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NORTH CAROLINA PRISONS
Old Problems, Tough Choices

N.C. Center for Public Policy Research

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Cover: Triple-bunk dormitory at Craggy Prison in Asheville. Photo by Elizabeth Leland © 1986 *The Charlotte Observer.*

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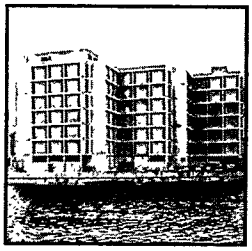
POLICY CHOICES



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The Correction Conundrum—What Punishment is Appropriate?

To Cicero, it was simple. Let the punishment match the offense, said the Roman statesman. In the ensuing 2,000 years since Marcus Tullius Cicero spoke, civilizations have been struggling to match the punishment to the crime, with varying degrees of success. In North Carolina, we still labor to devise appropriate sentences for the crime committed. Traditionally, we have made prisoners of those we convict of a crime. That prisoner becomes a ward of the state—ours to feed, clothe, shelter, protect, and sometimes rehabilitate.

In the process, however, we too often have created prisons that test the constitutional limits of what are "cruel and unusual punishments." Consider these assertions from sworn affidavits filed in federal court in 1986 regarding several North Carolina prisons: "I feared for my safety and life every day I was at Caledonia," said one inmate. Wrote another: "I . . . saw two incidents of forced homosexual activity. The two victims were young inmates who were forced to commit the act by several other inmates."

A prisoner at one southeastern N.C. unit said he heard a Department of Correction guard offer this remark about another inmate involved in a fight the day before: "Well, you can kill him for all I care. Just as long as I don't know about it." The affidavits speak of bribery of prison guards; of rainwater running down the inside of walls and along the floors of triple-bunked dormitories; of homosexual rape while guards watched but did nothing to stop it; of guards dispensing medicines even though they could not read the dosage instructions; of the easy availability of weapons. "I estimate that I owned 15 to 20 street knives while I was at Columbus County Prison," said one inmate.

Such descriptions of our prison system make a mockery of the original meaning of the word *prisoner*. It stems from the Old French. A thousand years ago, mercenaries captured in battle by the French were called *prizes* from the Latin *prendre*, to take. Where else to put these prizes? In *prizen*, of course, and later, prisons. But few today would regard the prisoners of the state as anything close to prizes—costly prizes at that.

If anything, most of us would regard the prisoner as a burden, and usually our attention is focused on *how* we punish them—often losing sight of *why* we punish. In 1930, a Pennsylvania appellate judge (and later Chief Justice of the Pennsylvania Supreme Court) named P. J. Stern outlined in his review of a murder case the four commonly-accepted theories "as the basis upon which society should act in imposing penalties upon those who violate its laws. These are: (1) to bring about the *reformation* of the evil-doer; (2) to effect *retribution or revenge* upon him; (3) to *restrain* him physically, so as to make it impossible for him to commit further crimes; and (4) to *deter others* from similarly violating the law."[1]

Because it was a murder case, Stern dispensed with reformation or rehabilitation because the defendant would not be in contact with society again "and since secular law is concerned with one's relation to the community and not primarily with his inward moral development, the spiritual regeneration of a defendant is not, in such a case as this, a dominant factor. . . ."

The second theory, retribution, "may be regarded as the doctrine of legal revenge, or punishment merely for the sake of punishment. It is to pay back the wrong-doer for his wrong-doing, to make him suffer by way of retaliation even if no benefit result thereby to himself or to others. This theory of punishment looks to the past and not to the future, and rests solely upon the foundation of vindictive justice. It is this idea of punishment that generally prevails, even though those who entertain it may not be fully aware of their so doing." This, he went on, is not "a proper basis upon which to impose the penalty of law."

But, wrote Stern, restraint of the wrong-doer in order to make it impossible for him to commit further crime is not only "a justifiable basis for action but . . . one which is vital to the protection of society. To permit a man of dangerous criminal tendencies to be in a position where he can give indulgence to such propensities would be a folly which no community should suffer itself to commit, any more than it should allow a wild animal to range at will in the city streets."

The final basis for punishment, the judge went on, is deterrence—"the theory which regards the penalty as being not an end in itself but the means of attaining an end, namely, the frightening of others who might be tempted to imitate the criminal."

Too often, these four purposes of punishment are lost in the public clamor for locking offenders away, out of sight and out of mind. Little thought may be given to which of these purposes is best suited to an individual offender's own circumstances. Moreover, little thought may be given to the possibility that there may be better ways—better deterrents to crime, cheaper ways to punish, safer ways to punish offenders, and more efficient means to protect society—than locking criminals behind iron bars and forgetting them. As state Parole Commission Chairman Bruce Briggs told *Insight*, "The whole damn thing is out of kilter."

A year ago, Gov. James G. Martin introduced his prisons package, titled "Corrections at a Crossroads." In a sense, the state *is* at a crossroads, a critical juncture where state officials and the 1987 General Assembly must make choices now that will serve as the state's prison policy for years—perhaps decades—to come. As state Sen. Anthony Rand (D-Cumberland) puts it, "Addressing the prison problem may well be *the* most important thing we do this session."

In this theme issue of *North Carolina Insight*, the N.C. Center for Public Policy Research seeks to provide state policymakers, legislators, professional groups, the news media, and the public with a primer on criminal justice policies as they have evolved in North Carolina. Our purpose is to help focus the debate on the state's prison system and the alternatives to incarceration that could help solve North Carolina's corrections conundrum. Should North Carolina build more prisons? Should it expand alternatives to incarceration? Should it alter its goals of imposing criminal sanctions, or modify the range of crimes for which people are imprisoned?

This primer begins with an explanation of prison demographics—who is in prison and why the system is so overcrowded. Following it are articles on who makes correctional policy and why the state lacks a cohesive corrections policy; a description of a series of federal lawsuits challenging inhumane conditions in North Carolina's prisons—suits which have driven prison policy in this state to the current brink of a possible federal court takeover; and an interview with Secretary of Correction Aaron Johnson.

The next section examines three policy issues that have a direct bearing on the correction conundrum. It examines suggestions that might solve the problem—or which might exacerbate it. First, we examine how the state's Fair Sentencing Act, adopted six years ago amid uncertainty over its impact on the prison system, has actually helped hold down the growth in the prison population—and how some proposed alterations in the law might reverse that course and contribute to more prison crowding. An article on alternatives to incarceration illuminates the full range of options available to state policymakers for ways other than imprisonment to punish offenders, and offers a number of specific recommendations that North Carolina might follow in its trek through the legal minefields. Finally, we examine the Martin administration's proposal to contract with private businesses for for-profit prisons, a proposal that has stirred hot debate because of the legal, moral, and constitutional implications.

We trust that this primer will contribute to solving the prison puzzle—and help fulfill Cicero's admonition to make the punishment fit the crime.

—Jack Betts
Associate Editor

[1]*Commonwealth v. Ritter*, Court of Oyer and Terminer, Philadelphia, 1930, 13 D.&C. 285.

Behind Bars: North Carolina's Growing Prison Population

by Jack Betts

A little more than a century ago, North Carolina had no prison overcrowding problem. North Carolina didn't even have a state prison, for that matter. Trial and punishment for criminal offenses were largely a local matter: Those convicted were hung, if the circumstances warranted it, or they were punished locally. Corporal punishment was not unusual, and public stocks were used to pillory offenders for a time. Not until after the Civil War was a state penitentiary built, and it would be decades before prison units were bulging at the seams.

But bulge they do, despite the expenditure of millions of dollars in recent years in a futile attempt to keep pace with the growth in the number of North Carolinians who are put behind bars each year. By the end of December 1986, the prison population in the state's 86 prison units topped 18,000 for the second year in a row. Yet the state's prisons—many of them older by far than the inmates they house—were designed for only 16,633 inmates. Another 4,000 inmates crowd the state's 151 local jails, awaiting trial or serving short sentences. The overcrowding problems have caused inmate unrest and have led to suits in federal courts aimed at forcing the state to improve its prison system.

Overcrowding is one problem, and the state's *rate of incarceration* is another. North Carolina has long had one of the highest rates of incarceration in the nation. According to the U.S. Justice Department, the state's rate of incarceration in mid-1986 was 256 inmates per 100,000 population, ranking the state 11th highest among all states. The incarceration rate appears to be growing again after two years of slight decline in 1983 and 1984.[1] This incarceration rate continues to rise despite the fact that North Carolina has traditionally had one of the nation's lowest crime rates, 32nd in 1985.[2] (See Table 1, pp. 8-9.)

The state's overcrowding and high incarceration problems have been fairly constant in the post-World War II era. As the Report of the Commission on the Future of North Carolina noted in 1983:

"The pattern of high incarceration rates is long established, though the state was one of the last in the nation to build its first prison. After half a century of debate, construction of the first state prison was finally mandated in 1868. One of the principal arguments against it at that time was the cost of operation, but some people contended that the administration of the criminal justice system was best left in the hands of the counties. Despite these concerns, the prison system, once established, grew rapidly. By 1934, more than 7,500 inmates were confined . . . . Between 1950 and 1960, an average of about 15,000 were imprisoned each year. The number declined during the middle 1960s but began to climb again in the 1970s."[3]

Climb it did, and as a result, the state's prisons are filled beyond capacity. Taxpayers have financed costly projects to build new prisons and to replace outmoded ones. The state's lawyers are tied up in federal courts defending the North Caro-

Jack Betts is associate editor of North Carolina Insight.

lina prison system against charges that the correction system violates the Eighth Amendment's ban on cruel and unusual punishment.[4] And the Martin administration and the legislative leadership are searching for ways out of this penal puzzle. But to understand how to begin dealing with the future requires a glimpse at the past.

A Short History of Corrections in North Carolina

Not long after the Revolution, the nation's first prison was set up by Quakers when they converted the old Walnut Street jail in Philadelphia into a prison. Their theory of criminal justice reform was that, instead of subjecting offenders to public humiliation or whipping, the ends of justice could be better served by locking them away in solitude to allow them to repent and rehabilitate themselves. This place of repenting—hence the word penitentiary—gained widespread public support, and most states set up central penitentiaries to house their worst offenders.

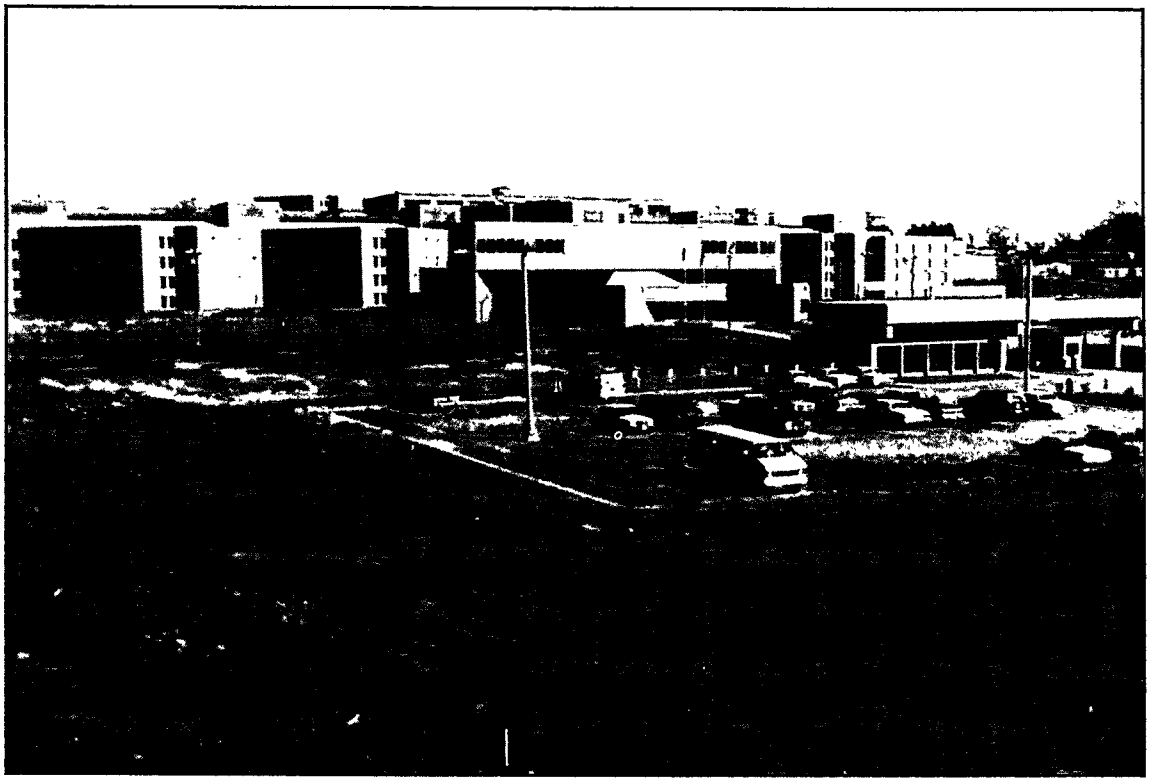
But not North Carolina. In the 18th Century, state law required counties to do only two things —to build a courthouse, and to build a jail.[5] Offenders were tried and punished where offenses were committed—at the local level. Not until 1854 did the General Assembly authorize imprisonment as criminal punishment. Even then, incarceration was only an alternative. The Constitution of 1868, adopted during Reconstruction, finally authorized construction of a "central prison" in Raleigh for those offenders sentenced to terms of a year or longer. That prison, which came to be known as Central Prison, opened in 1884 and stood for nearly a century until it was replaced by a new Central Prison during the administration of Gov. James B. Hunt Jr.

A few years after the original prison was built, the state began acquiring farmland in Halifax and Northampton counties for use as prison farms and began sending inmates to till those fields. But even by the turn of the century, county governments remained the prime custodians of prisoners, who were often sentenced to labor on public works projects of varied nature. As the need for public works projects waxed and waned, so, sometimes, did the size of the prison population. Jail inmates built county roads, dug canals, drained swamps, laid railroad track, and dammed creeks—sometimes for private contractors who hired inmate labor from the state. That practice continued until 1929, when Gov. O. Max Gardner halted the practice.

In 1933, the State Highway and Public Works Commission took over North Carolina's prison system and responsibility for every person sentenced to 30 days or longer in jail. A women's prison—known as the Industrial Colony for Women—was opened in Raleigh in 1934, a state Parole Commission began operating in 1935, and a Probation Department opened its doors in 1937. By 1939, the state had constructed permanent buildings at the old county road camps in almost every county, and today many of these old road camps survive as units of the state prison system.

Road camp of the 1930s, when state prisoners were put to work on roads by the State Highway and Public Works Commission.

N.C. Department of Transportation



Jack Betts

Central Prison in Raleigh, the state's largest unit, with a capacity of 800 inmates.

"The marriage of roads and prisons was one of convenience based on financial necessity," concluded the Citizens Commission on Alternatives to Incarceration, chaired by then-Court of Appeals Judge (and now an Associate Justice of the N.C. Supreme Court) Willis P. Whichard of Durham, in 1982.[6] By the 1950s, a growing body of sentiment concluded that because highway construction and prisons served different governmental functions, they ought to be managed by separate agencies. Researchers examining state prison policy, according to the Whichard report, "found a confusing diversity in the operation of different units. There was a lack of goals and coordination of policy, as the membership of the Highway Commission changed with every gubernatorial administration."

Faced with a choice of giving control of prisoners back to the counties or setting up another state department, the General Assembly in 1957 established the Department of Prisons, renamed in 1971 as the Department of Social Rehabilitation and Control, and again renamed in 1977 as the Department of Correction. But twin legacies of past policies continued—and survive today—as major correctional policy issues: First, the state retained control of thousands of inmates who *in other states would have been housed in city jails and in county lockups.* And second, the state retained many of the old county road camps as full-fledged, functioning prison units, and that's why today North Carolina has more *prison units* than any other state in the nation.

The gravity of these two factors cannot be overlooked, for they are principal elements of today's overcrowding problems and today's high rate of incarceration. By continuing to accept prisoners who in other states would be housed in local jails, the state inflates its own prison population. And it is able to accept so many prisoners, even past the point of overcrowding, because it has so many units—large, medium, and small—in which to house them.

