MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN RUSSELL FAGG**, on January 5, 1993, at 8:00 a.m.

ROLL CALL

Members Present:

Rep. Russ Fagg, Chairman (R)
Rep. Randy Vogel, Vice Chairman (R)
Rep. Ellen Bergman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Bob Clark (R)
Rep. Duane Grimes (R)
Rep. Scott McCulloch (D)
Rep. Jim Rice (R)
Rep. Angela Russell (D)
Rep. Tim Sayles (R)
Rep. Liz Smith (R)
Rep. Bill Tash (R)
Rep. Howard Toole (D)
Rep. Karyl Winslow (R)
Rep. Diana Wyatt (D)

Members Excused: Rep. Dave Brown, Vice Chair (D)

Members Absent: Rep. Tim Whalen

Staff Present: John MacMaster, Legislative Council
Beth Miksche, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HJR 1
Executive Action: None

Opening Statement by Chairman:

CHAIRMAN RUSSELL FAGG, House District 89, Billings, opened the first meeting of the 53rd Legislature Judiciary Committee and requested that **REP. ED GRADY, Chairman, Institutions Subcommittee,** make a presentation regarding how criminal justice bills affect the institution system. **REP. GRADY** asked **James "Mickey" Gamble, Corrections Administrator,** to present the effect of legislation on our correctional system.

Informational Testimony:

Special presentation by **Mr. Gamble**, requested by **REP. GRADY. Mr. Gamble's** presentation encompassed the effect of legislation on our correctional system. He is concerned about the overcrowding of the prisons and that there is a national crisis in America. His focus is rehabilitation, not building more prisons. **Mr. Gamble** believes that rehabilitation and integrating prisoners in society is more beneficial to everyone than incarcerating prisoners. Although **Mr. Gamble** would like more community-based programs for the prisoners, he realizes that safety and high-security is a major factor. He said that people on parole and probation can benefit from public participation. **EXHIBIT 1 AND 1A**

HEARING ON HJR 1

VICE-CHAIRMAN RANDY VOGEL introduced **CHAIRMAN FAGG** who proceeded to discuss HJR 1. HJR1 is an update that will greatly reduce litigation and greatly enhance the judicial system in the state of Montana. **CHAIRMAN FAGG** said we cannot change the Montana Rule of Procedure, that Montana Supreme Court has the only authority to change the Rules of Procedure. This resolution is requesting or urging the Montana Supreme Court to change rule 68, The Montana Rules of Civil Procedure. Rule 68 is called Offer of Judgement. HJR 1 allows the party making the offer to pick up the costs, i.e. fees, and requests the Montana Supreme Court to add attorneys' fees to costs. Rule 68 only allows the party making the offer to pick up the costs of the other party, and the costs typically include deposition costs, expert witness fees, filing fees. These costs are a minor part of a lawsuit; most money goes into attorneys' fees (attorneys charge from $75 to $190 per hour).

HJR 1 requests the Montana Supreme Court to add attorneys' fees to costs. Right now Rule 68 is currently on the books, and it appears that only defendants can make offers of judgements. **CHAIRMAN FAGG** believes that the plaintiff should be able to make an offer of judgment as well.

Proponents' Testimony: None.

Opponents' Testimony:

Russell Hill, Montana Trial Lawyer's Association, endorses the intent of HJR 1 to encourage settlements and discourage prolonged, costly litigation. He does not accept or support having attorneys' fees added to the judgement. **EXHIBIT 2**

Questions From Committee Members and Responses:

REP. HOWARD TOOLE asked **CHAIRMAN FAGG** if HJR 1 was brought to him from a sponsor. **CHAIRMAN FAGG** responded that no one brought the legislation to him; it came about from his past experience defending a couple of lawsuits. **REP. TOOLE** then asked what type of agreement is set up where the attorney offered to settle the case for $20,000, and the insurance company offered $7,500 and the case is worth $15,000. He is concerned that the pressure will decrease to about half the value of the case, and the plaintiff may not be able to pay. **REP. TOOLE** also asked **CHAIRMAN FAGG** if it will have the effect of cutting value to cases by as much as half. **CHAIRMAN FAGG** said that the legitimate cases will withstand scrutiny and their value is going to stand as it would normally.

REP. JODY BIRD asked **CHAIRMAN FAGG** if he talked with any insurance companies about this proposed change and if it will make a difference to them. **CHAIRMAN FAGG** had not talked to any insurance companies, but feels it will be beneficial because it will make people look harder at settlements.

REP. DUANE GRIMES asked if the attorney would charge a fixed cost after settlement and if there's a chance the costs would be raised after the settlement. **CHAIRMAN FAGG** reminded the committee that Rule 68 of HJR 1 says "reasonable" attorneys' fees". For example, the plaintiff would go to court and say, "My hours into this case have been 48 hours and the defense attorney has 155 hours; is that "reasonable." The Court would have discretion to cut down to what the court considers reasonable.

Closing by Sponsor:

CHAIRMAN FAGG closed today's hearing by saying that HJR 1 will put pressure on both parties to seriously consider an offer of judgement, an offer to settle a civil lawsuit, and encourage settlements, which is the intent of this bill. It will also discourage frivolous lawsuits.

ADJOURNMENT

Adjournment: 11:30 a.m.

REP. RUSSELL FAGG, Chair

BETH MIKSCHE, Secretary

RF/bcm

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL DATE January 5, 1993

NAME	PRESENT	ABSENT	EXCUSED
Rep. Russ Fagg, Chairman	✓		
Rep. Randy Vogel, Vice-Chair	✓		
Rep. Dave Brown, Vice-Chair			✓
Rep. Jodi Bird	✓		
Rep. Ellen Bergman	✓		
Rep. Vivian Brooke	✓		
Rep. Bob Clark	✓		
Rep. Duane Grimes	✓		
Rep. Scott McCulloch	✓		
Rep. Jim Rice	✓		
Rep. Angela Russell	✓		
Rep. Tim Sayles	✓		
Rep. Liz Smith	✓		
Rep. Bill Tash	✓		
Rep. Howard Toole	✓		
Rep. Tim Whalen		✓	
Rep. Karyl Winslow	✓		
Rep. Diana Wyatt			

HR:1993
wp.rollcall.man
CS-09

EXHIBIT 1
DATE 1-5-93
HJB-1

TO: JAMES "MICKEY" GAMBLE, ADMINISTRATOR
CORRECTIONS DIVISION

FROM: RICH PETAJA
RESEARCH SPECIALIST

SUBJECT: 8:00 A.M. POPULATION REPORT

DATE: Tuesday -- January 5, 1993

MONTANA STATE PRISON.

TOTAL COUNT:	1208	
ON-SITE POPULATION:		1166
OFF-SITE POPULATION:		1
TRANSFERS*:		41
WAITING LIST:	0	

SWAN RIVER FOREST CAMP.

TOTAL POPULATION:	47	
ON-SITE POPULATION:		46
OFF-SITE POPULATION:		1

WOMEN'S CORRECTIONAL CENTER.

TOTAL POPULATION:	59	
ON SITE: 58		
MAIN UNIT:		50
EXPANSION UNIT:		8
OFF SITE: 1		
WAITING LIST:	0	

*TRANSFERS INCLUDE OUT-OF-STATE, COURT, MSH, GALEN, SUP.REL.

EXHIBIT 1A
DATE 1-5-93
HJR-1

DEPARTMENT OF CORRECTIONS AND HUMAN SERVICES

MARC RACICOT, GOVERNOR

1539 11TH AVENUE

STATE OF MONTANA

(406) 444-3930
FAX: (406) 444-4920

PO BOX 201301
HELENA, MONTANA 59620-1301

MONTANA CORRECTIONS ISSUES

DATE: **January 5, 1993**

TO: **MONTANA HOUSE JUDICIARY COMMITTEE**

FROM: **JAMES M. GAMBLE, CORRECTIONS ADMINISTRATOR**

THANK YOU FOR THE OPPORTUNITY TO DISCUSS THE EFFECT OF LEGISLATION ON OUR CORRECTIONAL SYSTEM. PLEASE FEEL FREE TO ASK ANY QUESTIONS RELATIVE TO THE PRESENTATION OR OTHER CORRECTIONAL RELATED ISSUES.

Background:

* Montana correctional institutions have been overcrowded in varying degrees since 1980. Crowding at Montana State Prison and Women's Correctional Center now is at critical levels.

* Conservative prison population projections indicate a marked increase in population for the foreseeable future. These projections show by the end of Fiscal Year 93 we will have 1,608 males in the prison system and 84 females. By FY 97 this will increase to 2,121 males and 156 females.

* Corrections programs also are very expensive--$28,251,852 expended in FY 92, with 610.29 FTE authorized for the Corrections Division.

