

# The Future of Responsive Sentencing in North Carolina

Is there such a thing as a sentencing optimist? The North Carolina experience since 1994 has created a few, and with good reason.

The state revamped its sentencing practices and began to operate its new system in October 1994. The sentencing commission announced some goals as it formulated the new rules. The commission wanted to ration prison resources by devoting more prison cells to violent and repeat offenders and by using prison less often for property offenses. It promoted the development of a broader range of non-prison sanctions. The commission hoped that the state would live within its means: its sentencing rules aimed to use only the correctional resources available to the state, both for prison beds and for slots in other corrections programs. As a related goal, the commission wanted the sentence that an offender actually served to remain close to the sentence the judge announced (an objective known as "truth in sentencing"). Finally, the commission aimed for rules that would produce "consistent and certain" punishment: offenders with similar criminal histories who are convicted of similar offenses should "generally" receive similar sentences.<sup>1</sup>

This was no modest agenda. And after four years of experience (and three years of data now available) it is clear that the North Carolina commission has succeeded. The structured sentencing rules have improved practices in each of the categories that the commission targeted from the beginning.<sup>2</sup>

Take just one indicator of success: shifting more prison resources away from lower-level felons to higher-level felons with more extensive prior criminal records. As Judge Ross and Ms. Katzenelson show in their article in this Issue, the sentences that judges are imposing under the rules do show some proportionality. In a rough sense, a prior criminal record does increase the likelihood that an offender will receive a prison term, and it increases the average duration of a prison term. Similarly, in a rough sense, more serious felonies are more likely to result in active prison terms.<sup>3</sup> Serious crimes also lead to longer average prison terms than less serious felonies. Although this was true to some extent under earlier law, the new rules have strengthened to relationship between the seriousness of the crime and the use of prison.

With this set of initial goals now largely accomplished, the commission turns to the future and its next set of challenges. There are many priorities the commission might emphasize in its next phase, and there are many changes in practice that may call for a

response. Here I will only raise two sets of questions that the North Carolina commission could face during its next few years.

Each of these issues has some bearing on the responsiveness of the sentencing system over time. The numbers of arrests and convictions change from year to year; the types of criminals appearing before a sentencing judge change; the charging practices of prosecutors change; social attitudes about particular crimes and punishments change. Thus, a static sentencing system is bound to fail. North Carolina's sentencing commission must remain alert to changing conditions if it hopes to build upon (or even merely to preserve) its past successes.

## Slow Growth or No Growth for Prisons

The North Carolina sentencing commission created its rules for rationing prison resources during a time of expansion. The prison system has grown at a remarkable rate since 1990, when the legislature first created a sentencing commission. In 1990, the capacity of the state's prison system was around 18,000. Today it is about 35,000.

Some of that increase was already planned before the commission ever created its guidelines. The state's voters approved a two hundred million dollar bond issue to expand the prison system in 1990,<sup>4</sup> and those new prison beds have now been constructed. The original package of sentencing rules in 1993 used the available prison beds and called for no expansion in the system.

But some of the state's prison expansion has occurred after structured sentencing went into place. In almost every legislative session since the new rules were approved in 1993, the state has added to the projected size of its prison population. At the outset, the commission projected that the prison population would grow to about 33,000 by the year 2005. Then, the 1994 legislature passed a group of new crimes and enhanced punishments that added about 2,000 inmates to the projected prison capacity over a ten-year period. The 1995 legislature added another 3,000 inmates over that time period, and the 1996 and 1997 legislatures also expanded the system by smaller amounts.

The commission itself asked for some of these increases in the projected size of the prison system. In other cases, the initiative came from the state legislature. Indeed, legislators proposed far more dramatic increases than the ones that finally became law. One of the most important roles of the sentencing commission



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has been to inform legislators about the likely effects of new criminal punishments on the state's correction system. That information, presented in a credible and politically sensitive manner, has convinced the legislature to scale back the proposals for criminal punishments that ultimately became law. The commission has moderated prison growth.

Nevertheless, this prison growth during the commission's early years presents some challenges for the commission in the future. Just as it is easier to reduce a budget deficit during a strong economy, so it is easier to ration prison resources during a time when the system is growing rapidly. But what will happen if the state's willingness to expand the prison system disappears? If the commission hopes to shift more prison resources towards an emerging problem, is it capable of taking those resources from other types of crimes or offenders where they are currently in use, rather than just counting on growth in the system? If the commission cannot reduce prison use for selected crimes when the time comes, it will fail in the long run to match sentencing rules with corrections resources.

Those concerned about the overall size of the American prison system must ask whether growth is somehow built into the system in North Carolina. Does the presence of structured sentencing and the availability of the commission's expertise change the habits of legislators? Does the very visibility and predictability of the current sentencing rules keep crime control on the political agenda at times when legislative energy might have gone in different directions?