Further changes in state prison policy have shaped today's correction system. In 1966, North Carolina instituted pre-release and after-care programs, and by 1971 had phased out inmate road work. Those work gangs would be revived on a small-scale basis in the Hunt administration, and an experiment in youth forestry camps would be proposed in 1986 by the administration of Gov. James G. Martin. In the 1970s, North Carolina's

prison problems came to the public's attention. Overcrowding, deteriorating facilities, and concerns over the cost of correction programs generated action by the General Assembly. The Legislative Commission on Correctional Programs, chaired by former state Sen. Eddie Knox of Charlotte, led to changes in sentencing that have had a salutary effect on prison overcrowding (see article on the Fair Sentencing Act, p. 42). As the 1980s began, more reforms were adopted, and the use of alternatives to incarceration began to gain legislative credence and public credibility (see article on alternatives to incarceration, p. 50).

But even with these changes, North Carolina's prison population continues to be a problem. In 1985 and again in 1986, it reached record levels. Why? As Whichard put it in an interview, "If you look at our statistics, you would have to conclude one of two things: either we have the worst people in the world, or we have relied excessively on incarceration as a remedy for criminal acts. I think the latter is the case. I don't think we have more than our fair share of bad people."

Dubious Distinctions

Nationally, more than half a million persons are incarcerated in state and federal prisons.[7] The prison population is growing at the rate of about 10 percent a year, and North Carolina is still among the leaders in terms of the number of persons it sends to jail, even though the rate of growth has slowed. According to the U.S. Department of Justice, in mid-1986, the state's prison population (in both federal and state prisons) stood at 17,596, which ranked the state third in the South (behind only Florida and Texas) and eighth in the nation, behind California (55,238), Texas (37,760), New York (36,100), Florida (29,712), Ohio (21,942), Michigan (19,437), and Illinois (19,317). See Table 1, pp. 8-9, for more.

Traditionally, North Carolina not only has one of the largest prison populations, but also one of the highest rates of incarceration—the number of prisoners per 100,000 population. In mid-1986, according to the figures computed by the U.S. Justice Department, the state's rate of incarceration was 256, the eleventh highest rate in the country.[8] Those states which have higher rates of incarceration are Nevada, South Carolina, Louisiana, Delaware, Maryland, Alaska, Alabama, Arizona, Oklahoma, and Georgia (see Table 1). The national rate of incarceration, the Justice Department says, is 210 per 100,000 population; this

"A few years ago, I worked undercover for some weeks as a corrections officer in Texas's maximum security prison. The training manual had all of the right words in it:

'Every man cherishes his dignity. Without it he is less than a man. In his dealings with inmates the correctional officer is expected to preserve that dignity. A man humiliated, shamed or degraded is a man alienated, perhaps forever.'

So how did these words carry over into action? Each field officer had twenty convicts, all attired uniformly in white, whom he ordered to bend over to start picking September's cotton at 8 a.m. None of these convicts straightened his back without permission, be it to wipe his brow, light his cigarette, or pour out his urine. Twice in the long, hot morning and twice in the long, hotter afternoon, each man got a drink of water from a metal dipper. Verbal abuse, much of it profane, poured down on the sweating line, heaviest of course on whichever man was slowest at filling his burlap bag. At day's end, the inmates stripped bare in the blazing sun at the back gate of the prison, exposed their body cavitites to the corrections staff for inspection, and ran naked across the yard to the showers and clean uniforms beyond. Somehow I couldn't get that training manual out of my head as I watched the rectal searches.

'A man humiliated, shamed or degraded is a man alienated perhaps forever.'

—John R. Coleman, president
Edna McConnell Clark Foundation

Table 1. Ranking of States by Number of Inmates, 1986, and Rates of Incarceration and Crime, 1985

State	Population Rank	Number of Inmates, 6/86	Rank	Rate of Incarceration	Rank	Rate of Crime, 1985	Rank
Alabama	22	11,326	16	273	7	3,942	35 (tie)
Alaska	49	2,343	37	282	6	5,877	11
Arizona	27	9,108	19	267	9	7,116	2
Arkansas	33	4,682	30	197	22	3,585	43
California	1	55,238	1	198	21	6,518	8
Colorado	26	3,373	32	103	41	6,919	3
Connecticut	28	6,727	23	134	35 (tie)	4,705	25
Delaware	47	2,702	34	301	4	4,961	21
Florida	6	29,712	4	253	12	7,574	1
Georgia	11	16,812	9	259	10	5,110	19
Hawaii	39	2,143	38	141	33	5,200	18
Idaho	40	1,357	42	134	35 (tie)	3,908	38
Illinois	5	19,317	7	167	26	5,299	17
Indiana	14	9,930	18	176	23	3,914	37
Iowa	29	2,867	33	100	42 (tie)	3,942	35 (tie)
Kansas	32	5,010	28	204	17 (tie)	4,375	27
Kentucky	23	5,926	25	159	27	2,947	47
Louisiana	18	14,222	11	316	3	5,564	13
Maine	38	1,293	44	91	45	3,672	42
Maryland	20	13,407	12	284	5	5,373	15
Massachusetts	12	5,702	26	98	44	4,758	23
Michigan	8	19,437	6	213	15	6,366	10
Minnesota	21	2,459	35	58	49	4,134	31
Mississippi	31	6,532	24	242	13	3,266	44
Missouri	15	10,243	17	203	19 (tie)	4,366	28
Montana	44	1,160	45	140	34	4,549	26
Nebraska	36	1,957	39	116	38	3,695	41
Nevada	43	4,282	31	448	1	6,575	5

figure ranks the United States third in the world, *behind only South Africa and the Soviet Union* in the rate of incarceration, according to the Citizens Commission on Alternatives to Incarceration.

The state's high incarceration rate has long alarmed state correction officials, who must find places for the inmates sent to prison. In the 1970s, North Carolina ranked first in its rate of incarceration. This became an embarrassment to the state, in the category of other such "distinctions" as having a high rate of infant mortality, for instance, or leading the region in hookworm disease or illiteracy. In a front page story in 1978, for example, *The New York Times* took note of

Table 1. Ranking of States by Number of Inmates, 1986, and Rates of Incarceration and Crime, 1985, *continued*

State	Population Rank	Number of Inmates, 6/86	Rank	Rate of Incarceration	Rank	Rate of Crime, 1985	Rank
New Hampshire	41	732	48	72	48	3,252	45
New Jersey	9	11,977	14	157	28	5,094	20
New Mexico	37	2,389	36	152	30	6,486	9
New York	2	36,100	3	203	19 (tie)	5,589	12
North Carolina	**10**	**17,596**	**8**	**256**	**11**	**4,121**	**32**
North Dakota	46	411	50	55	50	2,679	48
Ohio	7	21,942	5	204	17 (tie)	4,187	29
Oklahoma	25	8,960	20	272	8	5,425	14
Oregon	30	4,688	29	174	24	6,730	4
Pennsylvania	4	15,027	10	127	37	3,037	46
Rhode Island	42	1,324	43	100	42 (tie)	4,724	24
South Carolina	24	11,533	15	319	2	4,841	22
South Dakota	45	1,089	46	149	31 (tie)	2,641	49
Tennessee	17	7,129	21	149	31 (tie)	4,167	30
Texas	3	37,760	2	227	14	6,569	6
Utah	35	1,803	40	107	40	5,317	16
Vermont	48	701	49	87	46	3,888	39
Virginia	13	12,441	13	210	16	3,779	40
Washington	19	6,950	22	155	29	6,529	7
West Virginia	34	1,637	41	85	47	2,253	50
Wisconsin	16	5,436	27	113	39	4,017	33
Wyoming	50	866	47	171	25	4,015	34

Sources:
Population Ranking: U.S. Department of Commerce, Bureau of the Census, News Release No. CB85-229, Dec. 30, 1985.
Prison Population and Rate of Incarceration: U.S. Department of Justice, Bureau of Justice Statistics, News Release No. BJS 86-210, Sept. 14, 1986. Refers to rate of imprisonment per 100,000 population.
Rate of Crime, 1985: *Uniform Crime Statistics 1985*, U.S. Department of Justice, Federal Bureau of Investigation, July 1, 1986, pp. 44-50. Refers to rate of crimes committed per 100,000 population.

the state's rate of incarceration in a story headlined, "North Carolina's Leaders Worried by Blemishes on the State's Image." Now Stevens Clarke, a faculty member at the UNC-Chapel Hill Institute of Government, says that the news is not all bad. Although North Carolina's rate of incarceration has continued to grow, it has slowed down rapidly, while the rest of the nation's incarceration rate has increased, he notes.

"We are all used to hearing about how high our prison population is, and how fast it has been growing, and the federal lawsuits, and so on," Clarke told the legislature's Special Committee on Prisons in a September memo.[9] "I don't mean to

suggest that there is cause for complacency about this situation, but I'd like to pass on some good news." That news (see Table 2, below) is that North Carolina's prison population was "the third slowest-growing in the United States from 1980 to 1985, and the second-slowest growing in the South." During the six-year period, said Clarke, the number of prisoners in all states grew by nearly 53 percent, and in the South by nearly 39 percent. But in North Carolina, the number grew by only 11.7 percent—"only about one-fifth as fast as the all-states total," said Clarke. In the early 1970s, North Carolina's incarceration rate had led the nation; now it was still high and still growing, but not as high as the rates in 10 other states.

North Carolina's prison population is high despite the fact that, historically speaking, the state's *crime rate* has been fairly low. According to statistics published by the Federal Bureau of Investigation, 31 states in 1985 had higher crime rates than North Carolina (see Table 1).

"North Carolina's crime rate generally is among the lower crime rates nationally," observes Whichard, "but we are higher in terms of rates of incarceration. It would be easy to conclude that our high rate of incarceration keeps our crime rate low, but you cannot draw that conclusion if you look at the same statistics on other states. For instance, Florida has a much higher crime rate, but a slightly smaller rate of incarceration. And West Virginia has a very low rate of incarceration, and a very low rate of crime. So the analogy between the two just doesn't hold."

Two's Company, But 18,000's A Crowd

On paper, at least, North Carolina's prisons were designed to hold 16,695. But Director of Prisons John Patseavouras says that figure is, for all practical purposes, meaningless. On the day Patseavouras spoke with *Insight,* the prison system held 18,022 prisoners, close to the 1985 record of 18,044, and about 1,400 higher than the rated capacity. But, Patseavouras pointed out, the actual capacity of the North Carolina system, if the state adhered to American Correctional Association standards requiring 50 square feet of cell space for each inmate, the capacity of the N.C. prison system would be only 13,200—not counting cells now under construction by the state.

In other words, if the state complied with nationally accepted penal standards, North Carolina's overcrowding problem would sound even worse—an overflow of about 4,800 inmates. North Carolina never has conformed to ACA standards, and not one North Carolina state prison unit has *ever* been accredited by the American Correction Association. The State Auditor calculates that even if a figure of 40 square feet per inmate were used, the system's current capacity would be 14,800.[10] By any calculation, these figures are small. Even the ACA standard of 50 feet would mean inmates have an average cell space that is no larger than a medium-sized residential bathroom.

The Department of Correction, in its 10-year plan released in March 1986, projects that it will have an additional overpopulation of 5,500 in-

Table 2. Growth of N.C. Prison Population Compared to Prison Population of All States and Southern States, 1980-1985

Rate of Incarceration Per 100,000 Population	1980	1981	1982	1983	1984	1985	% Increase 1980-85
North Carolina	244	250	255	233	246	254	4.1%
Southern States	188	202	224	225	231	238	26.6%
All States	130	144	160	167	176	187	43.8%

Source: Institute of Government, UNC-Chapel Hill, Sept. 15, 1986. Based on statistics from U.S. Department of Justice, Bureau of Justice Statistics.

Note: These statistics reflect prison populations and rate of incarceration as of December 31 of each year. Traditionally, each state's prison population is at its lowest point at that time of year, due to holiday release programs.

N.C. Department of Transportation

Road gang inmates of the 1920s.

mates by 1995. That will mean a total capacity deficit of about 10,000 adequate spaces—using the ACA standard—for inmates, unless "an ambitious construction program [is] adopted which will mitigate against federal court intervention and provide for reasonable conditions of confinement within the N.C. prison system."[11]

Prisoners are housed in four types of facilities in the 86-unit state prison system:

- 47 minimum custody units, many of them the vestiges of the old county road camps;[12]
- 28 medium custody prisons;
- two combination minimum and medium custody prisons;
- four close and medium custody units;
- one close custody unit;
- one halfway house; and
- three maximum and close custody units.

The latter category includes the largest state prisons—Central Prison in Raleigh for men, N.C. Correctional Center for Women in Raleigh, and Caledonia Prison in Halifax County. The average daily prison population in these 86 units in 1985 was 16,953 inmates.[13]

But state prison units are not the only lockups in the state. Another 151 local units exist, according to the Department of Human Resources' Division of Facility Services. These units include:

- 99 county jails (including four satellite jail units in the same building as the main jail);
- nine free-standing county satellite jails;
- 41 municipal jails, most of which are small; and
- two regional jails serving multi-county areas (the Albemarle Regional Jail in Elizabeth City serves Pasquotank, Perquimans, and Camden counties, and the Bertie-Martin Regional Jail in Windsor serves Bertie and Martin counties).

In 1985, the average daily population of these 151 units was 4,075 inmates, most of whom were awaiting trial or serving short sentences.[14] In other words, an average of 21,028 North Carolinians were locked behind bars on any given day in 1985.

The specter of further overcrowding without substantial new construction is a chilling thought—especially to those who occupy the existing prison cells. In June 1986, the Office of State Auditor provided a snapshot in time of the prison population as it existed on the final day of 1985.[15] That snapshot, provided to the Special Committee on Prisons, has changed since then, of course, because the makeup of the prison population changes daily. But the breakdown of the population that day was representative of the current population today (see tables 3 and 4, pp. 12 and 13).

Of the 17,513 inmates under lock and key that day, most of them (94.3 percent) were male, and more than half were black (52.9 percent)—more than twice the percentage of blacks (24 percent) in the state's general population. Nearly 43 percent were white, and the rest were Oriental, Indian, or of unreported races. As always, most of the inmates were young, with more than 31 percent under the age of 25 and 74 percent under the age of 35. In other words, nearly three-fourths of the prison inmates were younger than 35—far out of

Table 3. Inmate Population by Race and Sex, Dec. 31, 1985

	Felons	Misdemeanants	Other	Total	Percentage of Total Inmates
Race and Sex:					
Males:					
White	5,621	1,570	—	7,191	41.1%
Black	7,436	1,434	—	8,870	50.6%
Indian	325	76	—	401	2.3%
Oriental	2	—	—	2	0.0%
Other	53	5	—	58	0.3%
Total Males	13,437	3,085	—	16,522	94.3%
Females:					
White	247	65	—	312	1.8%
Black	299	105	—	404	2.3%
Indian	16	3	—	19	0.1%
Oriental	1	—	—	1	0.0%
Other	—	—	—		—
Total Females	563	173	—	736	4.2%
Not Reported/Unsentenced	—	—	255	255	1.5%
Totals	14,000	3,258	255	17,513	100.0%

Table Prepared by Office of State Auditor

proportion to their numbers in the population in general, about 59 percent.

The high number of young people in prison may have been a direct outgrowth of the same trend in the general populace. "The 'baby boom' bulge in the general population may have contributed to the dramatic increase in the total number of criminal offenders and the prison population during the 1970s and early 1980s," notes Joseph E. Kilpatrick, assistant director of the Z. Smith Reynolds Foundation in Winston-Salem, which, with the Mary Reynolds Babcock Foundation, funded the Citizens Commission on Alternatives to Incarceration. "Based on this theory, some believe that the 'prison overcrowding crisis' will subside as the baby boomers grow older," Kilpatrick adds.

Not only were the inmates relatively young, but most had less than a high school education, and less than one-fourth of the inmates were married. Nearly 200 inmates—about 1 percent—had four years of college, and nearly 7 percent of the inmates had at least some college education —triple the rate of 1970, when only 2.3 percent of the inmates had some post-high school education.

