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Counting the Cost of Sentencing in North Carolina, 1980–2000

ABSTRACT

North Carolina’s Fair Sentencing Act of 1979 emphasized the need to reduce sentence disparities. Because the statute lacked any enforcement mechanism, judges reverted to earlier practices within five years. In the Structured Sentencing Act of 1993, legislators put concerns about disparity to the side and concentrated on changing the state’s prison use priorities. The new law lengthened prison terms for violent crimes and assigned more property offenders to nonprison sanctions. It also guided judicial choices among “intermediate” and “community” punishments for lesser crimes. Tight controls on judges made it possible to match corrections resources to sentencing practices. The intended effects took hold during the first five years. Judges imposed longer prison terms for violent crimes and sentenced a larger proportion of property felons to intermediate and community sanctions. The longer-term effects may prove more difficult to manage. Appellate judges have remained uninvolved in sentencing policy; no “common law” of sentencing is developing. Prosecutors are dismissing and discounting more charges while at the same time obtaining more serious felony convictions overall.

The sentencing system in North Carolina has changed even faster over the last two decades than the state’s demographics, and that is saying a lot. A state that once had the highest rate of imprisonment in the nation now has a rate just under the national average. A state that once devoted almost no money to community corrections now publishes an
annual compendium of programs to keep judges updated on the options available. Where the state once assumed that prison space would be available for whatever punishments the legislatures and judges together might impose, today it forecasts prison populations twenty years into the future. The route from the old system to the new has been erratic and eventful.

This essay records the key events in the development of sentencing policy in North Carolina since 1980. The plans and motives of the people involved are difficult to reconstruct and in some cases remain unrecorded today. The essay also explores the free movement of ideas in sentencing policy. Some features of the North Carolina experience may be transferable elsewhere; others might not. But North Carolina’s efforts do confirm that sentencing ideas can move from state to state, because events in other states shaped North Carolina's choices.

This case history covers a full twenty years because in North Carolina there were two distinct phases to the redesign effort, and the second played out differently than the first. The first phase began as a reaction to the uncontrolled growth of expensive prisons and to concern about the unequal distribution of sentences. The remedy at the time was to send stronger signals to judges about the proper sentences in normal cases. The legislature chose “presumptive” sentences for judges to impose for each class of crime. But the new system’s lack of an enforcement mechanism, together with its failure to link corrections resources with the sentences that judges were handing down, proved fatal. Within five years, the system was in trouble.

The second phase focused more emphatically on prison costs as the problem, and it relied on centralized control over judges as the solution. A commission created a set of sentencing guidelines that gave judges less power to sentence outside the preferred range for each class of crime. Overall size was the key to this new system; equality of sentences among individual offenders (or among racial groups) was not a concern this time around. The new sentencing rules lengthened prison terms for violent offenders and diverted many less serious offenders into nonprison punishments.

The second revamped system—the one operating today—is a fiscal planner's approach to sentencing. The key question is not the effect of the sentence on the criminal or on crime rates; instead, the key questions are how sentences affect the ability of the state to plan what it
needs, and how sentences affect the overall credibility of the system with the public. This approach bypasses many of the impenetrable questions of sentencing philosophy. Throughout the second redesign of sentencing policy in North Carolina, the participants debated in terms of cost. Most debaters presumed that longer prison terms would be the ideal for the great majority of offenders, but an equally important starting assumption was the public’s limited willingness to pay for this public good. So the debate returned time and again to ways of getting the most out of a regrettably limited resource. Over the last twenty years, money became the universal solvent of sentencing disputes in North Carolina.

The system that emerged from these two phases of reform is distinctive in several ways. First, the new laws place unusually tight controls on sentencing judges: the laws provide for three fairly generous ranges of sentences (mitigated, presumptive, and aggravated ranges) but do not allow the judge to “depart” from the guidelines to impose some different sentence in an unusual case. Second, the structured sentencing laws place an unusual emphasis on integrating prison and non-prison sanctions. The felony and misdemeanor rules include detailed guidance for the selection of nonprison sanctions, while systems in other states offer more open-ended instructions for nonprison sentences. The funding for prison and nonprison sanctions is also tightly connected. Finally, the North Carolina system is distinctive in its routine use of prison population projections. While most states project prison populations on a regular basis, the projections in North Carolina became part of an iterative process during the drafting of guidelines. The projections also became a routine feature in all legislative debate on crime measures.

An observer, with the benefit of twenty years of perspective, might draw a few lessons from North Carolina. The state illustrates both the limits and virtues of a managerial approach to sentencing. Rather than reacting to periodic problems in the prisons and courts, legislators and other officials in North Carolina have paid steady attention to the link between sentencing policy and corrections resources. The sentencing laws no longer benefit from periods of benign neglect. The emphasis on prison costs has squelched debate on some fundamental ethical questions, such as the proper reach of the criminal law and the equality of sentences among similar offenders. But on the positive side, legislators now expect systematic rather than anecdotal information during
debates on crime and normally consider the long-term fiscal consequences of their actions. North Carolina also shows that relatively subtle arguments can sometimes succeed in the politics of crime. Political leaders can sell new sentencing laws as a package making the best use of scarce prison resources, by trading less prison time for some low-priority crimes and thereby freeing up more prison beds for high-priority crimes. Although these ideas are relatively complex because they involve the interaction among sentences for many different people and many different crimes, they translate well into everyday public debate. This political outcome is easiest to achieve in a setting where the corrections system is still growing, as it was in North Carolina during the 1990s.

The state also offers some interesting lessons about the role of judges in sentencing reforms. Appellate judges played virtually no part in shaping structured sentencing in North Carolina. All the judicial input came from individual judges who worked with the commission and from the shifting patterns of sentences that trial judges imposed. Appellate courts can surely develop useful sentencing doctrine to redirect or reinforce new statutes, but a "common law" of sentencing is not necessary for a system to succeed.

This essay takes the following route through the North Carolina experience. Section I summarizes the first phase of sentencing reform under the Fair Sentencing Act (FSA), from 1981 to 1988. Section II revisits the period from 1988 to 1991, when Democratic leaders in the legislature reevaluated the Fair Sentencing Act and diagnosed the reasons for its failure. Section III then describes the efforts of the legislature and the sentencing commission to create a new structured sentencing system. The section ends with some observations about the features that make North Carolina's system distinctive when compared to the sentencing laws in other states.

Section IV recounts events in the legislature just after the passage of the Structured Sentencing Act, when the legislators very nearly undermined their earlier work by returning to uncoordinated crime legislation. Section V reviews the major effects of the new sentencing laws on prison sentences and community corrections, along with the shifts in charging and sentencing practices that have occurred as prosecutors, judges, and others have adjusted to the system. Section VI, the conclusion, surveys some of the challenges now facing North Carolina and some of the implications of two decades of sentencing upheaval in the state.
Counting the Cost of Sentencing in North Carolina


The first phase of the transformation of North Carolina sentencing was embodied in the Fair Sentencing Act of 1979. The FSA placed tighter statutory controls on the sentences that judges imposed, while eliminating parole. The creators of the new law hoped that it would produce less disparity among similar defendants and eliminate overcrowding in the state prison system. After some initial success, however, the FSA failed on both counts. Because judges routinely avoided the presumptive sentences set out in the statute, the system drifted for a decade without any centralized coordinating force. A second phase in the transformation of North Carolina sentencing became necessary, and the failures of the FSA shaped the priorities of reformers in the second phase.

A. The Brief Promise of the Fair Sentencing Act

Before 1981, North Carolina’s sentencing system used a division of labor that was typical for the times. The criminal code, created and amended in a haphazard way over the years, authorized a broad range of sentences for each crime. The sentencing judge in a particular case chose both the disposition (prison or some other sanction such as simple probation) and the duration of the sentence from within the statutory range. The parole commission released some offenders serving prison terms before the announced sentence was complete. For most crimes, the offender had to serve at least one quarter of the minimum sentence imposed before becoming eligible for parole (N.C. Gen. Stat. sec. 15A-1371).

By the 1970s, this uncoordinated and discretionary system was drawing criticism from several different quarters. Increasing prison costs prompted Governor Bob Scott to ask the North Carolina Bar Association to study the state’s corrections and sentencing. The Bar Association’s Penal System Study Committee published two reports that recommended ways to move some offenders—such as public drunkenness and nonsupport cases—out of the prison system (North Carolina Bar Association 1971, 1972). Many of the recommendations in these reports dealt with ways to reduce the caseload for probation officers and to improve the rehabilitative effects of prison programs. The committee also emphasized the need for further study of the “great disparity between lengths of sentences imposed upon individuals with like backgrounds for like offenses” (North Carolina Bar Association 1972, p. 14).
Meanwhile, the prison system continued to grow rapidly (Clarke and Pope 1982). The per capita rate of imprisonment in North Carolina was the highest in the nation in 1973—the state’s prisons and jails held 184 out of every 100,000 residents, compared with the national average of eighty-seven for state systems. North Carolina’s rates were higher than any other state’s for much of the decade, occasionally finishing a close second to Georgia (Bureau of Justice Statistics 1992, table 6.72). The Department of Correction was submitting ever-larger requests for construction funds (Legislative Commission on Correctional Programs 1977, p. 3).

In response to the two concerns of prison overcrowding and disparate sentences, the legislature in 1974 appointed the Legislative Commission on Correctional Programs, dubbed the “Knox commission” for its chair, state senator Eddie Knox (1973 N.C. Session Laws, 2d Sess. 1974, Res. 184). Knox was an attorney and a friend and former university classmate of Democratic lieutenant governor (and senate president) Jim Hunt. Changes in the sentencing laws were a priority for Hunt.

The commission set out to develop a coordinated state corrections policy that would depend less heavily on prison and produce more consistent sentences for felons. The Knox commission issued its major recommendations in its 1977 final report. The report began with a discussion of increasing crime rates during the 1970s and pointed to disparity in sentences as the key shortcoming of the system that undermined public confidence and the deterrent value of the criminal law. It recommended sentences that were “shorter,” more “certain,” and more “uniform” (Legislative Commission on Correctional Programs 1977, pp. 6–8, 34–35). To that end, the commission called for revised sentencing statutes that would assign all felonies to a small number of classes and set a “presumptive penalty” for each class of felonies. Although the proposal permitted judges to decide on the disposition (prison or some other sanction), it controlled durations more closely. Judges would be required to impose the presumptive prison term unless some statutorily defined aggravating or mitigating factor was present in the case. Appellate review would ensure that trial judges complied with the presumptive sentences.1

1 The Knox commission based its presumptive sentence concept on the work of Alan Dershowitz and the Twentieth Century Fund Task Force on Criminal Sentencing (1976). The final report also discussed the work of Marvin Frankel, dealing with the need to constrain the discretion of sentencing judges through legal rules (Frankel 1973).
The general assembly voted down the earliest version of the bill, based mostly on the objections of judges and lawyers. Both groups hoped to retain the judge’s power to individualize sentences. Attorneys were concerned that the presumptive terms would limit their ability to influence sentence outcomes during plea bargaining. But the legislation still got vocal support from Jim Hunt (by now the governor), who believed that more “certain” sentences were consistent with the anticrime agenda of his 1976 campaign (Clarke 1984). After the Bar Association failed to produce a serious alternative to the Knox commission package, the legislation finally passed in 1979. The Fair Sentencing Act took effect in 1981.

The strategy of the FSA (like the Knox commission proposal) was to eliminate parole and to control sentences more closely on the front end. The statute retained the old maximum and minimum boundaries for authorized sentences but also designated for each crime a new “presumptive” sentence within those ranges for judges to impose. The presumptive sentences would, on average, provide shorter but more certain prison terms for felons. For instance, the FSA assigned a presumptive sentence of three years for crimes such as involuntary manslaughter, assault with a deadly weapon inflicting serious injury, and felonious larceny. A presumptive term of twelve years applied to second degree murder, rape, armed robbery, and burglary.

In place of parole, the FSA created appellate review of sentences above the presumptive level. Trial judges had to provide written reasons for prison terms lasting a longer or shorter time than the presumptive term. The FSA also established automatic reductions in sentences for “good time” (one day reduction for each day without major misconduct in prison) and “gain time” (the amount varied, based on participation in prison work or education programs).

But the presumptive sentences of the FSA had no real power to control the sentences that judges selected, so long as they remained within the existing statutory maximum and minimum. For instance, there was usually no presumptive outcome for the judge’s disposition decision, leaving the judge free to select prison, probation, or some other sanction. Furthermore, the judge could depart from the presumptive duration for any legally adequate “aggravating” or “mitigating” factor, so long as written reasons for the departure were given (N.C. Gen. Stat. sec. 15A-1340.4; Clarke 1991; Meyer 1993). Even a perfunctory mention of one mitigating or aggravating factor was an acceptable statement of reasons.
Although the Knox commission report never specified the aggravating and mitigating factors that would authorize a sentence above or below the presumptive level, the legislation created long lists of such factors—sixteen aggravators and fifteen mitigators. The FSA (unlike the Knox commission package) also empowered trial and appellate courts to add to these lists over time (N.C. Gen. Stat., sec. 15A-1340.4). Trial judges and prosecutors in particular were concerned about possible increases in trial rates, so they convinced the legislature to amend the FSA in 1980 (a year before the bill took effect) to treat a plea of guilty as a mitigating factor that would authorize a sentence below the presumptive level (Clarke 1987, p. 3). This became the largest exemption from the FSA, taking most felony cases outside the reach of the presumptive sentences.

Despite these limits, the FSA had the desired effects for the first few years after passage. Sentences did cluster close to the presumptive level, the length of active terms imposed moved down, and growth in the prison population slowed. Although the judges usually could find a way to avoid a presumptive sentence, that presumptive sentence gave a more precise benchmark than before, and many judges chose a sentence at or near the benchmark (Clarke et al. 1983, pp. 6–11). Racial differences in sentencing outcomes also became smaller under the FSA (Clarke 1987, pp. 19–20).

But the unifying and moderating effects did not last long. By the mid-1980s, judges treated most cases as aggravated cases, and their sentences started drifting away from the presumptive level. Table 1

### TABLE 1


<table>
<thead>
<tr>
<th>Year</th>
<th>Median Length Imposed (Months)</th>
<th>Mean Length Imposed (Months)</th>
<th>Standard Deviation (Months)</th>
<th>Percent of Active Sentences above Presumptive</th>
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<tbody>
<tr>
<td>1976–81</td>
<td>60</td>
<td>108</td>
<td>143–67</td>
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<td>1981–82</td>
<td>36</td>
<td>78</td>
<td>112</td>
<td>35</td>
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<td>1983–84</td>
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</tr>
<tr>
<td>1985–86</td>
<td>60</td>
<td>98</td>
<td>156</td>
<td>53</td>
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</tbody>
</table>

Source.—Clarke 1987, pp. 11–12.
summarizes evidence that Clarke (1987, pp. 11-12) assembled in his study of the effects of the FSA. The mean and median length for felony prison sentences imposed, the standard deviation among felony prison sentences, and the percentage of active sentences above the presumptive level all crept up after 1982. The gap in imprisonment rates among blacks and whites began to grow again (Clarke 1997, p. 72). By 1986, sentences looked much as they did before the FSA took effect.

Why did the effects of the FSA on judges last for such a short time? There are several possible reasons. First, the percentage of the active felony sentences that defendants actually served continued to go down after the FSA took effect (Clarke 1987, fig. 24). The average felony defendant sentenced in 1979-80 to a term under four years served just under 40 percent of the sentence imposed (down from about 50 percent in 1973-74). By 1981-82, the median dropped under 35 percent. Although the downward trend was already happening before the FSA era, judges were keenly aware of early releases allowed through automatic statutory grants of good time and gain time, as opposed to the less predictable releases through parole under the old system (Clarke 1991, pp. 44-48).

Second, the appellate courts made clear in their earliest rulings on the FSA that they would not actively monitor the sentences imposed above the presumptive levels. Because the statute did not specify how a court should weigh the aggravating and mitigating factors present in a case, the sentencing judge was safe from review if he or she found one very clear aggravating factor along with any mitigating factors arguably present and then imposed a sentence above or below the presumptive level (State v. Baucum, 66 N.C. App. 298 [1984]; State v. Parker, 315 N.C. 249 [1985]).

Thus, by the middle of the 1980s the FSA became almost irrelevant to the sentencing practices of judges. Without any meaningful control over sentences on the front end, and no parole authority to adjust sentences on the back end, there was no centralizing force in North Carolina sentencing. No institution had the power to draw case-level sentences into a statewide policy that would match the available corrections resources.