At a recent National Forum on developing a Vision Statement for Corrections for the United States, there were a series of themes which support the development of a community based alternatives approach to corrections, for appropriate placements. As Corrections Administrators representing many of the state systems in the United States we all agreed the corrections system throughout the country is in crisis. We further agreed as the chief jailers of the country, we must find solutions to building more prisons.

The main theme that evolved was a definition of foolishness:

> **IT IS FOOLISH TO CONTINUE TO DO THE SAME THINGS, HOPING FOR DIFFERENT RESULTS.** What we are doing is <u>not working</u>! It is neither effective nor efficient.

The Corrections system has traditionally operated on two assumptions:

> Our citizens demand and deserve safe communities. We now see they are being ill served by our current criminal justice/corrections systems.
>
> Our historic emphasis has been on retribution. We seek to punish criminals. Over the long term, what we find is this system has not been productive for society or the offender. At the forum we agreed we need to pay more attention to returning the offender to the community.

The institutions we have developed have proven to be ineffective as a means to control, let alone eliminate, crime in this country. It is evident that **a new approach to corrections must be found.**

These problems must be addressed in the context of changing social conditions. It is evident given the economic decline in our society, we can ill afford to continue pouring limited, precious resources into systems that are ineffective. Our shrinking work force and limited fiscal resources will not allow for the continuation of a redundant, unfocused, segmented approach to our correctional problems.

One further issue we discussed at the forum was the unrealistic expectations of citizens. Law-abiding citizens seem to feel powerless over crime, and over the myriad of changes taking place in their communities. We consider this to lead our citizens to want to rely solely on large scale governmental institutions to habilitate offenders. Our society wants to warehouse these individuals, assuming if we can get them out of our communities the problem is solved. For the short term that may be true, at increasing costs. We need to remember, these offenders represent the failure of all other social systems available to us and supported by us. And, most of them will return to our communities when they have served their time. At the forum it appeared evident to us that a continued approach to corrections based on separated, isolated correctional systems will only perpetuate our failings. We continue to act foolishly, doing the same things, hoping for different results. The solution requires a holistic approach based on collaboration among many key criminal justice and social institutions. The synergy that would result from this collaboration would undoubtedly be more effective in accomplishing the desired ends.

NATIONAL VISION

After serious deliberation at the National Corrections Forum, we developed the following vision statement which we hope will guide the development of a more effective and efficient correctional system. All of these ideas are presented in draft form.

> THE FUTURE DEMANDS LEADERSHIP FROM CORRECTIONS. OUR VISION OF THAT LEADERSHIP IS CHARACTERIZED BY THIS NEW PARADIGM:
>
> * INTEGRATING RATHER THAN SEPARATING OFFENDERS FROM THE COMMUNITY

EXHIBIT 1A
DATE 1-5-93
HJR 1

* RESPECTING THE DIGNITY OF EACH INDIVIDUAL

* MOVING FROM RETRIBUTIVE TO RESTORATIVE SOLUTIONS

* EMPOWERING INDIVIDUALS TO LIVE PRINCIPLE CENTERED LIVES

* SYSTEMATIC METHOD OF DIALOGUE WITH SOCIETY TO ACHIEVE REALISTIC EXPECTATIONS OF OUR SHARED ROLES

* SUPPORTING AND ADVOCATING EARLY INTERVENTION FOR THOSE AT RISK

* ESTABLISHING COLLABORATIVE PARTNERSHIPS WITH THE COMMUNITY AND ITS' SYSTEMS

* ADVOCATING HOLISTIC SOLUTIONS TO PROBLEMS

* ALLOWING AND SUPPORTING RISK TAKING

* TAKING PRIDE IN AND RESPONSIBILITY FOR THE QUALITY OF WHAT WE DO.

A MONTANA PLAN

Based on the National Vision Statement, and the experience of the correctional team in the Montana Division of Corrections, we make these observations on the course of action required to address crowding: (Attachments #3 and #4)

* WE MUST BEGIN TO DEVELOP COMMUNITY BASED SANCTIONS/PUNISHMENTS OR WE WILL BE STUCK BUILDING NEW PRISONS ON A REGULAR BASIS.

* COMMUNITY ALTERNATIVE SANCTIONS SHOULD INCLUDE CONSIDERATION OF HOUSE ARREST, DAY REPORTING CENTERS, INTENSIVE SUPERVISION PROGRAMS, AND MORE PRE-RELEASE CENTERS AND COMMUNITY CORRECTIONS PROGRAMS.

* WE SHOULD LIMIT BUILDING AT THE MONTANA STATE PRISON, AND PUT THE EMPHASIS ON THE DEVELOPMENT OF COST EFFECTIVE COMMUNITY BASED SANCTIONS/PUNISHMENTS.

* SOME CONSTRUCTION WILL BE REQUIRED.

* ADDITIONAL STAFF WILL BE NEEDED AT THE PRISON.

* WE WILL HAVE TO REDUCE THE PRISON POPULATION TO 1,100 INMATES WITH PLANS TO INCREASE THE STAFF TO BETTER ADDRESS THE NECESSITY OF PREPARING THE INMATES TO FUNCTION IN THE INDIVIDUALIZED COMMUNITY ALTERNATIVES.