Of the 17,513 inmates, the vast majority —14,000—were felons, compared to 3,258 misdemeanants and 255 prisoners in other categories. In other words, nearly 80 percent of the inmates were felons. But a far lesser percentage were felons serving crimes of violence. On the final day of 1985, there were 7,509 felons—43 percent of the population—serving sentences for such assaultive crimes as homicide, rape and sexual assault, and robbery. Another 1,369 inmates—8 percent—were behind bars for public order felonies including drug-related crimes, and 5,122—29 percent—were in prison for felony property crimes, including burglary, larceny and auto theft, and forgery and fraud.

Table 4. Inmate Population by Crime Category, Dec. 31, 1985

	Felons	Misdemeanants	Other	Total	Percentage of Total Inmates
Assaultive Crimes:					
Homicide	2,355	—	—	2,355	13.4%
Rape and Sexual Assault	1,568	—	—	1,568	9.0%
Robbery	2,717	—	—	2,717	15.5%
Other	869	400	—	1,269	7.2%
Total Assaultive Crimes	7,509	400	—	7,909	45.1%
Public Order Crimes:					
Drugs	1,198	80	—	1,278	7.3%
DWI	—	726	—	726	4.1%
Traffic	—	350	—	350	2.0%
Other	171	218	—	389	2.2%
Total Public Order Crimes	1,369	1,374	—	2,743	15.6%
Property Crimes:					
Burglary	3,075	447	—	3,522	20.1%
Larceny and Auto Theft	1,235	718	—	1,953	11.2%
Forgery, Checks, Fraud	633	204	—	837	4.8%
Other	179	115	—	294	1.7%
Total Property Crimes	5,122	1,484	—	6,606	37.8%
Not Reported/Unsentenced	—	—	255	255	1.5%
Total Inmates (All Crimes)	14,000	3,258	255	17,513	100.0%

Table Prepared by Office of State Auditor

Choices for Eliminating Overcrowding

These categories of crimes include non-violent and property-crime offenses for which many states do not imprison offenders. State officials generally are reluctant to enumerate which crimes should not carry active prison sentences, at least as an alternative. As Wade Barber, former district attorney in Chatham County and an advocate of appropriate use of alternatives to incarceration, puts it, "There are *some* bad check writers who ought to go to jail. But rather than defining a crime by how long we should send a person to prison, we need to determine what is the best way to punish an offense, whether it is prison, or probation, or restitution, or all of these."

Another advocate of alternatives, former state Rep. Parks Helms, puts it this way: "My guess is that we have far too many people in our prison system for 'non-violent' crimes, and that detracts from our ability to focus our attention on the serious offenders who are in fact threats to society."

Former Governor James B. Hunt Jr. warned, however, "If an alternative form of punishment will best provide that protection, we ought to use it. If prison will best protect our people, we should use prisons and build as many as we have to. My policy remains the same: that is, swift, certain, and severe punishment for the criminal."

Correction officials, including Secretary of Correction Aaron Johnson and Director of Prisons John Patseavouras, cite DWI, or Driving While Impaired, convicts as examples of inmates that might be better housed elsewhere. At the end of 1985, for instance, there were 726 misdemeanants

serving DWI sentences in state prisons. Had they been housed elsewhere, the state's prison overcrowding would have been relieved—but local jail overcrowding would have been worsened.

Still, Patseavouras points out, prison crowding could be alleviated somewhat if inmates with short sentences were not committed to state prisons. "We get more than 400 inmates a year who've been given sentences of 60 days or less. Now, I know that sounds like a small number, but it is expensive to take an inmate in, to transport them, give them all the testing that we must, file all the reports, just for a short sentence. Is that the most effective way to handle an inmate?" The prison system already processes—that is, checks in, examines, and checks out—about 18,000 persons a year. It is a time-consuming and expensive process, departmental officials point out.

More than 90 percent of the state's inmates are serving sentences of one year or longer, and the largest group of inmates is serving 10-year to life sentences (see Table 5, below, for more). Fewer than 8 percent serve sentences of less than one year; 9 percent serve one to two years; 21 percent serve two to five years; nearly 18 percent serve five to 10-year sentences; nearly 34 percent serve from 10-year to life sentences; and more than 9 percent are in prison for life sentences or are on Death Row. (These sentences do not reflect the actual time served in prison. For a description of how the Fair Sentencing Act has worked in North Carolina, see article on p. 42.)

The Martin administration has proposed a two-pronged approach to prison overcrowding— more alternatives to incarceration (see article on p. 50 for more) and more prison construction, including an experiment with three privately built prisons (see article on p. 74 for more on this point). Governor Martin proposed a 10-year plan to add 10,000 beds to the state system at a total cost of $202 million, including spending $50 million during the first three years of the plan to add 2,500 new beds and replace the decrepit Craggy Prison, a medium custody unit in Asheville generally regarded as the worst prison structure in the state. The Martin administration also proposed a diversion of up to 5,000 inmates into alternative programs, which the Governor said would reduce the number of new prison beds needed.

The costs of incarceration are startling. The Department of Correction, which employs 7,600 staff members, operates on an annual budget of $216 million. According to the State Auditor, the average daily cost per inmate in 1984-85 was $30.57.[16] The cost of operating prisons varied according to the level of custody, from a low of $22.79 per inmate for minimum custody, to $29.31 for medium custody, to $47.67 for maximum and close custody inmates. The cost varied widely depending upon the unit, too. At the new Central Prison in Raleigh, the daily cost of incarceration is $68.14 per inmate; at the N.C.

Table 5. Inmate Population by Sentence Length, Dec. 31, 1985

	Felons	Misdemeanants	Other	Total	Percentage of Total Inmates
Sentence Length:					
6 Months or Less	199	322	1	522	3.0%
6 Months to 1 Year	52	722	—	774	4.4%
1 to 2 Years	372	1,229	—	1,601	9.1%
2 to 5 Years	3,021	668	—	3,689	21.1%
5 to 10 Years	2,933	194	—	3,127	17.9%
10 Years to Life	5,771	116	—	5,887	33.6%
Life/Death*	1,603	4	—	1,607	9.2%
Not Reported/Unsentenced**	49	3	254	306	1.7%
Total Inmates	14,000	3,258	255	17,513	100.0%

* Includes inmates sentenced to death penalty.
** Includes inmates who have been convicted but who have not been sentenced by trial judge.

Table Prepared by Office of State Auditor.

Correctional Center for Women across town, it was almost half that—$35.51. In other words, to keep *one* inmate locked up at Central Prison for *one* year costs the taxpayer $24,871. More than one legislator has observed that it would be cheaper to hire a full-time probation officer to shadow a freed inmate than to lock him up and feed and clothe him.

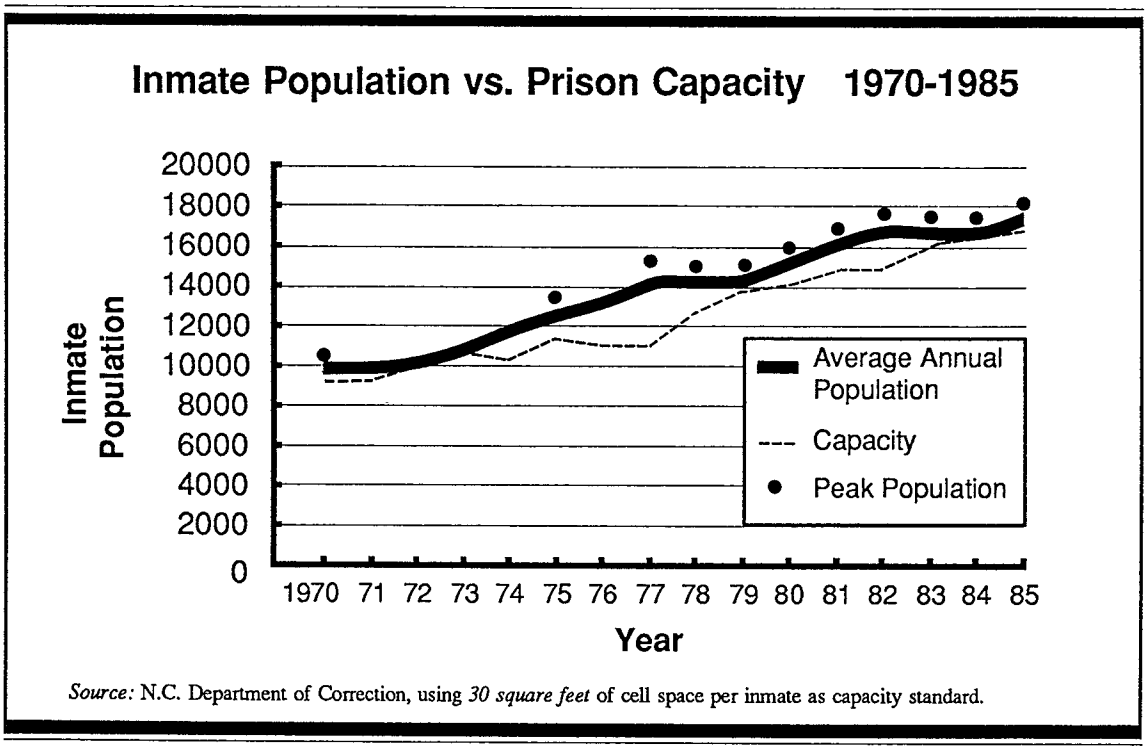
Of course, cutting the population by a few, or adding a few prisoners, will produce no substantive savings. But cutting the prison population by a significant amount could save millions by avoiding the costs of new prison construction. For instance, the 1985 General Assembly financed a consent agreement—a legal settlement to a lawsuit filed in federal court charging the state with operating inhumane prisons—to improve state prisons in the Piedmont, to the tune of $12.5 million. How is the state spending this money? The taxpayers are footing the bill for five new 100-bed dormitories, at a cost of $7.4 million—or nearly $1.5 million per dormitory, and about $15,000 per dormitory bed. And that's just for a minimum custody, dormitory-style unit. Prisons that have single cells, or maximum-custody prisons like Central Prison, cost many times that amount. The Martin administration proposes one new 500-bed institution—at a cost of $28.5 million. Average projected cost per bed? About $57,000.

Of course, projections sometimes are off the mark. The Martin administration, for instance, has projected a prison population increase of up to 22,850 by 1995 (see Table 6, below). But the State Auditor noted that the Martin administration based that projection on a continuation in the existing rate of increase, without accounting for diversion of prisoners in alternative programs and other methods of reducing prison overcrowding.[17] Thus, the State Auditor's projection is for an increase up to 19,191 prisoners by 1995—which could require

Table 6. Size of Prison Population, Actual and Projected

Year	Governor's Ten-Year Plan Projections	Governor's Revised Projections May, 1986	Actual Population	State Auditor's Report Projections
1970			9,677	
1971			9,899	
1972			9,931	
1973			10,792	
1974			11,935	
1975			12,581	
1976			13,154	
1977			14,332	
1978			14,189	
1979			14,218	
1980			15,151	
1981			16,095	
1982			16,786	
1983			16,469	
1984			16,461	
1985			17,430	
1986	18,350	18,200		18,164
1987	18,850	18,750		18,574
1988	19,350	19,200		18,776
1989	19,850	19,550		18,856
1990	20,350	19,950		18,890
1991	20,850	20,300		18,926
1992	21,350	20,700		18,968
1993	21,850	21,100		19,029
1994	22,350	21,500		19,083
1995	22,850	21,950		19,161

Sources: Office of State Auditor and Department of Correction



Source: N.C. Department of Correction, using *30 square feet* of cell space per inmate as capacity standard.

Carol Majors

far less new construction. (In May, the Martin administration revised its projections, lowering its 1995 estimate to 21,950—still higher than the Auditor's estimates.)

That would delight those advocates of increased use of alternatives to incarceration—particularly those who perceive that new prison construction simply confirms a corollary to Parkinson's Law—that objects tend to fill the space provided for them. As Parks Helms puts it, "The more prisons we build in response to political pressures will simply mean that we will place more people in prison. I cannot imagine a time when our citizens will allow prison space to stand vacant." Others argue the reverse—that growth in the prison population itself drives new construction. But no one argues that the financial and social costs of corrections are small.

Says former District Attorney Barber, "Prison is *the* most expensive alternative for punishing an offense, both in terms of what it costs the taxpayer, and in terms of how we are punishing the offender. Prisons should be the *last* alternative that we consider in deciding how to punish an offense."

FOOTNOTES

[1]Memo from Stevens Clarke, Institute of Government, UNC-Chapel Hill, to N.C. legislative Special Committee on Prisons, Sept. 15, 1986, based on statistics from U.S. Department of Justice, Bureau of Justice Statistics.

[2]*Uniform Crime Statistics,* 1985, U.S. Department of Justice, Federal Bureau of Investigation, July 1, 1986, pp. 44-50.

[3]*The Future of North Carolina: Goals and Recommendations for the Year 2000,* Report of the Commission on the Future of North Carolina, N.C. Department of Administration, 1983, pp. 243-244.

[4]The Eighth Amendment to the U.S. Constitution reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[5]*Report of the Citizens Commission on Alternatives to Incarceration,* Fall 1982, pp. 35-38.

[6]*Ibid.,* p. 37.

[7]U.S. Department of Justice, Bureau of Justice Statistics, News Release No. BJS 86-210, Sept. 14, 1986.

[8]*Ibid.*

[9]Clarke, p. 2.

[10]*Operational Audit Report, North Carolina Department of Correction,* Office of the State Auditor, June 1986, p. 34.

[11]*Corrections at the Crossroads, Plan for the Future,* 10-Year Plan by the N.C. Department of Correction, March 6, 1968, Part IV, pp. 1-3.

[12]The classifications of custody are defined by the Department of Correction as follows: *Maximum* custody inmates are housed in single security cells separated from the regular inmate population at secure prisons. *Close* custody inmates are housed in similar prisons, but are granted more freedom of movement and activity within the institution. *Medium* custody inmates are also under armed supervision but are assigned to field units where they live in dormitories and may work on off-site jobs, such as road squads, under armed supervision. *Minimum* security inmates are housed in field units, but are not under armed supervision. Inmates include misdemeanants and approved felons who are nearing release. Minimum security inmates may be eligible for work release, study release, and home leaves.

[13]*Operational Audit Report,* pp. 101-103.

[14]Interview with Robert Lewis, Division of Facility Services, Department of Human Resources, Nov. 14, 1986.

[15]*Operational Audit Report,* pp. 22-23 and pp. 83-107.

[16]*Ibid.,* pp. 101-103.

[17]*Ibid.,* pp. 30-32.

Who's In Charge?

by Bill Finger and Jack Betts

WANTED: Forceful, effective leader with legislative clout. Must be willing to provide clear vision for developing a state corrections policy—building prisons, expanding alternatives, sentencing reform, and more. Timing critical. Must act now.

JOB REQUIREMENTS: Ability to transcend partisan politics while forging alliances among various state government agencies and professional groups working in the criminal justice field.

APPLY TO: N.C. General Assembly, Jones St., Raleigh, N.C. 27611

A want ad for one of North Carolina's most pressing problems might read like this. No political leader has stepped forward with a *comprehensive* approach to corrections policy. What kind of criminal justice policies should the state be pursuing in its many programs—and who should be in charge of them?

Republican Gov. James G. Martin and his Secretary of Correction, Aaron Johnson, have released a "10-year" plan on prison policies. State government's leading Democrats, Lt. Gov. Robert Jordan III and Speaker of the House Liston Ramsey have appointed a Special Committee on Prisons. Co-chaired by Rep. Anne Barnes (D-Orange) and Sen. David Parnell (D-Robeson), this committee has reviewed many corrections issues and made numerous recommendations. The Office of State Auditor, headed by Democrat Ed Renfrow, who is elected statewide, has conducted an exhaustive series of operational audits on the entire corrections system.

Because duties are spread among at least four state government agencies, not to mention the General Assembly and the state judiciary, can a single politician or state agency step forward with a roadmap for the future? That may be difficult, because corrections is one of North Carolina's traditional minefields. In the same way that no politician can hope to win an election by inveighing against tobacco, no Tar Heel politician can hope to build a statewide constituency by championing the issue of prison overcrowding or alternatives to incarceration. Until very recently, criminal justice issues kept politicians handcuffed. The only winnable formula for politicians addressing criminal justice issues was presenting themselves as tough on crime—as law-and-order candidates.