B. New Limits on Prison Space

Even before the FSA started operating, many observers in the state worried that the new statute would not change sentencing practices enough. Two influential in-state foundations funded a study commis-
sion whose name clearly indicated its purpose: the Citizens Commission on Alternatives to Incarceration. The commission, chaired by Judge Willis Whichard of the state’s court of appeals, issued a report in 1982 that outlined “the case for community-based penalties rather than prison for appropriate offenders” (Citizens Commission on Alternatives to Incarceration 1982, p. 4).

The legislature responded to this report in 1983 with the passage of the Community Penalties Act (N.C. Gen. Stat., secs. 143B-500 to -507). The new Community Penalties Program authorized private nonprofit agencies to create (at state expense) “client-specific plans” for the sentencing judge, recommending community penalties for some defendants who might otherwise receive a prison term. These agencies, in turn, encouraged the development of new or expanded community penalty programs at the local level.

But at this point, such nonprofit agencies only appeared in a few of the more populous counties. For the time being, community corrections programs offered alternatives to prison in very few cases. Meanwhile, increases in the state’s population, with correspondingly higher levels of crime in the state, pushed up the number of convictions and prison admissions. The prison population at the end of 1981 was 15,786; by 1988, the population was 17,292.

By some measures, this level of growth was modest. The prison population increased at the same pace as the state’s overall population, and this happened during a period when the rate of incarceration in the United States as a whole was moving up steeply. As table 2 shows, North Carolina’s rate of incarceration stayed flat between 1981 (when it was 248 per 100,000) and 1988 (when it was 249), while the national rate—that is, the average rate for state systems in the country—went from 144 to 227.

But hidden beneath this unchanged incarceration rate in the late 1980s was an ever greater demand for prison space. Because there was no major building program underway in the early or mid-1980s, the prison system was housing far more people than its rated capacity. Judges wanted to impose longer prison terms on more offenders, but there was no room for them. Thus, the number of prison admissions was moving up faster than the prison population, meaning that prisoners were staying in the system for shorter periods of time (Clarke 1997).

The federal courts entered the scene at this point and played a pivotal role. Attorneys for state prisoners, including attorneys at North
TABLE 2
Incarceration Rates (per 100,000) and Prison Populations, 1971–99

<table>
<thead>
<tr>
<th>North Carolina</th>
<th>SouthEast Region Rate</th>
<th>National Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prison Population</td>
<td>Rate of Incarceration</td>
<td></td>
</tr>
<tr>
<td>1971</td>
<td>7,795</td>
<td>153</td>
</tr>
<tr>
<td>1972</td>
<td>8,263</td>
<td>160</td>
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<tr>
<td>1973</td>
<td>9,641</td>
<td>184</td>
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<tr>
<td>1974</td>
<td>11,006</td>
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<td>1975</td>
<td>11,449</td>
<td>210</td>
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<td>1976</td>
<td>13,257</td>
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<td>14,250</td>
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<td>240</td>
</tr>
<tr>
<td>1980</td>
<td>15,382</td>
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<tr>
<td>1981</td>
<td>15,786</td>
<td>248</td>
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<tr>
<td>1982</td>
<td>16,660</td>
<td>255</td>
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<td>1983</td>
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<td>20,454</td>
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Carolina Prisoner Legal Services (an offshoot of North Carolina Legal Services), filed several class action lawsuits in federal district court in the early 1980s. In the most important of the cases, Small v. Martin (No. 85-987-CRT, E.D.N.C., April 3, 1989), the plaintiffs asked Judge Earl Britt to declare that overcrowded conditions in forty-nine of the state's ninety-seven prisons amounted to cruel and unusual punishment in violation of the Eighth Amendment.2 The same argument had

2 Prisons elsewhere in the state were covered in companion cases such as Thorne v. Martin, No. 87-446-CRT (E.D.N.C., April 3, 1989).
worked for prisoners in earlier litigation affecting a smaller group of prisoners in the state; the odds of success for these prisoners looked very strong. The state resisted gamely at first. The plaintiffs filed suit early in 1985, and the court arranged for settlement negotiations (with a magistrate presiding) to begin by the end of the year. Those negotiations did not produce an agreement until December 1988.

Although the effect was not immediate, the federal litigation eventually spurred the state into action. Major expansion of the prison system would take time and would be very costly, so the first legislative responses limited the demand for prison space, without increasing supply. In 1985, the legislature passed the Emergency Powers Act, restoring to the parole commission a limited power to release felons 180 days before their release dates (N.C. Gen. Stat., sec. 15A-1380.2[h], 148-4.1). These powers were strengthened in 1986 and 1987. The pending federal litigation created an urgent need to control overall prison population and muted any opposition to the act.

The Democratic lieutenant governor (and senate leader) Bob Jordan, along with the longtime house speaker, Democrat Liston Ramsey, also appointed a special committee on prisons late in 1985, with eight members from the North Carolina House of Representatives and eight from the North Carolina Senate. Representative Ann Barnes and Senator David Parnell served as cochairs of the special committee, and from that position they became the most influential legislators on sentencing and corrections questions for several years to come. The legislative leaders chose Barnes and Parnell for these positions because they both already chaired the key committees dealing with appropriations for prisons.

The first order of business was to neutralize the threat from the federal litigation. Soon after the trial began in late 1985, the state entered settlement negotiations in Small v. Martin. Representative Barnes served with other legislators on the “Settlement Committee,” along with designees of Republican governor Jim Martin, whose election in 1984 preceded the start of the lawsuit. Through these negotiations, it became plain to the state what prison changes would be necessary to satisfy the federal court. As in other prison litigation around the country, the judge seemed inclined to require the elimination of triple bunking and to impose some minimum square footage for each prisoner.

On the recommendation of the special committee, the general assembly in 1987 passed the Emergency Prison Population Stabilization
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Act (North Carolina Special Committee on Prisons 1987). This legislation anticipated a way out of the federal litigation. It established a formula for setting a "prison cap," originally limiting the population to 17,640 inmates. As the state built more prison facilities, it was able to increase the prison cap to 19,324 in November 1990 and again to 21,400 in March 1994. The act also gave the parole commission the authority to release the number of offenders necessary to remain under the cap, although they could not release those sentenced under certain mandatory minimum statutes, including some narcotics crimes.

By March 1989, the settlement committee completed its work, and the legislature ratified the agreement. As anticipated by the prison cap legislation, the state agreed to eliminate triple bunking by July 1989 and to attain fifty square feet of living space per inmate by 1994. Given the representation from both political parties on the settlement committee during its three years of work, there was not much opposition to the final outcome. Judge Britt might have required even more from the state if there had been no agreement.

To keep the system within the limits of the prison cap despite the increased admissions and the longer durations that judges were announcing in their sentences, the parole commission had to release more offenders before the end of their prison terms, sometimes several hundred per week. The percentage of the announced sentence that an average felon actually served dropped quickly; it eventually reached less than 20 percent for some felony classes (North Carolina Sentencing and Policy Advisory Commission [NCSPAC] 1992a; Lubitz 2001). By 1991, misdemeanants served 6 percent of their sentences. Felons served as much as 35 percent of their sentences for the most serious violent felonies, and as little as 19 percent for the least serious. Judges responded by increasing the lengths of the prison terms they imposed, in the (mostly futile) hope of influencing the parole commission in a particular case.1 Thus, the average sentence lengths announced by judges were increasing at the same time that the average times served were declining.

1 Under earlier parole provisions, a felon was not eligible for parole until he or she had served the minimum sentence announced by the judge, provided that the judge’s minimum was no more than one-fifth the length of the maximum term. However, legislation in 1987 allowed the parole authority to ignore these limits for most offenders—sex offenses, murders, and drug trafficking convictions were excluded—when necessary to stay under the prison cap (N.C. Gen. Stat., sec. 148-4.1).
count on being released immediately—or being held only as long as it took the Department of Correction to complete the paperwork and fax it to the prison (Governor’s Advisory Board on Prisons and Punishment 1990, p. 11; Peek 1992). The state also released probation violators almost immediately, which meant that probationers no longer had much incentive to comply with conditions. Many offenders facing a choice of lengthy probation terms or shorter prison terms opted for prison, knowing that they would be released immediately and could avoid months of supervision by probation officers. (The state constitution gave this choice to convicted offenders, since it required consent from offenders before judges could impose conditions of probation.) Because neither prison nor alternative sanctions were credible, North Carolina had effectively decriminalized most misdemeanors and a few lower-level felonies.

II. Creating a Commission, 1988–90
When the immediate threat of federal court intervention in the state prisons dissipated in 1988, legislators stepped back to look for a longer-term solution. They drew some lessons from the FSA. The second phase of reform would require tighter centralized control over judicial sentencing, more effort to develop attractive nonprison options for the sentencing judge to choose, and greater ability to adjust quickly as practices changed over time.

A. Leadership from the Special Committee
Between 1988 and 1990, the special committee on prisons in the general assembly and the governor cast around for ideas that would succeed where the FSA had failed. This dialogue with the governor led the general assembly to characterize the state’s problem in terms of cost: the prisons were overcrowded, and a major expansion would be expensive. As a secondary matter, the special committee came to believe that the gap between the sentence announced and the sentence served was a major blow to public credibility for the system. In contrast to the debate leading up to the FSA in 1979, the debate this time placed only minor emphasis on the distribution of sentences within the state. Sentence disparity generally, and racial disparity in particular, played only a peripheral part in the debate.

Republican governor Jim Martin played an active role in the protracted negotiations over the federal prison litigation. The litigation convinced him that some major changes were necessary in the sentenc-
ing system. He believed that “alternative” sanctions were ineffective and made frequent public statements about the need to add enough prison capacity in North Carolina to give judges “alternatives to the alternatives” (North Carolina Public Television 1991; Drennan 2001). In February 1989, he appointed an advisory panel chaired by supreme court justice Burley Mitchell that recommended in 1990 a major increase in prison construction. The panel’s final report reviewed the downward trend in North Carolina’s rate of imprisonment (see table 2) and noted an increase in the amount of reported crime in the state. The report also pointed—selectively—to states that had increased imprisonment rates and decreased reported crimes in recent years. The conclusion for the panel was clear: it endorsed Martin’s proposal to seek $400 million in bond funds for prison expansion and proposed using that money to increase system capacity to 29,000 within five years. Prison capacity at the time was 18,000 (Governor’s Advisory Board on Prisons and Punishment 1990).

Meanwhile, the general assembly’s special committee on prisons showed little interest in such a large-scale expansion. Despite forceful requests by the Department of Correction for new construction funds every year from 1986 through 1990, the legislature paid for new facilities only grudgingly. It authorized $154 million for prison construction between 1985 and 1990, after authorizing $100 million the previous decade (North Carolina Special Committee on Prisons 1990, p. 3).

Representative Barnes and Senator Parnell came to view these appropriations as piecemeal responses to an unchanging problem. So in February 1988, they wrote a “Proposal” to the special committee, designed to break out of this cycle (North Carolina Special Committee on Prisons 1990, p. 71). While acknowledging that the committee’s early willingness to fund new prisons had strengthened the state’s negotiating position in prison litigation, the “emergency” had now passed. The time had arrived, said Barnes and Parnell, to develop a “balanced system of justice.” The state needed to create a fuller “continuum” of sanctions and rehabilitation services. To achieve this balance, it was necessary to use nonprison sanctions and to control more closely the power of sentencing judges who were “allocating the State’s penal resources.” A sentencing guidelines commission could make this possible by developing more specific crime categories and punishment ranges (North Carolina Special Committee on Prisons 1990, p. 71).

The special committee endorsed the Barnes-Parnell Proposal, and House Speaker Liston Ramsey and Lieutenant Governor Bob Jordan
used it as the basis for a “clarification” of their charge to the special committee in March 1988 (North Carolina Special Committee on Prisons 1990, p. 74). This was a critical moment in the transition to a new sentencing structure. Even though the threat of federal litigation was now defused, and even though the governor was speaking often in public about the need to emphasize major growth in the prison system, the Democratic leadership in the legislature wanted to shift more money and attention to alternative sanctions.

Why were the legislative leaders so reluctant to endorse prison expansion? The full answer is unknowable. But their attitude toward prison expansion was driven more by money than by prison’s effects on crime rates. In a weakened economy, the state at that point (unlike the more prosperous mid-1990s) struggled to balance its budget as required by the state constitution. In 1990, Standard & Poor’s credit rating service placed some of North Carolina’s AAA-rated debt on “CreditWatch” because of the state’s growing estimated deficit (Yacoe 1990). In a state that treasured its traditionally sound credit rating, this was serious business.

Moreover, this tight budget was threatening another major priority. State leaders were especially concerned about the weak system of primary and secondary schools in the state. They were tired of the annual low ratings of North Carolina students on standardized tests and were determined to spend more on education. The legislative leaders saw that a major shift of resources into prisons would wreck their plans to transform education. Key leaders, such as Ann Barnes and David Parnell, were elected from safely Democratic districts where the constituents shared their concern for public education.

After receiving its “clarified” charge, the special committee set to work, hiring consultants from the National Institute of Sentencing Alternatives (NISA) at Brandeis University and the Community Justice Resource Center in Greensboro, North Carolina. The members heard testimony from state corrections officials, county commissioners, and many others. These witnesses highlighted the popularity of the “truth in sentencing” concept, and the special committee started describing its legislative package in these terms, rather than in terms of “sentencing disparity.”

The special committee’s choice of NISA to serve as a consultant showed the high priority that Barnes and Parnell placed on nonprison sanctions as part of a “balanced” sentencing policy. Although the legislature had passed the Community Penalties Act in 1983, the special
committee found that community penalties had not progressed nearly far enough. The first phase of a report from the consultants at NISA in 1988 analyzed profiles of the prison and probation populations and pointed to a pool of 4,000–5,000 low-risk offenders (25–30 percent of the prison population at the time) who could be moved from prison into other corrections programs (Corrigan 1989a). To make this growth possible, the state needed to develop for itself—or convince local governments to develop—more openings in a greater variety of community sanctions.

Even if the additional program slots became available, experience under the FSA showed that judges might not use the slots. To make this growth in nonprison sanctions possible, the special committee looked for ways to increase centralized control over sentencing judges.

The NISA report pointed to states with sentencing commissions—such as Minnesota, Washington, and Delaware—as the answer to the question of centralized control (Corrigan 1989b). The special committee became convinced that a sentencing commission combined several attractions. A commission could create sentencing standards that combined clear rules for ordinary cases with more judicial flexibility for unusual cases. Further, a commission could respond quickly to changes in practice by amending the existing rules (Corrigan 1990). Legislators who had seen their good intentions in the FSA turn to ashes in less than a decade knew how important it was to have responsive sentencing rules. But the central attraction of a sentencing commission was its ability to serve as a “vital link” between sentencing policy and the available corrections resources (North Carolina Special Committee on Prisons 1990, p. 22). Unlike under the FSA, sentencing judges using guidelines would not promise more than the state was willing to deliver.

B. Directives to the Commission

The legislature met in “short session” in 1990, a session meant to address only budgetary matters and noncontroversial issues. The special committee’s recommended bill had the support of the Democratic leadership in the house and senate; most prominently, Barnes and Parnell obtained the backing of House Speaker Dan Blue. Blue, who was newly elected to the post of house speaker, was the first African-

\footnote{The academic consensus was also shifting strongly in this direction (Tonry 1979; Frankel and Orland 1984; Clarke 1987).}
American to hold that office. He had served on the settlement committee in the federal litigation and was acutely interested in ways to control prison costs.

The committee's bill passed through the legislative process without attracting much attention. With both chambers firmly in Democratic hands (Republicans had not controlled either the house or the senate since Reconstruction), the party leadership called the shots in the streamlined proceedings of the short session. The house and the senate both adopted the final conference committee version by unanimous votes.

The Sentencing and Policy Advisory Commission Act of 1990 devoted careful attention to the membership and powers of the commission. The twenty-three members of the commission obtained their seats through a balkanized appointment process. Some appointments came from the Republican governor and lieutenant governor; others came from the Democratic chief justice of the supreme court and the Democratic leadership of the house and senate. Various units of state government with criminal justice responsibilities named other appointees, including the Department of Correction, the Department of Crime Control and Public Safety, and the Parole Commission. Some commissioners came from the professional associations for sheriffs, county commissioners, chiefs of police, district attorneys, district court judges, superior court judges, and criminal defense lawyers. Still other members came from advocacy organizations, such as the Victim Assistance Network and the North Carolina Sentencing Alternatives Association (N.C. Gen. Stat., sec. 164-37). Although the twenty-three-member commission was larger than usual for a sentencing commission (Austin et al. 1996, p. 36), the wide representation on the commission would ultimately become one of its strengths.

