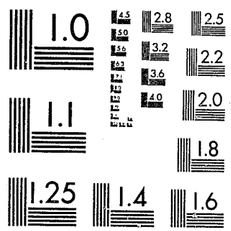

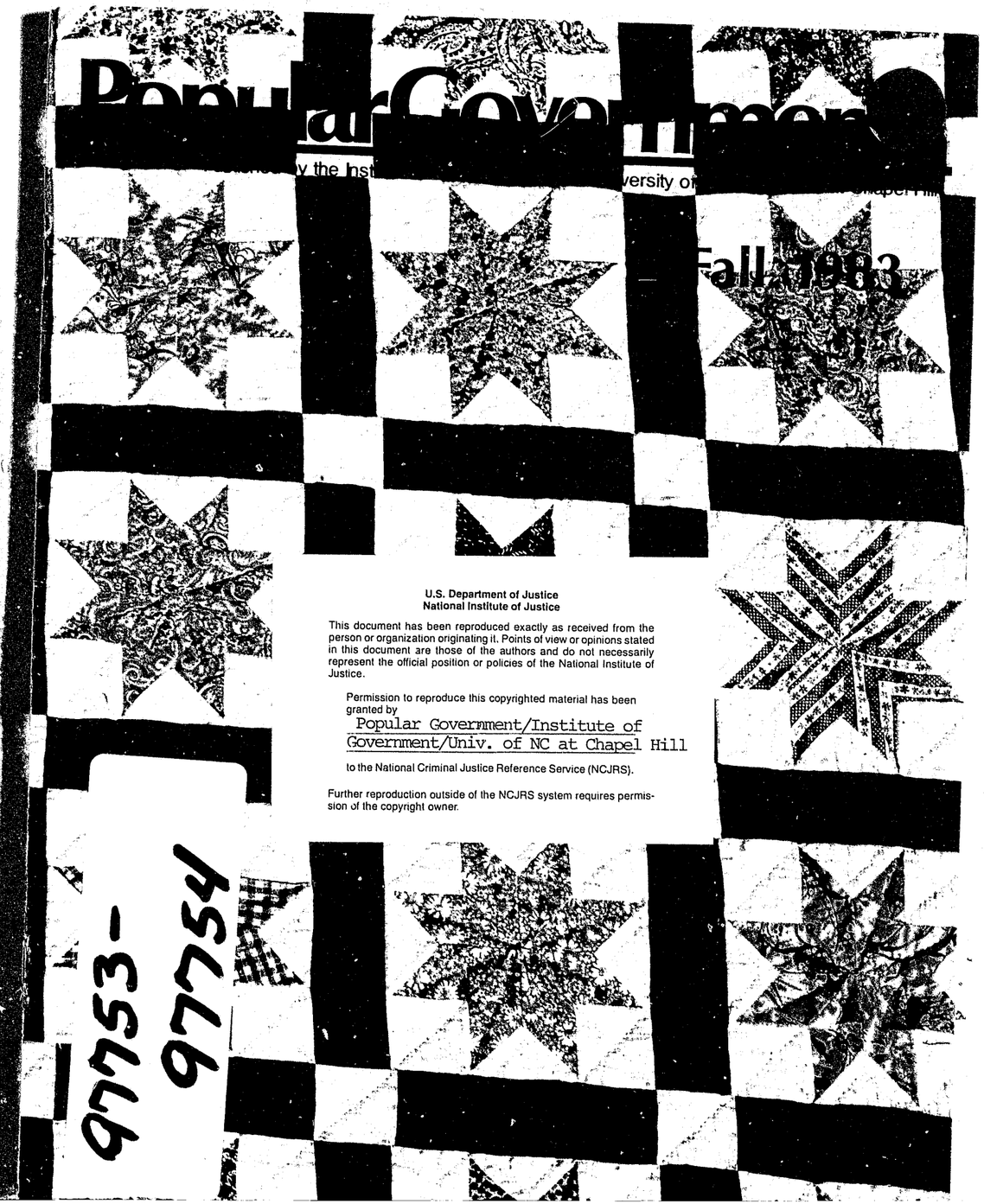

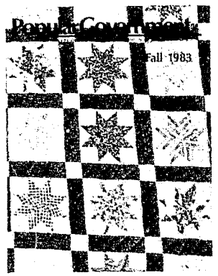

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Articles

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Cover Photo:
Quilting is a traditional folk art in North Carolina. Photo by C. Angela Mohr.
Maps and charts *by Ted Clark.*

Managing Prosecution

Brian Forst

It is well known that the prosecutor is a central figure in most stages of the court processing of criminal charges. The specifics, however, are less well known. Computerized data from a large number of district attorneys throughout the country reveal that about 40 per cent of all felony arrests brought to prosecutors are rejected at the screening stage or dropped soon after, usually because evidence of the crime is inadequate or because a key witness is unavailable.[1] Only 1 per cent of all felony arrests are dropped because of constitutionally inadmissible evidence.[2] Only 7 per cent of all felony arrests ever go to trial.[3] Less than one-tenth of 1 per cent are found not guilty by reason of insanity.[4] Prosecutors tend to focus on the big cases, often at the expense of many more cases that involve dangerous repeat offenders but are less interesting. Even the toughest D.A.s typically release several times as many criminal defendants as the most lenient judges release through dismissals, acquittals, and suspensions of prison sentence.