#### **Duration of Sentences and Signals for Change**

A second set of questions deals with the ability of the commission to respond to signals from sentencing judges. Experience in many states has shown that judges who do not accept the legitimacy of sentencing rules can change their practices and undermine the objectives of the rules. Successful sentencing rules must respond to the collective views of sentencing judges. They need not track the judges' wishes in every particular, but sentencing rules can change judicial practices only so much. Rules that stray too far from judicial sentencing views for too long will ultimately fail. North Carolina's sentencing structure, however, makes it difficult for the commission to respond to sentencing judges: the structure leaves judges with few tools available to signal the need for changes in sentencing rules.

Sentencing judges in North Carolina have less flexibility than judges in many systems to impose a sentence outside the range designated in the guidelines. For many combinations of offenses and offenders, the sentencing grid specifies only one disposition of either an active prison term, an intermediate sanction, or a community sanction. In these cases, the judge has no

power to depart from the disposition listed in the grid box. North Carolina also limits the power of the judge to impose a prison term with an extremely long or short duration. The sentencing grid designates three "ranges" of permissible sentences: a presumptive range, a mitigated range, and an aggravated range. A judge choosing a sentence from the mitigated or aggravated range must give a special justification, although it is quite easy to identify such special reasons.

Granted, the sentencing judge in North Carolina still has flexibility. The judge may select from two dispositions for some grid boxes. Moreover, the mitigated, presumptive and aggravated ranges do give judges some significant choices about the duration of a sentence. A sentence in the mitigated range in North Carolina is analogous to a downward departure in other states; a sentence in the aggravated range is similar to an upward departure.

Nevertheless, the North Carolina system places stronger and narrower limits on the options of the sentencing judge (especially in unusual cases) than other state systems do. The judge can change the disposition for some cases, but only for 18 of the 56 grid boxes. The judge can increase or decrease the length of the sentence, but only to the outer bounds of the aggravated and mitigated ranges. These are narrower boundaries than the statutory maximum and minimum sentences that existed under pre-1994 North Carolina law.

In some sentencing systems, the commission can observe the number of departures, the size of departure sentences, and the reasons judges give for departing from the guidelines. Each of these might signal a need to adjust the guideline sentences in the direction suggested by the numerous departures; they might suggest the need to increase the range of sentences considered normal; they might show a need to make some other system changes, or to do nothing at all.

But most of these signals are muted in the North Carolina system. The size of the "departure" available to the sentencing judge must remain within the aggravated and mitigated ranges. The reasons judges give for choosing a sentence outside the presumptive range are typically drawn from a lengthy statutory list of pre-approved reasons, and offer little information tailored to the case at hand.

Thus, the North Carolina commission must keep an especially close eye on the distribution of sentences if it wishes to respond to judicial suggestions for change. While it is useful for some purposes to note (as Ross and Katzenelson do) the basic proportionality of sentences for entire classes of felonies, the commission must analyze much smaller categories of crimes and offenders to hear what judges might be saying.

Take, for example, the patterns in duration of sentences imposed. For all cases sentenced under the new system between 1995 and 1997, the courts selected a

sentence from the mitigated range in 9.8% of the cases. They chose a sentence from the aggravated range in 8.5% of the cases. This tells us that North Carolina judges are choosing a presumptive sentence about as often as judges in other states are imposing a guideline sentence. The overall rates reinforce the idea that the mitigated and aggravated ranges in North Carolina operate like departure sentences elsewhere.<sup>5</sup>

But the overall rate of mitigated and aggravated sentences cannot tell the commission which particular crimes or offenders the judges are having the most difficulty fitting within the presumptive range. If we compare the overall rates with the mitigated and aggravated rates within various prior record levels, we see some evidence of an important signal from judges. It appears that judges are putting more weight on an offender's prior criminal record than the commission used in constructing the presumptive ranges. This is especially evident in the distribution of mitigated sentences. While the overall mitigated rate is 9.8%, the rate for offenders with prior record level one (those with the least serious criminal histories) was 15.5%, which represents a 58.2% increase from the overall rate. For each prior record level two through six, the percentage of mitigated cases falls; the more serious the criminal record, the less likely that judges would select a mitigated sentence.<sup>6</sup> If the presumptive sentences matched the judges' instincts about the proper weight to give prior record, these rates would not fall.