But the 1990 law was short on specifics to guide the commission once the appointments were in place. The act instructed the commission to create a few analytical tools but left the uses of those tools wide open. The legislature told the commission to "develop a correctional population simulation model" to estimate the impact of any proposed sentencing rules (N.C. Gen. Stat., sec. 164-40), and it directed the commission to "classify" criminal offenses into categories of felonies and misdemeanors "on the basis of their severity" (N.C. Gen. Stat., sec. 164-41). The commission's most important tasks were to recommend a "comprehensive community corrections plan" and "structures for use by a sentencing court in determining the most appropriate sen-
tence to be imposed in a criminal case." But the statute was opaque about the content of these "sentencing structures" (N.C. Gen. Stat., secs. 164-42, 42.2).1

The 1990 act merely listed factors for the commission to "consider" as it created the sentencing structures. The factors included the nature of the offense, the characteristics of the defendant (including prior convictions), the available corrections resources, and the rights of victims. The one clear legislative instruction about the sentencing structures embodied the truth-in-sentencing concept: felons and misdemeanants were to serve "a designated percentage of their sentences" before becoming eligible for parole, although the statute did not designate what that percentage should be (N.C. Gen. Stat., sec. 164-42[b]).

The act declared that the sentencing structures should be consistent with the "policies" and "purposes" of sentencing. It then listed, in no particular order, some traditional purposes of sentencing, including protection of the public, punishment of offenders, and rehabilitation of offenders. The same section listed several "policies" for sentencing, including a policy favoring restitution for crime victims and a declaration that convicted offenders "should work when reasonably possible," either in the private sector or in community service (N.C. Gen. Stat., sec. 164-35).

The vagueness of these statutory terms contradicted the advice that the special committee received from its consultants. Consultants had advised the legislature to select the sentencing purposes that deserved the most weight and to treat the capacity of the correctional system as a hard constraint on the sentencing rules (Corrigan 1986; North Carolina Special Committee on Prisons 1990; Tonry 1991; cf. von Hirsch 1987, pp. 65–70). The legislature, it was suggested, should make the important value choices, and the commission should implement them. But the 1990 act merely collected relevant—and contradictory—values and left the commission to choose among them. In this respect, the North Carolina legislation was typical of statutes creating sentencing commissions in other states (Austin et al. 1996).

Although the legislature did not explicitly tell the commission in the 1990 act what amount of growth in the prison system it would accept, other events left a powerful clue regarding this question. Throughout the drafting of the statute creating the sentencing commission, mem-

1 The legislature deliberately avoided use of the term "guidelines" to describe the work of the commission because the newly created federal sentencing guidelines were uniformly unpopular among judges and lawyers in the state (Orland and Reitz 1993).
bers of the special committee on prisons negotiated with representatives of the governor on the question of building new prisons. Governor Martin made public appeals for $490 million in construction funds, with $400 million financed by a new bond issue. This money, he believed, would add 9,500 beds to the prison system (Governor’s Advisory Board on Prisons and Punishment 1990). The legislators, on the other hand, held out for a smaller construction package and a smaller bond package.

In the end, they adopted a compromise bond package. In July 1990, the general assembly authorized the sale of $75 million in bonds for prison expansion—the maximum allowed under state law without presenting the bond issue to the voters. The legislature also placed on the November ballot a request to issue an additional $200 million in bonds—at that point, the largest single appropriation for prison construction in the state’s history. Together, the funds would add almost 7,000 new beds. Although the package was smaller than Martin had requested, he publicly supported the bond referendum.

Much to the surprise of everyone involved, the vote was extremely close despite the lack of any organized campaign against the bonds. The referendum passed by less than 0.5 percent of the vote (Case 1990). Indeed, the vote would have been negative without strong support from the Charlotte area, where news stories and public debate spotlighted the unsafe and overcrowded local jail (Stahl 2001). This close outcome had a lingering effect. For some years to come, the state’s leaders took it as a sign that North Carolina citizens had reached the outer limits of their willingness to spend on prison expansion (North Carolina Public Television 1991).

III. Creating Guidelines, 1991–93
The commission was large—twenty-three members—and many of the individual commissioners were sharply ideological figures. Nobody expected easy compromise from William Webb (the governor’s appointee from the Department of Crime Control and Public Safety) or from Lao Rupert (from the North Carolina Community Sentencing Association). Other commissioners, while personally more open to debate and compromise, carried institutional ties that gave them strong views on sentencing matters. These included Jim Coman, the senior deputy

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6 The state constitution allows the general assembly to approve the sale of bonds without obtaining voter approval, but only up to two-thirds of the amount of debt retired the previous year.
attorney general; Roger Smith, from the Academy of Trial Lawyers; and Gregg Stahl, from the Department of Correction.

The commissioners had every inclination to disagree and to deadlock on questions of criminal justice when framed in global terms. But the commission leadership and staff created a sequence of decisions that avoided deadlock and allowed the commissioners to reach agreement on preliminary questions. The sequence of decisions postponed the most difficult choices until later in the process, when cost estimates and some timely signaling from the legislature made all the difference. They pushed the commission in the direction of modest prison growth and heavier reliance on community and intermediate sanctions.

A. Sequence of Decisions at the Commission

The 1990 act called for the chief justice of the supreme court to appoint a judge to chair the commission. Chief Justice James Exum was exceptionally knowledgeable about sentencing policy. He served as chair of the American Bar Association’s Criminal Justice Standards Committee, which was redrafting its sentencing standards during this period (American Bar Association 1994). Exum appointed superior court judge Thomas Ross to the post. Before his appointment to the superior court bench in 1984, Ross had practiced law and had worked as a professor at the Institute of Government, a university-based center for training and research related to state government operations.

During its initial organizational meetings, the commission hired Robin Lubitz as executive director. Lubitz came to North Carolina from Pennsylvania and had no familiarity with North Carolina politics. But his experience as the associate director of the Pennsylvania Sentencing Commission appealed to the North Carolina commissioners, and their decision to hire Lubitz demonstrated their interest in looking to developments outside the state (NCSPAC 1990).

The commission’s first substantive meetings took place at a multiday retreat in January 1991. The proceedings took place under the glare of camera lights; a film crew for a public broadcasting system documentary was on hand to record the meeting. The discussions began with general comments from commissioners about the nature of the sentencing and corrections problems in North Carolina. The list was long: lack of meaningful alternatives to prison, lack of prison capacity, de facto legalization of misdemeanors, disparity in sentencing, no truth in sentencing, and so forth. The group did not prioritize or explain the sources of these problems. The conversation then turned to a question
that revealed the depth of disagreement among the commissioners: the overall purposes of criminal sentences. Some emphasized deterrence and protection of the public and argued for major additions to the prison system. Others spoke passionately about the need for community sanctions and restitution as part of a rehabilitative program that would cost less to operate (NCSPAC 1991a, January 22). The prospects were dim for translating these disparate ideas into a coherent sentencing system.

However, the next phase of the January 1991 meeting offered a way out of the thicket. Lubitz and the staff proposed a detailed work plan that would ultimately allow the commissioners to reach agreement. The staff surveyed the structured sentencing systems from a long list of other states—Delaware, Florida, Massachusetts, Maryland, Michigan, Minnesota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington—and found some common elements in those systems. On the basis of these common elements from other states, the staff's plan then divided the work into four stages and created subcommittees of commissioners to carry the load for each of the stages.

The first stage involved a major input into the sentencing decision: how to account for various aspects of the offense conduct (the "offense structure"). The second stage asked about a second major input: what aspects of an offender's background to consider (the "defendant structure"). The third stage involved a major choice among sentencing outcomes, the decision of whether to use prison or some other form of punishment (the "dispositional structure"). The fourth involved another choice among sentencing outcomes, the length of the sentence imposed (the "durational structure"). This work plan largely tracked the work of the Minnesota Sentencing Commission (Parent 1988, pp. 51–114).

Some commissioners at first mistrusted the work plan. In particular, commissioners such as David McFadyen (representing the district attorneys), Jim Coman (from the attorney general's office), and William Webb (from the state Department of Crime Control and Public Safety) were concerned that the agenda might prevent the commission from considering major increases in the scale of the prison system. The key to obtaining approval for the work plan was a promise from Ross

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7 The commission kept minutes of all its plenary meetings and of each subcommittee meeting. Staff members were present at each meeting and wrote the minutes within a few days. The minutes are unpublished but are open to public inspection.
that the commission could revisit any particular component of the plan later (NCSPAC 1991a; January 23; Ross 1992; McFadyen 1993).

The staff, with guidance from Lubitz and Ross, set the subcommittee membership to reflect the ideological balance of the commission as a whole (Ross 1992). Each subcommittee included practicing attorneys, judges, and law enforcement officials. Each included members who could later vouch for the subcommittee’s work to other like-minded commissioners. The chair or vice chair of each subcommittee had criminal justice experience or strong influence with constituency groups. For instance, Senator Parnell chaired both the durational subcommittee and the dispositional subcommittee. Gregg Stahl from the Department of Correction was vice chair for the defendant structures subcommittee. Jim Coman from the Department of Justice chaired the offense structure subcommittee.

For the first few months, the commissioners treated recommendations from the subcommittees as reasonable compromises and accepted explanations from sympathetic members on the subcommittee. Only later did the divisions on the commission make the subcommittees less important.

1. Offense and Defendant Structures. The offense structures subcommittee began with the question of whether to use the Fair Sentencing Act, which already divided felonies into categories, as a starting point. There was some sentiment that the new legislation required only a modest reworking of the FSA, but most subcommittee members agreed that the legislature was expecting more comprehensive changes (NCSPAC 1991b). The subcommittee did, however, retain one key feature of the FSA: the sentencing structure would be based on the offense as charged, rather than the “real” conduct of the offender. The members were aware of serious problems with the new federal sentencing guidelines, based partly on “real” offense conduct, and decided to avoid the proof problems and controversy involved in that strategy (NCSPAC 1991a, 1991b; Stith and Cabranes 1998).

The offense structure subcommittee began its grouping task by drafting a set of general criteria for classifying crimes. The criteria were based on types of harm that various crimes cause. Serious, permanent personal injury was at the top of the scale, less serious and more temporary personal injury came next, while injuries to the social order and to property appeared at the lowest levels. The subcommittee settled on nine categories of felonies, with a tenth category for misdemeanors (NCSPAC 1991b).
The subcommittee was on unfamiliar ground here. Commissions in other states, such as Minnesota, relied on the intuitive judgments of commissioners about the seriousness of offenses (Parent 1988, pp. 55–60). The commissions in Louisiana and Oregon created general ranking criteria along the lines of those used in North Carolina (Bogan 1990; Austin et al. 1996). Outside of that, however, there was little precedent for sentencing commissions describing groups of crimes in general terms. Indeed, such a task resembled the work of commissions trying to rewrite substantive criminal codes, an unpromising point of comparison (Joost 1994).

The North Carolina commissioners hoped that their ranking criteria would allow them to make more consistent classifications. They also anticipated that general criteria would make it easier to explain their ranking choices to legislators and the public (North Carolina Public Television 1991). But the most important effect of the criteria was to establish that property crimes should be sentenced less severely than crimes against the person. North Carolina practice, as in other states in the region, was to treat property crimes as seriously or more seriously than some crimes of personal violence (NCSPAC 1991b; Spelman 2000, fig. 6). While the committee members disagreed about how severely to punish particular property crimes, they did all agree in the abstract that personal injury crimes were more important.

With the criteria in place for the nine felony categories, the subcommittee assigned specific crimes to each category. The members began with the most frequently charged felonies and concentrated on typical offense conduct rather than the extremes of conduct that a given charge might reach (NCSPAC 1991b, February 25; Knapp 1993). The views of practicing attorneys and judges on the subcommittee were especially important in deciding what offense conduct was typical. The chair of the subcommittee was James Coman, the senior deputy attorney general, who became an exceptionally important figure on the commission. Other members of the subcommittee with extensive practice experience included Judge Ross, Judge Jack Lewis, District Attorney David McFadyen, and defense attorney Roger Smith.

After the frequently charged felonies were in place, the subcommittee added the more unusual felonies. Table 3 sets out a few representative felonies for each class. They also selected a few misdemeanors whose statutory elements were similar to felonies and recommended that they be raised to felony status.

One key decision was to exclude driving while intoxicated (DWI)
<table>
<thead>
<tr>
<th>Class</th>
<th>Crime Criteria</th>
<th>Representative Crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class A</td>
<td>Murder in the first degree</td>
<td>Significant personal injury</td>
</tr>
<tr>
<td>Class B</td>
<td>Rape in the first degree</td>
<td>Murder in the second degree</td>
</tr>
<tr>
<td>Class C</td>
<td>Serious long-term personal injury</td>
<td>Kidnapping in the first degree</td>
</tr>
<tr>
<td></td>
<td>Serious long-term or widespread societal injury</td>
<td>Assault with deadly weapon with intent to kill inflicting serious injury</td>
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<tr>
<td>Class D</td>
<td>Burglary in the first degree</td>
<td>Robbery with firearms</td>
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<tr>
<td></td>
<td>Arson in the first degree</td>
<td></td>
</tr>
<tr>
<td>Class E</td>
<td>Assault with deadly weapon with intent to kill</td>
<td>Child abuse, sexual act</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Extortion</td>
</tr>
<tr>
<td>Class F</td>
<td>Significant personal injury</td>
<td>Dumping of toxic substances</td>
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<tr>
<td></td>
<td>Serious societal injury</td>
<td></td>
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<tr>
<td>Class G</td>
<td>Serious property loss: loss from the person or from the person’s dwelling</td>
<td>Burglary in the second degree</td>
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<td></td>
<td></td>
<td>Arson in the second degree</td>
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<td></td>
<td></td>
<td>Sale of Schedule I or II controlled substance</td>
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<tr>
<td>Class H</td>
<td>Serious property loss:</td>
<td>Breaking or entering buildings</td>
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<tr>
<td></td>
<td>Loss from any structure designed to house or secure any activity or property</td>
<td>Larceny of property worth more than $1,000</td>
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<td></td>
<td>Loss occasioned by the taking or removing of property</td>
<td>Sale of Schedule III–VI controlled substance</td>
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<tr>
<td></td>
<td>Loss occasioned by breach of trust, formal or informal</td>
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<td></td>
<td>Personal injury</td>
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</tr>
<tr>
<td></td>
<td>Significant societal injury</td>
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<tr>
<td>Class I</td>
<td>Forgery</td>
<td>False statements in affidavit</td>
</tr>
<tr>
<td></td>
<td>Assault with deadly weapon</td>
<td>Possession of Schedule I controlled substance</td>
</tr>
<tr>
<td></td>
<td>Societal injury</td>
<td></td>
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</tbody>
</table>

crimes entirely from the classification scheme (NCSPAC 1991b, April 26). The existing sentencing statutes treated DWI crimes separately from the FSA, and the commissioners were concerned that the legislature would reject or amend any package that lumped the DWI crimes together with others. The same was true for the most serious drug crimes (Coman 1992). In the end, the commission included lower-level drug crimes in the structure without reference to the general criteria, and without changing the average time served for those crimes under the FSA. The commissioners left DWI crimes and the larger drug-trafficking crimes untouched.

The defendant structures subcommittee also met regularly during the first half of 1991. Their assignment was to decide which characteristics of a defendant should become a regular part of the sentencing decision. Attention moved quickly to the prior criminal record of the offender, by default. Other individual characteristics—such as substance abuse or juvenile delinquency—seemed important in assessing the defendant’s chances of committing future crimes. But the subcommittee was convinced that reliable information was not routinely available for these characteristics. Such factors, they decided, should be left as grounds to aggravate or mitigate the ordinary sentence in a particular case (NCSPAC 1991b, Feb. 22, April 19).

Prior criminal record, on the other hand, would become part of the sentence in every case. After a review of the treatment of prior criminal records in other states, the subcommittee opted for a point system that would assign different amounts to defendants for various types of convictions. More serious offenses would receive more points, and offenses similar to the current crime would also receive more points. Defendants who committed new crimes while still on parole or probation for some previous offense would also receive extra points.