Data collected by the Institute of Government in twelve representative North Carolina counties in 1981-82 give a similar picture.[5] Of 1,193 defendants arrested and charged with felonies (serious crimes like rape, robbery, illegally entering a building to steal property, and so on), 37 per cent had all charges dismissed. In the vast majority of these cases the dismissal was made at the discretion of the prosecutor.

Prosecutors also exercise discretion by accepting pleas to lesser charges (often misdemeanors) from defendants charged with felonies. Nationwide, guilty pleas outnumber guilty verdicts by more than five to one. In the Institute's North Carolina study, 58 per cent of those charged with felonies pleaded guilty—28 per cent to a felony and 30 per cent to a misdemeanor. Thirty-nine per cent of the North Carolina defendants who pleaded guilty did so with a formal written plea bargain in which the prosecutor promised a quid pro quo (such as dismissal or reduction of some of the defendant's charges or a particular recommendation to the judge as to the sentence). Only 4 per cent of the defendants received a complete trial. The prosecutor's actions affected the sentence that defendants received, not only via charge dismissal or reduction of the charge but also directly by recommendation as to sentence; when defendants pleaded guilty to felony charges, 37 per cent of the time they did so with a formal plea bargain in which the prosecutor agreed to make a sentencing recommendation to the judge that the judge later approved.

In short, the available evidence indicates that prosecutors have a profound influence on most stages of the court processing of criminal charges, although not as often in trial or in the shadow of legal technicalities as is widely believed.

Prosecutorial decision-making

Which arrests end in conviction? Recent research in several jurisdictions shows that some factors that influence whether an arrest ends in conviction are beyond the direct control of the prosecutor: the strength of the evidence as presented to the police officer, whether crime victims and witnesses are willing to testify, the effectiveness of the officer in bringing the evidence (both tangible and testimonial) to the prosecutor, and the seriousness of the offense.[6] Other factors

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This article was adapted from *Prosecution and Sentencing, in* CRIME AND PUBLIC POLICY (Wilson ed. 1983).

The author is grateful to Steve Clarke for his helpful editorial suggestions and is alone responsible for errors.

1. B. FORST, J. LUCIANOVIC, & S. COX, WHAT HAPPENS AFTER ARREST? (1977); K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING (1979); CALIFORNIA BUREAU OF CRIMINAL STATISTICS, ADULT FELONY ARREST DISPOSITIONS (1981).

2. B. FORST, ET AL., *id.*, at 28; K. BROSI, *id.* This is not to suggest that the practice of aborting or retarding prosecution is an appropriate response to questionable police procedures of obtaining evidence. The 10,000 or so felony cases that are rejected annually in the United States because of such violations of due process rights may be 10,000 too many from the victims' point of view. I wish only to point out here that the problem is small from another perspective: For each case rejected because of the exclusionary rule, about 20 are rejected because the police failed to produce sufficient tangible or testimonial evidence.

3. See references at note 1 *supra.* Also, VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS (1977).

4. J. MONAHAN & H. STEADMAN, eds., MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCES (1983).

5. See the article by Stevens H. Clarke in this issue of POPULAR GOVERNMENT.

6. B. FORST, ET AL., *op. cit. supra* note 1; B. FORST, F. LEAHY, J. SHILAKLY, H. TYSON, E.

they need to develop into able trial lawyers. The Courts Commission addressed this point in its recent report to the General Assembly:

> The Commission believes it is desirable to have as many private lawyers as possible actively participating in the criminal courts, for many reasons, and to that end it recommends that any public defender's office be staffed and expected to handle no more than 70 per cent of the indigent defense work in the district. Cases in which the public defender's office cannot ethically represent a defendant will always require some assigned counsel to be used, but the Commission believes the State's policy should go beyond that minimum.[21]

Such a policy may be a way to provide experience to young lawyers. But young lawyers hired as assistant public defenders get experience too. In fact, they probably learn criminal defense work much faster and better than they would if they got occasional assignments to defend indigents. Also, because young assistant public defenders are supervised by an experienced specialist (the public defender), the client may be less likely to suffer from mistakes of inexperience than if he were represented by young assigned counsel. In any event, there is a serious question as to the propriety of sacrificing the indigent defendant as a "guinea pig" for the development of the fledgling (assigned) lawyer.

Another objection to the public defender system is that the defenders are paid by the state, just as the prosecutors are, and may therefore be too cooperative with the prosecutors. There has been no evidence to support this complaint. Indeed, the same argument could be made against assigned private counsel. After all, it could be argued that the trial judge decides what the assigned attorney is paid, and this makes the assigned attorney too "cooperative" with the court and thus not aggressive enough in promoting his client's interests.[22]

The public defender system is in full and effective force in seven judicial districts. I believe that it should be expanded. Expansion into districts where it would be most cost effective is now being cautiously considered. I agree with the Courts Commission, which in its recommendation to expand the public defender system where it would be cost effective said: "In the final analysis, however, the court system belongs to the public, and it is their best interest that should be served. If that best interest requires a public defender system to provide some of the legal representation for indigents, the preference of the bar and bench must be secondary." •

21. *Op. cit. supra* note 4.

22. For example, a superior court judge recently complained to an assistant public defender that it was a waste of state money to have the closing arguments in a jury trial recorded. The court complained that the public defenders regularly moved for recordation whereas the private lawyers did not. A privately assigned lawyer could easily yield to this type of judicial pressure, especially if counsel thought that the judge may make a reduced fee award for not succumbing to the judge's wishes.

