum sentence	0	0	0	0
Maximum II sentence <sup>94</sup>	0	5.5	2.0	5.5
<b>Second Offense</b>				
Minimum sentence	78.6	61.5	60.0	70.4
Maximum sentence	0	0	0	0
Maximum II sentence	7.1	15.4	15.0	7.4
<b>Onondaga County:</b>				
<b>First Offense</b>				
Minimum sentence	88.6	82.4	89.5	93.2
Maximum sentence	11.4	17.6	10.5	6.8
<b>Second Offense</b>				
Minimum sentence	90.0	84.6	100	96.2
Maximum sentence	10.0	11.5	0	3.8

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<sup>94</sup> The Maximum II sentence is the product of a relaxation of the original conditions for a maximum sentence. Instead of requiring that any two of the three maximum penalties apply, the Maximum II asks that any one of the three penalties apply.

data to discover how much of the variation in sentences was related to the year of the decision.<sup>95</sup> In the Onondaga data the result was an R-squared of .02.<sup>96</sup> In the Hampden data the range of R-squared scores was from .00 to .18.<sup>97</sup> The latter score applied to the "court costs" penalty which was introduced by legislation in the middle of the research period — 1983. Thus, in neither set of data is there any substantial evidence indicating that as the 1980s progressed DWI defendants faced more severe sentences.

### B. Caseload Characteristics

A final consideration in the examination of sentencing trends is the relevance of other caseload characteristics to the sentencing data. For example, are personal injuries more common in DWI caseloads in recent years? Is any trend evident in the blood alcohol content of DWI defendants? Because each data set offered different variables, each county will be examined separately in this section.

With regard to the Hampden caseload, no significant changes are evident in the data. First, injury cases are few, and there is no time-based pattern to the injury rate.<sup>98</sup> Likewise, the fatality rate is low and apparently random.<sup>99</sup> Finally, while the data suggest that the accident rate did increase dramatically in 1984, that increase is the product of new reporting methods used by the police from 1984 onward.<sup>100</sup> Thus, data from 1984 and 1985 are not comparable to earlier figures. The number of other charges brought against the defendant has not changed substan-

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95. Regression analysis enables a researcher to determine the extent of a relationship between changes in one variable (for example, sentences) and changes in another variable (for example, the year of the sentence). The R-squared figure is the standard regression measure; its maximum value is 1, indicating that all variation in one variable can be explained by variation in another variable. The minimum R-squared value is 0, indicating no relationship between the variables. The Onondaga data suggest that only 2% of the variation in sentences is related to the year of the sentence. For more on regression analysis, see ZEISEL, SAYING IT WITH FIGURES 166-85 (1985).

96. *Id.*

97. *Id.*

98. Only in 1984 did the injury rate climb above 2% of the caseload. See O'Callaghan, *supra* note 29, at 82.

99. *Id.* The rate peaked in 1983 at 1.3% of the caseload.

100. *Id.*

tially. Approximately 34% faced a DWI charge and no more, while 50-55% were subject to one or two other charges. The variation from year to year was unpredictable. As for the age groups of the defendants, again there was little variation in this period. Similarly, the proportion of first time DWI offenders has varied little: from 77.6% of the caseload in 1982 to 77.8% in 1985.<sup>101</sup>

As for Onondaga, the available data indicate no significant caseload changes in this period. The defendants' age groups remained quite stable. Likewise, the blood alcohol content remained consistent; each year the vast majority (76%) of the defendants fell in the .10%-.20% range. There was some variation in the defendants' prior records — an important factor in sentencing. In the 1983 cases, an unusually large proportion of defendants had a prior DWI conviction.<sup>102</sup> Interestingly, the fact that there was an unusually large second offender caseload in 1983 may be related to the unusually high maximum sentence rate evident that year.<sup>103</sup>

#### IV. Conclusion

The data from Hampden and Onondaga counties did not support the research hypothesis. There is no sign that heightened public concern over DWI offenders influenced judicial decision-making resulting in increased sentence severity in the mid-1980s.<sup>104</sup> Thus, despite increased public concern over DWI, neither merit-appointed nor elected judges were affected enough to fashion a new sentencing policy. Both groups of judges are remarkable for their relative passivity. Indeed the one suggestion of an increase in sentence severity reversed the original hypothesis: second offenders sentenced by merit-appointed judges (Hampden County) received harsher treatment in the mid-1980s.

Although both the caseload and the conviction rate in both counties have increased, it is punishment which falls in the unique province of judges whether they are elected or appointed.

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101. *Id.*

102. In 1983, 14% of those arrested, compared to an average of 10% for the other years, had a prior drunk driving conviction.

103. See Table 3.

104. *Id.*

Furthermore, the tendency of both types of judges has been to rely on minimum statutory provisions.<sup>105</sup> Thus, trial judges in DWI cases appear content to have sentencing policy, and actual sentences, determined by the legislature.<sup>106</sup>

Returning to the broader issue of the alleged advantages of the merit plan, this research is in agreement with a large body of literature. To the extent that selection system appears to have no impact on trial court sentencing, merit-appointed judges are no more unresponsive — or responsive — than their elected counterparts.

The debate over the “best” method of selecting state judges has often been framed in terms of two theoretical underpinnings: judicial independence versus judicial accountability. The selection system most closely associated with judicial accountability is, of course, the electoral system. The Merit Plan is, on the other hand, most closely associated with enhancing judicial independence from politics. This research suggests that elected trial judges and merit-appointed trial judges are not noticeably more or less responsive than each other. Selection system literature suggests two reasons for this phenomenon. Political connections are a crucial factor in the “non-political” Merit Plan.<sup>107</sup> Electoral systems are notorious for a lack of voter interest.<sup>108</sup> Thus, it appears that the two selection systems have more in common than their advocates usually acknowledge. It may well be that the idea of accountability versus independence is beside the point. Any system existing in the real world of politics and voter apathy is bound to include traces of both qualities.

The hypothesis of this research expressed the idea that elected judges would be more responsive to clear demands of

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105. Sometimes judges will sentence below the law's minimum provisions. These anomalous sentences were apparent in this data and are common across the nation. A Department of Transportation study indicates that this was a nationwide phenomenon in 1983. DEPARTMENT OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DWI SANCTIONS: THE LAW AND THE PRACTICE III-2 (1983).

106. It may be the case that variables not examined here play a part in examining the surprising stability of DWI sentences. Such variables might include the race and socio-economic status of the defendant, and the background of the sentencing judge.

107. R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* 352-53 (1969).

108. See H. GLICK, *COURTS, POLITICS AND JUSTICE* 79 (1983); H. STUMPF, *AMERICAN JUDICIAL POLITICS* 175 (1988).

public opinion than merit-appointed judges. Instead, within the boundaries of this two-county data set, it is fair to conclude that merit and elected judges have a great deal in common — they are equally unresponsive to the vagaries of public opinion about DWI. It may be the case that the socialization process explains a great deal more about judicial sentencing policy than the selection process. While elected judges can theoretically be more aware of the opinions of the public, it remains to be seen whether their behavior reflects that relationship in any significant manner.