Two considerations loomed large in each of these choices. First, the subcommittee was concerned about the reliability and ease of use for each type of record in question. Second, the staff surveyed for the subcommittee the practices among about twenty “structured sentencing” states, with special attention to Pennsylvania, Washington, Oregon, and Minnesota (NCSPAC 1991b, February 22, April 19). Most of the decisions, such as the use of a point system and the weighting of prior offenses based on their severity, tracked the majority approach in those states. However, the subcommittee declined to follow the lead of other states that provided for “decay” of an offender’s criminal record points after a crime-free period; they wanted to avoid complex calculations.
and disputes over the age of prior convictions. The subcommittee also diverged from common practice in other states when it assigned an extra point for an offender whose current offense was “the same or similar to” a previous offense.

The subcommittee then estimated the number of offenders currently in the system who would receive various point totals and, on the basis of that estimate, decided how to group the defendants into six different prior record levels. The decision was ad hoc, rather than a deliberate choice about the relative importance of criminal history and the current crime of conviction. The dividing lines the subcommittee chose made it relatively easy to move to the highest levels of prior record (NCSPAC 1991b, February 22, May 10). It later became clear that this fast progression up the scale would contribute heavily to the expense and severity of the system, but that was not apparent at the start.

2. Disposition and Duration Structures. The work of the first two subcommittees combined to form a sentencing “grid,” familiar in many states with sentencing commissions and guidelines (Frase 1993b). The offense structures subcommittee classifications became the vertical axis of the grid (with the most serious felonies occupying rows at the top of the grid), while the offense-level classifications of the defendant structures subcommittee became the horizontal axis (placing offenders with no prior record on the left side, and offenders with more serious criminal records in columns further to the right). But the boxes in the grid remained empty for now.

Two subcommittees filled in the dispositions available to the judge within each of the grid boxes: the dispositions structure subcommittee and the community corrections subcommittee. The first of these subcommittees designated either an active prison term or a nonprison sanction for each box of the grid. The community corrections subcommittee developed in more detail the nonprison punishments that would be available in the relevant boxes (see fig. 1).

The FSA allowed the judge complete discretion over the “in-out” decision. The commissioners believed that this needed to change; centralized control over the decision to use prison or some other sanction was crucial to the state’s ability to plan its corrections resources. The disposition structure would need to bind sentencing judges.

In its earliest meetings, the dispositions structure subcommittee members discussed the purposes of sentencing more extensively than any other commissioners. They agreed right away that punishment and incapacitation of offenders were the leading purposes of active prison
<table>
<thead>
<tr>
<th>Offense</th>
<th>Prior Record Level</th>
<th>Class</th>
<th>I</th>
<th>II</th>
<th>III</th>
<th>IV</th>
<th>V</th>
<th>VI</th>
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<td>216-270</td>
<td>252-315</td>
<td>288-360</td>
<td>324-405</td>
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<td>84-105</td>
<td>115-144</td>
<td>134-168</td>
<td>152-190</td>
<td>172-235</td>
<td>192-240</td>
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<tr>
<td>C</td>
<td>67-84</td>
<td></td>
<td>92-115</td>
<td>107-134</td>
<td>122-152</td>
<td>138-172</td>
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<td>118-148</td>
<td>135-169</td>
<td>152-190</td>
<td>168-210</td>
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<td>D</td>
<td>59-74</td>
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<td>71-89</td>
<td>94-118</td>
<td>108-135</td>
<td>122-152</td>
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<td>E</td>
<td>25-31</td>
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<td>38-51</td>
<td>44-38</td>
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Fig. 1.—Felony punishments as proposed by commission, 1993. A = Active punishment; I = intermediate punishment; C = community punishment. Cells with a slash allow either disposition at the discretion of the judge. Sentence ranges are in months. Source: North Carolina Sentencing and Policy Advisory Commission 1993a.

terms. Rehabilitation seemed more important to the commissioners for nonprison sanctions, though punishment remained a relevant purpose here, as well (NCSPAC 1991b, August 6; Lubitz and Ross 2001). But the discussion of sentencing purposes made no real difference in the subcommittee’s central task: deciding which offenders were best suited to receive various types of sanctions (Stahl 1992). Sentencing purposes mattered less than past sentencing practices and future cost estimates.

The subcommittee began by estimating the proportion of offenders
in each grid box who were receiving prison and nonprison sanctions under the FSA. They designated the grid boxes at the top of the scale (involving the most serious felonies) as "active" boxes. Only an active sentence was available to the judge for those cases, even though a few offenders in those boxes received nonprison punishments under the FSA.

Then the subcommittee made a remarkable choice. In an effort to conserve prison space for the most violent and serious felonies, the members decided that some grid boxes in the bottom left corner of the grid (those involving the least serious crimes and the least serious prior criminal records) would offer only nonprison sanctions. Even though the strong majority of the least serious felons were already receiving no active prison time under the FSA, it was provocative to declare openly that prison sentences should not be available at all for some felonies. At this point, the commission had not addressed the "departure" provisions. Perhaps commissioners supported this restriction on the use of prison based on the prospect that judges could "depart" in unusual cases and impose an active term.

A few of the boxes in the middle of the grid allowed sentencing judges the option of choosing either prison or nonprison sanctions. These areas became known as "border boxes."

The community corrections subcommittee developed in more detail the different types of nonprison sanctions that judges could use in the lower boxes. They reviewed existing community sanctions and placed them on a "continuum," depending on the amount of supervision the program offered. The nonprison sanctions fell into two groups: the least restrictive programs such as ordinary probation or community service were labeled "community" sanctions, while more intrusive sanctions such as residential drug treatment programs were called "intermediate" punishments. The dispositional structure subcommittee recommended the term "punishments" rather than "sanctions" to make them more acceptable to the public (NCSPAC 1991b, June 7). The community punishments became the dispositions at the lowest levels of the grid, while the intermediate punishments became available to judges at slightly higher levels, before the active prison terms came into play. Again, border boxes in between these areas on the grid gave judges a choice between community or intermediate punishments.

Perhaps the most significant work of the community corrections subcommittee involved misdemeanors. This subcommittee attracted large groups of visitors to its meetings, and many of the visitors (such
as Patrice Roesler from the County Commissioners’ Association) were concerned about the costs of criminal punishments for local governments. The subcommittee members understood that limits on the use of state prisons could translate into major increases in the use of local jails for misdemeanors. In North Carolina, any misdemeanor sentenced to more than a six-month active term served the sentence in state prison. In the early 1990s, about 15,000 misdemeanants every year passed through the state prisons, occupying about 1,500 prison beds on an average day (NCSPAC 1991b, December 6). If the new law simply shifted those misdemeanants into local jails, the cost to local government would be enormous. Furthermore, limits on low-level felony sentences could have an impact on local jails. Prosecutors could start charging misdemeanants rather than low-level felonies if they wished to see an active prison term even when the felony grid blocked such a sentence. Once again, local jails would bear the weight of this change.

As a method of preserving local resources to develop community sanctions, the subcommittee created a simplified grid system for misdemeanors (see fig. 2; NCSPAC 1991b, September 13, November 26). Patterned roughly on the work already done for felonies, the misdemeanor grid contained fewer offense and prior record categories and simpler point systems, making it easier to use for busy district court judges (Coman 1992).

The durations structure subcommittee created the final missing piece. Its task was to designate a range of months that a judge should normally choose as the duration of an active prison term for offenders
within each grid box. In its earliest meetings, the subcommittee emphasized “truth in sentencing” and decided that all offenders would serve 100 percent of the minimum announced sentence. Prisoners would serve the maximum, set 20 percent higher than the minimum, only when they failed to comply with institutional rules. Commissioner Gregg Stahl from the Department of Correction assured other subcommittee members that the 20 percent difference gave prison administrators enough leverage over inmate behavior (NCSPAC 1991b, December 6).

This subcommittee choice effectively abolished parole. Although it was a major landmark in the design of the system, it happened with no fanfare. The enabling legislation left open the possibility of a parole system (N.C. Gen. Stat., sec. 164-37). Pennsylvania and other states with sentencing commissions and guidelines still retained parole within limits (42 Pa. Cons. Stat., secs. 2153[a][1], 2154[a]; 61 Pa. Cons. Stat., sec. 331.2). But the North Carolina commission never seriously discussed keeping parole alongside its sentencing structures. The association between parole and the emergency releases over the previous decade made parole unpopular. Senator David Parnell, as chair of the subcommittee, anticipated no difficulty in the legislature on this question (NCSPAC 1992b, January 3).

The durations structure subcommittee also left in the hands of the sentencing judge some real control over the duration. It created three ranges for each grid box: a “presumptive” range, an aggravated range that expanded 25 percent higher than the top of the presumptive range, and a mitigated range that dipped down 25 percent lower than the bottom of the presumptive range. (The only state with a similar structure with three sentencing ranges was Pennsylvania, where Lubitz had served on the commission staff.) The judge had to find an aggravating or mitigating factor present in the case before moving to the higher or lower ranges of months, but it would be quite easy to make such a finding. The subcommittee, for ease of administration, kept the existing aggravators and mitigators from the FSA, except for the removal of a prior record and a few other factors they had already built into the new structure (N.C. Gen. Stat., sec. 15A-1340[a],[b]). The subcommittee also left judges to decide whether to impose concurrent or consecutive sentences in cases with multiple counts. This choice was typical of sentencing guidelines in other states (Austin et al. 1996).

Fourteen states have abolished parole release for all offenders (Bureau of Justice Statistics 1999, p. 3).
For intermediate and community punishments, the judge would select the length of a suspended prison term to impose, a term the offender would serve only after violating the terms of probation. The structure also limited the durations of the intermediate and community punishments. Normally, intermediate punishments lasted between eighteen and thirty-six months; the presumptive range for community punishments was twelve to thirty months. Even in exceptional cases, five years was the maximum probation term.

With these structural decisions in place, the subcommittee started to fill in the numbers. Senator Parnell called this the commission's most "interesting" and "difficult" work to date (NCSPAC 1991b, October 11). The staff presented a starting point for discussion by placing into each grid box a presumptive range reflecting the average time currently served by defendants sentenced under the FSA. Although the guidelines began as "descriptive" of current practice, the commissioners soon gave them a clear "prescriptive" cast. Over the course of several meetings, the subcommittee members identified crimes that ideally should be punished more severely. In some cases, commissioners argued against the largest proposed increases by showing that the proposal would double or triple the time served currently in North Carolina or in other states. But the general thrust of the committee's work called for major growth. When the bidding ended, the staff compiled cost estimates to present to the commission as a whole.

3. Scaling Back, Round 1. The system based on the wish list of the durations subcommittee produced astonishing cost estimates. The plan required $1 billion in new construction and an annual operating budget of $1.5 billion dollars. It would nearly have doubled the size of the prison system, adding 20,000 new beds right away (NCSPAC 1992a). Even more beds would be needed over the next ten years to handle the predicted increases in conviction rates. At first, the commissioners hoped to find some solution other than scaling back their ideal proposal. Judge Herbert Small convinced the commission to adopt a resolution calling on the governor and legislature to "use every resource available . . . to increase the prison capacity of this State" (NCSPAC 1992a, January 16–17).

However, political reality soon took hold. At the pivotal February and March 1992 meetings, a majority of commissioners declared that they were willing to scale back their plans to require only "reasonable" growth. Most still said that the previous version was ideal, but it was not politically realistic. Senator Parnell warned that such an expensive
plan would be “dead on arrival” in the legislature (NCSPAC 1992a, February 21). It was now clear, for the first time, that the current capacity of the prison system would place some constraint on the system the commission would recommend.9

The debate turned to the best method to make the cuts. Commissioner Lao Rupert (from the Alternative Sentencing Association) proposed the deepest cuts, designed to remain strictly within the existing prison capacity. Her proposal changed the dispositions in several grid blocks from “active” to “intermediate.” It also scaled back the durations for all crimes, taking the largest amounts from the least serious crimes.

Commissioner Gregg Stahl from the Department of Correction produced a plan that revisited an earlier subcommittee decision: it cut overall sentence levels by reducing the importance of prior criminal record. The Stahl plan required a more extensive criminal record to move into the right side columns in the grid and made the crime of conviction more important than the prior record. Stahl argued that this philosophy was consistent with the basic premises of the criminal law, punishing a person for criminal acts rather than for criminal propensities (Stahl 1992).

Judge Small continued to insist that the commission should not worry about cost. He proposed increases in the lowest levels of the grid, to make six months the shortest duration for an active prison term for any class of felony.

But the decisive proposal came from the chair, Judge Ross. The Ross plan did not rework the basic choices of the subcommittees and changed none of the recommended dispositions in the grid blocks. Instead, it cut all durations—by 20 percent at the top and bottom of the grid, and by 30 percent in the middle levels—until the projected use of prison space for new felons reached the level already projected to be built by 1994, about 24,000 beds. But unlike the Rupert plan, the Ross plan did call for some serious growth in the prison system. Some immediate building (over 3,000 beds) would be necessary to handle the misdemeanants who remained in the state system, along with proba-

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9 North Carolina followed the same path as commissions in some other states on the best response to ambiguous statutory instructions on prison capacity. The commission in Minnesota read its statute to limit its recommendations within existing capacity (Martin 1984). The statute in Washington instructed the commission to make “frugal use” of corrections resources, and the commission interpreted this as a real constraint on system capacity (Austin et al. 1996, p. 43). However, the North Carolina commission made no conscious use of these other states as a model on this particular point.
tion violators. And some further building would need to happen to anticipate increased prison admissions after 1994. These additional needs would require new construction of over 15,000 new prison beds over the next ten years (NCSPAC 1992a). But the price tag for the Ross plan was within the realm of political reality: less than half the cost of the committee’s first draft, and roughly on a scale with Governor Martin’s proposal of 9,500 new beds discussed during the 1990 bond campaign.

With time running out, the weight of opinion on the commission gathered around the Ross plan. Jim Coman from the attorney general’s office brought into the coalition some of the key conservatives who trusted his judgment. Roger Smith, the defense attorney, brought along enough liberals. The commission settled on this scaled-down package just in time to include it in an interim report to the legislature (NCSPAC 1992c).

A few commissioners, led by Art Zeidman (from the Department of Crime Control and Public Safety) and Judge Herbert Small, drafted a minority report for the legislature. The minority report insisted that the role of the commission was to give its expert opinion about what North Carolina needed, and to let the legislature worry about the political and fiscal costs. The report also suggested that the commission’s deliberations were a sham; it was reaching a preordained outcome. The minority report complained that legislators were using the commission merely to avoid political responsibility for their unpopular and unwise decision not to invest in prison expansion. In the eyes of the minority, a few commissioners (presumably Senator Parnell and Judge Ross) prevented the commission from exploring any different options. But the legislature was about to show that the commission was not perfectly in tune with its wishes, after all.

B. Legislative Signals and Approval

According to the 1990 legislation, the commission was to present its final report by the summer of 1992. But this proved to be too short a time, so the commission instead delivered an interim report, along with a request for an extension of their deadline and a reauthorization of their operating budget. The legislature was meeting again in short session that year. The request for a delay came as no surprise, since Lubitz and Ross provided occasional updates to House Speaker Dan Blue, and Senator Parnell kept his senate colleagues updated.

But legislators reacted coolly to the Ross proposal because it still
called for prison growth. The legislature spent much of the session deciding how to spend the final $87.5 million from the bond issue that the voters narrowly approved in 1990. Given the weak economy and the exceptionally tight state budget, the legislature was finding it difficult to pay for the full amount—they delayed issuing the last of the bonds for a year, from 1992 until 1993 (North Carolina Public Television 1992b). Furthermore, much of the agenda in the short session dealt with health care, one of the major competitors for state funding at the time (Denton 1992; Moore 1992). In this setting, legislators considered any extra prison spending above the amounts already in the pipeline to be financially unrealistic.

Hence, the legislation authorizing the commission to continue work added some pointed instructions. It required the commission to submit at least one proposal that required no growth above current prison resources. And to drive the point home, the legislation added four new commissioners, two senators and two representatives (N.C. Session Laws 1991, 2d Sess., chap. 816). The new members, it was thought, would enforce a sense of political reality as the commission completed its work (Coman 1992; Moore 1992; Stahl 1992). The strengthened ties to the legislature were especially important on the house side, where the original 1990 appointee took no active part in the process after deciding to run for lieutenant governor. Ann Barnes—a major force in the 1990 legislation—and David Redwine became the two new commissioners from the house.

In response to the new legislative instructions, the commission appointed a standard operating capacity (SOC) subcommittee to develop the “bed-neutral” plan required by law. The subcommittee members used a combination of techniques to achieve this second round of cuts. They added a few more “border boxes” to give judges more opportunities to choose nonprison punishments for some midlevel crimes. They reduced all sentences, and reduced some of the most serious felonies (Classes B–D) even more. They also adjusted the prior record point system to move offenders less quickly into the right-hand columns on the grid.