But the law-and-order mood is changing throughout the nation. State prisons are locking up so many people that even the most avid lock-'em-up-and-throw-away-the-key judges and politicians are beginning to endorse alternatives to incarceration. The increasing size and traditional methods of the prison systems are costing the taxpayers too much money. Politically, two conservative maxims have come into conflict—more law-and-

Table 1. Incarceration Programs in North Carolina Government

Program[1]	Department/Division	Activities	Statutory Authority
Adult Prisons	Department of Correction Division of Prisons	Operates 80 adult prison units (4 for women), with a total population of about 16,100	G.S. 148-4
Youth Prisons	Department of Correction Division of Prisons	Operates 6 youth prison units (ages 14-21), with a total population of about 1,900	G.S. 148-44
Local Jails	County and Municipal Governments	Operate 151 local jails in 99 counties, with a population often exceeding 4,000.	G.S. 153A-216
Training Schools	Department of Human Resources/Division of Youth Services	Operates 5 training schools with an average daily population of about 625	G.S. 134A-6; G.S. 134A-8
Youth Dentention Centers	Department of Human Resources/Division of Youth Services	Funds and/or operates 8 detention centers; monitors these 8 and 3 county-run centers for compliance with state standards; average daily population of about 65	G.S. 134A-37; G.S. 134A-38
		TOTAL EXPENDITURES:	

FOOTNOTES

[1]Various state programs not shown on the chart include some functions related to incarceration. For example, the Department of Human Resources' (DHR) Division of Facility Services sets standards for local jails and licenses local jails as part of its larger licensing and standards functions (it has a separate Jails and Detention Section). Similarly, the DHR Division of Mental Health, Mental Retardation, and Substance Abuse Services (MH/MR/SAS) monitors the delivery of such services within the prison system. These services are supposed to meet standards established by the Commission for Mental Health, Mental Retardation, and Substance Abuse Services.

[2]Expenditures are for operating expenses only, which includes direct costs for the prison units and their pro-rata share of departmental administrative costs. Capital expenses for FY 1985-86 were $4,561,466.

[3]No one keeps aggregate figures for jail expenditures. This *estimate* is calculated in this way: In FY 85-86, the state paid counties $11 per day for men from the prison system kept in local jails (in 1986, the legislature raised the amount to $12.50). Multiplying the average daily population in all 151 jails (4,200) times $11 per person equals $46,200 per day for all 151 jails, or $16,863,000 per year. From this total, subtract the amount of state reimbursements ($2,113,000), which yields $14,750,000. This figure covers only operating expenses, not capital expenses.

order versus cut governmental spending.

Last year, the state spent $223 million keeping 18,000 people incarcerated. It spent another $48 million on community-based programs for more than 60,000 adult criminal offenders and juvenile delinquents. Meanwhile, local governments spent an estimated $15 million incarcerating 4,200 people in 151 jails. The Department of Correction runs the adult prison system, and the Department of Human Resources operates the system for juvenile delinquents. But four different departments oversee various programs for convicted offenders outside of prison. And who decides whether a person gets incarcerated or not? Enter the judicial branch, where 223 superior and district court judges decide through the sentencing process who goes to prison, who goes on probation, and who goes into an alternative program.

Implementing programs is only part of the puzzle. Who decides what policies these programs should follow? The Governor's Crime Commission, within the Department of Crime Control and Public Safety, supposedly serves as the major forum in the executive branch for developing crimi-

Expenditures in N.C., FY 1985-86

(7/1/85-6/30/86) (in thousands of dollars)

Local	State	Federal	Total
$0	$175,735 [2]	$106	$175,841
$0	$25,822 [2]	$776	$26,598
,750 [3]	$2,113 [4]	NA [5]	$16,863
$0	$17,902	$1,061	$18,963
$0	$1,761	$0	$1,761
,750	$223,333	$1,943	$240,026

FOOTNOTES, *continued*

4This is paid by the Department of Correction to county jails for adult males sentenced to local jails.

5A substantial number of local jails have agreements with the U.S. Bureau of Prisons to house federal inmates on an as-need basis. Each county negotiates a contract for its daily reimbursement rate. No aggregate totals are kept by the Bureau of Prison for these reimbursements.

nal justice and corrections policies. And the General Assembly, with its 170 members and scads of study commissions, enacts the laws and appropriates the money that ultimately control prisons and correction policy in North Carolina. But what is that policy?

You'll look far and wide and still won't find it written down under the heading of "North Carolina Corrections Policy." There are several versions, however. Under G.S. 143B-261, you can find these words: "It shall be the duty of the Department [of Correction] to provide the necessary custody, supervision, and treatment to control and rehabilitate criminal offenders and juvenile delinquents and thereby to reduce the rate and cost of crime and delinquency."

Or, if you were present at his press conference March 6, 1986, when Governor Martin issued his "10-Year Plan for the Future," you could have heard him say: "We have an opportunity today to establish a corrections policy that reflects reasonable standards, guaranteeing that criminals will not go unpunished, that punishment will fit the crime, and that public safety is enhanced."

Then there's the declaration in G.S. 15A-1340.3, also known as the Fair Sentencing Act: "The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior."

In 1985, a series of events triggered a major reappraisal of N.C. corrections policies. That year, the General Assembly committed $12.5 million to settle a class-action lawsuit against 13 prison units in the south Piedmont area, to relieve overcrowding, improve training programs, and address many other conditions (see article on page 29). Soon after, Jordan and Ramsey created the Special Committee on Prisons with a mandate to review all prison-related issues. Then in 1986, a federal court certified another class-action suit covering 48 state prison units, a suit the state is currently defending.

Just as the Special Committee on Prisons got cranked up, the State Auditor began what became a major, year-long investigation into the entire corrections field. In July 1985, after a suspicious and highly publicized death of a N.C. parolee and another person in a Myrtle Beach motel room, the Governor and Secretary Johnson asked the State Auditor to conduct an operational audit of the parole program under which the inmate had been released. Then, in a Dec. 4, 1985 letter, Jordan and Ramsey asked the Auditor to conduct a broad investigation into the entire corrections field, to "assist legislators in making the difficult decisions regarding the prison system."

With the federal courts, the Special Committee on Prisons, and the State Auditor all at work examining the prison system, the question of who does make policy came under close scrutiny. "A major challenge in examining North Carolina's

Table 2. N.C. State Government Programs for Adult Criminal Offenders and Juvenile Delinquents Not Incarcerated

Program	Department/Division	Activities	Statutory Authority
I. Adults Once Incarcerated (in most cases) —"Exit Alternatives"			
Adult Parole	Department of Correction Division of Adult Probation & Parole	Supervises 3,500 parolees and operates pre-release training program and re-entry parole investigations	G.S. 15A, Art. 85
Intensive Parole	Department of Correction Division of Adult Probation & Parole	Teams supervise felons in community settings; expanded in 1986 to 45 teams in 43 counties, supervising about 20 parolees (and 350 probationers, see below)	G.S. 15A-1374(b) G.S. 15A-1380.2(
Parole Commission	Quasi-judicial; in Department of Correction, for administrative purposes only	Grants and revokes paroles of prisoners; assists governor in granting reprieves, commutations and pardons; authorizes indeterminate-sentence release and release of youthful offenders	G.S. 143B-266
II. Intensive Supervision for Otherwise Prison-Bound Adult Offenders —"Entrance Alternatives"			
Intensive Probation	Department of Correction Division of Adult Probation & Parole	Teams supervise felons in community settings; expanded in 1986 to 45 teams in 43 counties, supervising about 350 probationers	G.S. 143B-262(c)
Community Penalties	Department of Crime Control & Public Safety/Division of Victim and Justice Services (state grants to local nonprofit organizations)	Designed to reduce prison overcrowding; develops a community sentencing plan through local agencies for prison-bound, non-violent "H, I, and J" felons and misdemeanants; expanded from 5 to 9 programs in 1986, covering 20 counties	G.S. 143B-500 to 143B-507

Expenditures in N.C., FY 1985-86

(7/1/85-6/30/86) (in thousands of dollars)

Local	State	Federal	Total
$0	$2,941	$0	$2,941
$0	(see intensive probation below)	$0	$0
$0	$1,562	$0	$1,562
$0	$705 (covers intensive parole and probation)	$0	$705
$71 [1]	$285	$0	$356

FOOTNOTE

[1]Includes money from businesses, individuals, foundations, and civic organizations.

system of criminal justice is the identification of all the programs that exist and the cost of operating these programs," began the final and most ambitious of the State Auditor's four separate operational audits. "The system is confusing to the offenders as well as the officials responsible for administering the programs and blending them in with the other components of the system." Released in draft form in October and in final form in December, the audit recommended a major reorganization scheme designed to address what it characterized as "fragmentation in the criminal justice system."

In a lengthy rebuttal to the draft audit presented to the Special Committee on Prisons in November, the Governor rejected the basic premise of the entire audit. "I am not convinced that this 'fragmentation,' if indeed this is an accurate term, is undesirable. Nor do I believe there to be evidence that there is excessive duplication of services." The Governor defended the performance of the three central agencies targeted for consolidation and reorganization by the Auditor—Adult Probation and Parole (Department of Correction), the community service program and alternative sentencing program (Department of Crime Control and Public Safety), and the alcohol and drug education programs (Department of Human Resources). Then he concluded: " . . . [R]ather than go the route of major restructuring which you propose, I believe greater interagency cooperation can resolve whatever questions of overlapping and duplication of services may exist."

This sharp debate hinged on a critical disagreement over whether the system was "broke." The Auditor wrote back to the Governor: "From our perspective, the system *is* in need of repair. It is acknowledged by all that offender services are fragmented among several state agencies. Each department logically has different agenda and priorities, as well as 'turf' to protect." But Robert Hassell, who presented the Governor's response to the Special Committee, insisted in a heated presentation, "I haven't seen the evidence that it's broke."

The attention on agency structure forced the Special Committee on Prisons, which is controlled by Democrats, to address the issue of bureaucracy. At its Dec. 16 meeting—which the two Republican committee members did not attend—Barnes and Parnell proposed moving adult probation to the Administrative Office of the Courts (which already oversees youth probation) but leaving community service in the Department of Crime Control and Public Safety, among other

Table 2. N.C. State Government Programs for Adult Criminal Offenders and Juvenile Delinquents Not Incarcerated, *continued*

Program	Department/Division	Activities	Statutory Authority
III. Community-Based Programs for Adult Offenders			
Adult Probation	Department of Correction Division of Adult Probation & Parole	Supervises 59,300 probationers, through monitoring of probation sentence and collection of fees	G.S. 15A, Article 8
Community Service Work	Department of Crime Control & Public Safety/Division of Victim and Justice	Provides community service placements for non-violent offenders through four programs: Driving While Impaired (DWI), Non-DWI, Parole, and First Offender; served 35,000 people last year, 25,000 of whom were in the DWI program	G.S. 20-179.4; G.S. 15A-1343(b1)(G.S. 15A-1371(h); G.S. 15A-1380.2; G.S. 143B-475.1
Alcohol and Drug Education Schools (ADETS)	Department of Human Resources/Division of Mental Health, Mental Retardation, and Substance Abuse Services	A statewide system (89 schools) designed to educate (not treat) first offender DWIs	G.S. 20-179.2
DWI Substance Abuse Assessment	Department of Human Resources/Division of Mental Health, Mental Retardation, and Substance Abuse Services	Statewide screening system through 41 mental health programs, established as part of 1983 "Safe Roads Act"	G.S. 20-179(m)
Drug Education Schools (DES)	Department of Human Resources/Division of Mental Health, Mental Retardation, and Substance Abuse Services	Statewide education program through 41 area mental health programs for drug possession (first offenders)	G.S. 90-96
Treatment Alternative to Street Crime (TASC)	Department of Human Resources/Division of Mental Health, Mental Retardation, and Substance Abuse Services	Federal program which funds 10 agencies serving 14 N.C. counties; agencies offer treatment for substance abuse for nonviolent offenders	G.S. 122C-117

proposals.

The Republican administration hit the roof. "At the bottom line it is political," said Secretary Johnson. "I think it is the same old strategy they [legislators] have tried to use since this administration took over, to try and take over the Governor's authority and power to weaken the office of the governor." The committee in January 1987 backed off that recommendation, deferring action indefinitely, turning instead to another controversial proposal: a cap of 18,000 on the prison population (see p. 72 for more).

Expenditures in N.C., FY 1985-86

(7/1/85-6/30/86) (in thousands of dollars)

Local	State	Federal	Total
$0	$21,859	$0	$21,859
$0	$3,300	$0	$3,300
$2,286[2]	$222	$100	$2,608
$204[2]	$0	$0	$204
$102[2]	$3	$8	$113
$0	$344	$143	$487

FOOTNOTE

[2]The source of almost all of these "local" funds are mandatory fees paid into the program by the offenders themselves.

How much energy should the 1987 legislature devote to restructuring the criminal justice bureaucracy? "As long as we concentrate on shuffling a bureaucracy around, we run the danger of losing sight of what makes our programs work, of how they relate to local government, and the many other important issues involved," says Stephanie Bass, executive director of the N.C. Center on Crime and Punishment. "We could be missing an opportunity to examine the overall goals of the system. We could improve things a great deal without changing the way the departments are set up. But the onus is really on the Governor to do that."

If the burden does lie in the governor's office, it also has fallen into the laps of the General Assembly. This year, the legislature faces questions of new prison construction, of experiments with private prisons, of expanding alternatives to incarceration, and of altering state sentencing laws. The 1987 General Assembly has the opportunity to determine precisely who makes prison policy and what that policy is. Central to deciding *that* is understanding how prison policy and programs currently work.

Asking the Right Question— What Is a Program's Function?

The bureaucratic location of a particular program is not as important as the functional relationship among programs—that is, the *purposes* of a program and how a program attempts to *accomplish those purposes*. The two major tables accompanying this article (Tables 1 and 2) divide the prison-related programs in North Carolina government by function.

Few analysts question the major alignment of the programs involved with *incarcerated* persons (see Table 1). The stickiest bureaucratic problem —dividing responsibilities for adult offenders and juvenile delinquents—was worked out in large part in 1975. That year, the General Assembly, acting against the Correction Department's wishes, transferred the youth training schools to the supervision of the Department of Human Resources, which had responsibility for other youth services. The "youth" prisons still under the Department of Correction contain inmates 16 to 21 years old, and some aged 14 to 16, if they were tried and sentenced as adults.

Questions do remain over the relationship between local jails and the state prison system. Both systems are overcrowded. In some parts of the state, the local jails house inmates specifically sentenced to the state prisons; in other parts, local sheriffs send offenders from local jails into the state system. Sentencing patterns are also important in this area, requiring, for example, that certain misdemeanants be sentenced only to local jails. For more on trends within the systems of

Table 2. N.C. State Government Programs for Adult Criminal Offenders and Juvenile Delinquents Not Incarcerated, *continued*

Program	Department/Division	Activities	Statutory Authority
IV. Community-Based Programs for Juvenile Delinquents			
Juvenile Probation and After-Care	Administrative Office of the Courts	Juvenile intake, probation, and aftercare for selected juvenile offenders	G.S. 7A, Art. 24
Community Based Alternatives (CBA)	Department of Human Resources/Division of Youth Services (state grants to counties, and then to nonprofit groups)	Monitors CBA program for juveniles; promotes local needs assessment and program planning	G.S. 7A-289.13
Governor's One-on-One Program	Department of Human Resources/Division of Youth Services	Develops and monitors local adult volunteer programs statewide; provides training and technical assistance	G.S. 7A-289.13
		TOTAL EXPENDITURES:	

jails, see page 68.

In contrast to the programs related to incarceration, opinions on the array of programs for criminal offenders who are *not* locked up ranges wide indeed. Table 2 divides the major programs responsible for these persons into four areas, based on *function*: exit alternatives, entrance alternatives, community service programs, and programs for juveniles. The article on alternatives to incarceration (page 50) examines most of these programs in detail. What's important to note here is the division of the programs by function.

An "exit" alternative—called by some analysts a back-door approach—refers to the three aspects of the parole system: adult parole, the new "intensive" parole system, and the Parole Commission. Virtually every criminal offender involved with one or more of these three programs comes directly from a prison unit. Hence, as a functional system, keeping parole programs closely related to the agency in charge of the prison units themselves makes good sense. The prison record, along with the person's sentence, controls whether (and when) he or she will be paroled.