EXHIBIT NO. 1A
DATE 1-5-93
HJR-1

SESSION LAWS WITH INFLUENCE ON CORRECTIONS POPULATIONS

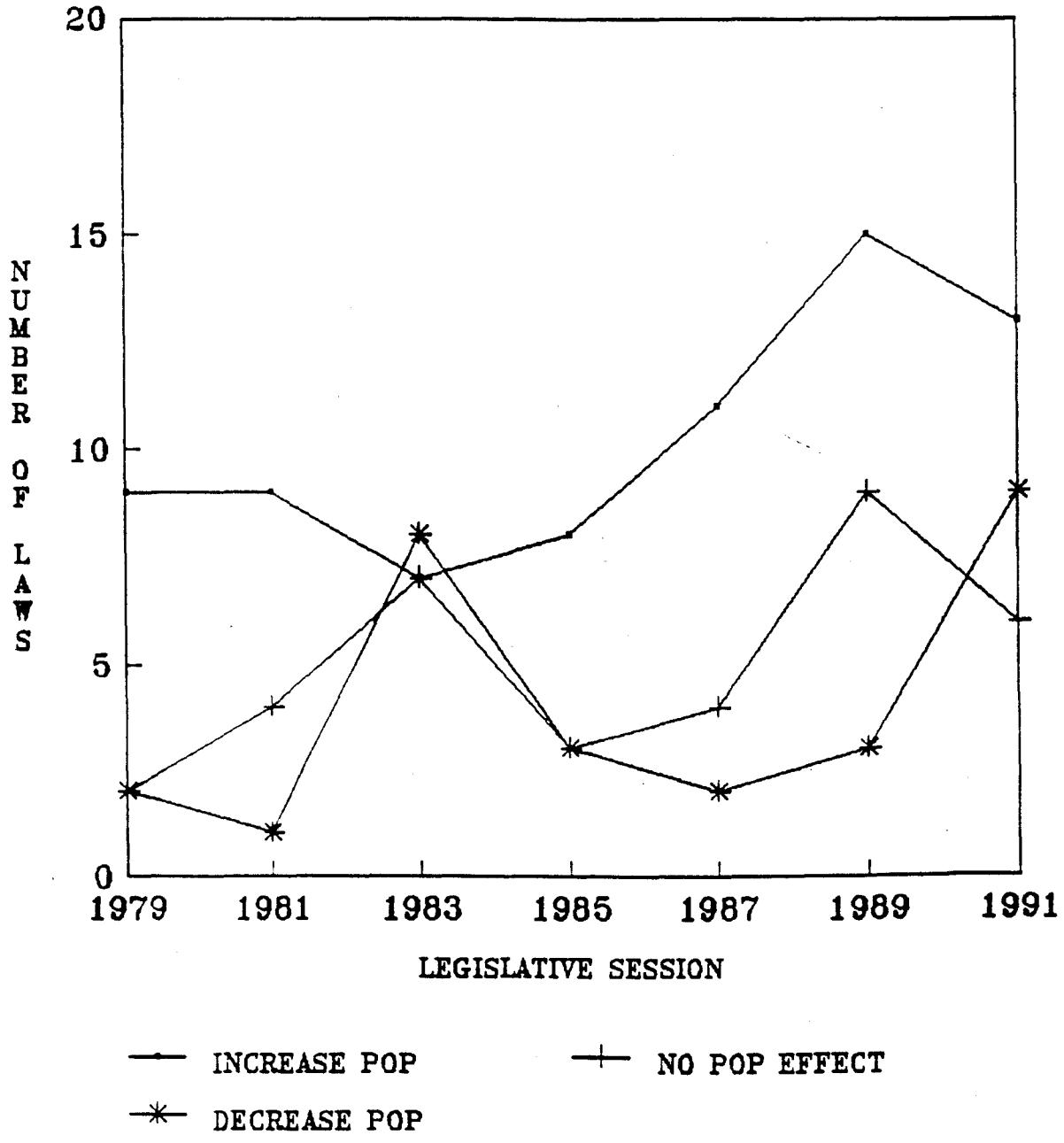
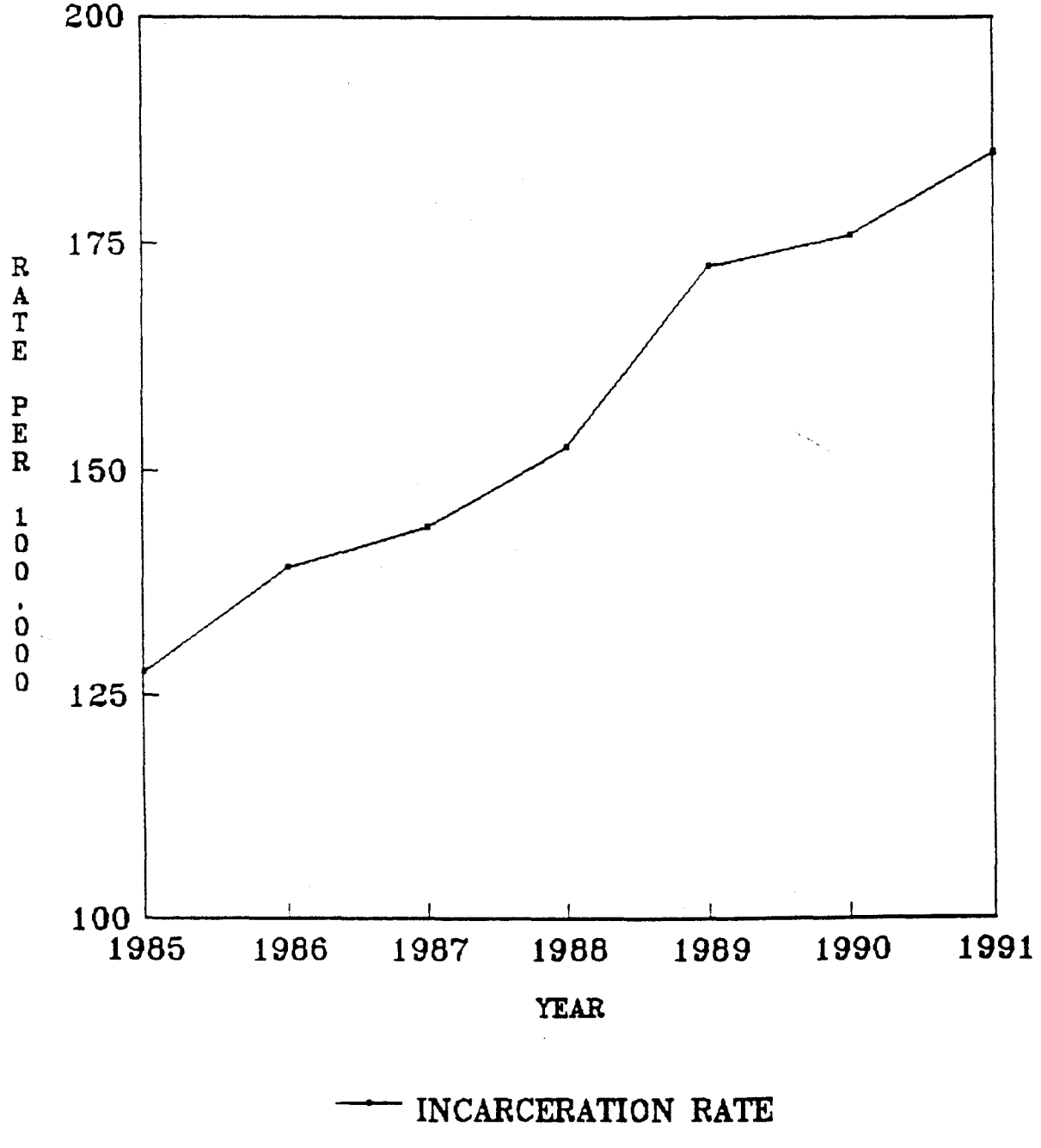


EXHIBIT 12
DATE 1/5/93
HJR 1

MONTANA INCARCERATION RATE.
RATE PER 100,000 POPULATION



1/15/93
HTR-1

Note that, with the exception of estimates of female prison admissions, the results of forecasts using Winter's and Holt methods are quite congruent. Note also that DCHS estimates of male prison admissions and length of stay occupy the mid-point between the high and low estimates of those variables using Winter's and Holt methods. This is not the case with estimates of female admission and length of stay, where DCHS estimates are substantially greater than those generated using Winter's and Holt methods. Presumably, this is due to the volatility of recent trends in female admissions and length of stay.

IMPACT generated projections of male and female total jurisdiction prison populations are presented in Table 3. The projections differ as a result of different input assumptions - i.e., input data vary as a result of the method chosen to develop them.

Table 3. Projected male and female total jurisdiction prison populations. FY 1993 - 1997

Method	Fiscal Year End 1993	1994	1995	1996	1997
Males					
DCHS	1608	1714	1836	1973	2121
Winter's High	1617	1741	1881	2038	2187
Winter's Low	1614	1712	1803	1879	1942
Holt High	1615	1734	1868	2039	2178
Holt Low	1617	1719	1799	1859	1908
Females					
DCHS	84	94	109	129	156
Winter's High	81	83	87	93	99
Winter's Low	79	78	78	79	81
Holt High	82	83	90	95	104
Holt Low	79	77	79	84	85

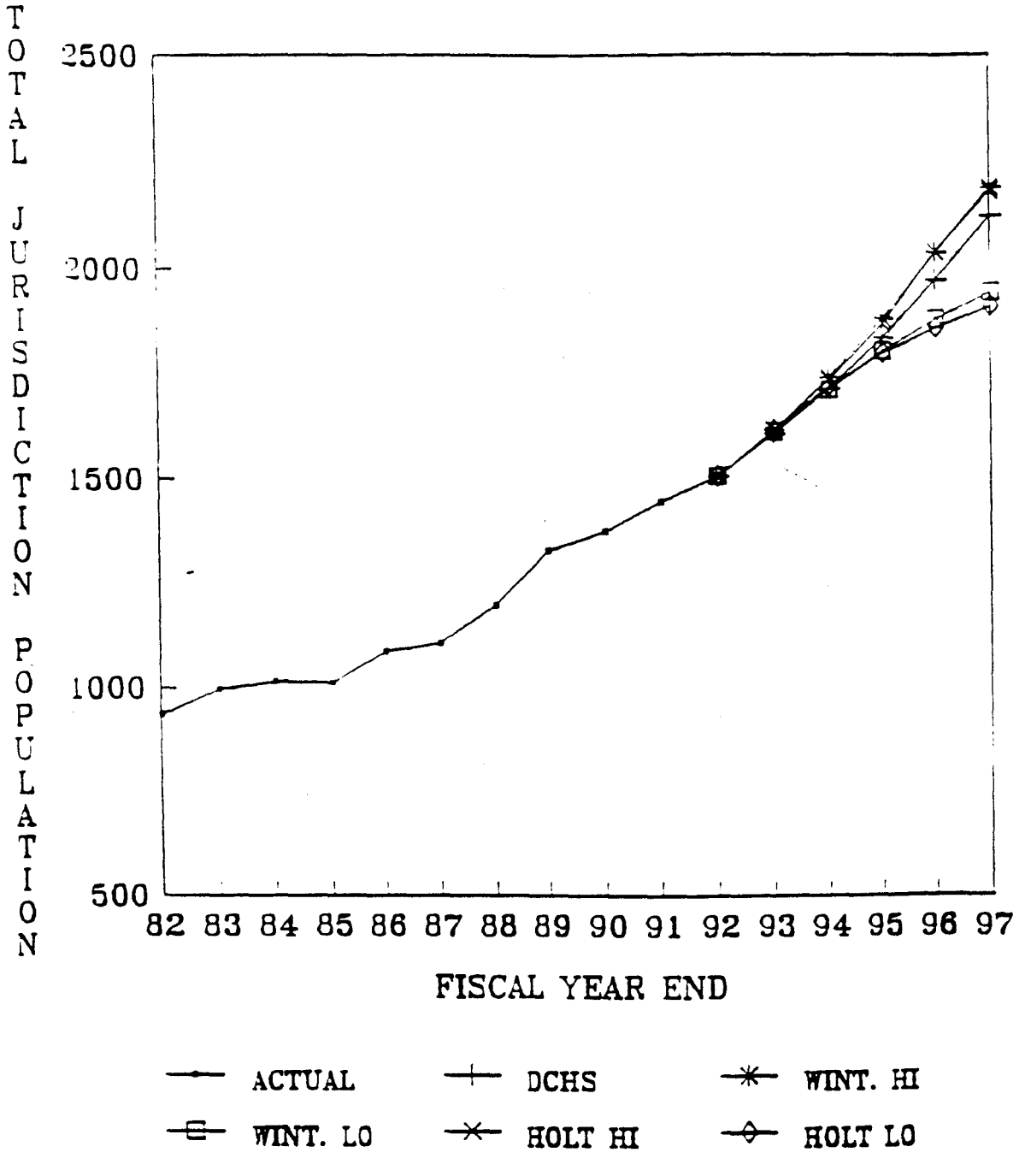
The results of the alternative IMPACT population projections are portrayed graphically on the following pages.