While the SOC subcommittee was at work, the rest of the commission reinforced controls on sentencing judges. The sentencing structures in most states allowed judges to depart from the presumptive sentence in unusual cases. Various formulations of the departure power in different states made it easier or harder for the sentencing judge to depart. Appellate courts were available to block possible abuses of the
departure power (Austin et al. 1996; Reitz 1997). Departures were the leading source of flexibility in sentencing structures, the usual method for individualizing sentences when the circumstances of the case called for an unusual outcome.

Experience in other jurisdictions suggested that judges could use departures responsibly, without undermining the predictability of the sentencing guidelines (Ashford and Mosbaek 1991, pp. vii–ix; Frase 1993a; Tonry 1996, p. 38). Nevertheless, the commissioners in North Carolina decided not to allow departures. In light of the FSA experience, they believed that departures presented too great a temptation for judges. Predictability was too important to risk. Although judges would be able to choose dispositions in a few grid boxes (the “border” boxes), and could choose among three generous ranges for the duration of an active sentence, the commission voted not to allow departures. The sentencing structure would bind the judge in all cases, both for the disposition and for the duration of the sentence.

As the commissioners assembled their final report for the legislature, they expressed their disapproval of the SOC plan. A few considered the plan irresponsible and argued that the commission should ignore the legislature’s instruction to create a bed-neutral plan. In the end, the commission submitted its recommended plan (tracking the outlines of the plan submitted in the interim report), followed by the SOC plan (with no recommendation), and a minority report calling for more extensive use of prison and continued judicial discretion in sentencing. The commission’s recommendation called for $300 million in new construction over five years (NCSPAC 1993a).

Discontent with the commission’s final package went beyond the four commissioners who signed the minority report. Shifting majorities of commissioners voted for each component of the structure. Several commissioners stated openly that they would lobby for some components and against others. There is some question whether the package would have survived a simple up-or-down vote at the end of the process, but Ross never forced the issue (NCSPAC 1992a, p. i; McFadyen 1993). After the commissioners voted the final pieces of the package into place, the staff drafted the legislation and report and sent them to the legislature.

Both the senate and the house assigned the bill to their judiciary committees. The package received more attention in the house than in the senate. For weeks, the relevant subcommittee in the house met every morning at 7:30 for substantive hearings. The members reviewed
the package piece by piece and heard complaints from critics of the bill. Representative Robert Hensley, a Democrat from Raleigh who chaired the hearings, routinely allowed Lubitz to explain the commission’s rationale for each piece of the package and to respond after testimony from critics.

Two leading opponents of the bill were criminal defense attorneys and the parole commission. The defense attorneys objected that the guidelines limited judicial discretion “in an attempt to solve problems that the judiciary did not create.” Furthermore, they said, the sentencing structure ignored the “unique facts of each individual case” and would result in “staggering” costs for the state (North Carolina Bar Association, Criminal Justice Section 1993, pp. 1–2). They tried to persuade the North Carolina Bar Association to oppose the bill, but Judge Ross met with bar leaders during their annual summer meeting in 1993 and persuaded the board to support the bill.

The parole commission issued a report collecting evidence about the difficulties other states encountered when they abolished parole (Lewandowski 1992). These troubles included massive overcrowding of prisons and poorly planned releases of inmates. The parole commission favored, in the place of structured sentencing, the widespread use of mandatory minimum sentences, coupled with maximum sentences much higher than the minimum (Boyd 1992). This would allow greater latitude for the parole commission to identify the most dangerous felons and to incapacitate them for a longer time.

But the parole commission’s document was not credible. Its examples of overcrowding in states abolishing parole came from California and a few other states that eliminated parole without creating sentencing guidelines and without using computer projections of prison growth. While there was a serious case to be made for a parole authority rather than judges as the coordinating force in sentencing law, the North Carolina parole commission never made the case. Their arguments never swayed many legislators.

By the time the bill emerged from the committee hearings in the house, it was clear that the SOC plan would attract enough votes, while there was little support for the commission’s more expensive plan. The agenda for the 1993 session included some major spending proposals for education and health, two of the traditional budgetary competitors with criminal justice (Moore 1992; Miller 1997). The desire to save state money for these other priorities focused the legislature on the least expensive sentencing package. The sentencing reform
package, based on the prison capacity already available to the state, passed the house 91 to 2 and the senate 38 to 0.

These were exceptionally wide margins of victory. Given the public concern about the large numbers of early parole releases, there was widespread agreement in the legislature that major changes to the sentencing laws were necessary, and right away (Drennan 1992). It was also easy to recognize that no single piece of the complicated system was to blame. A complete overhaul was necessary. The sentencing commission produced the only plausible plan for overhaul, and the commission staff emphasized the risks of changing isolated parts of the integrated whole. Representative Ann Barnes endorsed the SOC plan, and the key Democratic leaders in both houses (Dan Blue in the house and Marc Basnight in the senate) were supporters. Surely there were alternatives to a “yes” vote, but none were anywhere in sight.

Apart from the choice of the SOC plan over the durations that the commission recommended, the new law made only a handful of changes from the commission’s proposal. For one thing, the legislature trimmed back the “habitual felon” provision. Under the FSA, a prosecutor could charge a defendant with a Class C felony if the defendant had been convicted of three previous felonies. Some members of the sentencing commission tried to abolish this crime, arguing that it double-counted the criminal record that was already factored into the grid. Nevertheless, David McFadyen from the Conference of District Attorneys made this provision his highest priority. Believing that support from prosecutors was crucial to the proposal’s success in the legislature, the commission kept the habitual felon provision but demoted it from a Class C to a Class D felony. The legislature further weakened the provision by adding a new requirement: only one of the previous felonies could be from Class H or I (N.C. Session Laws, 1993, chap. 538, sec. 9).

In retrospect, the political timing of the legislative debate was fortunate. If the commission had met its original 1992 deadline, the general assembly would have debated the whole package during a session just months before an election. Legislators would have worried about voters’ reactions to a bill that reduced maximum sentences, even though it meant an increase in actual time served for many crimes.

The outcome of the 1992 gubernatorial election was also important to the outcome of the sentencing debate. Democrat Jim Hunt defeated Republican Jim Gardner in the election. Gardner campaigned actively against the work of the sentencing commission and surely would have
worked to block its passage in 1993 if he had won the race. Although the North Carolina governor has no veto power, vocal opposition from a governor still makes it difficult to pass a bill.

Governor Hunt, on the other hand, mentioned sentencing hardly at all during the campaign and remained noncommittal about the work of the sentencing commission. Hunt strongly supported the FSA during his first two terms (1977–85) and continued to view favorably the idea of “determinate” and uniform sentencing. In a campaign brochure, he kept his distance from the sentencing commission: “I hope the Commission’s proposals will bring us closer to the original goals of the Fair Sentencing Act: more certainty and more deterrence. If they do, I will support the proposals” (Hunt 1992, p. 35). After he took office in 1993, he remained on the sidelines as the house and senate debated the new package. It was only a year later that Governor Hunt became an important player in sentencing.

C. Distinctive Features of the Final Product

The North Carolina commission drew explicitly on the work of other states, most frequently the sentencing guidelines in Pennsylvania (Robin Lubitz’s previous employer), Oregon, Washington, and Minnesota. In the creation of the work plan, and in setting out the structural options available to the commissioners, staff members typically described practices in about twenty other states to illustrate a few leading options (Drennan 1992). These state surveys were especially influential in dealing with prior criminal record—the North Carolina commission deliberately followed the “majority” approach to most questions involved in calculating the seriousness of a prior criminal record. Comparisons to the average time served for crimes in other states also figured in the setting of durations for prison terms.

These other states were not simply a source of ideas; they were also a source of confidence. A state with experience using a feature gave the North Carolina commissioners some assurance that the approach was politically and administratively workable. The recent passage of a Community Corrections Act in Texas was encouraging to the North Carolina commission. The generous funding of such programs in Texas suggested that they were politically saleable (North Carolina Public Television 1992a). Some commissioners also drew on other states as negative examples: they referred to California and Florida from time to time as states that were failing in their efforts to “spend their way out” of prison crowding problems (Ross 1992).
Despite the importance of models from other states, the North Carolina version of structured sentencing did follow its own path at some points. North Carolina’s commission created its own distinctive selling point for this system. Structured sentencing, they said, was the most reliable way to increase prison terms for serious and violent felonies. If prison is used indiscriminately, it requires enormous recurring costs—especially in a state with a growing population and a resulting growth in crimes and convictions. The competing fiscal demands on state government make it unlikely that the legislature will devote such resources to prison every year. Given the episodic political support for prison growth, it is important to conserve scarce space for the most important cases. Thus, the best way to increase prison terms for serious felonies is to decrease the use of prison for less serious crimes.

Limits on the use of prison for the least serious felonies were crucial if the system was to control prison costs while sending serious felons to longer prison terms. But the limit also proved unpopular with judges, prosecutors, and other important constituent groups. So the North Carolina sentencing commission turned to another innovation to make these alternatives less unpopular. The commission emphasized the range of nonprison punishments available by dividing them into “community” and “intermediate” punishments, highlighting the heavy supervisory component of intermediate punishments.

The range of available community corrections under the new sentencing structure made the trade-off more palatable for many groups. Too often, the choice between an active prison term and a sentence to probation is perceived as an all-or-nothing choice for the sentencer (Morris and Tonry 1990). In light of the large caseload of the ordinary probation officer, it was probably true that probation was not an onerous or effective punishment for many offenders. But the North Carolina guidelines did not present the sentencing judge with a stark choice. Under structured sentencing, there was no immediate drop-off from active prison terms to ordinary probation.

North Carolina’s system was also distinctive in the amount of centralized control it offered. This emphasis was likely the product of the unhappy experience with nominally “determinate” sentences that were decentralized in fact under the FSA. Thus, the new system covered both misdemeanors and felonies. Frase (1995) surveyed seventeen guideline systems, including North Carolina, and found only four that covered misdemeanors.

The new North Carolina system also created no departure power
for judges. Although the sentencing judge could choose from within an ample range of durations, the judge could not go above or below the specified range in special cases. The structure also controlled the type of nonprison punishments that the judge would choose. In some boxes, only community punishments were available. In others, only intermediate punishments were available. Once the judge decided (or was required) to impose an intermediate or community punishment, the structure limited the length of the available probation terms and required certain conditions of probation in all cases. This was one of the few features of the North Carolina system that varied from the loose guidance offered under the American Bar Association Criminal Justice Standards on Sentencing (American Bar Association 1994, standards 18-3.7 and 18-3.8).

Because the most important work of appellate judges flows from their review of departures, the North Carolina system left appeals courts with little meaningful role to play. One might view aggravated and mitigated sentences as the functional equivalent of durational departures. But North Carolina appellate judges also said very little about the use of these substitutes for departures. Frase (1999) surveyed state sentencing guideline systems and found that six of the seventeen states have “effective appellate review,” while North Carolina and three other states have “some” appellate review. Appellate courts in states such as Washington and Kansas have placed important boundaries on the acceptable grounds for departures from the presumptive sentence. Those rulings reinforced the power of sentencing guidelines to produce more uniform outcomes in similar cases.

The final distinctive feature of the North Carolina system relates to the roles of different institutions. The legislature and the sentencing commission in North Carolina reversed the customary roles that such institutions played in sentencing reform elsewhere. In states that passed guidelines prior to 1993, sentencing commissions showed less enthusiasm than legislatures for a growing prison system. For instance, in Pennsylvania, the legislature rejected the original proposed guidelines from the commission because they were too lenient and too restrictive on judicial discretion (Kramer 1997). In North Carolina, however, the politically insulated sentencing commission called for faster growth in the prison system, while the general assembly held out for cheaper alternatives to prison, at least for some lower-level felons (Wright and Ellis 1993, pp. 457–58).

The slow economy and shaky state revenues in the early 1990s gave
the general assembly strong reasons to play this limiting role. While the general assembly was a politically responsive body that understood the political popularity of crime-fighting measures, it also worked from a generalist rather than specialist point of view. The legislature’s responsibility to balance criminal justice spending against spending on health care and other needs of the state gave it a different perspective from the sentencing commission, which devoted two years of attention to one set of problems. The balanced budget provision in the state constitution, combined with a rhetorical tradition of praising fiscal conservatism in North Carolina, reinforced the legislature’s chosen role. Those same factors would also help the sentencing guidelines survive a threat in the legislature during its first two years.

IV. Developing Legislative Discipline, 1994–98
The first few years after the passage of the Structured Sentencing Act were marked by second thoughts in the legislature. During 1994 and 1995, as the new sentencing system was getting underway, the legislature debated a string of proposals that would have dramatically increased the use of prison and reversed the basic direction of structured sentencing. In each case, the key to the outcome was—once again—the money.

A. Impact Projections in the 1994 Session
Although Governor Hunt had no major effect on the 1993 debate over the passage of structured sentencing, he did create the first major test for the new system. In 1993, a man who was released from prison after serving two years of a six-to-ten year prison term murdered the father of basketball star Michael Jordan in eastern North Carolina. Men released early from prison also were involved in the killings of two Charlotte policemen. Newspapers reported on other parolees charged with murders. To top it off, a group of crime victims filed a class action suit to force the state to repeal the prison cap, which was being phased out slowly as structured sentencing took effect (Eubank 1993).

Governor Hunt, referring to these events, called a special session of the general assembly to deal with crime. For seven weeks in February and March 1994, legislators introduced over 400 new crime bills. Many dealt with punishments for sexual assault and the use of weapons. Others embodied some variety of “three strikes and you’re out” punishments—sentencing repeat felons to life imprisonment without
possibility of parole—which were gaining attention at the same time in about half the state legislatures (Wright 1998b).

At the time, the commission staff members were occupied with the huge job of educating judges, prosecutors, defense attorneys, probation officers, and clerks about the new system. They developed training materials and conducted seminars around the state. At the start of the special session, however, some staffers dropped their more routine work to respond to the new sentencing proposals popping up in the legislature.

Under the 1993 sentencing legislation, any new sentencing bill introduced in the general assembly required a “fiscal note” (N.C. Gen. Stat., sec. 164-43). The sentencing commission estimated the number of new convictions or lengthened prison terms a crime bill would add to the system, then used a computer simulation model to calculate the number of prison beds that would be necessary over different time intervals. The projections moved in one-year increments for the first ten years, and then in five-year increments. The research arm of the state legislature supplemented this information with its own estimate of construction costs for new prison facilities necessary to handle the increased prison population. The estimates were based on the assumption that all convicted defendants were sentenced to the midpoint of the punishments designated in the bill. One difficult component of the estimates involved a prediction about future increases in the number of convictions in the state. An advisory panel recommended to the sentencing commission periodic changes to the “multiplier” for changing conviction rates.

Robin Lubitz, sometimes working alone and sometimes with Judge Ross, delivered these impact statements to legislators personally, during private conversations in the lawmakers’ offices. By delivering the impact statements early and in private, Lubitz hoped to make it more palatable for the sponsor to alter or withdraw the bill. While some legislators did not at first believe the impact statements, after a methodical explanation of how the commission created its estimates, most legislators considered the numbers trustworthy. Many then worked with the commission staff to amend their bills in ways that still accomplished many of their goals with a lower impact on prison populations (Lubitz 1994).

By the end of the special session on crime, the legislature passed a “three strikes” law, a gun-enhancement law, and new punishments for rape. In each case, the commission’s analysis had a sobering effect on
the legislators, who amended each of the bills to reduce their impact on prison population. The bills, as introduced, would have increased the population by well over 20,000 beds within ten years. The bills that actually passed during the 1994 special session required about 2,000 new beds within ten years (Bennett 1994; Wright 1998a).

One legislative change to structured sentencing in 1994—revisions to the habitual felon law—had a larger potential to expand the prisons. The 1993 version of the habitual felon law allowed a prosecutor to charge a separate Class D felony upon conviction of three prior felonies, but two of the three felonies had to be more serious than Class H. The 1994 amendment increased the habitual felony crime itself from Class D to Class C, and the new law applied after any three prior felonies (N.C. Gen. Stat., secs. 14-7.1 et seq.). The habitual felon law now enabled prosecutors to increase a presumptive sentence for almost all the offenders in about twenty of the fifty-four cells in the felony sentencing grid, the lower right-hand corner of the grid.