Aggravated sentences showed more or less the same pattern, with the highest rates of aggravated sentences occurring for defendants with the most extensive prior criminal records. The biggest increase from the overall mitigated rate of 8.5% occurred for prior record level six, where judges chose aggravated sentences in 18.2% of the cases, a 114% increase from the overall aggravated rate. Although rates of aggravated

sentences typically declined as prior record levels became less serious, there was a 10.7% aggravated rate for prior record level one, a 25.9% increase from the overall rate.<sup>7</sup>

The commission could also measure the judges' level of comfort with the placement of crimes within the ten classes of felonies in the sentencing grid. Some clues might come from the level of mitigated and aggravated sentences imposed within each offense class. Several offense classes have mitigation and aggravation rates significantly higher than the overall rates, as Tables 1 and 2 indicate.<sup>8</sup>

Note that felony classes B2 and E show higher than normal rates of both aggravated and mitigated sentences. Judges apparently believe that a few offenses often deserve higher or lower sentences than they receive under the presumptive rules; perhaps these crimes belong in a different offense class. But before the commission reaches this conclusion, it will need to dig deeper. What is the standard deviation of offenses within these classes? Are there particular crimes that are responsible for most of the aggravated or mitigated sentences? Does the prior record level matter more or less within this offense class than it does for crimes overall?<sup>9</sup>

The North Carolina sentencing commission must inquire at this small level of detail if it hopes to hear what judges are saying about the workability of its presumptive sentencing ranges over time. And judges, of course, are only one of the many constituencies who can tell the commission how well (or poorly) structured sentencing is working. It will be equally important for the commission to monitor the charging practices of prosecutors to determine whether similar cases are indeed resulting in similar sentences. Prosecutors can change sentences dramatically by charging the same recurring conduct under different criminal statutes over time.

**Table 1**

Rates of Mitigated Sentences Imposed,  
by Offense Class  
n = total cases sentenced 1995-97

Offense Class	Mitigated Rate	% Change
D/n = 1630	24.8%	153%
B2/n = 588	20.2%	106%
B1/n = 189	16.9%	72%
E/n = 1456	12.5%	28%
% Change from Overall Rate		9.8%

**Table 2**

Rates of Aggravated Sentences Imposed,  
by Offense Class  
n = total cases sentenced 1995-97

Offense Class	Aggravated Rate	% Change
B2/n = 588	19.7%	132%
F/n = 843	14.7%	73%
E/n = 1456	12.2%	44%
C/n = 1237	11.2%	32%
% Change from Overall Rate		8.5%

A responsive sentencing system is the product of effort and insight sustained for years at a time. It is little wonder that the North Carolina commission remains too busy to savor the optimistic conditions it has created.

#### Notes

- <sup>1</sup> For an early articulation of the commission's goals, see NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, SUMMARY OF NEW SENTENCING LAWS AND THE STATE-COUNTY CRIMINAL JUSTICE PARTNERSHIP ACT 1 (rev. ed. Apr. 1994).
- <sup>2</sup> These are not the only possible goals for a sentencing commission. For instance, other commissions have emphasized the need to prevent racial and economic factors from influencing sentences. This is a feature of sentencing that the North Carolina commission has not yet attempted to measure or control. Cf. Debra L. Dailey, *Prison and Race in Minnesota*, 64 U. COLO. L. REV. 761 (1993).
- <sup>3</sup> The exception here is Class G. These felonies, which include crimes such as second degree burglary and common law robbery, are more likely to result in active prison terms than Class F felonies, which are theoretically more serious crimes such as assault inflicting serious bodily injury.
- <sup>4</sup> That bond issue increased the system capacity from 18,000 to over 24,000. See Cathy Cash, *Martin, Legislature Reach Prison Deal*, UNITED PRESS INT'L, June 27, 1990. The voter's decision was not surprising, given the drop in the size of the state's prison system relative to the prison systems of other states in the region during this time. See Ronald F. Wright, *North Carolina Avoids Early Trouble with Guidelines*, in SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 84, 88 (Michael Tonry & Kathleen Hatlestad eds., 1997).
- <sup>5</sup> MICHAEL TONRY, SENTENCING MATTERS 38 (1996) (collecting rates of departure in various states).
- <sup>6</sup> The percentages are 11.1 for level two, 8.5 for level three, 7.7 for level four, 7.5 for level five, and 7.0 for level six. Each of these changes from the overall mitigation rate are statistically significant at the 99% confidence level, except for levels five and six, which are significant at the 95% confidence level.
- <sup>7</sup> The rates of aggravated sentences were 7.3% for prior record level 4 and 6.6% for prior record level 3. The change from the overall rate of aggravated sentences was not statistically significant for prior record levels 2 and 5.
- <sup>8</sup> Tables 1 and 2 show the rates only for those offense classes where the increase from the overall rate of mitigation or aggravation was statistically significant at the 99% confidence level. For mitigated rates, classes H and I had statistically significant decreases from the overall rate: 6% and 5.3%, respectively. For aggravated rates, class H had a 5.3% rate, which was a statistically significant decrease from the overall rate.
- <sup>9</sup> It is not possible to answer the first two questions based on data that the commission has published. As for the third question, it is possible to venture an answer. In felony class B, prior record levels one through four all show significantly higher aggravated rates than those prior record levels show overall. In felony class E, prior record levels two and three show higher-than-expected aggravated rates, while levels three and four show higher-than-expected mitigated rates.