"Entrance" alternative programs, as grouped in Table 2, are the state-funded efforts to keep *prison-bound* offenders out of the prison system and in a community-based setting. The two state programs, intensive probation and community penalties, began receiving state funding only four years ago and are still in an embryonic stage (see pages 55-62 for more on how they work, their differences, and their similarities). Currently, the Department of Correction administers the intensive probation system through its Division of Probation and Parole, but the Department of Crime Control and Public Safety administers the community penalties program, which functions through grants to local nonprofit organizations. These two programs are closely related in terms of their purpose —to keep prison-bound offenders out of prison— yet are in two different departments. Hence, a

Expenditures in N.C., FY 1985-86

(7/1/85-6/30/86) (in thousands of dollars)

Local	State	Federal	Total
$0	$9,709	$0	$9,709
$3,753 [3]	$7,142	$3,787 [3]	$14,682
$0	$148	$372	$520
$6,416	$48,220	$4,410	$59,046

FOOTNOTE

[3]For CBA programs, local (matching) funds and any federal funds are not administered through the Division of Youth Services.

specific need exists for close interagency coordination or for consolidation into one agency.

The third section of Table 2—community-based service programs for adult offenders—describes three kinds of state programs: adult probation, community service work, and four alcohol- and drug-related programs (for more on these programs, see pages 63-65). These programs *alone* do not keep *prison-bound* offenders in the community but rather work in conjunction with other programs, such as intensive probation and community penalties. (Historically, probation was considered *the* alternative to prison, i.e., an "entrance" program. Today, however, probation *alone* rarely serves as an alternative for a *prison-bound* person.)

Probation and community service are closely related *in purpose*—to monitor the behavior of an offender to ensure that the community-based sanctions are met (community work, restitution, substance abuse education or treatments, work routines, etc.). There are important differences, certainly. Probation officers monitor the behavior of an offender out of prison, keeping track with whether the probationer completes all the conditions of a community-based sentence. Community service officers have more specific responsibilities for placing a person in a community work program and monitoring that specific work assignment, among other duties.

Last year, about 60,000 persons were on probation on a given day, and in the course of the year, some 35,000 people (many of them also on probation) went through the community service program. Yet these two major bureaucracies are based in separate departments at the state level, with separate field offices and field workers, each keeping separate files on offenders. The inherent connection of the two programs requires close coordination at all levels—state, judicial district, and individual case workers. The State Auditor's reports focused on potential duplications in these two programs and proposed a new Division of Adult Services incorporating both these programs (and others). Officials working with the two programs involved objected strongly to any such merger. Sorting out the relationship between these two bureaucracies remains a tough but important issue for both the legislature and the Governor to address.

The four substance abuse programs in Table 2 are closely related, and all of them are monitored through the Department of Human Resources. Mostly, the programs are operated through the state's 41 area mental health agencies, which cover the entire state. (For more on these programs, see

"...And you won your case most easily and soon you will be free
But there will be a million more who lose their liberty
Not because of what they did but what they did not do
They did not pay a lawyer or a judge to see them through...."
—from "Respectable" by Don McLean

Table 3. Executive Branch Boards, Commissions, and Councils With Responsibilities for Correctional Issues

Board, Commission or Council *Where Group is Housed*	Purpose	Established By	Members Appointed By
1. The Governor's Crime Commission *Department of Crime Control and Public Safety* a. Juvenile Justice Planning Committee (22 mem.) b. Legislative Committee (16 mem.) c. Sentencing Committee (22 mem.) d. Victims Committee (20 mem.) e. Drug Assistance Committee (12 mem.) g. Justice Assistance Committee (7 mem.) h. Victims of Crime Act Committee (7 mem.)	Serves as primary advisory board for Governor and Sec. of Crime and Public Safety on crime and criminal justice matters; publishes a legislative agenda every two years and reports on various issues; administers federal grants and must have a committee for each such grant	G.S. 143B-478	23 - Governor 2 - Lt.-Gov. 2 - Speaker of the House 13 - Ex-officio (7 voting, 6 non-voting) [1] **40 - Total** [2]
2. Board of Correction *Department of Correction*	Advises Secretary of Correction on prison policy and makes recommendations	G.S. 143B-265	11 - Governor 1 - Sec. of Corr. (non-voting) **12 - Total**
3. Community Resource Councils *Department of Correction/ Division of Prisons*	86 local councils provide various services to local prison units	Sec. of Corr. Memorandum, June 13, 1985	Governor appoints all members; minimum of nine
4. Crime Victims Compensation Committee *Department of Crime Control and Public Safety*	Hears claims made by victims or dependents of deceased victims of criminally injurious conduct and sets compensation amount to be paid by offender to victim	G.S. 15B-3 (enabling legislation only; no funding)	3 - Governor 2 - Gen. Assembly[3] **5 - Total**

page 64 and the table on pp. 58-60.)

The last section of Table 2 summarizes the main programs for juvenile offenders who are not incarcerated. Currently, the Administrative Office of the Courts, under the supervision of the Chief Justice of the N.C. Supreme Court, monitors juvenile probation and after-care issues. The Department of Human Resources Division of Youth Services administers the community-based programs for juvenile delinquents. These programs operate primarily through local nonprofit organizations. State funds go to counties, which in turn distribute the monies to the nonprofit groups.

Does Form Follow Function in Prison Policy?

It's obvious that corrections policy in North Carolina has had no primary architect. Frank Lloyd Wright would have been confused as to whether function has followed form, or the reverse, in state prison policy. The 1987 General Assembly no doubt will debate what form criminal justice programs should take, especially which departments should control which programs. The state could move in two directions, administratively—either toward expanding the Department

Table 3. Executive Branch Boards, Commissions, and Councils With Responsibilities for Correctional Issues, *continued*

Board, Commission or Council *Where Group is Housed*	Purpose	Established By	Members Appointed By
5. Criminal Justice Education and Training Standards Commission *Department of Justice*	Sets regulations and minimum standards for 1) criminal justice training schools and 2) employment, education, and training of 25,000 criminal justice officers	G.S. 17C-3	3 - Governor 1 - Att. Gen. 14 - Others[4] 7 - Ex-officio[5] **25 - Total**
6. N.C. Sheriffs Education and Training Standards Commission *Department of Justice*	Sets regulations and standards for certification of sheriffs and deputies, training schools and programs, studies ways to improve education and training in administration of justice	G.S. 17E-3	1 - Governor[6] 11 - Sheriffs Assn. 2 - Gen. Assembly[7] 2 - Non-voting[8] **16 - Total**
7. Inmate Grievance Commission *Department of Correction*	Reviews and hears inmate grievances and makes recommendations to the Secretary of Correction	G.S. 148-101	5 - Governor[9]

FOOTNOTES

[1]The seven voting members are: Governor; Chief Justice of the Supreme Court; Attorney General; Director, Administrative Office of the Courts (AOC); Secretary of Human Resources (DHR); Secretary of Correction; and Superintendent of Public Instruction. The six non-voting members are: Director, State Bureau of Investigation; Secretary of Crime Control and Public Safety; Directors of Divisions of Prisons and Adult Probation and Parole; Director, Division of Youth Services (DHR); and Administrator for Juvenile Services.

[2]Many of these members also serve on the various committees.

[3]Upon recommendation of the Lt. Gov. and Speaker of the House.

[4]N.C. Assn. of Police Executives (3); N.C. Assn. of Chiefs of Police (3); N.C. Law Enforcement Officers' Assn. (2); League of Municipalities (1); Law Enforcement Training Officers' Assn. (1); N.C. Assn. of Criminal Justice Educators (1); North State Law Enforcement Officers' Assn. (1); N.C. Assn. of District Attorneys (1); and N.C. Law Enforcement Women's Assn. (1).

[5]Att. Gen.; Sec. of Crime Control & Public Safety; Sec. of Human Resources; Sec. of Correction; Pres. of UNC; Pres. of Community Colleges; and Dir. of the Institute of Government.

[6]From a list of three nominees for the N.C. Assn. of County Commissioners.

[7]Upon recommendation of the Lt. Gov. and Speaker of the House.

[8]State Pres. of Community Colleges and Dir. of the Institute of Government.

[9]The five commission members must come from a list of 10 people nominated by the North Carolina State Bar.

of Correction to encompass nearly every state correction program, including victim services and alternatives to incarceration, or toward continued decentralization of correction programs, with duties shared by a host of agencies.

Lattie Baker, assistant secretary for Programs & Personnel Development in the Department of Correction, and former president of the N.C. Correctional Association, has studied correction policies—and administrative structures—for years. He points out, for instance, that the Department of Correction is still one of the state's youngest cabinet-level departments, and "has not yet been recognized as a true agency." When the community penalties program was developed, for instance, correction officials argued that the Department of Correction should administer it. It went instead to Crime Control and Public Safety. "In an expansive model," adds Baker, "a Department of Correction would deal with victim programs as well as with alternatives."

On the other hand, expanding one agency to handle all correction programs does not by itself guarantee that any problems of fragmentation will be solved. Even when placed under one administrative roof, different divisions can still operate

independently, without cooperation and coordination, unless there is a well-defined policy and unless someone—the Governor or the cabinet secretary—provides firm leadership.

That's easier said than done, of course, and lately the General Assembly has taken a much stronger role in setting prison policy and directing what shall—and shall not—be done. That's largely because the legislature is dominated by Democrats, and Governor Martin is a Republican. Things were much different when Democrats were in power. For example, in 1977, Gov. James B. Hunt Jr. was dissatisfied with the state Parole Commission, then dominated by Republicans appointed by Hunt's predecessor, Gov. James E. Holshouser Jr. Hunt had only to ask the General Assembly to abolish the old Parole Commission and to create a new one, whose members Hunt would appoint, and—presto!—the state had a new Parole Commission.

After announcing his 10-year plan, Martin attempted to set forth his own correction program to the 1986 General Assembly. Unlike Hunt, a Democrat working with a friendly legislature, Martin ran into a political gelding by the legislature. The 1986 short session did provide funding for some of Martin's proposals—including a reserve fund for replacing Craggy Prison and more money for alternatives-to-incarceration programs—but in the main, the legislature made the Governor sit tight for another year. For example, in his most highly publicized proposal, to experiment with three privately run prisons, Martin got neither cooperation nor even a thorough hearing. Instead, the legislature enacted a last minute moratorium on private prisons (see article on p. 74).

Certainly proposals before the 1987 General Assembly will be wrapped up in politics, including specifically partisan politics, which may cloud the more substantive issues involved. In addition, a major new actor has come onto the political stage—the federal court system. The federal courts could well become more involved in determining how the prisons themselves are operated, either through the implicit threats of various lawsuits or through the settlements or court rulings themselves.

A governor's administration and the General Assembly can invest substantial time and political energy in examining the criminal justice system only so many times in a decade. In the early 1980s, the legislature took a comprehensive look at sentencing issues. Now, the overcrowded prisons, combined with the litigation, have forced policymakers to look again at the system. The legislature and the Martin administration may be tempted to fight the battles through a political smokescreen, or, more optimistically, examine individual programs in a more bipartisan spirit. But either approach will fall short.

Political sentiment on criminal justice has shifted. No longer can a politician merely embrace law and order with a single-minded view of corrections policies; saving taxpayers' money with alternatives to incarceration is now equally defensible politically. Within this shifting political mood, a political leader could come forward to champion a comprehensive corrections policy, including meaningful alternatives to incarceration as well as locking up those who are a danger to society. But who will that champion be in North Carolina?

No one has stepped forward. And without a champion with clout, the corrections system may continue to go down diverging paths at the same time, with no vision of the future.

Standing Legislative Committees of the N.C. General Assembly with Responsibilities for Examining Prison Legislation

1. Senate Appropriations Committee on Justice and Public Safety
2. Senate Judiciary Committees (Each of the four Judiciary Committees handles substantive correction legislation)
3. House Appropriations Base Budget Committee on Justice and Public Safety
4. House Appropriations Expansion Budget Committee on Justice and Public Safety
5. House Committee on Corrections
6. House Committee on Courts and Administration of Justice

Note: The Special Committee on Prisons, established in 1985 by the Lieutenant Governor and the Speaker of the House, has made its final report to the 1987 legislature. For it to continue, the Lieutenant Governor and the Speaker must reauthorize the committee.

Will the Federal Courts Run N.C.'s Prison System?

by Joel Rosch

On Sept. 16, 1985, U.S. District Court Judge James B. McMillan (Western District-N.C.) approved an out-of-court settlement in a five-year-old lawsuit, *Hubert v. Ward et al.* The settlement covered conditions in 13 prison units in the south Piedmont area.[1] Before submitting the settlement to Judge McMillan, the defense counsel—N.C. Attorney General Lacy Thornburg and other Department of Justice officials—submitted the agreement to Gov. James G. Martin and the General Assembly. The legislature appropriated $12.5 million to cover the terms of the settlement prior to Judge McMillan's action. A year later, however, the plaintiffs filed new motions claiming that the state had not moved at the pace it promised the court. As of Feb. 15, 1987, Judge McMillan had not ruled on these motions.

Meanwhile, on Oct. 21, 1986, U.S. District Court Judge W. Earl Britt (Eastern District-N.C.) certified a lawsuit similar to *Hubert* as a class action covering all inmates in 48 other state prison units, essentially all the "road-camp" units outside the south Piedmont area.[2] The state could be forced by this suit, called *Small v. Martin*, to make an appropriation of far more than $12.5 million, if the state decides to settle *Small* as it did *Hubert*, or if the plaintiffs win.

These two suits, covering 61 of the 86 prison units in the state, represent the most severe threat of federal intervention into the state prison system in the history of North Carolina. "If the General Assembly does not take decisive action during the 1987 session, the state is in serious danger of losing control of the prison system," says Ben Irons, executive administrative assistant for the Department of Correction and the department attorney most involved in the litigation. "I mean by that, judicial intervention would be much more likely."

That bugaboo phrase—"judicial intervention"—has over the years helped prompt significant legislative action, to the tune of some $125 million for construction costs alone since 1976. But the combination of the *Hubert* settlement and the *Small* case has forced the legislature to take notice like never before.

"In the late '70s and into the early '80s, the focus of the litigation was primarily on brutality and individual complaints," says Marvin Sparrow, director of N.C. Prisoner Legal Services. "Now the emphasis has shifted to class actions regarding overcrowding and conditions of confinement— triple bunking, bathroom space, clothing, recreation, medical treatment, and protection from violence."

In 1985, after the General Assembly approved the $12.5 million for the *Hubert* settlement, Speaker of the House Liston Ramsey and Lt. Gov. Robert B. Jordan III established a Special Committee on Prisons to review all issues related to the litigation. "The litigation has focused attention on the prison overcrowding," says state Rep. Anne Barnes (D-Orange), co-chair of the special committee, which presented its latest report to the 1987 legislature. "Sometimes, it takes special attention, like these suits, to bring some things into

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focus. It's a situation that very definitely needs some major attention. We have received some guidance from the consent settlement in the south Piedmont case in regard to what the court feels needs to be done. I'm certainly hopeful that through the work of the Special Committee, the General Assembly, and the Martin administration, we can keep control of our prison system."

While the federal courts can hand down orders and even appoint "special masters" to administer day-to-day operations in a state system, they cannot appropriate money. Moreover, appellate courts have been reluctant to uphold lower court rulings ordering states to spend money. In some instances, initial victories by inmates have been limited on appeal. In others, long after cases are settled out of court, conflict continues over the pace of implementation and the means of paying for improvements.[3]

A recent decision in Texas dramatically illustrates the point. On Jan. 5, 1987, U.S. District Judge William Wayne Justice found the state of Texas in contempt of court for failing to implement reforms in its prison system previously ordered by the court and agreed to by the state. The contempt ruling involves the complex and longstanding case, *Ruiz v. Estelle*.[4] "Judge Justice ordered the state to remedy the problems by April 1 or face fines that an attorney for the state said could amount to $800,500 a day," *The New York Times* reported on Jan. 6. "Texas is facing an estimated $5 billion budget deficit. State officials said they would probably appeal."