Discussion

Prison population size is determined by the number of persons sentenced to prison and by the effective length of their sentences. Those variables are controlled, in large measure, by public policy decisions concerning definitions of crime, perceptions of the prevalence of crime and definitions of the appropriate public response to crime. Correctional overcrowding in Montana and elsewhere clearly demonstrates that correctional population size is not the result of some universal, mechanistic social phenomenon.

EXHIBIT 1A
DATE 1/5/93
HJR-1

PROJECTED MALE PRISON POPULATIONS
DCHS. WINTER'S AND HOLT METHOD INPUT



IMPACT GENERATED PROJECTIONS

12
1/5/93
HTR-1

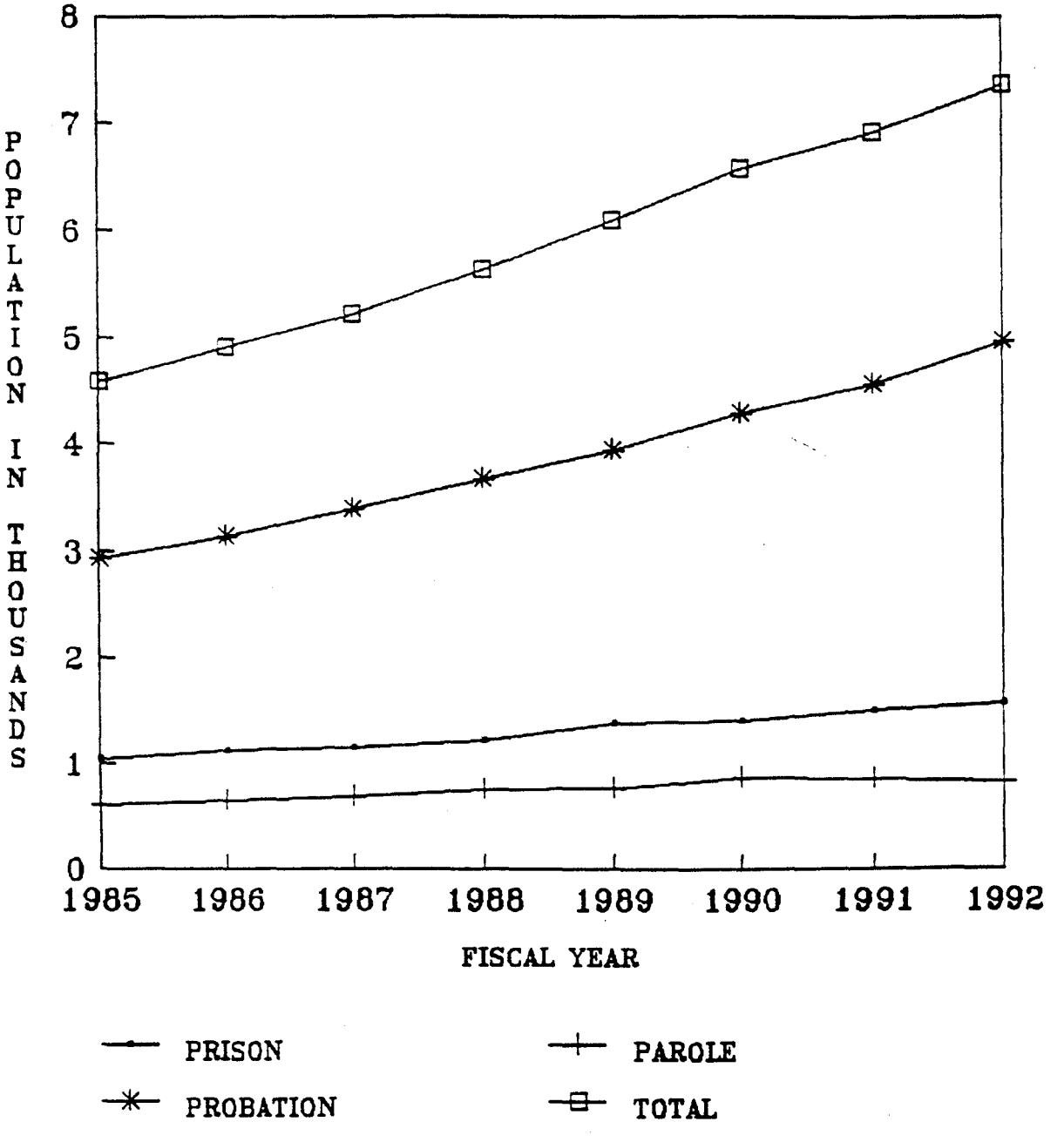
Table 1: Average Daily Populations of Montana Adult Corrections Programs. Fiscal Years 1987-1992.

	FISCAL YEAR					
	1992	1991	1990	1989	1988	1987
MSP	1192.1	1140.2	1097.2	1031.9	957.4	925.5
SRFC	55.3	57.4	52.3	50.2	49.1	49.4
WCC	62.6	58.2	53.3	46.3	35.2	34.4
Subtotal	**1310.0**	**1255.8**	**1202.8**	**1128.4**	**1041.7**	**1009.3**
BLSTC	9.3	11.9	11.6	11.1	9.6	10.6
MLSTC	25.1	24.9	24.8	24.1	23.4	23.9
ALPHA	32.0	33.1	30.3	29.3	30.5	24.4
BPRC	36.1	35.5	34.3	33.5	32.2	26.1
GFPRC	38.3	39.1	32.3	29.2	27.5	25.3
Subtotal	**140.8**	**144.5**	**133.3**	**127.2**	**123.2**	**110.3**
Probation*	3561.0	3240.0	3005.0	2745.0	2771.0	2708.0
Parole*	614.0	557.0	513.0	455.0	451.0	441.0
ISP	44.8	43.0	29.4	16.0	11.0	____
Subtotal	**4219.8**	**3840.0**	**3547.4**	**3216.0**	**3233.0**	**3149.0**
Total	**5670.6**	**5240.3**	**4883.5**	**4471.6**	**4397.9**	**4268.6**