Managing Prosecution

(continued from page 4)

duce the data. District attorneys can induce police, for example, to make better arrests by periodically providing information—broken down by department, precinct, and officer—to police supervisors about the outcomes of the arrests brought to prosecution.[20] These reports could include information about the frequencies of each major type of outcome and the reasons for dismissals. Information about outcomes of cases could also be given routinely to victims and witnesses. Police, victims, and witnesses are essential to prosecution; they deserve more systematic feedback than they now receive about how their cases turn out.

Basic management improvements like those described above may soon be standard prosecution practice. Guidelines are gradually gaining acceptability, and more statistical information about prosecution is becoming readily available in many states. Why? One apparent reason is that information-processing technology has advanced so much that it has become irresistible even to those who are ordinarily reluctant to modify the familiar way they do business. This technology in turn produces the data that, when analyzed, often make the need for the guidelines more apparent. A second inducement to reform in prosecution management is pressure—from peers in other jurisdictions, from legislative bodies, from budget officials, from the media, and from political opponents. It is simply no longer respectable for a prosecutor to reject sound principles of management or to resist reasonable attempts to structure the exercise of discretion. •

20. Interviews conducted in 1979 with 180 police officers who made arrests in two metropolitan jurisdictions (Manhattan and Washington, D.C.) revealed that none of the officers (nor their immediate supervisors) routinely received information about the court outcomes of their arrests. B. FORST, ET AL., *op. cit. supra* note 6.

G1759

North Carolina's Fair Sentencing Act: What Have the Results Been?

Stevens H. Clarke

The Institute of Government recently completed a study that assessed the effects of North Carolina's new determinate sentencing law, the Fair Sentencing Act,[1] by comparing the first year of experience under the new act with experience in previous years. The study was done for the Governor's Crime Commission with a grant from the National Institute of Justice.[2] This article summarizes its results.

Generally speaking, the Fair Sentencing Act (FSA) was intended to reduce unjustified variation in felony sentences and to make sentences more predictable, but not necessarily more severe.[3] Briefly, the FSA:

—Applies only to felonies committed on or after July 1, 1981.

—Leaves former wide ranges in possible prison terms unchanged for most felonies (example: zero to ten years for felonious larceny).

—Sets a presumptive (standard) prison term for each felony (example: three years for felonious larceny).

—Establishes certain criteria (aggravating and mitigating factors) that the judge must consider in deciding whether to impose a nonpresumptive prison term.

—Requires judges either to impose the presumptive prison term or to give reasons in writing for imposing a different term unless the sentence is imposed pursuant to a plea bargain approved by the judge.

—Allows judges to do any of the following without giving written reasons: suspend the prison term with or without probation supervision, impose consecutive prison terms for multiple convictions, and grant CYO (committed youthful offender) status to a felon under 21[4] with eligibility for immediate discretionary parole.

—Provides a right of appellate review of a prison term longer than the presumptive term if the sentence was not imposed pursuant to a plea bargain, and facilitates appellate review by requiring a record of reasons for nonpresumptive prison terms.

—Eliminates discretionary parole except for CYOs.

—Provides for deductions of good time and gain time[5] from the prison sentence at fixed statutory rates, subject to much less discretion by prison officials than former law allowed.

During the study, the Institute interviewed a number of prosecutors, judges, and defense attorneys concerning the FSA and its expected and actual effects. Those interviewed made a variety of assertions about the FSA's effect that were tested as hypotheses in the study. Besides the interviews, four sources of data were used: (1) a sample from twelve representative

The author is an Institute faculty member whose field is criminal justice.

1. N.C. GEN. STAT. § 14.1; *id.* §§ 15A-1021, -1340.1 through -1340.7, -1380.1, -1380.2, -1414, -1415, -1442, -1444; *id.* § 148-13.

2. Neither of these agencies is responsible for any statement made in this article.

3. See CLARKE & RUBINSKY, NORTH CAROLINA'S FAIR SENTENCING ACT (2d ed. Institute of Government 1981).

4. After this study was completed, the General Assembly raised the CYO age limit to 25 for misdemeanants and certain felons; N.C. Sess. Laws 1983, Ch. 531.

5. Under the FSA, "good time" is a deduction of one day of the sentence for each day spent in prison without major misconduct, and "gain time" is a deduction at various rates set by statute for work or study assignments. See N.C. GEN. STAT. § 15A-1340.7; *id.* § 148-13.

counties,[6] which provided information on court processing of felony defendants—1,325 before the FSA and 1,193 after the FSA; (2) the Department of Correction (DOC) statewide felony sentence sample,[7] which included 9,752 felons convicted in 1979 and 5,707 convicted in 1981-82 subject to the FSA; (3) the release cohort data—information on time served by felons released from prison (1,634 in 1977-78, 1,569 in 1980, and 2,030 in 1981); and (4) the statewide judgment sample, consisting of information from felony judgments issued under the FSA during August 1981-January 1982 for 1,457 convicted felons.