Courts rarely settle controversial prison issues. Rather, they redefine them and change the context in which the political battles are fought. Certainly, that has been the case in North Carolina where the threat of losing control of the N.C. prison system to the federal courts has become quite real. Why does "judicial intervention" pose such a threat to N.C. lawmakers? What role does litigation play in developing prison policy?

Why Federal Courts Rule on State Prisons

Historically in this country, the courts have taken a hands-off policy towards the rights of people after they were convicted of crimes and sent to prison. The theory was that corrections officials could make the best decisions about administering a state prison system. Over the last four decades, a

Crowded triple-bunk dormitory at the Columbus County Prison Unit

"If the General Assembly does not take decisive action during the 1987 session, the state is in serious danger of losing control of the prison system."

—Ben Irons, attorney, Department of Correction

series of court cases has gradually replaced this so-called hands-off policy.

The process began in 1948, when the U.S. Supreme Court ruled in *Price v. Johnston* that people convicted of crimes in federal cases retain certain constitutional rights as long as those rights do not interfere with custody and prison administration.[5] This decision gave *federal* inmates the right to ask the courts for relief if their rights were being violated under the Eighth Amendment to the U.S. Constitution, which says: "Excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted." Most prison inmates, however, are in institutions run by state and local governments, not the federal government. In *Robinson v. California* (1962), the federal courts applied the Eighth Amendment protections to *state*-run prisons as well as federal institutions.[6] These suits and subsequent litigation relied on the Fourteenth Amendment to the U.S. Constitution, which says in part: ". . . nor shall any State deprive any person of life, liberty, and property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The flood of litigation regarding state prisons over the last two decades stems from a breakthrough in *Cooper v. Pate* (1964), which allowed the use of "section 1983" as a litigation strategy for lawsuits by prisoners.[7] "Section 1983" refers to a federal law (42 U.S.C. 1983), originally passed in 1871 to protect civil rights in general, especially of the newly emancipated black population.[8] This law allows plaintiffs alleging violations of their civil rights to bring lawsuits against state agencies and local governments to federal court without having to go first to the state courts. The ability to file directly in federal court is very important for prisoners living in overcrowded conditions. State courts can be inhospitable to claims against state and local agencies. In addition, some states have put legal limits on the ability of state courts to grant judgments against state and local agencies.

In a "section 1983" suit decided in 1970 (*Holt v. Sarver*), a federal court found the entire Arkansas penal system to be in violation of Eigth Amendment prohibitions against cruel and unusual punishment.[9] This decision only set the stage for the most dramatic scenario, which took place in Alabama. In *Pugh v. Locke* (1976), prison officials in Alabama surrendered control of the day-to-day operation of their institutions.[10] In Alabama, federal judges and their appointed agents have helped determine cell size, urinal space, staff-inmate ratios, the temperature of water in prison showers, and the number of inmates that the state could incarcerate. Orders to reduce prison populations have even affected how much time individual inmates have served.[11]

The Alabama situation is not unique. As of January 1, 1987, nine states (seven of them in the South) had their *entire prison system* under court order (see Table 1). In addition, 28 states, including North Carolina, were operating at least part of their prison systems under some kind of court order, and four states were facing litigation concerning overcrowding conditions. Only nine states had no litigation pending regarding prison conitions.

A number of definitions of "overcrowded" exist. The American Correctional Association defines a "crowded inmate" as a person confined in a multiple-inmate unit that provides less than 50 square feet of floor space per person. The N.C. Department of Correction currently says that its prison system has a capacity of 16,695 people. Using this capacity figure, each inmate would have an average space of about 30 square-feet (6' by 5'). The actual population, as of December 1, 1986, was over 18,000. The department hopes eventually to have 50 square feet per person, says Ben Irons.

Section 1983 Suits in North Carolina

In 1980, four inmates at the Union County prison unit near Monroe, including self-educated legal student Wayne Brooks, filed a suit challenging conditions there. In December 1982, eight additional inmates joined the suit and asked permission "in the interest of judicial economy, convenience and fairness, and in order to avoid unnecessary duplication and multiplicity of actions" to raise claims on behalf of all inmates confined in the five medium- and seven minimum-custody units in the south Piedmont Department of Correction administrative area. (A 13th unit was eventually added to the suit.) In April 1983, the name of the suit was changed to *Hubert v. Ward et al.*, and it became a class action suit on behalf of all inmates who were then or in the future would be confined in that administrative area. Except for one, all of the units challenged are "road-camp" prisons. Constructed mainly in the 1920s and 1930s, the road camps housed prisoners who helped build roads throughout the state. Today, 60 of North Carolina's 86 prisons are still known as road-camp units.

In their suit, the inmates claimed that conditions in the south Piedmont prison units violated their rights under the Eighth and Fourteenth amendments to the U.S. Constitution to be free from cruel and unusual punishment. The suit also argued that conditions did not meet American Correctional Association standards and that they violated state building and fire codes, several North Carolina statutes,[12] and the N.C. Constitution.[13] The inmates made these claims, among others:

- buildings held far more prisoners than they were designed to hold;
- prisoners slept in triple bunks so close to each other that they practically touched, allowing no physical integrity;
- weapons were readily available to inmates, and violence or threats of violence were common;
- because of inadequate supervision in the overcrowded units, prisoners were often forced to submit to involuntary homosexual activities;
- educational, vocational, mental health, and medical facilities did not meet minimal state standards; and
- the units did not comply with state laws regarding diagnosing, classifying, and assigning prisoners to proper units.

The 1983 court ruling making *Hubert* a class-action suit also gave the plaintiffs' attorneys the right to conduct extensive discovery proceedings.

Toilet facilities at Columbus County Prison Unit

Under discovery, attorneys may review documents held by the defendants and interview defendants and their assistants under formal judicial conditions. During the discovery period, numerous experts retained by the plaintiffs and by the Department of Correction toured each of the prison units to review conditions and programs. The case was set to come to trial in October 1984. Shortly before the trial date, the Department of Correction began discussing a settlement with the plaintiffs. In 1985, the parties reached an agreement, which then went to the Governor and the legislature for approval.[14] Finally, in October 1985, Judge McMillan approved the settlement.

North Carolina had a lot to lose if the *Hubert* case had gone to trial. As in Alabama, the Department of Correction (DOC) could have lost control of the day-to-day operation of the 13 prison units to officials appointed by a federal judge. Moreover, if the court had found against the state in *Hubert*, the entire state system might then be fair game for a court order. Because so many of the state prison units are as old and overcrowded as those covered by *Hubert*, state prison officials had real concerns about the impact of a trial in *Hubert*. At the same time, state officials saw a settlement as an opportunity to speed up planned improvements.

"The consent judgment contained a great many things that the Department of Correction already wanted to do," says Special Deputy Attorney General Lucien "Skip" Capone III.

In the settlement, the DOC agreed to eliminate triple bunking in all dormitories and to reduce the population in the south Piedmont district by a third. The consent judgment listed the maximum number of inmates that could be held in each dormitory facility.[15] This could be accomplished either by developing alternatives to incarceration or by building new facilities. (In the settlement, the plaintiffs did not express a preference regarding alternatives or new units.) If new units were to be built, they had to meet design requirements set forth in the settlement, including: a minimum floor area of 50 square feet per occupant in the sleeping area, a ceiling height of not less than eight feet, one operable toilet and shower for every eight occupants, one operable wash basin with hot and cold running water for every six prisoners, and other such specifications covering the separate day rooms, temperature, lighting, and noise. The DOC also agreed to:

- upgrade fire safety, heating, cooling, ventilation, and lighting to meet state and national standards;
- establish meaningful educational, vocational, and work programs;
- improve the conditions of inmates segregated for discipline reasons from the other inmates;
- repair and/or install missing window screens, broken windowpanes, and door screens;
- provide all inmates with winter coats, wool blankets, and clean mattress covers;
- improve recreational facilities and equipment;
- hire additional staff and file regular progress reports to the court; and
- upgrade medical and religious programs.

The DOC said it could do all of this for $12.5 million.

Because the state admitted that conditions in one part of the penal system were bad enough to settle a case, inmates now have an easier time raising claims about similar conditions in other prison units. Three other major suits have been filed against the state: *Small v. Martin*, *Epps v. Martin*, and *Stacker/Milby/Bobbitt v. Woodard*.

"The consent judgment contained a great many things that the Department of Correction already wanted to do."

—Lucien "Skip" Capone III, Special Deputy Attorney General

Small v. Martin. Potentially the most important of all four suits (including even *Hubert*), it is still in the early stages for such major litigation. Discovery proceedings have just begun. The state at this point is defending the lawsuit and not considering a settlement. The suit began in July 1985, with James Small, an inmate at the Columbus County prison unit (near Whiteville) alleging many of the same problems raised in *Hubert*. On June 20, 1986, four inmates confined at other units joined the *Small* case, and their attorneys filed a motion to make *Small* a class-action suit covering 48 units. All 48 are road-camp prisons, similar to those covered under *Hubert*. The overcrowding and related conditions have made these old facilities vulnerable targets for litigation.

"Almost all road camp units are triple bunked now," says Sparrow of N.C. Prisoner Legal Services. Not only are the bunks very close together in the large, dormitory-style sleeping areas, they have also spread into the congregate lounge areas.

With triple bunks so close together, "You couldn't swing your legs out of bed without hitting someone," says one prisoner.

Epps v. Martin.[16] In May 1986, this class-action suit was filed against the state concerning conditions in the Craggy Prison Unit in Buncombe County, built in 1924. Craggy is not a road-camp unit but has all the same problems plus a leaky roof and broken plumbing. The state moved to have the case dismissed as moot, on the grounds that the department plans to close Craggy, and the legislature has appropriated some money towards that goal. (In 1986, the legislature voted $5.6 million toward a replacement for Craggy.)

"I feared for my safety and life every day I was at Caledonia [prison]."

"I also saw two incidents of forced homosexual activity. The two victims were young inmates...."

—from inmates' affidavits in Stacker/Milby/Bobbitt v. Woodard

Lawyers for the inmates are aware of the long-range plans to close Craggy. "We want to make sure that the admittedly deplorable conditions at Craggy are ended," says Melinda Lawrence, a Raleigh attorney with the law firm of Smith, Patterson, Follin, Curtis, James & Harkavy, and an attorney for the plaintiffs in the *Hubert*, *Small*, and *Epps* cases. "It's not even clear that land has been identified to purchase for a new facility. Moreover, even if a new prison is eventually built, it's not clear what will happen to Craggy."

Stacker/Milby/Bobbitt v. Woodard.[17] In April 1982, inmates at the Caledonia Prison Unit, a large prison complex in Halifax County, filed a class-action lawsuit claiming cruel and unusual punishment. In 1985 and 1986, the suit was consolidated with two others also involving Caledonia. N.C. Prisoner Legal Services represents all the plaintiffs in the suit. This combined suit bases its claims on conditions similar to those in the road-camp units (covered by *Hubert* and *Small*) and at Craggy. It alleges particularly stark conditions regarding availability of weapons, forced homosexual activity, and a shortage of staff to control the dormitories.

"I feared for my safety and life every day I was at Caledonia (prison)," said one inmate in an affidavit in *Stacker*.

Another inmate at Caledonia said in an affidavit filed with *Stacker*: "I also saw two incidents of forced homosexual activity. The two victims were young inmates who were forced to commit the act by several other inmates."

Sparrow, one of the attorneys in the suit, says that conditions were particularly violent at Caledonia because the Department of Correction "used to send all the troublemakers there. They are in the process of changing that policy now." Currently, the parties in the lawsuit are engaged in settlement negotiations.

Other Cases. Inmates in N.C. prisons have won several cases in federal court which forced the Department of Correction to institute new administrative procedures. For example, *Slakan v. Porter* forced the department to issue regulations restricting the use of high-pressure fire hoses, tear gas, and billy clubs to punish or control inmates confined in their cells.[18] In another case, *Bounds v. Smith*, the courts required the state to provide inmates with "meaningful assistance" with access to the courts, such as adequate law libraries. Filed more than 10 years ago, this case went all the way to the U.S. Supreme Court.[19] And, it still continues over the question of "meaningful assistance." The court ordered the state to facilitate

Table 1. States Under Court Order or Facing Litigation Because of Prison Conditions, January 1987

A. Entire prison system under court order (9)

Alabama[1]	Mississippi	South Carolina
Florida	Oklahoma[1]	Tennessee
Hawaii	Rhode Island	Texas

B. One or more facilities under court order (28)

Arizona	Kansas	Ohio
California	Kentucky	South Dakota
Colorado	Louisiana	Utah
Connecticut	Maryland	Virginia
Delaware	Michigan	Washington
Georgia	Missouri	West Virginia
Idaho	Nevada	Wisconsin
Illinois	New Hampshire	Wyoming
Indiana	New Mexico	
Iowa	**North Carolina**	

C. One or more facilities in litigation (4)

Alaska	Massachusetts	Pennsylvania
Arkansas		

D. No litigation pending (9)

Maine	New York	Nebraska
New Jersey	Montana	Oregon
Minnesota	North Dakota	Vermont

FOOTNOTE

[1]In these states, the federal court no longer maintains a compliance mechanism, but the court order is still in effect.

Source: American Civil Liberties Union, National Prison Project

access to the courts for inmates in N.C. prisons by providing free legal counsel, specifically by funding an additional 10 lawyers at N.C. Prisoner Legal Services. The state has appealed this ruling.[20]

Finally, a brutality case at the once notorious Piedmont Correctional Center in Salisbury involved criminal charges. While not tied directly to overcrowding and related conditions, the case shows another way that the courts can monitor the activities that take place behind prison bars. Known as the Hinton case, charges of brutality led to investigations by the Federal Bureau of Investigation and the State Bureau of Investigation, and to criminal convictions.[21]

Prison Policy from the Courts

The role of the federal courts in prison litigation, in North Carolina and nationwide, raises a number of questions about the separation of powers between the legislative, executive, and judicial branches of government and about the division of power between the states and the federal government.[22] In our democratic society, decisions about building and administering prisons are traditionally made by the elected "representatives of the people"—the legislature—not by federal judges, who are appointed to office. In our system of federalism, each state is supposed to run its prison system, not the federal government. At the same time, prison inmates are guaranteed certain minimum constitutional rights.

Since the 1930s, a controversial view of the judiciary has emerged that has spurred the way for prison litigation. The U.S. Supreme Court has paid special attention to the rights of certain "discrete and insular minorities," as U.S. Supreme Court Justice Harlan Fiske Stone put it.[23] These minorities have no place else to turn besides the courts for just treatment from the government, because the other parts of the political system do not work for them. Defenders of such "judicial activism" argue that democracy includes respect for the rights of the minority as well as majority rule. When the court acts in the interest of those who cannot effectively use the political system, it creates a forum for the politically powerless to air their grievances.[24]

Many jurists regard the Eighth Amendment as establishing a minimum standard of decency below which the courts will not allow prison conditions to fall. When conditions for inmates became as egregious as they were shown to have become in Alabama and Arkansas, the courts used its powers on behalf of inmates who had no place else to turn. In addition to the overcrowding and cruel living conditions, like those alleged in the various N.C. lawsuits, Alabama and Arkansas had particularly nightmarish situations, including even suspicious deaths and graves found under some Arkansas prisons.