This was a legislative battle the Association of District Attorneys lost in 1993, and it was at the top of their priority list for the 1994 legislative session. This time around, the prosecutors won. They pointed out that very few offenders were actually convicted of the habitual felon crime and that its real value was to give them leverage during plea negotiations. The sentencing commission, relying on this pattern of charges in the past, predicted a small impact on prisons. For a few years after the passage of the new habitual felon law, prosecutors continued to use it sporadically. The commission did not count on prosecutors changing their patterns of charging, but that is what eventually happened.

B. Legislative Newcomers in the 1995 Session

The November 1994 elections created another early test for the viability of structured sentencing. While governors changed during the debates over structured sentencing (Democrat Jim Hunt from 1977 to 1985, Republican Jim Martin from 1985 to 1993, followed again by Jim Hunt in January 1993), the legislature remained stable. Democratic leaders in the general assembly dominated the special committee on prisons, formulated the instructions for the sentencing commission, appropriated the funds for new prison space and corrections programs, and adopted the Structured Sentencing Act.

But in 1994, for the first time since the Reconstruction Era, North Carolinians gave Republicans a majority in the house of representatives.
(68 of 120 seats). The senate remained in Democratic hands, but barely; they held only 26 of 50 seats. The question was whether the sentencing commission could sustain support for structured sentencing across party lines.

Incumbent Republicans overwhelmingly supported the 1993 Structured Sentencing Act. When they moved into leadership roles, Republican legislators spoke in general terms about North Carolina lagging behind other states in the punishment of criminals, but they never attempted to rework the new sentencing structure (Wright 1998a, pp. 11–12). One of the most influential Republican leaders, Representative Leo Daughtry from Smithfield, worked actively to repeal the statute requiring a “fiscal note” for any sentencing bill introduced in the general assembly. Daughtry believed that the fiscal notes made legislators overly timid and caused them to ignore the long-term benefits of crime reduction. But other Republican lawmakers convinced Daughtry that the fiscal notes were a useful discipline containing accurate information. The alternative did not inspire confidence: as Representative Dan Blue put it, in about two-thirds of the debates on crime bills before 1993, “We just guessed” (Bennett 1994). The fiscal notes requirement stayed in place.

The 1995 general assembly passed sentencing laws that made only modest long-term changes in the system. The combined effect of the 1995 changes to structured sentencing was, to be sure, larger than the impact of the 1994 statutes. The 1994 statutes carried a predicted increase of about 2,000 new prison beds over ten years. The 1995 amendments to the structured sentencing statutes combined for an estimated increase of about 3,200 beds over ten years. Nonetheless, the statutes that finally passed the legislature were once again considerably less expensive than the bills initially proposed.

The largest prison increases flowing from the 1995 amendments came from changes in the handling of assault cases. The 1993 statutes contained a gap in the treatment of assaults: a few assaults (such as assault with a deadly weapon) could be treated as serious Class E felonies, while simple assaults on a citizen received misdemeanor status. This meant that some crimes of real concern to judges and victims—particularly some domestic assaults—could not receive any prison time. The commission heard repeated complaints from judges and prosecutors about this “gap” in the assault sentences and proposed a set of amendments for the legislature. The 1995 legislation mostly tracked the commission proposals. It created a new intermediate cate-
logy for assaults and changed the felony sentencing chart to allow judges to choose an active prison term as the punishment for more assault defendants (Wright 2001).

In the long run, the changes to the assault laws gave prosecutors more latitude to select charges for a high-volume class of crimes. But in the short run, none of these 1995 amendments rejected the basic principles of structured sentencing. The essential compromises held together.

A consensus settled into place: the sentencing structure, like the sentencing commission itself, was perceived to be apolitical. It was a planning device that allowed the state to link its sentencing aspirations with the corrections resources at hand. This role as a credible and nonpartisan technical advisor allowed the sentencing commission and the sentencing structure to remain intact even after the legislators who created them were no longer in leadership roles (Lubitz and Ross 2001).

The commission’s prison projections created much of this good will in the general assembly. Legislators who remembered the mass releases of felons on short notice under the FSA and the prison cap were impressed that the sentencing commission’s projections of prison populations were reasonably accurate (Ross and Katzenelson 1999).

When the commission issued its “population projections” each fiscal year, it attached a nontechnical explanation of the assumptions involved. These included the commission’s estimates of the rate of parole for the FSA offenders remaining in the “stock” population, the percentage of the maximum sentence that structured sentencing offenders would serve, the growth rate for felony convictions, the rate of active sentences imposed, and so forth. This document gave legislators just enough detail to appreciate the difficulty of making good projections ten years into the future. The commission also revised its projections each year. For instance, the commission in 1997 projected a prison population of 30,060 for fiscal year 2000; by January 2000, the projection for that year shifted to 32,113. The actual population at the end of the fiscal year was 31,899. The commission’s ability to offer more accurate predictions as the relevant year approached was unsurprising. However, the ability to explain projections and to earn the trust of legislators was a real communications achievement.

C. Community Corrections Funding

In 1993, the general assembly fully funded the prison construction necessary to operate within the sentencing guidelines until 2001. Dur-
Counting the Cost of Sentencing in North Carolina

After the passage of the new sentencing structure, the time arrived to make appropriations for the planned expansion in community corrections programs and budgets. Corrections officials were concerned that the legislature would fail to follow through on the funding necessary for these programs. But during its 1994 and 1995 sessions, the legislature funded the expansion in corrections programs without controversy. The link between prison and non-prison punishments remained intact.

The sentencing structure determined the total number of intermediate and community punishment slots needed. The 1993 legislation anticipated more use of probation officers. It established specific targets for an upper limit on the caseloads of probation officers—ninety regular cases or twenty-five intensive cases per officer—and included funds to hire over 500 new probation officers (Gen. Stat., sec. 15A-1343.2). But the structure did not decide which other existing or potential new programs would expand to fill the increased need. The 1993 legislation depended on several state agencies, along with local governments and local agencies, to develop the programs, using state funding and some general state standards of accountability (NCSPAC 1993b).

The sentencing commission contacted administrators of the existing community corrections programs and asked for a “five year plan” for expansion under the new sentencing structure (Lubitz 1996). Planners at various state agencies, including the Department of Correction and the Department of Health and Human Services, met regularly to coordinate their requests. In the past, each of the existing community corrections programs had submitted independent budget proposals. Under the auspices of the sentencing commission and the Department of Correction, these programs submitted a budget proposal to the legislature that unified what had once been diffuse political support for community corrections (Pearce 2001). This planning process made it possible to present a unified vision to the general assembly.

Under the new administrative structure, state and local government shared the responsibility. The state continued to fund and administer most of the largest programs, including those—such as intensive probation and electronic house arrest—that were expected to grow most quickly. Local governments continued to fund and administer the small number of programs already in place.

The centerpiece of the new partnership was an appropriation every year—$12 million each year for the first few years—available for grants to local governments. The state disbursed 80 percent of the
money in “formula” grants, with each county eligible for a different amount depending on population. The state reserved the remaining 20 percent for “discretionary” grants. Each county could appoint a local advisory board and submit to the Department of Correction a plan to expand an existing program or to create a new one. The discretionary grants often funded one-time capital expenses, such as renovating a building to house a day reporting center. Counties obtained operating expenses through the discretionary grants only for the first few years of a new program; after that time, state officials hoped that the local government would see the value of the program and fund it for themselves.

In the first few years under the new law, eighty-two of the state’s 100 counties applied for grants, and seventy were funded right away (Lubitz 2001). By 2000, ninety-three counties were receiving state grant funds to operate community corrections programs (Stahl 2001). The annual expense was relatively small: about $12 million, compared with a $200 million budget for the state’s probation and parole division and a $660 million operating budget for prisons. But the extra program slots generated with this money were critical to the credibility of structured sentencing with judges.

V. Changing Sentence Patterns, 1995–2000
The central goal of structured sentencing was to direct prison resources more emphatically to violent felonies while controlling prison costs by expanding the use of nonprison sanctions for lesser felonies. A secondary goal was to promote more deliberation in the legislature about new sentencing laws and perhaps to restrain any new growth in the use of prison. Other goals were to remove the gap between the announced sentence and the time served and to monitor sentencing practices so the system could adjust over time. Have sentencing practices actually changed in the direction that the system’s creators hoped they would? Although a complete review of the impact of structured sentencing goes beyond the scope of this historical overview, analysis of commission reports and the one independent evaluation completed thus far (Collins et al. 1999) offer partial answers.

A. Prison and Jail Terms
The basic objectives of structured sentencing were accomplished during its first few years of operation. The objective of “truth in sentencing” was the first and most straightforward achievement: all of
TABLE 4
Percentage of Active Terms Imposed for Felony Convictions

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<tbody>
<tr>
<td>All felonies</td>
<td>48</td>
<td>28.1</td>
<td>31.5</td>
<td>33.1</td>
<td>33.7</td>
<td>32.6</td>
</tr>
<tr>
<td>Violent crimes</td>
<td>66</td>
<td>64.0</td>
<td>63.2</td>
<td>64.1</td>
<td>64.8</td>
<td>60.4</td>
</tr>
<tr>
<td>Property crimes</td>
<td>45</td>
<td>24.7</td>
<td>26.9</td>
<td>28.5</td>
<td>28.4</td>
<td>27.8</td>
</tr>
<tr>
<td>Lesser drug crimes</td>
<td>36</td>
<td>12.0</td>
<td>17.1</td>
<td>16.9</td>
<td>18.1</td>
<td>19.0</td>
</tr>
<tr>
<td>Other felonies</td>
<td>65</td>
<td>49.2</td>
<td>55.5</td>
<td>55.5</td>
<td>52.8</td>
<td>52.9</td>
</tr>
<tr>
<td>Number of convictions</td>
<td>21,395</td>
<td>17,871</td>
<td>20,531</td>
<td>20,495</td>
<td>20,536</td>
<td>24,146</td>
</tr>
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funders sentenced under the new law serve 100 percent of the minimum term, unless the legislature later amends the sentencing laws to revive the dormant parole authority. Parole is a resilient practice, as the FSA experience in North Carolina—and similar episodes in states such as Florida—can attest (Handberg and Holten 1993). But at this point, its return in North Carolina does not seem likely.

The central priority of structured sentencing—sending fewer property crime offenders to prison, thereby allowing longer prison terms for violent offenders—also has taken hold as expected. As table 4 shows, fewer felons overall have gone to prison.

During fiscal year 1993–94, just prior to the beginning of structured sentencing, 48 percent of the felony convictions resulted in an active prison sentence. Under structured sentencing, the percentage dropped and remained between 28 and 34.

Much of the decline came from property crimes, as intended. As table 4 indicates, the proportion of active prison sentences imposed in property crimes fell from 45 percent in 1993–94 to somewhere between 24 and 29 percent for each year after the new law took effect (Ross and Katzenelson 1999).

But a corresponding increase in the percentage of active prison terms for violent felonies has not occurred. The proportion for violent crimes in 1993–94 was 66 percent, and remained near that level under the new law, ranging between 60 and 65 percent. The proportion of

10 Unless indicated otherwise, all the tables in this part of the essay draw on the annual “Monitoring Reports” issued by the commission. The figures for 1993–94 derive from a commission study of felony sentencing before structured sentencing (NCSPAC 1994). They do not include Mecklenburg County because of incompatibility of the computer systems for Charlotte.
TABLE 5
Mean Length of Active Terms Served or Minimum Term Imposed for Felony Convictions (Months)

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</thead>
<tbody>
<tr>
<td>Violent crimes</td>
<td>21.0</td>
<td>59.6</td>
<td>59.4</td>
<td>62.2</td>
<td>64.8</td>
<td>67.0</td>
</tr>
<tr>
<td>Property crimes</td>
<td>6.5</td>
<td>12.3</td>
<td>11.2</td>
<td>11.9</td>
<td>11.2</td>
<td>12.0</td>
</tr>
</tbody>
</table>


active prison sentences for some particular violent crimes did move up or down. The proportion of active prison terms for common law robbery went from 70 percent to 50 percent; three forms of rape (those other than first degree) went from the 60–86 percent range in 1993–94 to 100 percent under the new law. But these changes in particular violent crimes canceled each other out; the rate for the group of crimes remained about the same.

The changes in the use of prison for violent crimes came not in the proportion of felons going to prison, but in the length of the prison terms actually served. (The increase in the length of prison terms actually served in North Carolina is consistent with a national trend [Blumstein and Beck 1999].) As table 5 shows, the average time served for active prison terms imposed in fiscal year 1993–94 for personal injury crimes was twenty-one months. The minimum term imposed for personal injury crimes under structured sentencing ranged from 59.4 to 67 months. The average time served for property crimes also increased. Although fewer property felons received prison terms under structured sentencing, those who did go to prison served longer terms.

As the inmates sentenced under the new laws filled up the system, the overall makeup of the prison population changed. Since 1995, the population has shifted toward those who committed assultive crimes—from 46 percent in 1995 to 52 percent in 2000—and away from those who committed property crimes—from 27 percent in 1995...

11 The Department of Correction calculated in 2001 the mean time served for sentences imposed in FY 1993–94 for violent felonies and property felonies. As a result, the figure does not include those whose sentence is not yet complete. Ultimately, the figure for violent crime sentences imposed in 1993–94 will rise higher than twenty-one months. But given the large proportion of cases with a maximum term imposed of seven years or less (those whose sentences were complete by 2001), it is clear that the time served for 1995–96 sentences will remain higher.
to 18 percent in 2000 (North Carolina Department of Correction 2001, p. 12). The changes in the makeup of the population will make it more difficult over time for the state to use minimum- and medium-security prison facilities, another source of increased costs.

Thus, the system delivered on the feature that produced its broad political appeal. It directed prison resources to longer sentences for violent offenders. This did not occur quite as predicted, since the proportion of violent felons receiving an active term remained about the same. But the violent criminals who did go to prison received longer active terms. These outcomes make North Carolina a bit different from other sentencing guidelines states, where the proportion of violent offenders receiving active prison terms went up markedly, along with increases in sentence length (Knapp 1984, p. 31; Washington State Sentencing Guidelines Commission 1986, fig. 1; Gebelein 1997, pp. 89–90).

Although the system managed to redirect prison resources, it has not succeeded so clearly in slowing the growth of the prison system, one of the major concerns of the legislators who started this process in 1988. The prison system added (and used) lots of new beds during the 1990s. The legislature added prison capacity with the proceeds from the 1990 referendum bonds, and the construction from those funds was largely in place by 1994. The general assembly also provided for construction needed to handle the influx of new prisoners under the 1994 and 1995 increases in sentences, along with the anticipated natural growth in convictions, bringing the current system capacity to about 34,000. This is almost twice the size of the system in 1989. Local governments have also added jail capacity. The number of persons held in jails increased from 8,939 in 1993 to 10,122 in 1995 (Community Corrections Coalition 1996, pp. 4–5). With no further changes to the system, between 5,000 and 8,000 new prison beds will be needed over the next ten years (Katzenelson 2001).

Table 2 shows trends in the prison population in the state. A deluge occurred the first year that structured sentencing took effect: the population went from about 24,000 in 1994 to 29,000 in 1995. This increase, however, was the result of prisoners first admitted under the Fair Sentencing Act. The parole commission drastically slowed the rate of releases for prisoners sentenced under the old law in 1995, so the population grew more quickly than anticipated. Indeed, until the last of the new prison construction was ready for use, North Carolina had to rent prison space out of state (Neff 1996).
The prison population remained almost unchanged between 1996 and 1999, hovering around 31,000 inmates. As North Carolina’s general population increased, this meant a declining imprisonment rate for the state—from 379 to 345—during a time when the national average rate for the states was still climbing, from 394 to 434. In sum, while the prison system did grow during the 1990s, there were reasons to expect even faster growth.

After the increased spending and growth during the mid-1990s, the legislature has now adopted a system with almost the same prison capacity that the sentencing commission originally proposed in 1993. The commission at that time endorsed a system that would have increased prison space to just under 40,000 beds by 2004. The legislature adopted instead the less expensive “standard operating capacity” proposal, which would have resulted in a prison capacity of about 31,000 by 2004. With its 1994 and 1995 increases in prison usage, the legislature has split the difference between the SOC proposal and the commission’s original plan.

Did the legislature accomplish anything in 1993 by insisting on the lighter use of prison, only to add to the system again over the next few years? Perhaps the way things happened, prison growth occurred later and gave the state more time to pay for the expansion. The commission’s 1993 proposal would have required growth right away, while the increments added in 1994 and 1995 took longer to show their effects. It is also possible that even if the Democrat-dominated legislature in 1993 had opted for a more expansive program, the 1995 Republican-dominated legislature still would have left its own mark on the system by adding onto the existing population base.