The study investigated the possible direct effects of the FSA on: sentencing procedures; sentencing practices including suspension (probation), imposition of consecutive prison terms for multiple offenses, and granting of CYO status; the frequency of appeals and post-conviction motions; severity of sentence; and the state prison population. It was possible that the prosecutor and other participants in the processing of felony cases in criminal court could have evaded the policies of the FSA by exercising their discretion to file multiple charges, dismiss and reduce charges, and engage in plea bargaining (including bargaining about the sentence). Consequently, the study also examined multiple charging, dismissal and reduction of charges, and plea bargaining. Court delay was measured to see whether it increased after the FSA. Finally, statistical tests were made to determine whether any changes occurred after the FSA in the effects of certain other factors that had been shown to affect court disposition and sentences before the FSA, such as: the amount of harm caused by the crime; the defendant's prior criminal record; race, age, and sex; how long the defendant spent in pretrial detention (in jail awaiting disposition); the type of attorney he had (privately paid or court-appointed); and whether he pleaded guilty or opted for a jury trial. The results are summarized below.

Multiple charging

In a sense, the FSA provides an incentive (albeit unintentional) to file multiple felony charges against a defendant: no written findings need be made by the judge (nor evidence provided by the prosecutor to support them) to impose consecutive presumptive sentences for each charge, although imposing a longer-than-presumptive sentence for any single charge would require findings and supporting evidence. But the twelve-county sample indicated no increase in the number of felony charges per defendant; in fact, this number declined from 1.90 to 1.56. The use of consecutive sentences grew, but this did not result in longer total sentences after the FSA than before.

Trial court dispositions

Some court officials thought that the FSA, by setting what they considered rather low presumptive prison terms for felonies, would remove some of the incentive to plead guilty because defendants would believe that these presumptive terms would limit what they would receive if they gambled on a trial and were convicted. But this did not occur. The twelve-county data indicated that jury trials dropped from 5.7 per cent of all defendants' dispositions to 3.2 per cent; virtually all the decrease occurred in jury felony convictions (see Table 1). The rate of guilty pleas remained almost constant (59 per cent pre-FSA, 58 per cent post-FSA), but a shift occurred after FSA toward pleading guilty with a formal (recorded) plea bargain (the latter rate increased from 33 per cent to 39 per cent) rather than pleading guilty to the original charge or pleading guilty with an "informal" bargain or understanding. Meanwhile, the rate of dismissal of all charges increased slightly—from 34 to 37 per cent. To the extent that these changes in trials, plea bargains, and dismissals are attributable to changes in the behavior of prosecutors, defense attorneys, and judges,[8] what may have happened (and this is speculative) is that some defendants who formerly would have gone to trial and been convicted of felonies by juries were, after the FSA, pleading guilty pursuant to formal plea bargain. (Another possible explanation—but much less plausible—is that those who would formerly have been convicted of felonies by juries were, after the FSA, having all their charges dismissed.)

Some knowledgeable observers had predicted that sentence bargaining—negotiation of plea bargains in which the prosecutor agrees to make a sentence recommendation desired by the defendant—would increase after the FSA, because imposing the plea-bargained sentence requires no support in written findings. This prediction also did not come true; in fact, sentence bargaining became less frequent after the FSA. Among defendants who pleaded guilty to felonies pursuant to a formal plea bargain, the percentage who obtained a prosecutor's promise of any sort of sentence recommendation decreased from 59 per cent to 45 per cent.

These results suggest—although they do not conclusively prove—that some defendants who would formerly have gone to a jury trial and been convicted of felonies were, after the FSA, pleading guilty pursuant to a formal plea bargain. They also suggest that felony defendants were more willing, after the FSA, to plead guilty to felony charges without the added assurance of a prosecutor's sentence recommendation; this result may have been due to the increased predictability of sentence lengths under the FSA. On the other hand, the decline in felony sentence bargaining may have been part of a growing distaste for the practice that had nothing to do with the FSA.

Examination of disposition patterns among the twelve individual counties indicated that, while the counties retained the individual differences observed before the FSA, they generally experienced the same overall shifts: jury trials became less frequent with most of the decrease occurring in felony guilty verdicts, written plea bargains increased, other guilty pleas declined, and dismissal rates generally increased somewhat.

6. The twelve counties were Mecklenburg, New Hanover, Buncombe, Rockingham, Craven, Harnett, Rutherford, Anson, Cherokee, Granville, Pasquotank, and Yancey.

7. The DOC felony sentence data included defendants convicted of felonies who received either active prison sentences or supervised probation. It did not include those convicted felons who received other sentences such as unsupervised probation, but these were rare (estimated at no more than 10 per cent of the total).

8. The changes in disposition patterns were not necessarily due to any change in the behavior of prosecutors, defense attorneys, and judges caused by the FSA; they could have been due to mere chance variation, or to small changes with respect to strength of evidence, severity of crimes, and the like in felony cases coming into the court system.

Trial court delay

Concern was expressed before the FSA went into effect that it would increase the time necessary to dispose of felony cases in trial courts, both by making sentencing procedure more complicated and by removing some of the defendant's incentive to plead guilty. In reality, trial court disposition times *decreased* in the twelve counties studied but not necessarily because of the FSA. The median time from arrest to disposition declined from 58 days pre-FSA to 48 days post-FSA, and the 75th percentile decreased from 117 days to 104 days. This speeding up of dispositions seems to result from the reduction in the frequency of jury trials after the FSA plus the slight increase in dismissals. Sentencing procedure apparently did not become much more time-consuming, probably because judicial findings were rarely required to support sentences.