* **supervised in state**

EXHIBIT 1A
DATE 1/5/93
HJR-1

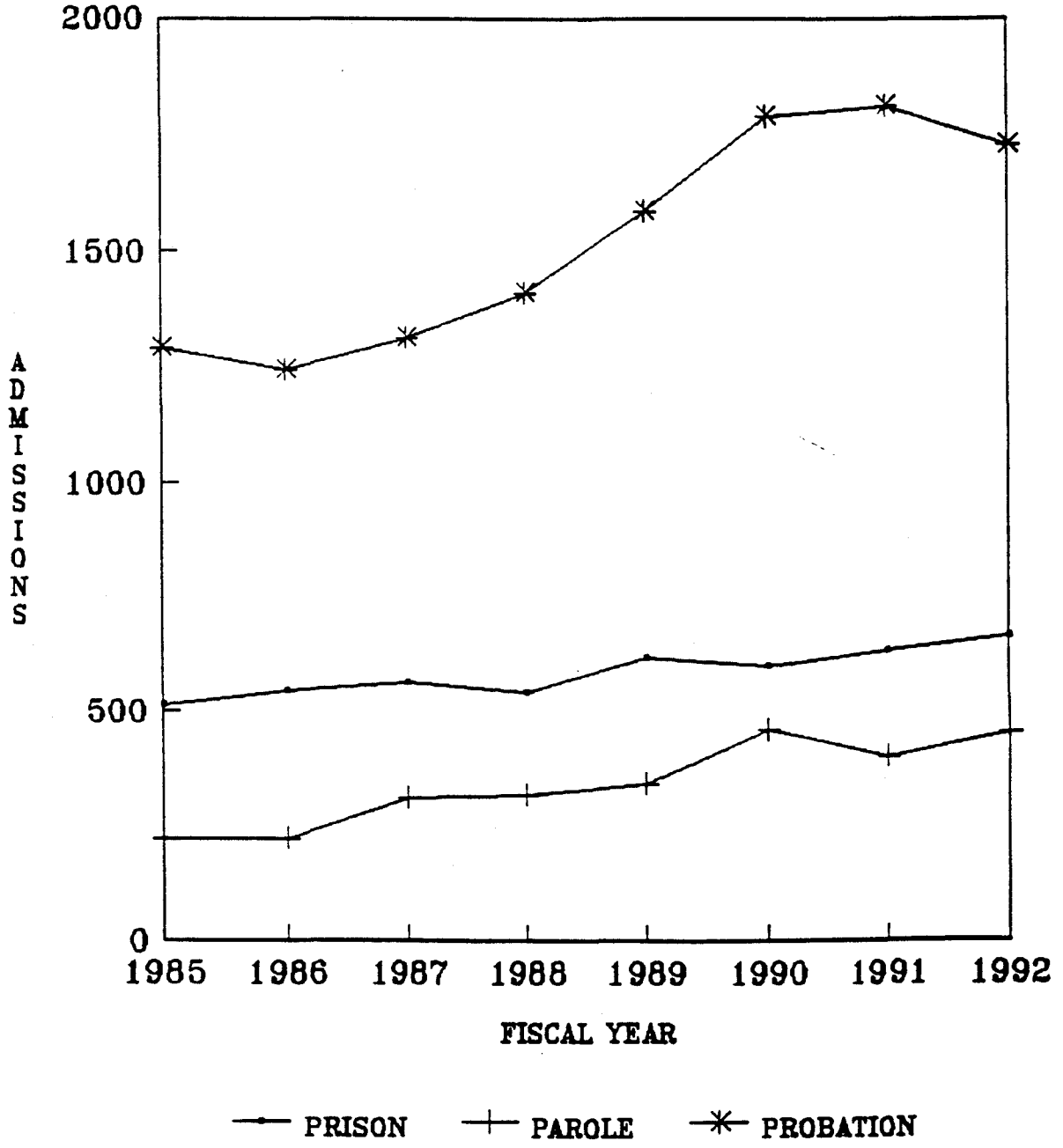
TOTAL MONTANA CORRECTIONS POPULATIONS. FISCAL YEAR END



Includes supervised out of state

1/5/93
HJR 1

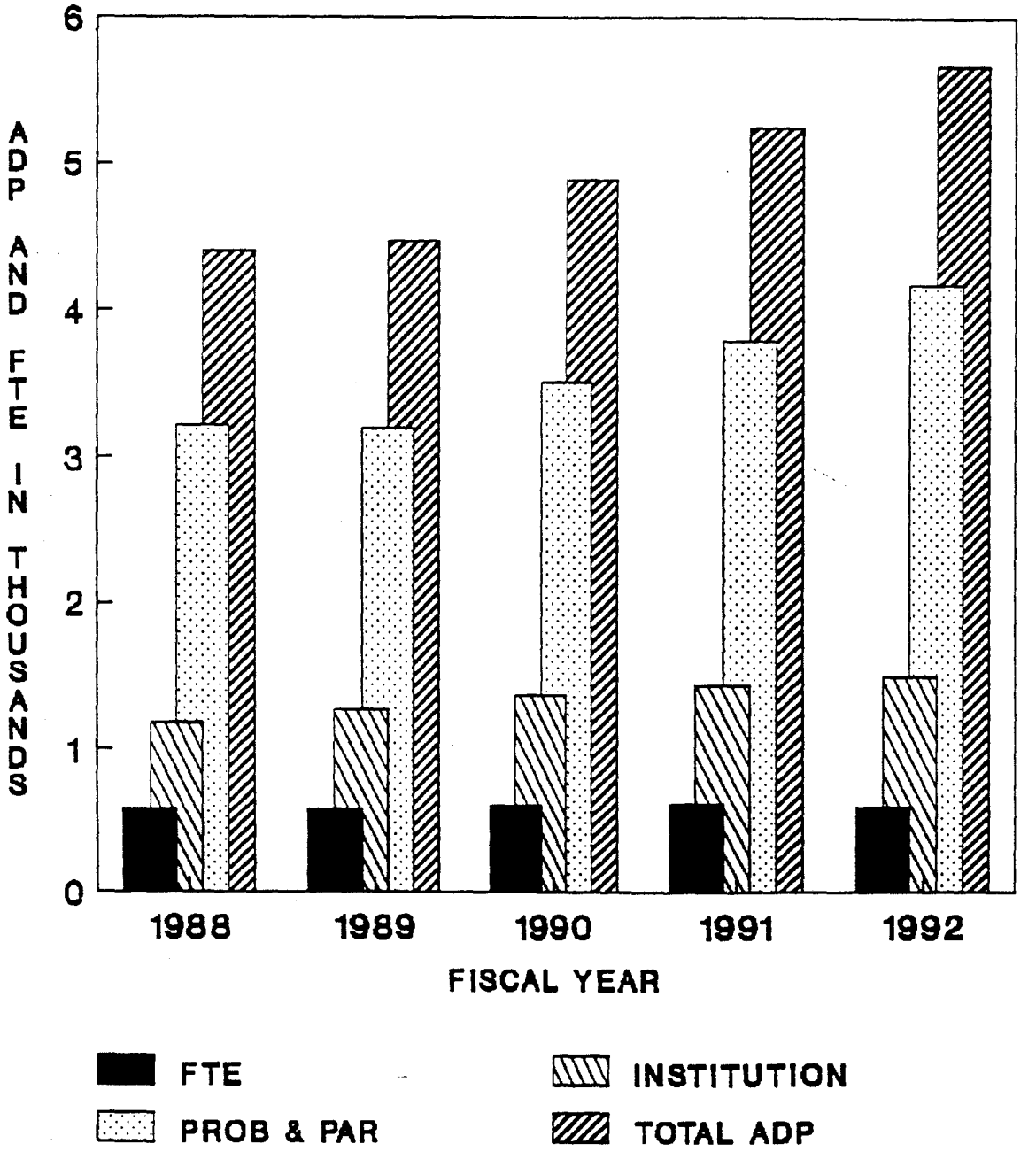
ANNUAL ADMISSIONS TO MONTANA CORRECTIONS PROGRAMS



1A
1/5/93
HJR-1

EXHIBIT 1A
DATE 1/5/93
HJR-1

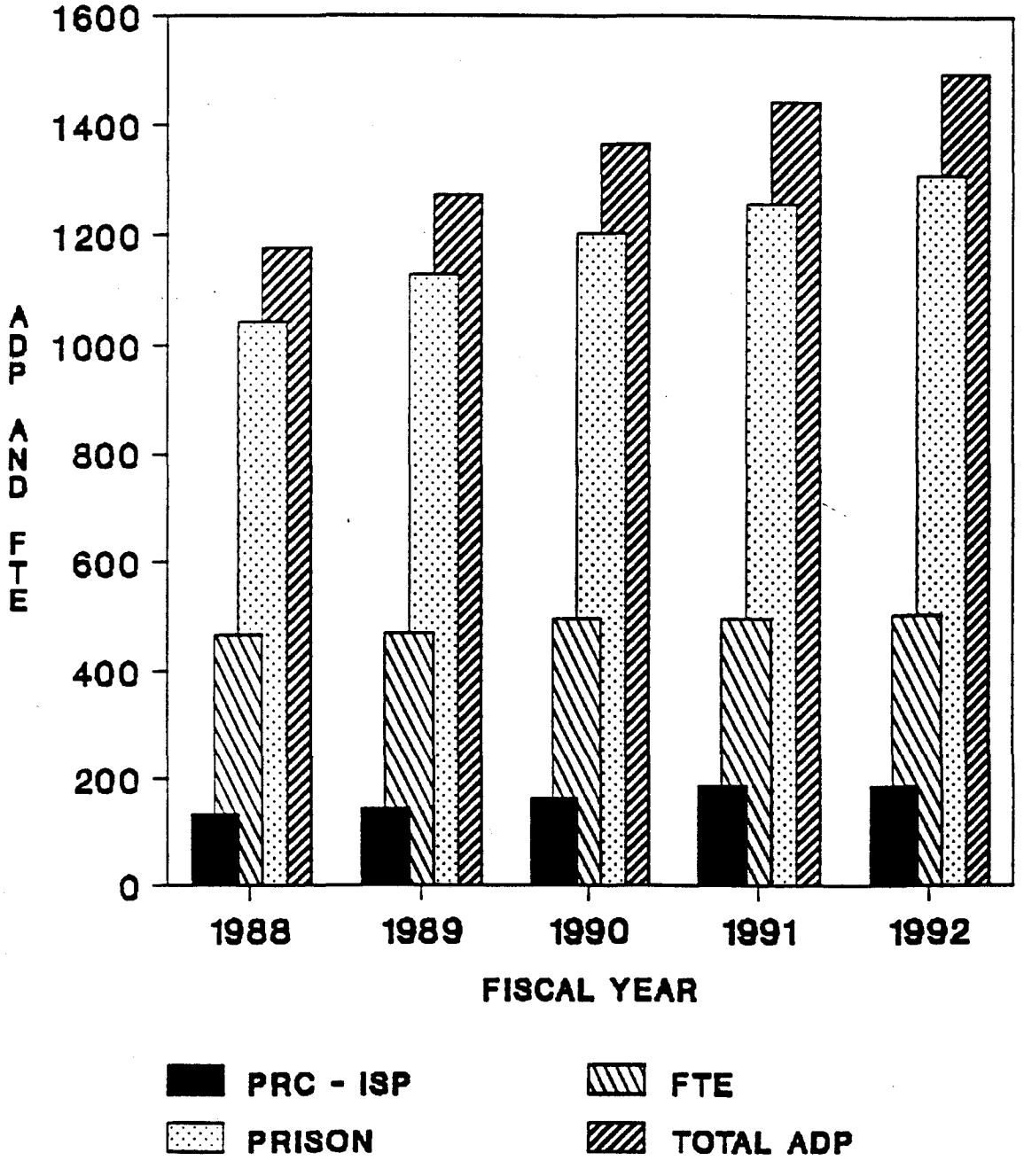
CORRECTIONS AVERAGE DAILY POPULATIONS AND FTE. FISCAL YEARS 1988 - 1992.