But it is also plausible, after reviewing this history, to conclude that the new system did not control prison growth. Structured sentencing in North Carolina surely allowed for planned growth, but planning does not necessarily mean moderation. A system that monitors sentencing practices carefully also keeps criminal justice closer to the top of the public agenda. Growth might be built into this system.

In the end, we cannot know whether structured sentencing in North Carolina controlled the growth of the prison system. The fact that North Carolina’s rate of imprisonment grew more slowly than the national average (see table 2) is suggestive, but that trend was happening before the commission was born. It may be that prison rates reach equilibrium through forces other than sentencing policy. The movement toward the national average rates may be driven by demograph-
TABLE 6
Use of Intermediate and Community Punishments in Felony Cases (Percent)

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<tbody>
<tr>
<td>Intermediate</td>
<td>46</td>
<td>42</td>
<td>40</td>
<td>41</td>
<td>44</td>
<td></td>
</tr>
<tr>
<td>Community</td>
<td>52</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total felons</td>
<td>21,192</td>
<td>17,871</td>
<td>20,531</td>
<td>20,495</td>
<td>20,536</td>
<td>24,146</td>
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The influx of so many newcomers to North Carolina from other regions and nations. As Zimring and Hawkins (1991) have demonstrated, there is no clear relationship over the long haul between the scale of imprisonment and particular sentencing policies or social conditions. We have much to learn about what causes the stops and starts of massive prison growth.

B. Community and Intermediate Sanctions

The availability of more nonprison sanctions was necessary for the system to remain in balance. Local governments and state agencies developed enough programs overall. The sentencing commission also made efforts to educate sentencing judges about the programs available. Its annual “Compendium of Community Corrections Resources” listed the programs operating and described the types of offenders best suited for each (NCSPAC 2001a). But some types of programs—especially residential treatment programs—remained underdeveloped, and judges too often had to select a community or intermediate punishment that was not their first choice.

The overall use of community and intermediate punishments did grow as intended under structured sentencing. As table 6 shows, judges during fiscal year 1993–94 sentenced about 11,000 felony offenders to nonprison sanctions. By fiscal year 1998–99, those nonprison sentences had increased to over 16,000.

Most of the increase came in the use of intermediate sanctions. The largest single intermediate punishment, year in and year out, has been the split sentence (called “special probation”), under which the offender serves some fraction of the term—no more than a quarter of
the maximum term, with a six-month cap—in prison or jail, and the remainder of the term on probation. Intensively supervised probation has become almost as important as special probation, growing from 2,528 felons in 1992–93 to 10,362 felons admitted in 1999–2000. Day reporting centers, which did not exist before the advent of structured sentencing, now admit close to 4,000 felons each year.

Unfortunately, the supposed distinction between community sanctions and intermediate sanctions is not apparent to many of those working in the system. For many sentencing judges, intermediate punishments do not seem significantly different from community punishments (Drennan 2001).

The offenders in the intermediate programs are now more chronic and serious offenders than in the past. They present special challenges because they are less likely to comply with program rules and more likely to abscond (Pearce 2001). The number of offenders violating program requirements also could be a consequence of better monitoring rather than different behavior by the offenders. More intrusive supervision will inevitably uncover more violations of the program conditions (Tonry 1996, pp. 108–21).

The partnership between state and local authorities also hindered some of the newer intermediate programs. Local governments and agencies had experience providing mental health services, but they had no experience keeping tight controls on people outside the local jail. Thus, the intermediate programs meant to provide strict controls on offenders have operated more like the training and service-oriented community sanctions. It was perhaps asking too much of local agencies to design new programs so different from the ones they had known in the past. The Department of Correction may need to get more involved in setting standards or in operating intermediate programs, to assure judges that offenders sentenced to these programs will be properly monitored.

C. Trial Judge Signals about Proportionality

It is clear enough that the growth of prisons and intermediate punishments has occurred on a scale that legislators and commission­ers intended from the start. But judges, prosecutors, and defense attorneys do not concern themselves with the overall scope of the corrections system. They ask whether the punishment in the case at hand is proportional—that is, whether it is appropriate in light of the facts about the offense and the offender that everyone considers relevant. If they
believe that the sentencing structure is not distributing the available punishments fairly and proportionately, they will change their charging and sentencing practices. The ability of the North Carolina system in the future to recognize changing practices and to adjust as needed is still in doubt.

Any changes to the structure, whether large or small, must go through the legislative process. The commission does not have authority to accomplish these amendments by itself, through an administrative rule-making process. This process slows the reaction time when changes occur (Wright 1994).

Furthermore, because of the emphasis on control of resources in North Carolina, the system has a weakened ability to recognize changes in practice as they develop. Because its judges cannot “depart” from the prescribed sentence ranges, it is difficult for the commission to notice and respond to developing problems. In an ordinary “departure” jurisdiction, a pattern of departures in particular types of cases, including the explanations of the trial and appellate judges in such cases, is a rich source of information to a sentencing commission. It can signal the cases where judges are most unhappy with the operation of the sentencing rules and can suggest potential amendments to the rules (Wright 1991; Berman 2000).

In North Carolina, sentencing judges do not depart and do not give enlightening explanations for their decisions to choose a sentence in the “mitigated” or “aggravated” range. This leaves little room for appellate courts to create a common law of sentencing that could reinforce or redirect the statutes. Moreover, North Carolina’s appellate courts have been reluctant to use their limited authority. The court of appeals and supreme court have made it plain that they will overturn a sentence only based on legal error in calculating prior criminal record or for a failure to select one of the readily available grounds for an aggravated sentence. The government cannot appeal a sentencing judge’s decision to select a mitigated sentence.

It is true that appellate courts expect sentencing judges to make minimal factual findings to support an aggravating factor. For example, in State v. Ballard (349 N.C. 286 [1998]), the defendant was convicted of second degree murder after wrecking the car he was driving while impaired, killing the passenger, who was the son of his former girlfriend. The judge at sentencing found “abuse of a position of trust” as an aggravating factor, sending the sentence into the aggravated range. But the supreme court reversed, because the sentencing judge made no fac-
tual findings about whether the child's trust in the defendant caused him to get into the car.

The courts also hear many appeals complaining about trial judges who rely on nonstatutory aggravating factors. The appellate courts typically uphold the sentence. When they do overturn the use of an aggravating factor in the case, they stress that it is relatively easy for the sentencing judge to avoid trouble. Because the appellate courts have developed no limits on the weight that sentencing judges must put on a factor, any finding of a statutory aggravating factor will legitimize a sentence outside the presumed range. There is no reason for the sentencing judge in that situation to take the legal risk of creating a nonstatutory factor to test on appellate review. As the court advised in *State v. Rollins* (131 N.C. App. 601, 607 [1998]), "trial judges may wish to exercise restraint when considering nonstatutory aggravating factors after having found statutory factors."

Because it is so easy for sentencing judges to avoid trouble on appeal, the appellate courts in North Carolina have played almost no role in shaping sentencing policy. In other jurisdictions, such as Minnesota, the appellate courts became central players (Frase 1993a; Reitz 1997). In Alaska, appellate courts created "benchmark" sentences for various types of offenses. In the federal system, the U.S. sentencing commission relies on "circuit splits" to identify many potential trouble spots in the federal guidelines. The North Carolina sentencing commission cannot count on this sort of reasoned feedback from judges.

Instead of statements from trial and appellate judges, the North Carolina commission must rely on more subtle clues. In border boxes, the commission can watch for shifts over time from intermediate sanctions to active prison terms, or from community sanctions to intermediate sanctions (Wright 2001). They can also look for changes over the years in judges' choices between concurrent and consecutive sentences when there are multiple convictions. There are now some anecdotal reports that the use of consecutive sentences is increasing, especially for Class H and Class I felonies.

More telling are the proportions of cases that judges sentence outside the presumptive range for each grid box. Although these decisions are not accompanied by a full explanation and appellate review, the simple fact that many judges are moving outside the presumptive range says something about a potential problem spot.

Overall, the number of cases falling within the presumptive range has stayed fairly steady, moving between 79 and 83 percent. Table 7
TABLE 7  
Range Locations of Felony Sentences (Percent)

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<td>Aggravated, all</td>
<td>8.4</td>
<td>7.4</td>
<td>8.2</td>
<td>8.3</td>
<td>7.9</td>
<td>8.0</td>
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<tr>
<td>Level I only</td>
<td>12.8</td>
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<td>11.3</td>
<td>12.2</td>
<td>11.6</td>
<td>11.4</td>
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<td>Levels V–VI</td>
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<td>7.0</td>
<td>7.3</td>
<td>6.4</td>
<td>7.4</td>
</tr>
<tr>
<td>Presumptive, all</td>
<td>82.1</td>
<td>83.0</td>
<td>80.7</td>
<td>78.5</td>
<td>75.0</td>
<td>79.5</td>
</tr>
<tr>
<td>Level I only</td>
<td>70.7</td>
<td>75.7</td>
<td>72.5</td>
<td>70.2</td>
<td>68.3</td>
<td>71.5</td>
</tr>
<tr>
<td>Levels V–VI</td>
<td>84.8</td>
<td>84.1</td>
<td>84.2</td>
<td>81.7</td>
<td>78.7</td>
<td>82.2</td>
</tr>
<tr>
<td>Mitigated, all</td>
<td>9.5</td>
<td>9.6</td>
<td>11.1</td>
<td>13.2</td>
<td>17.1</td>
<td>12.4</td>
</tr>
<tr>
<td>Level I only</td>
<td>16.5</td>
<td>14.8</td>
<td>16.3</td>
<td>17.6</td>
<td>20.1</td>
<td>17.0</td>
</tr>
<tr>
<td>Levels V–VI</td>
<td>6.2</td>
<td>8.1</td>
<td>8.7</td>
<td>11.0</td>
<td>14.9</td>
<td>10.4</td>
</tr>
</tbody>
</table>


shows the presumptive, mitigated, and aggravated sentences imposed for each fiscal year since the start of structured sentencing. Aggravated and mitigated sentences were imposed in North Carolina about as often as judges in other states departed from the prescribed durations in their guidelines (Frase 1993a; Austin et al. 1996). But sentencing judges are now showing the first signs of discomfort with the sentencing structure as a whole. The most noteworthy change in the combined numbers is a near doubling of mitigated range cases, from 9.5 percent to 17.1 percent over the first five years.

The sentencing judges are not signaling any strong unhappiness with the role of prior criminal record in setting durations in the grid. If judges believed that the structure placed too much weight overall on prior record, Prior Record Levels V and VI (the most serious) would show the most mitigated sentences and the fewest aggravated sentences. That pattern has not appeared. Instead, Prior Record Level I (offenders with little or no criminal record) shows the highest proportions of both mitigated and aggravated sentences. The judges have responded in more diverse ways to offenders with less experience in the system, those at Level I.

It is also interesting that the aggravated range sentences have grown less quickly than the mitigated range. This holds true for all the levels of criminal record. The faster growth for mitigated sentences could mean that judges, on the whole, find the structure too severe to fit the cases they see from day to day. Alternatively, the faster growth in
the mitigated-range sentences may simply reflect the asymmetrical grounds for appellate review. Defendants may appeal aggravated-range cases, but the prosecution usually cannot appeal a judge's decision to impose a mitigated sentence (N.C. Gen. Stat., secs. 15A-1441, 1444, 1445).

There are also a few particular felony classes that are attracting more than the usual share of mitigated or aggravated sentences. Judges are choosing mitigated sentences more often than usual for Class D felonies—such as first degree burglary or armed robbery—and are choosing aggravated sentences more frequently for Class F felonies—such as assault inflicting serious injury, embezzlement, or some lesser forms of arson (Wright 1999).

Although the judges do not offer meaningful statements of reasons for their mitigated and aggravated sentences, the pattern of sentences has something to say. By breaking down the felony classes into particular crimes, the commission can discover which crimes are the source of judicial discontent. If judges are too often unhappy with the normal choices available to them for a given crime, some change in the structure might be necessary. The commission must inquire at this level of detail if it hopes to hear what judges are saying about the workability of its presumptive sentencing ranges over time.

Now that the sentencing structure has settled into place, the commission can begin to address questions about racial disparity that have always remained in the background under structured sentencing. The race of all felons taken together has not changed much since the start of structured sentencing. According to sentencing commission calculations, the proportion of blacks convicted of felonies has ranged between 59.4 percent and 63.1 percent since 1995–96, and the numbers do not show any particular trend. The proportion of whites convicted of felonies has stayed between 33 and 37 percent, again showing no trend over time. The percentage of Hispanics, although small, has grown steadily from 0.5 percent in 1995–96 to 1.9 percent in 1999–2000.

A study of structured sentencing in North Carolina by the Research Triangle Institute (Collins et al. 1999) found almost no shift in the racial mix of convicted felons after structured sentencing took effect. The percentage of blacks changed from 56.7 percent in 1994 to 55.7 percent in 1996.

The stability in the aggregate numbers does not mean that racial disparity is missing from North Carolina sentencing. The figures re-
ported above compare unfavorably to the overall population of North Carolina, which the 2000 Census identified as follows: 70.2 percent white, 21.6 percent black, 4.7 percent Hispanic, and 1.2 percent American Indian. Nobody has yet investigated whether the disproportionate number of blacks in the prison population is explained by different levels of participation in crime, or racial differences at arrest, charging, conviction, and sentencing, or some combination of them all. The commission stopped publishing demographics for particular crimes or types of sentences after its first two full years of statistical reports, so it is difficult to delve any further into the influence of race at sentencing. The commission is currently researching this subject and will soon issue a report.

D. Shifts in Charging Decisions

A system that makes the charge of conviction one of the two major factors in selecting the proper range for a sentence gives enormous power to the prosecutor. The high volume of work in state court makes it difficult for a prosecutor’s office to take full advantage of this power by systematically changing its charging practices (Miethe 1987). Momentum plays a huge role in a busy state system.

Despite the press of time, however, North Carolina prosecutors do appear to be adjusting their charging habits over time. There is some evidence of “bracket creep.” If prosecutors were systematically choosing charges that take full advantage of the sentencing structure, then one would expect over time to notice higher numbers of crimes being charged in the higher felony classes, and higher numbers in the more serious criminal history categories on the right side of the grid. According to table 8, both of these shifts are taking place to a limited degree, both for felonies and for misdemeanors.

For felonies, the proportions of low-level (Classes H and I) felonies have gone down slightly throughout the first five years of structured sentencing. Meanwhile, the percentages of some midlevel felonies (Classes F and G) have gone up during the same period. Unless criminal behavior has become more serious in North Carolina during this period of falling crime rates, this trend indicates that prosecutors are becoming more aggressive about selecting felony charges. The numbers are similar for misdemeanors. The most serious category, Class A1, has increased in about the same amount that Class I has decreased. The small increase in the seriousness of felonies charged marks a distinction between North Carolina and some other states, where prose-
TABLE 8
Offense Class, 1995–2000 (Percent)

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>A</td>
<td>.2</td>
<td>.3</td>
<td>.3</td>
<td>.4</td>
<td>.2</td>
</tr>
<tr>
<td>B1</td>
<td>.4</td>
<td>.3</td>
<td>.5</td>
<td>.5</td>
<td>.5</td>
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<tr>
<td>B2</td>
<td>1.1</td>
<td>1.0</td>
<td>1.2</td>
<td>1.4</td>
<td>1.0</td>
</tr>
<tr>
<td>C</td>
<td>2.2</td>
<td>2.1</td>
<td>2.6</td>
<td>2.9</td>
<td>2.6</td>
</tr>
<tr>
<td>D</td>
<td>3.0</td>
<td>2.9</td>
<td>3.0</td>
<td>3.1</td>
<td>3.0</td>
</tr>
<tr>
<td>E</td>
<td>4.9</td>
<td>5.1</td>
<td>5.4</td>
<td>4.8</td>
<td>4.1</td>
</tr>
<tr>
<td>F</td>
<td>3.5</td>
<td>4.1</td>
<td>4.8</td>
<td>5.4</td>
<td>6.8</td>
</tr>
<tr>
<td>G</td>
<td>7.0</td>
<td>7.5</td>
<td>8.3</td>
<td>10.6</td>
<td>11.6</td>
</tr>
<tr>
<td>H</td>
<td>46.6</td>
<td>44.1</td>
<td>41.5</td>
<td>40.7</td>
<td>40.0</td>
</tr>
<tr>
<td>I</td>
<td>31.2</td>
<td>32.5</td>
<td>32.5</td>
<td>30.3</td>
<td>30.2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
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<th></th>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A1</td>
<td>3.4</td>
<td>7.8</td>
<td>10.6</td>
<td>10.7</td>
<td>9.8</td>
</tr>
<tr>
<td>1</td>
<td>60.7</td>
<td>54.6</td>
<td>51.0</td>
<td>51.9</td>
<td>53.7</td>
</tr>
<tr>
<td>2</td>
<td>21.4</td>
<td>22.9</td>
<td>23.4</td>
<td>22.8</td>
<td>20.6</td>
</tr>
<tr>
<td>3</td>
<td>14.5</td>
<td>14.7</td>
<td>15.0</td>
<td>14.6</td>
<td>15.9</td>
</tr>
</tbody>
</table>


...cutors charged fewer serious crimes after new sentencing guidelines took effect (Tonry 1988). Table 9 shows similar changes happening in the level of criminal history points that defendants are accumulating.