Table 1

Twelve counties: Court Dispositions of Felony Defendants* Before and After Passage of the Fair Sentencing Act

	Before FSA (1970-80) Percentage	N	After FSA (1981-82) Percentage	N
District Court				
Dismissed, PJC, or deferred prosecution	26.68%	(346)	31.09%	(369)
Voluntary dismissal by prosecutor	19.51	(253)	23.84	(283)
Dismissal with leave by prosecutor	0.93	(12)	.42	(5)
Dismissal by judge	6.17	(80)	4.97	(59)
PJC	0.08	(1)	0.42	(5)
Deferred prosecution	0.00	(0)	1.43	(17)
Pleaded guilty to misdemeanor	21.28	(276)	20.89	(248)
Plea bargain on record	5.63	(73)	7.92	(94)
Other guilty plea	15.65	(203)	12.97	(154)
District court trial	1.08	(14)	0.76	(9)
Acquittal	0.54	(7)	0.25	(3)
Misdemeanor conviction	0.54	(7)	0.51	(6)
Grand Jury				
"No true bill"	0.62	(8)	0.51	(6)
Went to superior court	50.35	(635)	46.76	(555)
Superior Court				
Dismissed, PJC, or deferred prosecution	7.09	(92)	6.40	(76)
Voluntary dismissal by prosecutor	5.47	(71)	4.97	(59)
Dismissal with leave by prosecutor	0.85	(11)	0.42	(5)
Dismissal by judge	0.62	(8)	0.34	(4)
PJC	0.15	(2)	0.59	(7)
Deferred prosecution	0.00	(0)	0.08	(1)
Pleaded guilty	37.55	(487)	37.15	(441)
Plea bargain on record	26.45	(343)	31.26	(371)
Pleaded guilty to misdemeanor	8.17	(106)	8.26	(98)
Pleaded guilty to felony	18.27	(237)	23.00	(273)
Other guilty plea	11.10	(144)	5.90	(70)
Pleaded guilty to misdemeanor	2.08	(27)	0.93	(11)
Pleaded guilty to felony	9.02	(117)	4.97	(59)
Superior court trial	5.71	(74)	3.20	(38)
Acquittal or mistrial	1.08	(14)	1.01	(12)
Conviction	4.63	(60)	2.19	(26)
Misdemeanor conviction	0.31	(4)	0.34	(4)
Felony conviction	4.32	(56)	1.85	(22)
Total Felony Defendants	100.0%	(1,297)	100.0%	(1,187)

*Includes defendants whose cases began by arrest or summons; excludes those whose cases began by direct indictment or transfer from juvenile court.

Sentencing procedure

The statewide judgment sample indicated that after the FSA, judges gave written reasons to support the sentences of only 17 per cent of defendants convicted of felonies. Fifty-four per cent of defendants convicted of felonies received presumptive prison terms, and another 22 per cent were sentenced according to a plea bargain; neither of these kinds of sentences requires judges to give reasons. Sentences of another 5 per cent of the felons were unsupported by judicial findings without any explanation stated on the judgment.

When judges did give reasons, aggravating circumstances outweighed mitigating factors somewhat more often than the reverse. Judges, when they did make written findings, tended to cite as reasons for their sentences the defendant's prior convictions (or absence thereof), his voluntary acknowledgment of wrongdoing to a police officer, the fact that he committed the offense for hire or pecuniary gain, a mitigating mental or physical condition, and good character or reputation—all of which were specifically listed in the FSA and could be cited simply by checking appropriate boxes on the judgment form. But in about 20 per cent of the cases in which written findings were made, judges exercised their authority under the FSA to find aggravating or mitigating circumstances not specifically listed in the new legislation.

Judges had been expected to order written presentence reports by probation officers more frequently after the FSA, because of the FSA's emphasis on certain specific aggravating and mitigating circumstances as criteria in sentencing. But the twelve-county data indicated that presentence reports became *less* frequent, dropping from 7 per cent of cases in which defendants were convicted of felonies to only 1 per cent. Court-ordered presentence diagnostic commitments to prison for psychiatric examination also continued to be rare after the FSA. Perhaps judges saw no need for sentencing information other than what the prosecution and defense provided, or perhaps they had little confidence in presentence investigations.

Probation, consecutive prison terms, and CYO commitment

Since the FSA does not require written reasons for (a) imposing probation (i.e., suspending a prison sentence), (b) imposing consecutive prison terms for multiple felonies, and (c) committing the offender to prison as a CYO with immediate eligibility for discretionary parole, many observers thought that these options might be exercised more frequently after the FSA as a way to evade its requirements of judicial findings to support nonpresumptive prison terms and its abolition of discretionary parole for non-CYOs. In reality, probation did not increase. Supervised probation with no active time to serve dropped from 45 per cent to 37 per cent of those convicted of felonies, and "special probation" (with a short period of time to serve as a condition of suspending a longer prison term) remained at 4 per cent. (These and other results derived from the DOC statewide sentence sample do not include the felons—estimated at no more than 10 per cent of the total convicted—who received neither active prison sentences nor supervised probation.) CYO commitments also did not increase, still being imposed in 49 per cent of the sentences to prison of felons under 21. Consecutive sentences did increase substantially, according to the 12-county data—from 18 per cent before the FSA among felons who received multiple active sentences to 32 per cent after the FSA. But total sentence lengths generally did not increase after the FSA (in fact, they became shorter), and multivariate analysis of the DOC data indicated that the number of felony convictions for which the person was sentenced influenced his total prison term no more after the FSA than it had before. Consecutive sentencing may have been used to a greater extent after the FSA to circumvent the act's requirement of written findings to support nonpresumptive prison sentences, but it did not generally result in greater severity of sentence.