EXCLUDES CONTRACT PRC FTE.

EXHIBIT 1A
DATE 1/5/93
HJR-1

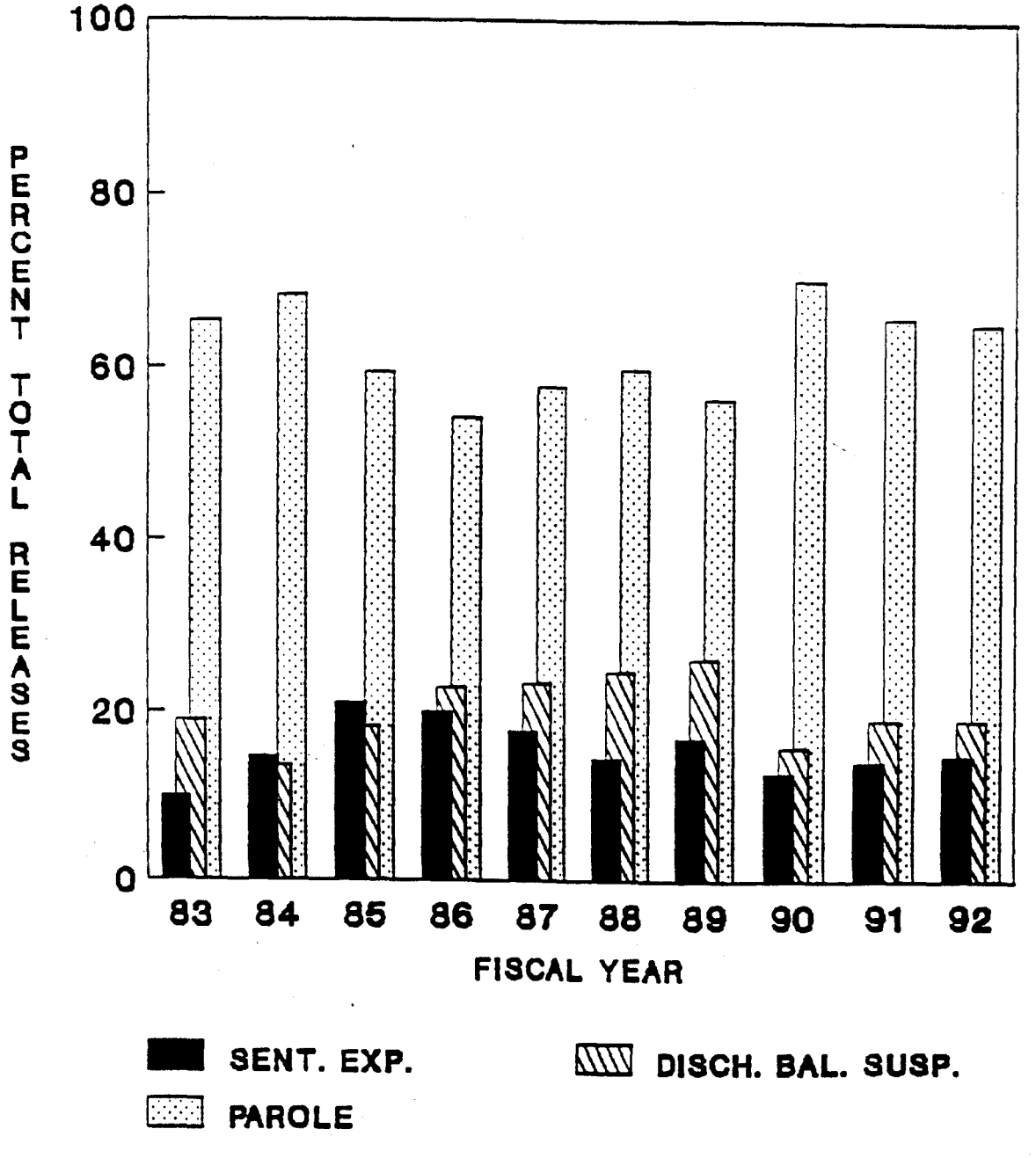
CORRECTIONAL INSTITUTION ADPS AND FTE COMPLEMENT*. FISCAL YEARS 1988 - 1992



* EXCLUDES CONTRACT PRC FTE

EXHIBIT 1A
DATE 1/5/93
HJR 1

MONTANA CORRECTIONAL INSTITUTION RELEASES. FISCAL YEARS 1983 - 1992



RELEASE TYPE AS PERCENT TOTAL

EXHIBIT 1A
DATE 1/5/93
HJR-1

MONTANA CORRECTIONAL ADPS, ADMISSIONS AND RELEASES. FISCAL YEARS 1983 - 1992

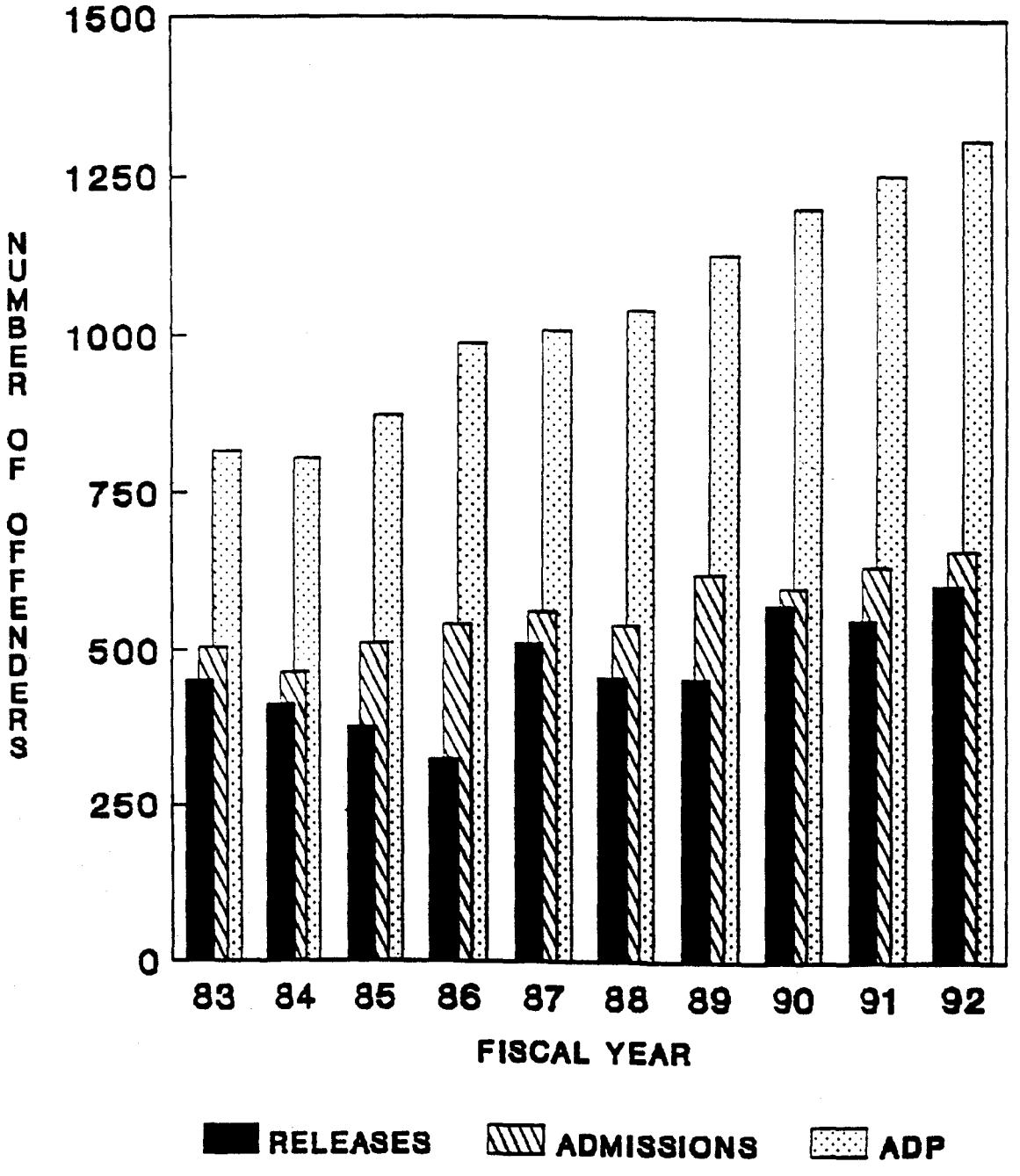


EXHIBIT 1A
DATE 1/5/93
HJR1

MONTANA CORRECTIONAL ADMISSIONS AND RELEASES. FISCAL YEARS 1983 - 1992

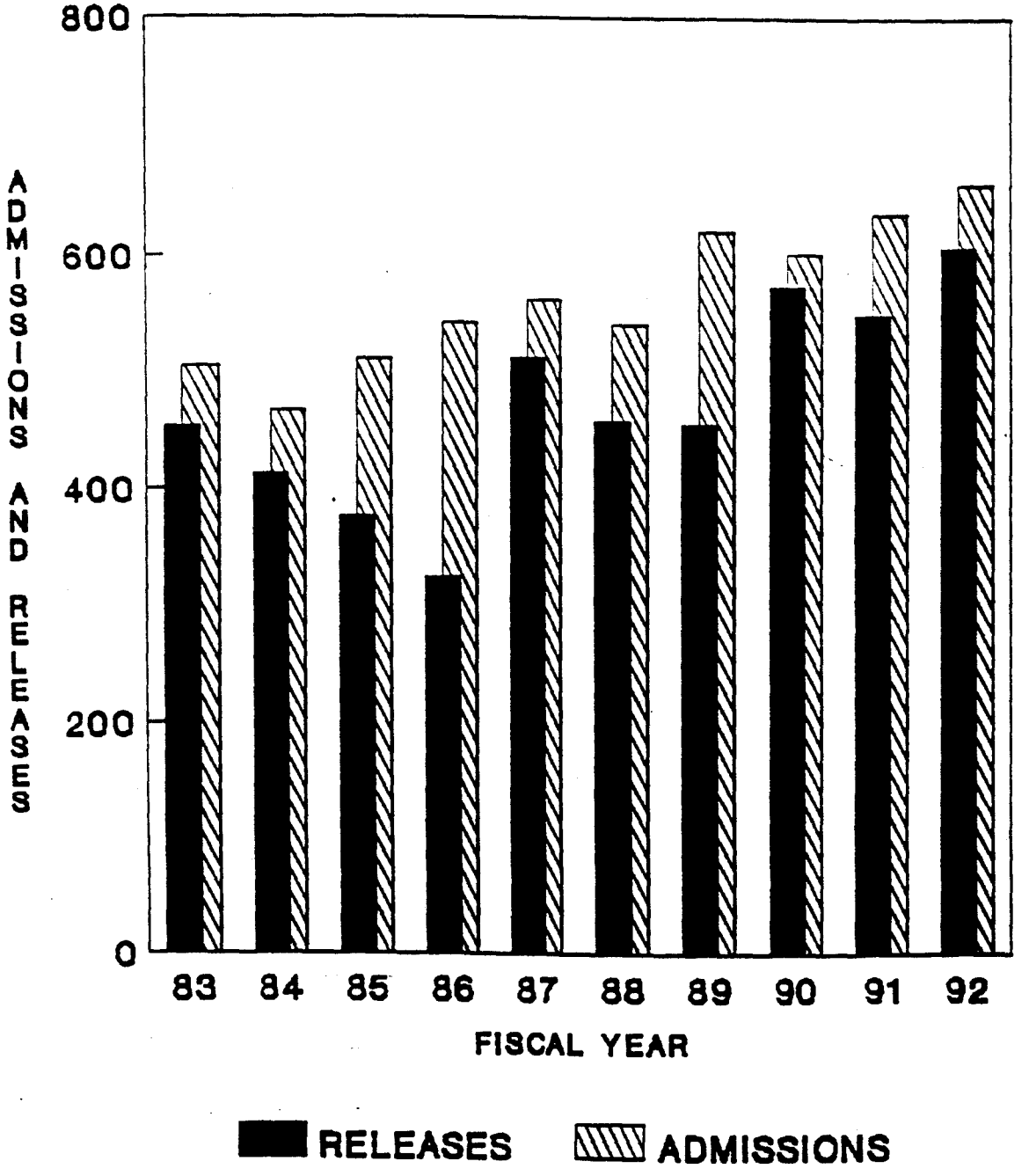


EXHIBIT 1A
DATE 1/5/93
HJR-1

CORRECTIONAL INSTITUTION RELEASES: PAROLE AND DISCHARGE BY FISCAL YEAR