In Alabama, Arkansas, and other states with their prison system under court order, rulings have had an impact not only on the prisons themselves but also on the overall political debate about

prisons. Successful court action on behalf of inmates is never popular with voters because the result is either that taxes must be raised to pay to improve the penal system, funds are diverted from other services for prisons, or fewer convicted offenders can be incarcerated. After the takeover of the Alabama prison system by the federal courts in 1976, George Wallace, in his presidential race, used the slogan "Vote for George Wallace and give a barbed wire enema to a federal judge."[25]

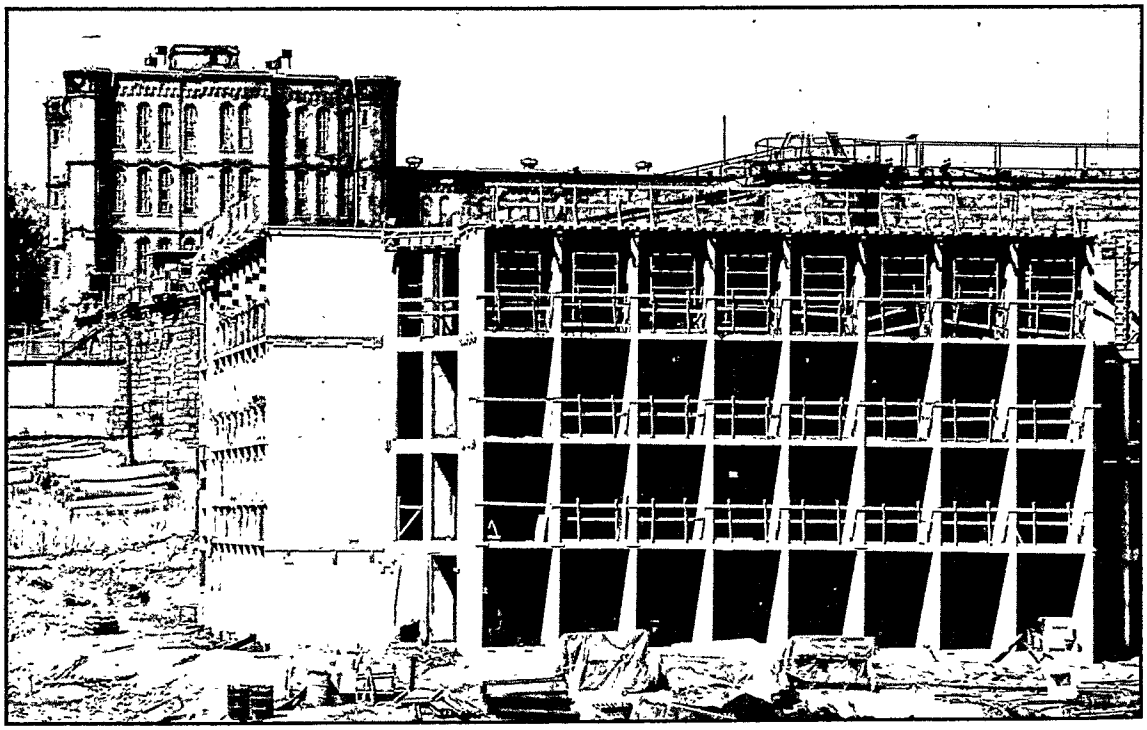
Regardless of one's philosophical view of judicial activism, legitimate questions can be voiced about the competence of court officials to make specific rules about running correctional institutions. Surprisingly, some recent research shows that court-ordered policies can be more cost effective than traditional correctional policies. For example, some aspects of what the courts have ordered in Alabama and in North Carolina (through the *Hubert* settlement) have proven to be *more cost effective* than a policy of overcrowding. One national study of prison costs found that correctional institutions with single cells, more square feet per person, and better sanitation facilities cost less to run than overcrowded prisons. For example, a prison that had 100 percent of inmates in single cells cost $7.20 less to run per person per day than a prison with 58 percent of inmates in single cells.[26]

Ironically, the inmates and attorneys who have filed the litigation in North Carolina have sought many of the same goals as have Department of Correction officials. "Almost all of the demands agreed to in the *Hubert* case and those that have been raised in *Small v. Martin* are things the department would want to do anyway," says Ben Irons. Likewise, because of the *Epps* suit, the department has a much better chance of replacing the Craggy Prison Unit than it had before the litigation. The prison system must compete with schools, roads, parks, the elderly, and many other constituencies for limited resources. The department's request for increased personnel has taken on new credibility since the settlement of the *Hubert* case.

Prison litigation in North Carolina has passed two critical junctures—the $12.5 million settlement of *Hubert* and the court's certification of *Small* as a class-action suit covering 48 units throughout the state. And, other important litigation continues to put pressure on the department and on the legislature to address problems in the prisons. In the wake of these decisions, a far larger constituency supports improving prison conditions. This growing constituency even reaches into the lower levels of the Department of Correction.

A number of lower-level correction officials

Central Prison in Raleigh under construction in 1980



Jackson Hill

"The litigation has focused attention on the prison overcrowding."

— Rep. Anne Barnes (D-Orange), co-chair, Special Committee on Prisons

cheer when the department loses a case, They are happy, they say privately, because longstanding problems will finally begin to be addressed. These officials (who do not want their names used for obvious reasons) could never muster the political punch to relieve the problems, but the litigation has provided new leverage. The litigation in a curious way links the "insular minorities" in the prisons with the "insular minorities" within the bureaucracy. Court action has permanently altered the political landscape in North Carolina by increasing the leverage of those advocating prison reform—both public and private advocates.

FOOTNOTES

[1]*Hubert v. Ward et al.*, No. C-C-80-414-M (W.D.N.C.).

[2]*Small v. Martin*, No. 85-987-CRT (E.D.N.C.).

[3]*Rhodes v. Chapman*, 452 U.S. 337 (1981). For a review of such cases, see Erika Fairchild, "The Scope and Study of Prison Litigation Issues," *The Justice System Journal*, Vol. 9, No. 3, 1984, pp. 325ff.

[4]*Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980); 679 F. 2d 1115 (5th Cir. 1980); *cert. denied*, 103 S. Ct. 452 (1983); *Modified on rehearing*, 688 F. 2d 266 (5th Cir. 1982); *cert. denied*, 103 S. Ct. 1438 (1983).

[5]*Price v. Johnston*, 334 U.S. 266 (1948).

[6]*Robinson v. California*, 370 U.S. 660 (1962).

[7]*Cooper v. Pate*, 378 U.S. 546 (1964).

[8]42 U.S.C. 1983. *"Civil action for deprivation of rights.* Every person who. . .subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

[9]*Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970); *aff'd.*, 442 F. 2d 304 (8th Cir. 1971).

[10]*Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

[11]Tinsley Yarbrough, "The Alabama Prison Litigation," *The Justice System Journal*, Vol. 9, No. 3, 1984, pp. 276ff.

[12]N.C.G.S. 148-12, -19, -22, and -26. These statutes include such requirements as the following: "The Department of Correction shall, as soon as practicable, establish diagnostic centers to make social, medical, and psychological studies of persons committed to the Department." N.C.G.S. 148-12(a); "The general policies, rules and regulations of the Department of Correction shall prescribe standards for health services to prisoners, which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis, for all types of patients." N.C.G.S. 148-19(a); and "The general policies, rules and regulations of the Department of Correction shall provide for humane treatment of prisoners and for programs to effect their correction and return to the community as promptly as practicable." N.C.G.S. 148-22(a).

[13]Constitution of the State of North Carolina, Article I, Section 27: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."; and Article XI, Section 1: "The following punishments only shall be known to the laws of the State: death, imprisonment, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State."

[14]In February 1981, the executive branch settled a highly controversial class-action suit (*Willie M. v. Hunt*) in federal district court without first notifying the General Assembly. The *Willie M.* settlement and subsequent appropriations have totaled more than $13 million. After the *Willie M.* settlement, the General Assembly passed a statute that required the Attorney General personally to approve any consent settlement and stated that no consent decree could be binding on the state unless sufficient funds were *first* approved by the General Assembly (N.C.G.S. 114-2.1 and 2.2). This statute was enacted as a special provision in the 1982 budget bill, Chapter 1282 of 1981 Session Laws (2nd Session, 1982), section 51. "These statutes took away the discretion that state agencies previously had simply to enter into consent judgments," says Lucien Capone III of the Attorney General's office. If at a later date (after the settlement), the court orders *additional* sums spent, then the statute is not binding. "The statute cannot be binding on the federal courts," says Capone. For background on the *Willie M.* settlement in the context of other separation of powers issues, see "Separation of Powers," *North Carolina Insight*, Vol. 5, No. 1, May 1982, pp. 42-43.

[15]According to the consent decree, the maximum number of inmates "housed in each dormitory facility (in existence at the date of this agreement) at the field units shall not exceed" the following numbers: Union (94), Iredell (92), Stanly (92), Cleveland (100), Mecklenburg I (82), Mecklenburg II (110), Rowan, North (68), Rowan, South (52), Cabarrus (66), Gaston (68), Lincoln (74), Catawba (56), and Anson (90), *Hubert v. Ward et al.*, No. C-C-80-414-M (W.D.N.C.), paragraph III-6.

[16]*Epps v. Martin*, No. A-C-86-162 (W.D.N.C.)

[17]*Stacker v. Woodard*, No. 85-231-CRT, *Milby v. Woodard*, No. 82-489-CRT, *Bobbitt v. Stephenson*, No. 86-69-CRT, (E.D.N.C.); these three cases have been consolidated into one, commonly called *Stacker/Milby/Bobbitt v. Woodard.*

[18]*Slakan v. Porter*, 737 F. 2d 368 (4th Cir. 1984).

[19]*Bounds v. Smith*, 430 U.S. 817 (1977).

[20]*Smith v. Bounds*, 610 F. Supp. 597 (E.D.N.C. 1985, *appeal pending*).

[21]In 1981-82, prisoners at the Piedmont Correctional Center in Salisbury filed numerous complaints regarding brutality, through the Department of Correction grievance procedure and to the FBI. The department conducted an internal investigation which resulted in demotions, transfers, and dismissals of several officials serving at the Salisbury unit, including the superintendent, Robert L. Hinton. The State Bureau of Investigation conducted a separate investigation and found no evidence of any wrongdoing. Meanwhile, an FBI investigation of the complaints led to criminal charges against six officials, including Hinton. All but Hinton entered guilty pleas; at Hinton's trial, some of the officers testified that Hinton had authorized beatings of prisoners. Hinton was convicted; he is appealing his conviction. The Salisbury unit developed a reputation as a "reign of terror," as Marvin Sparrow puts it. "They were taking prisoners into back rooms and beating the hell out of them. One guy got his skull broken."

[22]See "Separation of Powers," *N.C. Insight*, Vol. 5, No. 1, May 1982, pp. 36ff; "The Role of the Judiciary in Making Public Policy," *N.C. Insight*, Vol. 4, No. 1, April 1981, pp. 12ff; and *Boards, Commissions, and Councils in the Executive Branch of North Carolina State Government* by Jim Bryan et al., pp. 41-64.

[23]*United States v. Carolene Products Co.*, 304 U.S. 144, n. 4 (1938).

[24]See Stuart Scheingold, *The Politics of Rights*, Yale University Press, 1974.

[25]Yarbrough, p. 287.

[26]William Trumbull and Ann Witte, "Determinants of the Costs of Operating Large-scale Prisons with Implications for the Cost of Correctional Standards," *Law and Society Review*, Volume 16, No. 1, 1981-82, pp. 115-135.

An Interview with ***Aaron Johnson*** *Secretary of Correction*

Aaron Johnson, 53, became North Carolina's Secretary of Correction on Jan. 7, 1985 when he was appointed to the post by Gov. James G. Martin. Johnson had been a member of the Fayetteville City Council since 1979 and was Mayor Pro Tem at the time of his appointment.

A native of Willard in Pender County, Johnson graduated from Shaw University with a Bachelor of Arts in 1957 and did graduate work at Shaw University and at Southeastern Theological Seminary. He was pastor of Mount Sinai Baptist Church in Fayetteville for 25 years and has been active in civic and political affairs. A former member of the N.C. Good Neighbors Council, Johnson was a delegate to the 1980 Republican National Convention and has served as president of the Fayetteville Ministerial Association and the Fayetteville Civic Association. Associate Editor Jack Betts conducted this interview on Oct. 14, 1986.

What is the primary mission of the Department of Correction? Is it to punish offenders, protect the public, rehabilitate offenders, or what?

The primary mission of the Department of Correction is to promote public safety by carrying out criminal sentences imposed by the courts. We must protect the public from those who break the laws, particularly those who commit crimes of violence. And second, the Department of Correction's role is to impose court sanctions on those who break our laws, to punish them. And finally, in our role of rehabilitation, we attempt to help those inmates who are capable of reforming themselves to ultimately return to society as productive citizens.

Why do we put so many people in prison in North Carolina?

Historically, this has been a state that is very hard on crime, and it is a state that sends criminals to prison rather than allowing them to continue committing those crimes. And the fact is that North Carolina sends some offenders to prison for offenses which would not draw a prison sentence in other states. These include many misdemeanants as well as those who commit nonviolent crimes such as crimes against property. A number of states do not admit misdemeanants and nonviolent offenders into state prisons. These offenders are counted in local jail populations and other community programs.

You seem to be saying there are certain crimes for which we should not send offenders to prison. What sort of offenses are those?

There are a number of different types of crimes or offenses for which prison may not indeed be the best way to handle the situation. For example, the driving-while-impaired laws send to prison many inmates, but not all of those inmates necessarily should be imprisoned. Some of them should, of course, but for others there are better ways to handle them, such as work release programs and alternatives to incarceration.

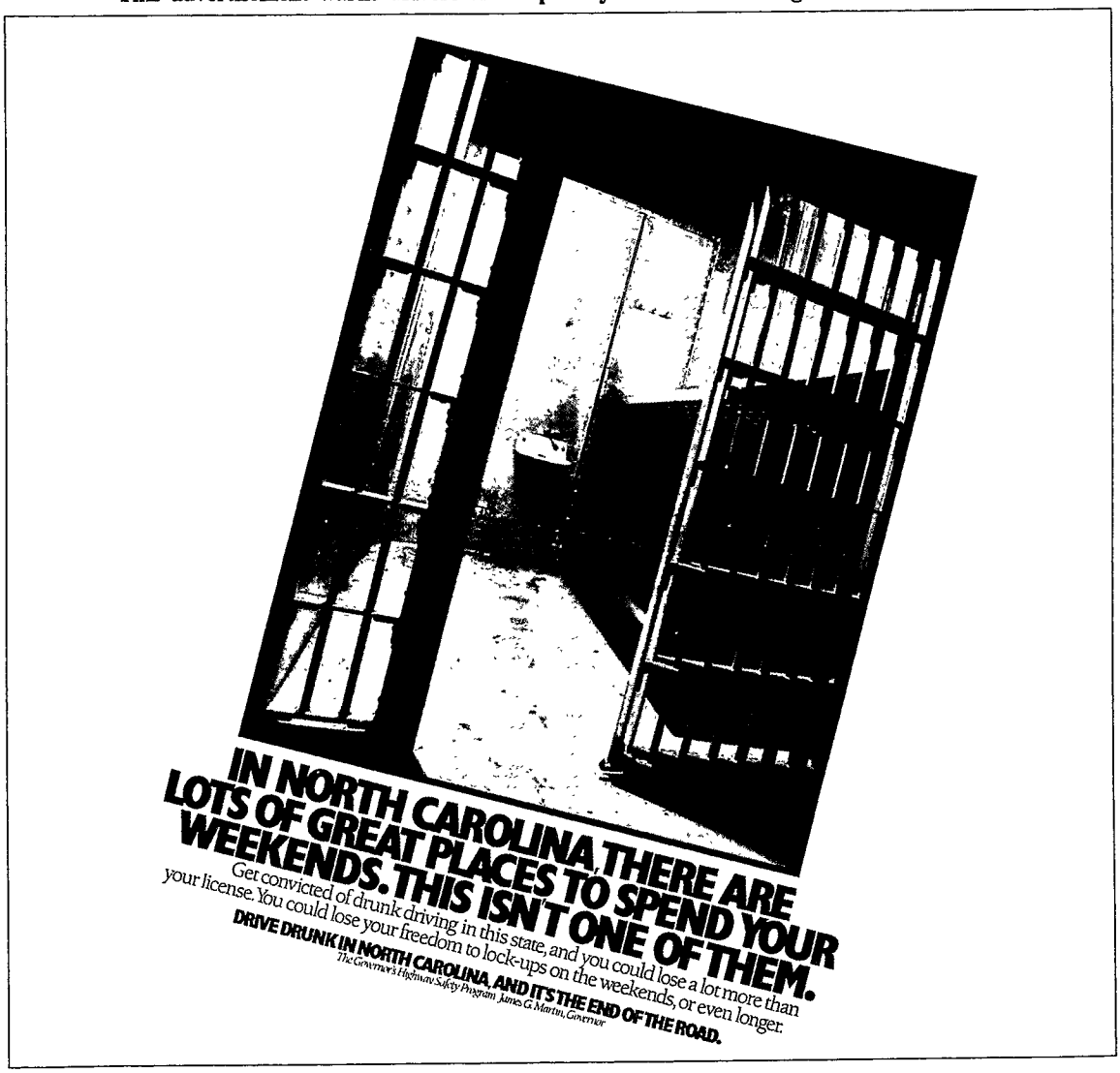
Our sentencing laws are not the only reason for prison overcrowding, of course. We also have another problem, and that is our resources. This department historically has been underfunded. We could probably live with the underfunding if there were not so many other restrictions put on the department, and when I talk about restrictions, I refer to such things as the restrictions on work release, for example. There are all kinds of restrictions that we have to operate under. First, we have no controls over population. We must accept court commitments to the system. Second, each inmate admitted must be provided humane conditions of confinement. Funding restricts the agency from doing all that could be done to provide the desired level of services. And frequently, operational adjustments are necessary. All this makes the development of strong correctional policy difficult.