Severity and variation in sentencing

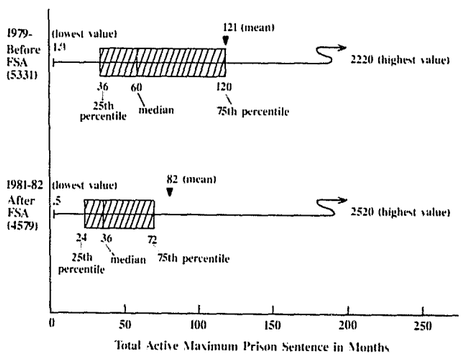
The twelve-county data indicated that there was no increase after the FSA in the likelihood that defendants *charged with* felonies who were convicted of some charge (half the time a misdemeanor) would receive an active (i.e. unsuspended) prison sentence. But for defendants *convicted of* felonies statewide, the DOC data indicated that the chance of receiving an active prison sentence (rather than supervised probation) increased from 55 per cent in 1979 (pre-FSA) to 63 per cent in 1981-82 (post-FSA). Multiple regression analysis indicated that the post-FSA increase in the probability of receiving an active prison sentence for a felony persisted when other variables (such as type of offense and prior convictions) that might have been responsible for the change were controlled for. Whether the increase in active sentencing was attributable to the FSA is open to question, because the FSA left the decision to suspend a prison sentence completely in the judge's discretion. The increase in active sentences may have resulted from a change in judicial attitudes that had nothing to do with the FSA, or it may have been the psychological result of the FSA's presumptive prison terms for felonies, which judges may have regarded as legislative recommendations for *active* prison terms.

With regard to the length of active prison terms imposed for felonies, *sentencing became gradually less severe after the FSA, and it also varied less* (see Figure 1). Before the FSA, total active maximum prison terms had a mean of 121 months and a median of 60 months; after the FSA, total active prison terms had a mean of 82 months and a median of 36 months. The interquartile range[9] dropped from 36-120 months before the FSA to 24-72 months after the FSA, indicating a reduction in variation. Similar reductions in means, medians, and interquartile ranges were found for most of the common specific felonies. *The median sentence length imposed under the FSA was equal to the presumptive prison term in most cases.* The drop in length of active sentence for felonies was confirmed by multiple regression analyses of the DOC data, both when only active sentences were included and when supervised probation sentences were added and treated as having zero length.

Because the law regarding service of prison terms was changed by the FSA—discretionary parole was abolished except for CYOs, and good time and gain time were made statutory—separate analyses were made that compared the time actually served by felons released from prison in 1977-78, 1980, and 1981 with estimates[10] of time served on FSA active sentences imposed in 1981-82. Considering the 20 most frequent felonies of conviction, time served in prison will generally decrease and vary less for those sentenced after the FSA than for those sentenced under prior law, although the changes are in most cases not confirmed by statistical significance tests. For two felonies—second-degree murder and armed robbery—time served will apparently increase and vary more after the FSA, but this fact probably results from legislative changes that preceded the FSA rather than from the FSA itself.

Figure 1

DOC Statewide Felony Sentence Sample: Distribution of Total Active Maximum Sentence Lengths Before and After FSA—All Felonies



Explanation: Shaded box shows interquartile range (from 25th to 75th percentile); vertical line in shaded box shows median; black triangle shows mean; and horizontal line shows full range.

9. The interquartile range is the range from the 25th percentile to the 75th percentile, sometimes called the "middle 50 per cent" of the range.

10. Time served on sentences imposed under the FSA is much easier to estimate than time served on sentences imposed under former law, because the uncertainty of discretionary parole has been removed and good time and gain time are much more predictable. A good rough estimate of the time actually served on an FSA prison term is 40 per cent of the term. A more precise estimate—the one used in the Institute's study—can be obtained from a formula derived by Kenneth Parker of the DOC's research staff.

11. Theft felonies—used for comparison purposes because they are the most common type of felonies—are here defined to include felonious larceny, breaking or entering of buildings, and receiving and possessing stolen goods.

12. "Significant at the .10 level" means that the observed change had no greater than a 10 per cent chance of being an accidental result of sampling. The significance level normally used in statistical analysis is .05.

Other variables

The study indicated that the defendant's prior convictions and the degree of physical injury and property loss caused by his crime had no more influence on severity of sentence after the FSA than before, despite the fact that the FSA emphasized these variables as aggravating factors. But the effect of other variables did change somewhat after the FSA, according to the regression analysis of the DOC data on felony sentences.

Whether an active sentence was imposed. The chance of receiving active time for violent felonies dropped somewhat (compared with the chance of receiving an active sentence for theft[11] felonies) after the FSA went into effect, although the change was significant only at the .10 level.[12] Some change may have occurred in the effects of age, sex, and race, but it could not be confirmed by tests of statistical significance. Defendants under 21 and female defendants, who before the FSA were significantly less likely than older defendants and male defendants (respectively) to receive active sentences, were closer to those defendants in the probability that they would receive an active sentence after the FSA; and black defendants, who were significantly more likely than whites to receive active time before the FSA, were not as much more likely than whites to receive active time after the FSA.