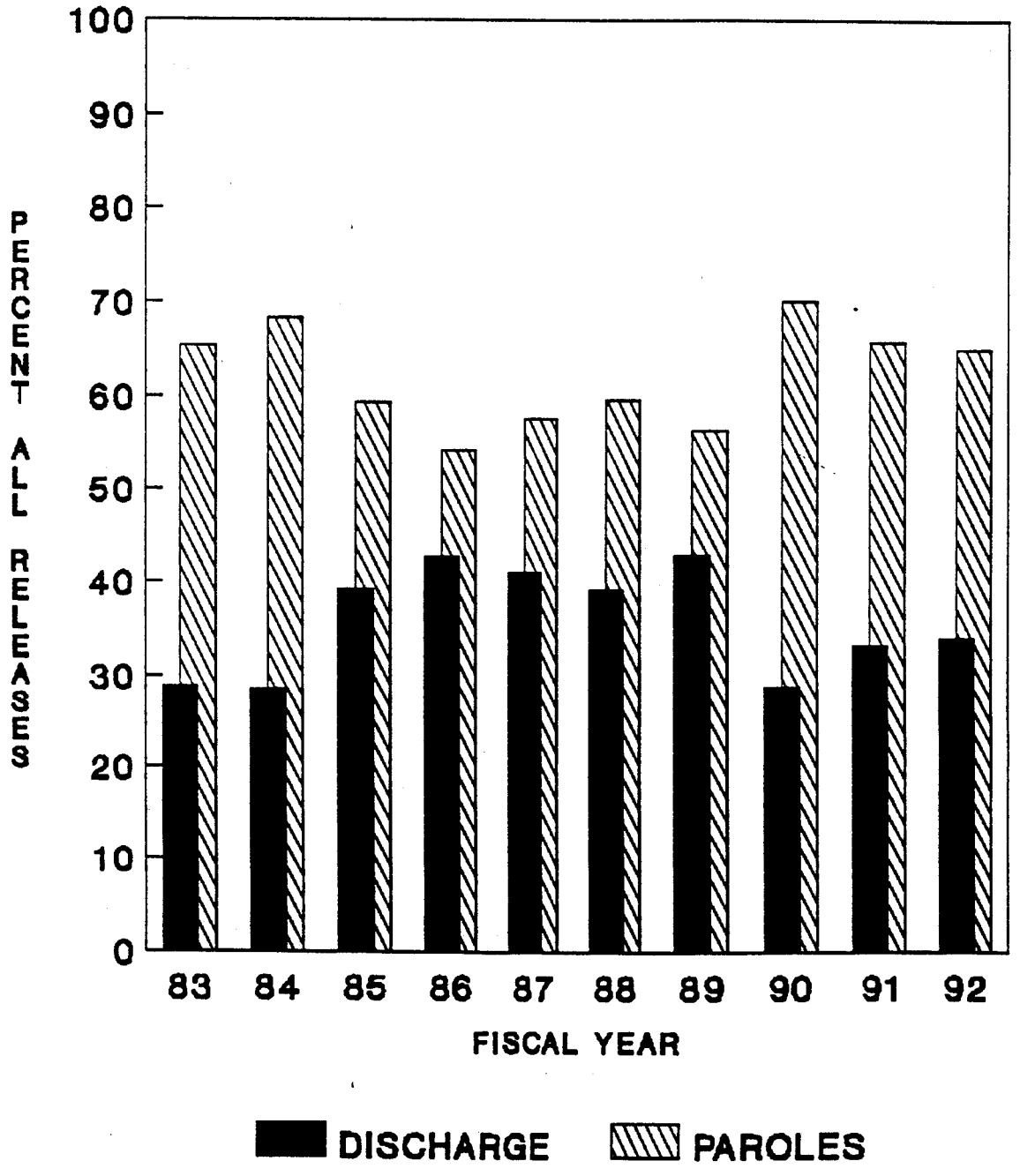


EXHIBIT 2
DATE 1-5-93
HB HJR-1

Montana Trial Lawyers ASSOCIATION

Executive Office
#1 Last Chance Gulch
Helena, Montana 59601
Tel: 443-3124

January 5, 1993

Rep. Russell Fagg, Chair
House Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: HJR 1

Mr. Chair, Members of the Committee:

The Montana Trial Lawyers Association endorses the intent of HJR 1 to encourage settlements in lawsuits and discourage prolonged, costly litigation. Consequently, MTLA supports the provisions of HJR 1 which most effectively encourage settlements: those authorizing plaintiffs to make settlement offers under Rule 68, M.R.Civ.P., on the same grounds as defendants now do.