Both for felonies and misdemeanors, the least serious category (Level I) is becoming less common over time, while each of the higher levels is growing slightly over time. Perhaps prosecutors are searching more thoroughly for prior criminal convictions or are finding ways to structure charges—by filing multiple charges, for instance—to escalate criminal history more quickly. Frase (1993a) described efforts by prosecutors in Minnesota along these lines.

Collins et al. (1999) found evidence that prosecutors are now filing more charges than they did before 1995. The number of single-charge felony cases stayed flat between 1994 and 1996 (about 31 percent). However, in multiple-charge felony cases, there was a slight shift from cases with two charges up to cases with three or more charges, as table 10 shows.

The Collins study found clearer signs of changes in charging and plea negotiations by looking at the number of cases dismissed and the cases where the defendant was convicted of fewer or less serious crimes...
Counting the Cost of Sentencing in North Carolina

TABLE 9
Changes over Time in Criminal History Level (Percent)

<table>
<thead>
<tr>
<th></th>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Felony level:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I</td>
<td>33.3</td>
<td>33.5</td>
<td>33.2</td>
<td>30.6</td>
<td>27.3</td>
</tr>
<tr>
<td>II</td>
<td>35.3</td>
<td>35.7</td>
<td>36.1</td>
<td>36.5</td>
<td>36.0</td>
</tr>
<tr>
<td>III</td>
<td>18.3</td>
<td>17.9</td>
<td>17.7</td>
<td>18.4</td>
<td>19.5</td>
</tr>
<tr>
<td>IV</td>
<td>9.9</td>
<td>9.8</td>
<td>9.6</td>
<td>10.6</td>
<td>12.6</td>
</tr>
<tr>
<td>V</td>
<td>1.8</td>
<td>1.9</td>
<td>2.2</td>
<td>2.3</td>
<td>2.9</td>
</tr>
<tr>
<td>VI</td>
<td>1.3</td>
<td>1.1</td>
<td>1.1</td>
<td>1.5</td>
<td>1.7</td>
</tr>
<tr>
<td>Misdemeanor level:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I</td>
<td>47.9</td>
<td>50.0</td>
<td>47.8</td>
<td>45.8</td>
<td>45.7</td>
</tr>
<tr>
<td>II</td>
<td>39.7</td>
<td>38.3</td>
<td>39.6</td>
<td>40.7</td>
<td>41.2</td>
</tr>
<tr>
<td>III</td>
<td>12.4</td>
<td>11.7</td>
<td>12.6</td>
<td>13.5</td>
<td>13.1</td>
</tr>
</tbody>
</table>


than the prosecutor originally filed. As summarized in table 10, there were increases in all these areas.

Taken together, tables 8–10 reveal a bit of a paradox. On the one hand, prosecutors appear to be obtaining convictions for more serious offenses and more extensive criminal records. On the other hand, they are dismissing and discounting more felony charges. Perhaps prosecutors are charging more aggressively for many felonies and then are dis-

TABLE 10
Indications of Changes in Felony Charging Practices (Percent)

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Single charge filed</td>
<td>31.2</td>
<td>31.4</td>
</tr>
<tr>
<td>Two charges filed</td>
<td>25.1</td>
<td>23.9</td>
</tr>
<tr>
<td>Three or more charges filed</td>
<td>43.7</td>
<td>44.7</td>
</tr>
<tr>
<td>Multiple charges, most serious dismissed</td>
<td>46.3</td>
<td>48.5</td>
</tr>
<tr>
<td>Reduction in number of offenses between charge and conviction</td>
<td>74.3</td>
<td>76.5</td>
</tr>
<tr>
<td>Single offense charged, reduction in offense class at conviction</td>
<td>59.7</td>
<td>64.2</td>
</tr>
<tr>
<td>Multiple offenses charged, reduction in offense class for most serious offense</td>
<td>59.3</td>
<td>63.3</td>
</tr>
</tbody>
</table>

Source.—Collins et al. 1999, tables 2.4, 2.6, 2.7, 2.8, 2.9.
Table 11
Habitual Felon Convictions, with Class of Most Serious Previous Felony (Percent)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>213</td>
<td>248</td>
<td>342</td>
<td>460</td>
<td>560</td>
</tr>
<tr>
<td>Class D</td>
<td>7.0</td>
<td>4.0</td>
<td>5.8</td>
<td>5.2</td>
<td>5.7</td>
</tr>
<tr>
<td>Class E</td>
<td>6.6</td>
<td>3.6</td>
<td>3.5</td>
<td>3.7</td>
<td>2.3</td>
</tr>
<tr>
<td>Class F</td>
<td>1.4</td>
<td>3.2</td>
<td>2.6</td>
<td>2.4</td>
<td>4.1</td>
</tr>
<tr>
<td>Class G</td>
<td>9.4</td>
<td>9.7</td>
<td>12.6</td>
<td>12.8</td>
<td>19.8</td>
</tr>
<tr>
<td>Class H</td>
<td>54.5</td>
<td>55.2</td>
<td>46.8</td>
<td>50.9</td>
<td>43.8</td>
</tr>
<tr>
<td>Class I</td>
<td>19.7</td>
<td>23.8</td>
<td>24.3</td>
<td>20.9</td>
<td>16.6</td>
</tr>
</tbody>
</table>


missing or discounting more heavily only in those cases where the defense has more negotiating leverage.

There is one particular area that is contributing to the increase both in felony levels and to the importance of prior criminal records. The “habitual felon” provisions, as expanded in 1994, allow prosecutors to target any felony defendant who was convicted of any three previous felonies. This could include relatively minor crimes such as failure to appear. The habitual felon is then convicted of a Class C felony, even if the underlying offense was a much less serious class (N.C. Gen. Stat., sec. 14-7.1). This provision gives prosecutors the power to ignore the sentencing structure for most defendants who would normally land in the lower right-hand quarter of the sentencing grid.

Before structured sentencing arrived, prosecutors did not often invoke the habitual felon law. Prosecutors obtained convictions on 82 habitual felony charges in 1991, 136 in 1992, 164 in 1993, and 230 in 1994. But after the passage of structured sentencing, the small annual increases started to mount. As table 11 shows, the previous felonies committed by those who are later convicted as habitual felons shifted away from highest and lowest classes (D, E, H, and I), and toward the middle classes (F and G).

Given the length of sentences involved for Class C felonies (up to 210 months for those with enough prior convictions), the increase is now significant. Habitual felon has become by far the most common charge in Class C (560 of the 618 convictions for Class C in 1999–2000).
Why are prosecutors turning more often to habitual felon charges? The increase may reflect general objections by prosecutors to the weight that the structure gives to prior record. A habitual felon charge dramatically increases the importance of prior record. But it seems more likely that the habitual felon laws reflect a prosecutorial strategy for a special type of case. Under the old law, if the prosecutor encountered a defendant who seemed especially dangerous even though the crime charged was not very serious, the judge still had enough discretion to impose a long prison term. Under structured sentencing, the constraints are tighter and it becomes more worthwhile for the prosecutor to do the extra paperwork needed to move the defendant up into Class C.

Prosecutors in different districts have different approaches to the habitual felon law. Some make it a priority to increase the use of this law, while others ignore it (Cunningham 2000). In those districts most actively pursuing habitual felon cases, prosecutors use a few techniques to expand the reach of the law. The Governor’s Crime Commission, under the “Bull’s Eye Project,” funded extra prosecutors in selected offices around the state to complete the extra paperwork necessary (verification of prior convictions) to increase habitual felon prosecutions. Some offices also found ways to convert multiple misdemeanor convictions into a habitual felon case. Under North Carolina’s chaotic criminal code, multiple convictions for some misdemeanors—such as breaking into coin-operated machines—can be charged as a felony (N.C. Gen. Stat., sec. 14-56.1). These charges combine with other felonies to create the necessary prior convictions (Spence and Boyum 2000).

Such a systematic effort to exploit a weak point in the sentencing structure is a real danger for the future. What is happening with habitual felon crimes could just as easily happen with assault crimes and others that give the prosecutor a choice among related crimes within different felony classes (Wright 2001). This is a blind spot in the North Carolina sentencing scheme. While the effects of shifting charging decisions have not been large so far, prosecutors could throw the system into serious imbalance before the commission and the legislature could react.12

12 The sentencing commission recommended new restrictions on the habitual felon provision as part of a legislative package that the general assembly will debate during 2002.
VI. Conclusion
North Carolina sentencing is approaching another transition point. The initial period of guideline development and the creation of a working relationship with the legislature is ending. After about five years of routine operation, favorable attention in the national press cast a positive light on this first phase. Both Robin Lubitz and Judge Tom Ross received national recognition for their work and made speeches to national public policy groups. In October 1997, the commission was one of ten programs nationwide to receive the Innovations in American Government award from the Ford Foundation. Newspaper articles in states with troubled sentencing systems sometimes turned to North Carolina as a possible solution (Hall 1999; Atlanta Journal-Constitution 2000). Although other states were operating systems similar to North Carolina's—and indeed had pioneered the basic features of the system—the conservative political culture of this southern state made North Carolina an appealing model. The optimistic view of the North Carolina experience was that better targeting of prisons and expansion of community punishments were possible in many places and not just in a handful of more liberal states such as Minnesota, Washington, and Massachusetts.

More difficult times for the sentencing commission will likely arrive in the near future. The commission has new leadership: Robin Lubitz left in 1997, and the commission hired Susan Katzenelson as the new executive director. Tom Ross, who was considered synonymous with structured sentencing, left in 1999 and was replaced by superior court judge Erwin Spainhour. Katzenelson has meaningful experience at other sentencing commissions; she served as staff director at the federal sentencing commission. Spainhour also brings credibility to the job; he had served on the sentencing commission since 1998. But neither has yet faced the sort of intense political testing that was a daily reality for the commission during the first half of the 1990s.

Such intense moments will occur within the next few years. If the commission's population projections hold true, then by 2002 the state's expanded prison capacity will be full again. The legislature will have to decide whether to expand prisons again to meet the next few years of growth or keep the prison capacity steady and shift more offenders into other punishments. Or another more insidious possibility could occur: the legislature could do nothing at all, and allow the strong linkage between sentencing rules and corrections resources to atrophy, inviting another crisis down the road.
Counting the Cost of Sentencing in North Carolina

Whatever the future holds, it is already possible to reach some judgments about the recent past. The second phase of sentencing redesign in North Carolina sustained its promise longer than the first did. Structured sentencing appears to be more successful and stable today than was true after the first five years under the FSA. Perhaps this is because the FSA endured a more severe test early on. Violent crime rates and numbers of convictions were rising when the FSA took effect, while structured sentencing began to operate about the time that violent crime rates began to fall.

But there were also important differences in the design of the two statutes. Structured sentencing fared better than the FSA for one overarching reason: the legislature viewed structured sentencing as a long-term management process rather than a one-time change to the sentencing rules. The decision to fund the sentencing commission permanently reflects this view. Steadier investment in both prison space and credible alternatives also reveals this ongoing management mentality and distinguishes the current system from the early 1980s. Neglect of corrections resources, alternating with haphazard growth, led to the downfall of the FSA. Thus far, the corrections resources for structured sentencing have kept pace with growth in the state's population. There is reason to hope, therefore, that no pressure is building beneath the surface among judges for greatly expanded sentencing options.

The legislature has maintained some self-discipline in the form of routine fiscal notes; this is a sign that the state's elected leaders think of sentencing as an ongoing management process. The commission has also acted with an awareness of its long-term place in system management. Among its highest priorities was its reputation among lawmakers as an apolitical source of technical information. It devoted careful attention to its routine projections for prison populations and use of other corrections resources. The executive director and chair of the sentencing commission have become two of the most influential policy makers in the state on matters of criminal justice, yet they operate within political boundaries set by others.

This approach to sentencing policy, emphasizing fiscal planning, has benefited North Carolina. Perhaps it was the only viable way to convince a politically fractured commission—in a politically fractious state—to endorse a plan. If the legislature had instructed the commission to address unequal distribution of punishment among defendants, the commission might have foundered. The members were not going
to agree on how to apply general sentencing purposes to concrete sentencing rules. Because of the legislature’s impatience with more prison spending during a stretch of tight state budgets, the commissioners never had to resolve for themselves the ideal use of prison as a sanction. It was easy to agree on the best use for prison—directing it toward violent offenders—and to leave the rest unanswered.

But there are losses to go along with the gains for managerial sentencing. Important questions about sentencing have gone unasked and unanswered in North Carolina. Some relate to crime control. Is the structure selecting those defendants who are most likely to commit truly harmful crimes and using the state’s prison space to incapacitate criminals and reduce crime in a targeted way? Some questions relate to the scope of the criminal code. North Carolina has one of the most vague, disjointed, and duplicative substantive criminal codes in the nation (Robinson, Cahill, and Mohammad 2000). Would a revision of the code prove more effective than election of prosecutors as a way for the public to control the criminal sanction?

Some of the most urgent questions—as always in American life—relate to race. What explains the racial differences in the sentences that North Carolina courts impose? Is it possible to isolate the most important causes and to change practices? Other states have pursued these questions more aggressively than North Carolina (Dailey 1993).

Thus, designers of sentencing systems elsewhere might look to North Carolina for guidance on some questions, even while appreciating that the state has not yet progressed much on some other crucial dimensions of sentencing policy. North Carolina offers the most when it comes to the connections between prison and other punishments. The structure not only determines the “in-out” disposition for most sentences but also designates which of two categories—intermediate or community punishments—the judge should select for nonprison sentences. The structure also controls to a limited degree the overall length of the nonprison punishment. The legislature understands the linkage between funding for community punishments and longer prison terms for violent offenders, and the commission monitors the number of available program slots.

Other places might also take note of the state’s handling of misdemeanors. The North Carolina structure was one of the first to cover misdemeanors as well as felonies. The coverage was crucial for the system to prevent misdemeanants from overwhelming the prisons and jails, not to mention the intermediate punishment programs. Much of
the prison overcrowding under the FSA grew from the fact that many misdemeanants were assigned to the prison system rather than to local jails. The new system would have failed if it had ignored misdemeanors. North Carolina’s system demonstrates that it is possible to construct a misdemeanor grid that is workable in the busy, high-volume atmosphere of misdemeanor court.

The limited role for judges—especially appellate judges—in the North Carolina system is also noteworthy. The aggravated and mitigated ranges function much like durational departures in other states; the “border boxes” offer judges some of the freedom of a dispositional departure. But North Carolina judges are still confined more closely than their colleagues elsewhere. This leaves few opportunities for appellate courts to shape the system, and the appellate decisions thus far have declined the few opportunities that have appeared. Such a system does make it easier to predict judicial behavior and to plan correctional resources. North Carolina has demonstrated that tight limits on judges will not necessarily create major opposition from the judges during the legislative debate. Whether the commission can adjust the system over time with only muted feedback from judges remains to be seen.

Some of these lessons are transferable to other places, because they resulted from the structure of the institutions involved. The legislature thought carefully about the groups that sent representatives to the commission. Although the initial legislation was not explicit on the question of prison capacity, later signals made it plain that the commission would have to remain within current prison resources. The commission staff highlighted for everyone the connections between felons and misdemeanants, between prison and nonprison sanctions. All of these structural features of the North Carolina system might work in other settings.

There are other parts of the North Carolina experience, however, that might not transplant so easily. The political savvy of figures such as Jim Coman, Gregg Stahl, Ann Barnes, Tom Ross, and Robin Lubitz might be difficult to duplicate. And part of the story in North Carolina turned on a working habit—incrementalism—that developed for reasons now hard to reconstruct. The state’s leaders have shown, over the last ten years, an ability to give routine attention to sentencing matters without allowing themselves to unravel their earlier work. If this incrementalism continues, the next twenty years of sentencing policy could (with a little luck) prove far less interesting than the previous twenty.
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