Length of active sentence. Drug felony sentences became longer (relative to theft felony sentences) after the FSA. (This change may be due, at least in part, to legislation,[13] effective July 1, 1980, that set very long minimum sentences for the fairly infrequent "trafficking" offenses—those involving large amounts of drugs.) The disadvantage of black defendants apparently nearly disappeared after the FSA. Before the FSA, the felony active sentences of blacks were estimated to be 7.8 months longer than whites' sentences; the difference dropped to nearly nothing after the FSA (this change was significant only at the .10 level). Time spent in pretrial detention, which was positively associated with length of active sentence, showed a slightly decreased effect after the FSA.

"Overall" length of active sentence (including supervised probation sentences as zero). After the FSA, drug felony overall sentences became longer (perhaps partly because of the new "drug trafficking" punishment) and violent felony overall sentences became shorter relative to sentences for theft felonies like breaking and entering and larceny. Thus the FSA overall sentences for the *most severely punished* (violent) felonies tended to *decrease* relative to sentences for theft felonies, and sentences for the *least severely punished* felonies (drug offenses) tended to *increase* relative to sentences for theft felonies. Black defendants' overall sentences became shorter relative to whites' (although this interaction effect was significant only at the .10 level).

Administrative variables. The FSA apparently did not change the influences on sentencing of how long the defendant spent in pretrial detention and whether he had a court-appointed attorney, but it may have changed the influence on sentencing of a guilty plea. (These administrative variables were tested in multiple regression models using the twelve-county data, which included felony defendants who were convicted of reduced misdemeanor charges as well as those who were convicted of felonies.) That the FSA had little effect on the influence of pretrial detention and type of attorney is not surprising, because the legislation did not attempt to change pretrial release or defense of indigents.

Both before and after the FSA, the longer a defendant spent in pretrial detention, other things being equal, the greater the odds were that he would receive an active prison sentence and the longer his overall active sentence was likely to be. (For example, for defendants convicted of felonies under the FSA who received active prison sentences, the regression model estimated that the length of the active sentence increased by about two months for each additional ten days spent in pretrial detention.) Time in pretrial detention varied a great deal among defendants and apparently had very little to do with the seriousness of their charges, their prior criminal records, and other "risk factors" in their cases—at least insofar as these factors could be measured from available data. One reasonable explanation of the observed correlation between pretrial detention time and severity of sentence is that spending time in detention made defendants less able to help their attorneys in their defense prepare arguments for a nonprison sentence, less able to maintain employment and otherwise favorably impress the sentencing judge, and more willing to accept an unfavorable plea bargain offered by the prosecution.[14]

13. N.C. GEN. STAT. § 90-95(h).

14. The study results that show a positive association between pretrial detention time and sentence severity, controlling for other factors, may be explainable in other ways [see CLARKE ET AL., FELONY PROSECUTION AND SENTENCING IN NORTH CAROLINA 26-28, 38-39 (Institute of Government, University of North Carolina, May 1982)]. Tests were made to determine whether pretrial detention time and severity of sentence were both determined by other variables such as the defendant's dangerousness as perceived by judicial officials—in other words, whether the correlation between pretrial detention and severity of sentence was spurious. The tentative conclusion

Among theft felony defendants who were convicted of some charge, those with court-appointed counsel continued after the FSA to be more likely to receive active sentences and to receive much longer overall sentences than those who paid their attorneys themselves. Pleading guilty rather than going to trial continued to be advantageous for theft felony defendants after the FSA, as it had been before the FSA, in that it was associated with shorter overall active sentences when other relevant factors were controlled for statistically. But for violent felony defendants, the differential in overall length of sentence between those who pleaded guilty and those who went to trial apparently disappeared after the FSA (the change was significant only at the .10 level). This change may have been due to (1) the decline in formal plea bargains concerning the sentence that occurred after the FSA, (2) ceasing the practice of granting more lenient sentences to those who pled guilty, or (3) the reduced proportion of jury trials resulting in felony convictions. These factors could, in turn, have been caused by the FSA, but we cannot be sure.

was that the correlation was not spurious—or not entirely spurious—because of these results: (1) Separate regression analyses indicated that very little of the variance in detention time could be explained by the "dangerousness factors" that could be measured from available data, like criminal record and type of charge. In other words, even among defendants who were similarly situated with respect to charge, criminal record, evidence, degree of harm caused to the victim, and other variables that could be measured, there were great differences in pretrial detention time. (2) In any case, the regression analysis that showed the association between detention time and severity of sentence *controlled statistically for* other variables that might have explained this association. The study's finding about detention time can also be interpreted as being attributable to incomplete or inaccurate measurement of "dangerousness" factors that could have explained away the apparent link between detention time and severity of sentence—for example, the information that police, prosecutors, and judges had concerning defendants' criminal histories that did not appear in the local records used for the Institute's study. This interpretation is probably correct to some extent, although the measurements of "dangerousness factors" that were used in the study *did* explain a substantial amount of the variation in severity of sentence, which suggests that they captured at least part of reality. I conclude that some, at least, of the correlation between detention and sentence severity is due to an independent effect of detention on sentencing, as the text of this article explains.