However, MTLA opposes the provision of HJR 1 regarding the addition of "reasonable attorney fees" (page 2, line 23) to Rule 68. MTLA bases its opposition on several considerations:

1. Most plaintiffs cannot afford the attorney fees incurred by most defendants, fees which even in straightforward personal-injury lawsuits can easily exceed $50,000. Indeed, many plaintiffs can't afford to pay their <u>own</u> attorneys and must rely on contingency-fee agreements. Defendants, on the other hand, are often able to spread such costs of doing business among many customers.

2. In order to guarantee all citizens equal access to justice, American courts since 1796 have rejected the so-called English Rule, which requires losing parties in lawsuits to pay the attorney fees of prevailing parties. The English Rule, a relic of England's autocratic history, has only survived in that modern democratic nation because the government and trade unions now subsidize a massive, socialized legal-aid system which pays the attorney fees for parties who can't. (See the accompanying September 24, 1992, <u>Wall Street Journal</u> guest editorial.)

3. HJR 1 (like Rule 68) applies only to costs and attorney fees incurred after a party rejects an offer. Since a major portion of the attorney fees paid by plaintiffs accrues before suit is even filed, and since defendants can often review a plaintiffs' case and make a risk-free offer before constructing a full legal defense, simply adding attorney fees to Rule 68 greatly exaggerates the disadvantages already imposed by that rule on injured Montanans.

4. Adding attorney fees to the costs assessed under Rule 68 could introduce major changes to Montana's civil-justice system, changes that go far beyond the intent of HJR 1 to encourage settlements without discouraging legitimate claims. Because of the real risk of such substantial changes, MTLA believes that the concept of attorney fees in HJR 1 deserves additional study.

Finally, note that references in HJR 1 to "receiving an adverse judgement" (page 1, lines 21-22) and to "an offer to allow judgment to be taken against the party making the offer" (page 2, lines 7-9) still reflect the defense orientation of Rule 68. Technically, a plaintiff who receives an adverse judgment or allows judgment to be taken against him can't recover anything. Similarly, the proposed addition of the phrase "or lack of liability" (page 3, lines 2-3) seems unnecessary, since the amount or extent of the liability will never remain to be determined by further proceedings if a verdict, order, or judgment has already determined that liability was lacking.

MTLA appreciates the opportunity to review and comment on HJR 1. If I can provide additional information or assistance, please contact me.

With best regards,

Russell B. Hill

Russell B. Hill
Executive Director

THE WALL STREET JOURNAL A17
September 24, 1992

For Many, English Rule Impedes Access to Justice

Counterpoint

By Michael Napier

As an English lawyer, I am quite puzzled that proposed legal reform to bring the "English Rule" to America continues to ignore the special conditions under which the rule operates in England. Perhaps that is why efforts to attach a form of the English Rule to U.S. litigation have gone nowhere. There appears to be almost no attention focused on the viable Legal Aid and dependable trade union support that are indispensable to the process in England. Further, even in England, the English Rule can and does deter meritorious litigation, by imposing on both sides unfair cost and fee burdens, as well as adding extra cases to court dockets.

Essentially the English Rule requires the loser in a lawsuit to pay the winner's attorney fees and court costs – you might say "double or quits." The plaintiff who cannot risk paying everyone's legal costs effectively forfeits his or her access to justice. Thus the litigation disincentive sometimes caused by the English Rule has more to do with the client's fear of costs than worry about the merits of the claim.

Contrast this with America's contingency fee arrangement in which the lawyer gets paid a percentage of the damages, but only if the client wins. The attorney bears essentially all costs, and the client pays no other legal fees. The decisive factor in whether the case goes to court is the attorney's view of its merits and, since the attorney's percentage fee is fixed, there is no incentive to drag out the proceedings. On the other hand, counsel for the defendant corporation or insurance company is paid by the hour, win or lose. The economics of the contingency fee system effectively deters lawsuits in which the damages will not exceed the lawyer's fees – a clear disincentive to minor litigation. By comparison, the English Rule does not remove lower level disputes from the system. Views differ about whether such cases should be discouraged. Should there be any impediment to access to justice?

Interestingly, at a time when even the vice president of the United States has attacked the contingency fee, many in England and elsewhere are discovering that it has its advantages. Not only does it provide access to justice for many victims, it also imposes on attorneys a powerful incentive to perform well.

Currently, an English lawyer is likely to be paid the same whatever the outcome of the case. The contingency fee arrangement puts a premium on skill, zeal and efficiency. Clients understand this, and our lawmakers appear to be listening, with the result that, under the Courts and Legal Services Act of 1990, the lord chancellor is now very close to introducing limited contingency-style "conditional fee" arrangements. Canada, too, has moved in the direction of greater use of contingency fees. I also understand that some American corporations have introduced contingency fee arrangements with their lawyers—even in major antitrust litigation.

It is hard to imagine how in the U.S. any individual or business, short of a corporate giant, can afford to risk the result of an English Rule award of costs. In England, the system has survived primarily because of a government-funded Legal Aid scheme, which cushions the effect the rule has on many losing plaintiffs.

The Legal Aid system is not limited to the indigent; families with incomes up to about $45,000 can qualify, although the proportion of the population eligible (now about 51%) is steadily shrinking, meaning that fewer potential litigants can afford to

EXHIBIT 2
DATE 1/5/93
HJR-1

run the costs risk of a court case. Access to justice is thus jeopardized for the "Minelas" (middle income, not eligible for Legal Aid). Legal Aid for civil cases other than divorce cost taxpayers a net £160 million in 1991-92, about £10 million for personal injury cases other than medical malpractice. Additional help comes from trade unions that provide legal representation for their 8.2 million members and pay the other side's fees if the case is lost. The expanding legal expenses insurance market is also partly plugging the gap for the 7% of the population who have such insurance.

Despite these funding methods, the English Rule system still leaves most self-funding middle-income (and even wealthy) individuals as well as small businesses and corporations with the financial risk of both sides' costs if they lose; usually they cannot contemplate this even if their claims are valid.

Many in England and elsewhere are discovering that the contingency fee has its advantages.

Even Legal Aid's softening effect on the English Rule can produce unfairness. It may leave successful defendants to recover only limited fees or perhaps nothing at all. A defendant who succeeds against an impecunious legally aided plaintiff may win only the hollow victory of an order of costs that cannot be enforced – only in exceptional circumstances are costs awarded against the Legal Aid Fund itself. Yet rigid application of the rule would make access to justice entirely a matter of wealth – a result that is fundamentally at odds with the concept of access to justice that is a feature of both our countries.

A graphic example of the contrast between a legally aided and a privately funded plaintiff faced with the English Rule was the litigation for those seeking redress for photosensitivity allegedly caused by the arthritis drug Oraflex in the 1980s. In England and Wales, out of about 1,200 plaintiffs, 800 qualified for Legal Aid. The other 400 nearly lost their day in court simply because they could not risk having to pay the legal fees of their lawyers and the pharmaceutical company's lawyers if they lost. Only when a philanthropist intervened could this group remain in the litigation and share in the confidential settlement ultimately achieved.

Beyond eliminating meritorious cases of Minelas, the English Rule has also resulted in many additional hours of negotiation and litigation solely concerned with issues of who should pay whom, and how much. Do reformers in the U.S. really want to import this extra legal industry that America currently does not have or need? This will cause only greater congestion to court dockets.

A civil justice system must give the public proper access to justice. It must also achieve a balance whereby the client's potential right to redress is not overshadowed by worries about legal bills, and where court congestion is not relieved by instilling in potential litigants a fear of attempting to vindicate their rights. Our two countries have taken different paths. Neither is perfect. But the quick-fix reformers who would impose the English Rule on American courts should look closely at the entire context for its use in Britain and avoid endorsing it in simplistic terms.

Mr. Napier is a practicing solicitor and a visiting professor of group actions and disaster law at Nottingham Law School. Nick Armstrong, a lecturer at the school, helped in preparing this article.

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Judiciary COMMITTEE BILL NO. HB #JB-7

DATE 1/5/93 SPONSOR(S)

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Russell B Hill, Helena	MTLA		✓
Jacqueline Lenmark	AIA	No position	
Ron Ashbaugh	State Fund	No Position	
Mickey Daniels	DCHS	Information only	
Janice Dowson	DCHS		

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.