Effect on prison population

In looking for possible effects of the FSA on the state's already rapidly increasing prison population, the study explored this question: Given the number of persons convicted of felonies, how will the FSA affect their contribution to the prison population? Two trends had to be reconciled: (1) The probability of receiving an active prison sentence for a felony *rose* after the FSA (this increase was not a strictly legal effect of the FSA, but it may have resulted from a psychological effect); and (2) the length of active prison sentences and estimated time served in prison generally *decreased*. Times served for several common felonies under pre-FSA law (adjusted for the pre-FSA active sentence rates) were compared with estimated times served under the FSA (adjusted for the higher active sentence rates now generally prevailing). The comparisons indicate that those convicted will contribute less to the prison population under the FSA than they would have contributed if they had been sentenced under former law. A similar analysis was done for all felonies taken together, with the same result.

The DOC has recently completed two forecasts of the prison population.[15] One uses the estimated times served under the FSA, and the other uses the longer times served under previous law. They indicate that by 1986 the prison population will be about 900 inmates less with the FSA in effect than it would have been if previous laws and parole practices had remained in place. These estimates and forecasts indicate that the FSA will probably not increase the felon prison population and may even reduce it somewhat.

On balance, it is fair to conclude from this study that the FSA accomplished at least some of what it was intended to accomplish, and without creating the problems that critics predicted it would create. Length of active sentences for felonies clearly varied less after the FSA. The fact that the FSA presumptive prison term was generally the median length of active sentence is strong evidence that the reduced variation was due to the FSA. Further evidence of adherence to the FSA's presumptive prison terms is the fact that judges tended to impose these terms even though they were generally well below the pre-FSA median and mean prison terms. Thus, although much variation remained in sentence lengths, the tendency was toward greater consistency.

While judges varied less in the length of active sentence for felonies, according to our statistical analysis they did not become more sensitive to aggravating factors emphasized by the FSA, such as prior convictions, degree of physical injury, and amount of property loss. Perhaps it was unrealistic to expect judges to comply equally with the two somewhat conflicting directives that the FSA gave them. In effect the FSA told judges: (1) adhere to standard sentences and justify nonstandard sentences in writing; but (2) pay more attention to certain specific aggravating and mitigating circumstances. Judges were apparently better able to implement the first directive than the second. The use of presentence investigations, which were expected to increase under the FSA because of the emphasis on aggravating and mitigating factors, in fact declined. (There are no data on whether the prosecution and defense supplied better sentencing information to judges when the FSA went into effect.) In only 17 per cent of the felony sentences did judges actually state in writing aggravating or mitigating circumstances to support the sentence, owing to both the frequent use of presumptives and sentence bargaining. But 17 per cent can also be regarded as better than nothing. Before the FSA, judges were never required to support their sentences with reasons—and in fact did so at their peril, since recorded reasons invited appellate review and reversal.

The study results with regard to race were encouraging: there were indications that the disadvantages of black defendants in sentencing declined or disappeared after the FSA. Perhaps these disadvantages had less influence on severity of sentence simply because sentences varied less.

The FSA still leaves some large loopholes in the exercise of prosecutorial and judicial discretion, which provided much opportunity to evade the policies of the legislation. But by and large, little evasion seems to have taken place through these loopholes. For example, multiple

(continued on page 40)

15. KENNETH PARKER, PRISON POPULATION PROJECTIONS THROUGH 1986 (North Carolina Department of Correction, Research Bulletin No. 14, Raleigh, N.C.: July 13, 1983.)

The Judicial Standards Commission—

Assuring the Competence and Integrity of North Carolina Judges

Gerald Arnold

The conduct of public officials has received a great deal of publicity in recent years, and judges no less than others have been in the public eye. Although most judges are honest, competent, and diligent, the few exceptions make the headlines.

North Carolinians should be aware that the General Statutes and the Code of Judicial Conduct drawn up by the State Supreme Court require judges to maintain certain standards of conduct. Public confidence in the judiciary is an indispensable ingredient of the rule of law. Before people can have that confidence, they must know that when judicial misconduct or disability does occur, there is an independent, impartial body to recommend that the errant judge be disciplined or the disabled judge removed. That is the job of the North Carolina Judicial Standards Commission.

The author is a judge of the North Carolina Court of Appeals and Chairman of the Judicial Standards Commission.

History of the Commission

The Commission came into existence in January 1973, after the voters approved an amendment to the State Constitution two months earlier. That amendment, along with legislation to implement it, had been proposed by the North Carolina Courts Commission.[1] It was designed to provide a new method of removing or censuring judges. Before the amendment was adopted, North Carolina had only two methods for removing judges: (1) address—that is, removal for "mental or physical incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly,"[2] and (2) impeachment—that is, removal through accusation by the House of Representatives and trial by the Senate.[3] There was no way at all to discipline a judge short of removing him. Both systems had proved ineffective—no judge had been removed by impeachment since 1868, and address had apparently never been used.[4]

The amendment (N.C. Const. art. IV, § 17 sec. 2) and implementing legislation (G.S. Ch. 7A, Art. 30) provide that on the Judicial Standards Commission's recom-

1. NORTH CAROLINA COURTS COMMISSION, REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY 19 (1971).
2. N.C. CONST. art. IV, § 17 (1).
3. *Id.*
4. *Op. cit. supra* note 1.

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