It sounds as though one of the things you're saying is the correction system in North Carolina could use more flexibility and more alternatives to deal with offenders, given the restraints of your budget and other resources, and the restrictions you mentioned.

Yes. I'm talking about budget restrictions as well as societal restrictions. Almost everyone you meet has got some opinion about how an offender or inmate ought to be treated. There is no in-between. Two things dominate: Everyone is an expert on corrections, and every inmate is innocent. I haven't found an inmate yet who will say he was guilty.

How can the department deal with these three problems—of overcrowding, tight resources, and restrictions on alternatives?

This advertisement warns drivers of the penalty for drunk driving in North Carolina



The department has developed a long- and a short-range plan. We call it the 10-year plan, but actually it is a three-year plan, because the first three years are the most critical years. The problem we face at this very moment is the problem of overcrowding. We have pretty close to 18,000 inmates in prison, but space for 16,695. We've got over 61,000 on probation or parole. Then there are the lawsuits pending against the department. So we are faced with the challenge of coming up with a correction policy that is more legally defensible than the policy we have now. That's the background for the 10-year plan.

Did the litigation have a lot to do with the development of the 10-year plan?

Very definitely. We had to take into consideration a number of pressing needs in drawing up that plan. For instance, the state of existing facilities, some of which need to be repaired and renovated. Most of the field units were built about 40 years ago. Then there's new construction. We have critical needs for new prison beds. And there is the matter of alternatives to incarceration, and how such programs might be designed and operated.

The ultimate goal is to set standards that we can defend, and we want to get the prison population at a more manageable level than it is now. The 10-year plan will help us meet those concerns.

Is North Carolina faced with having to build more prisons because of the litigation, or is it because of these two elements—the overcrowding and the litigation? In other words, are both those factors driving correction policy toward more construction?

I think it's both. The state has done a reasonably good job in the past in building prison facilities. Central Prison is a good example. North Carolina has not waited, as some other states have done, to build new prisons. I think we have spent over $210 million already on construction in recent years, so the state has not waited. But the population has grown so fast, until we have begun to exceed our capacity. With regards to litigation, the bottom line issue we face is a constitutional issue—whether or not we are providing humane conditions of confinement.[1] And we are attempting through the 10-year plan to set standards that are legally defensible in court.

Does North Carolina have any choice at all between building new prisons and developing alternatives to incarceration, or are we going to have to build new prisons regardless?

We're going to have to build new prisons regardless, and do some renovation of the old prisons, regardless. We can't come up with enough alternatives to get around doing that. Current prison facilities have not grown sufficiently to keep pace with space and program demands. A balance between construction and alternatives will eventually evolve. Our problem is twofold: While alternative programs are developed, tried, and tested, the state must maintain adequate prison facilities to house inmates sentenced by the state courts.

What are the prospects for federal or other court-ordered intervention in the N.C. prison system? Is it a real threat or a paper tiger?

It is indeed a real threat. If you don't believe that, look at what has happened in other states. Alabama is a good example. They have been under a federal court order, where a Special Master was named by the federal courts to operate prisons and bring them up to standards, and they have just finally gotten out from under it. But the federal courts did take over that system, and it cost that state hundreds of millions of dollars. We in North Carolina have been fortunate in that we have not had the pressure put on us as they have in some other states.

Just last year, we entered into a consent judgment concerning prisons in the Southern Piedmont, and there are those who argue we should never enter into another one, but instead should just fight these things out in court. There are other suits—about four major suits—pending now against the North Carolina prison system. So the state has no other choice. Either we come up with a plan to maintain certain standards, or the federal courts will appoint a Special Master. And the danger of a court master is this: The state loses control of its prison system. Right now, the state has a choice—to manage its prison system better or risk losing control. If the federal courts take over, you're talking about a long process, you're talking about millions of dollars being spent, while at the same time the state could very well be forced today to turn loose a certain number of inmates because of the overcrowding situation. That has happened in some other states. There were court masters in California, Georgia, New Mexico, South Carolina, Connecticut, Mississippi, New York, and Washington State in 1985.

What would you say are the top three pressing needs of the Department of Correction? If you had a magic wand or an unlimited departmental check-

book, what would be the first thing you'd do?

The first thing I'd want done is to get the General Assembly to go along with the 10-year plan. That's the first thing, because that would satisfy a lot of the needs and solve a lot of the problems we face. The second thing I'd want done is better pay for correctional officers. They are underpaid and they need better pay and better training. And the third thing I would want is more money for more effective programs for rehabilitation, such as education and treatment. About 70 percent of our inmates are incarcerated because of some drug- or alcohol-abuse related crimes. Seventy percent or more. Obviously, we need to have better and more effective treatment programs for those who are addicted to drugs. Already, we have some inmates who are hooked on hard drugs. Right now we're looking at the drug problem, not only the use and abuse of drugs, but also the sale of drugs in our prison system. I don't know how big a problem that is in our prison system, but we know it is a problem.

Rehabilitation has taken a back seat to the other aims of correction in North Carolina, has it not?

Yes, it has. I believe very strongly in rehabilitation. Now, there are a lot of people in my profession who do not believe in rehabilitation. But I do believe in rehabilitation. And the reason why I believe in rehabilitation and think we ought to try to make it work is so that we can change an inmate's behavior and prepare that inmate to go back out and live in society.

The fact is that 90 percent of the prison population will go back out one day. And it's even possible that some of those who are on Death Row now will go back out. Right now we have 63 inmates on Death Row and we have a population of about 18,000, so all but 63 of those inmates will one day go back into society.

Do you sense that the general populace in North Carolina is demanding harsher sentences than are handed out these days?

I think there's a lot of confusion about the sentencing process. The confusion comes in that it's very hard to determine how much time an inmate will serve.

You're speaking now of the Fair Sentencing Act?

Yes, the Fair Sentencing Act. Some people say it's working fine, others say it is not. The public hears, for instance, that a judge has sentenced a defendant to 10 years in prison, and the public thinks he's supposed to *serve* 10 years. And, from as little as a year and a half to maybe four years later, they see this person back on the street. Or they may see that person on work release, but all they know is that he's back on the street, and they don't know why. Nobody tells them. So there's a lot of confusion.

Now, on certain crimes, I think society is demanding stiffer and longer sentences, especially on drug-related crimes. I foresee that the prison population in the next years, with law enforcement cracking down on pushers, I foresee that population growing. That will create a different set of problems for us, in that we will have big-time pushers in our population, and that's a whole different animal.

Do you anticipate that private prisons could handle much of the overcrowding problem in North Carolina, or even any appreciable portion of it?

We only proposed three private prisons, and those private prisons would be used for treatment, work release, rehabilitation, and restitution programs. They would be minimum security facilities for non-violent prisoners. Now, that would do two or three things for us. It would help us as far as overcrowding is concerned, and it would help us with another problem, the lack of treatment for those who are addicted to drugs. And the most important benefit that could be derived from a private contract is that it would not cost the state any construction money. That's the important thing, I think. It's the cheapest way to provide new construction and additional bed space.

What are the prospects for it in the 1987 General Assembly?

I really don't know. I was taken aback really when the 1986 General Assembly took away the authority of the Secretary of Correction to enter into a private contract.[2] It had been a long-standing historical authority. We are going to fight for that authority and for the proposal to authorize private prisons and for the rest of the 10-year plan.

What we need from the General Assembly is a long-term commitment. Of course, the legislature says it can't go any farther than a two-year commitment, but when we go to court we must have a plan with long-term solutions. We've got to show more than just good faith.

FOOTNOTES

[1] U.S. Constitution, Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[2] Chapter 1014, Sec. 204 of the 1985 Session Laws (2nd Session, 1986).

The Fair Sentencing Act: Setting the Record Straight

by Dee Reid

Let the punishment
match the offense.
—Cicero

When then-Gov. James B. Hunt Jr. first proposed the Determinate Sentencing Act to the 1977 General Assembly, the sentencing-reform proposal ran into a stone wall. Legislators were granting nearly every other legislative wish of that session—Hunt's first as Governor—but they balked on only two major requests: the sentencing act, known colloquially as the Presumptive Sentencing bill, and ratification of the Equal Rights Amendment. No one really understood the sentencing act, and rank-and-file legislators, even loyal Democrats who had backed Hunt, didn't cotton to the arrogant sound of "presumptive" sentencing. The bill went nowhere.

But two years later, Hunt had learned a lot about images and labels, and the old sentencing bill was dusted off, rewritten, and gussied up with a new name that no one could oppose: The Fair Sentencing Act.[1] It was a key part of Hunt's get-tough-on-crime package, and legislators embraced it amid a growing recognition that North Carolina faced a serious crisis in prison overcrowding.

The statute was intended to make sentencing more equitable and predictable by setting standard punishment terms—or presumptive sentences that a judge must impose unless there were reasons to lengthen or shorten the sentences—for various felonies. But it was *not* designed to alleviate overcrowding. Other measures, the Hunt administration reasoned, would have to be devised to deal with that problem. The act abolished discretionary parole for most felons, instead providing inmates a way to reduce their sentences by as much as 60 percent with credit for working, attending classes, and being on good behavior.

By the time the law became effective in 1981, critics were predicting it would result in longer prison terms and an increase in active sentences, further exacerbating prison overcrowding. Others hypothesized that it would increase already overloaded court dockets as defendants would be more likely to opt for jury trials instead of guilty pleas. Now a report by Stevens H. Clarke of UNC-CH's Institute of Government proves the critics were wrong.[2] According to Clarke's preliminary findings, the Fair Sentencing Act so far has accomplished all it was supposed to, and more:

- Sentences and actual time served have been *shorter*, less varied in length, and more statistically predictable.
- The percentage of felons receiving an active prison sentence instead of probation—and vice versa—has not changed.
- Disparities in time served between blacks and whites and between men and women virtually have been eliminated.

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■ Court delays actually declined as the number of guilty pleas increased and the number of jury trials dropped in the first year.

However, the greatest surprise to early skeptics, including Clarke himself, is that presumptive sentencing has contributed dramatically to *reducing* the growth of North Carolina's prison population. For years, this state has had one of the highest incarceration rates in the nation. But from 1980 to 1985, the number of prisoners sentenced per 100,000 population increased by only 4.1 percent in North Carolina, compared to 43.9 percent for all states combined. In other words, North Carolina's notoriously high per capita *incarceration rate* increased only one-tenth as fast as the nation's.[3]

If a man destroy the eye of another man, they shall destroy his eye.

—Hammurabi Code

Similarly, U.S. Justice Department figures show that during the same period the *number of prisoners* in North Carolina increased by 11.7 percent, compared to 52.9 percent for all the states. As a result North Carolina now has the third-slowest-growing prison population in the country. "Not only did the Fair Sentencing Act do what it was supposed to do," says Clarke in an interview, "but it dramatically shortened prison sentences and contributed to slowing the rate of incarceration. A lot of people don't know that."

The Fair Sentencing Act's (FSA) effect on incarceration rates is particularly good news at a time when North Carolina faces a continuing prison overcrowding crisis. The state already has spent millions to relieve overcrowding, including about $12.5 million to settle a lawsuit in Southern Piedmont prisons in 1985 (see article on litigation, p. 29, for more). It will continue to face similar suits and expenditures if conditions are not improved in the rest of the state.

As many as 29 states have some form of determinate sentencing law, according to the U.S. Justice Department's Bureau of Justice Statistics, but only 11 other states have laws similar to North Carolina's—which uses explicit standards to determine a sentence length and specifies how much a sentence can deviate for aggravating and mitigating circumstances. Those other states are Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Maine, Minnesota, New York, and Washington.

Still, not everyone is pleased with the law. Some district attorneys complain that the law gives a false impression at the time of sentencing. District Attorney Edward W. Grannis Jr. of Fayetteville, addressing the Governor's Crime Commission in August 1986, put it this way: "Death means death, but life doesn't mean life" when a judge hands down a sentence. Criminals should serve the time for which they are sentenced, he said. Many judges, too, are frustrated to learn that the sentences they handed down in compliance with the FSA have been sharply reduced by as much as 60 percent as a result of prisoners earning time off for good behavior and for working or attending classes. Judges complain that citizens blame the judiciary when they learn that a defendant sentenced to 10 years has been released after serving only three. "Practically every component of the criminal justice system has expressed dissatisfaction with the unpredictability of what sentences really mean," says the Hon. Robert A. Collier Jr., the senior resident Superior Court judge from Statesville, who chairs the Governor's Crime Commission subcommittee on sentencing.

Clarke has informed judges about a formula[4], developed by Department of Correction analyst Kenneth Parker, that estimates how much time a defendant is likely to serve for each presumptive sentence (see Table 1, p. 44). Still, Collier says the system lacks integrity. "This law was sold to the public and the legislature as a way to provide fair and equitable sentencing. They were told individuals convicted for the same crime, with the same backgrounds, would be punished the same," says Collier. "That's not happening, because the determining factor in how long they serve is their behavior in prison. When you combine good time and gain time with early release (see Glossary, p. 48) for community service parole, people don't serve very much of the sentence they receive," he adds. "The public has lost confidence in the whole criminal justice system."

Given the increasing concern for prison overcrowding, however, it's unlikely that the legislature will be interested in pushing any changes that might worsen the overcrowding dilemma. "You can't go to the legislature with anything that may increase the prison population," says Rep. Joe Hackney (D-Orange), a member of Collier's sentencing committee. "We should stick with what we've got, unless there are some assurances, with statistics to back them up, that any changes won't make the [overcrowding] problem worse."

This doesn't mean that the FSA is likely to

Table 1. Time Sentenced and Time Served Under the Fair Sentencing Act

Offense	Presumptive Sentence	Likely Time Served
First degree murder, rape, or sex offense	Life*	Eligible for parole after 20 years
Second degree murder, first degree burglary, or arson	15 years	6 years, 2 months
Second degree rape, sex offense, burglary, armed robbery, first degree kidnapping	12 years	4 years, 10 months
Second degree kidnapping	9 years	3 years, 7 months
Voluntary manslaughter, or assault with deadly weapon with intent to kill inflicting serious injury	6 years	2 years, 4 months
Child abduction	4.5 years	1 year, 8 months
Common law robbery, involuntary manslaughter, felonious break-in, larceny, embezzlement, or welfare fraud	3 years	1 year
Forgery and issuing bad checks, bribery, and most drug felonies	2 years	7 months
Credit-card theft, forgery, or fraud	1 year	5 months

Source: Figures based on a 1984 Administration of Justice Memorandum published by the UNC-CH Institute of Government, entitled "Service of N.C. Prison and Jail Sentences: Parole Eligibility, Good Time and Gain Time," by Stevens H. Clarke.

*Actually, first degree murder can also bring a death sentence. If the jury recommends life, then the likely time served is a minimum of 20 years, with eligibility for parole after those 20 years.

remain unchanged forever. Clarke's research shows that the four-year trend toward shorter sentences—and its apparent impact on slowing down the incarceration rate—may already be starting to swing the other way, as judges act on their own frustrations. Clarke found that while sentences are shorter for all felonies combined, they are starting to increase for certain offenses. The law allows judges to use aggravating circumstances to deviate from the presumptive sentence, or to give consecutive sentences for multiple offenses in order to increase the actual time served.

"Any experienced judge can find aggravating or mitigating factors in any case," says Judge Collier. "If they think he needs three years, they'll give him 10."

Clarke says that it's still too early to call the recent upswing in some sentences a trend. "But it's an indication that there is reason to expect less judicial adherence to the presumptive sentences as time goes by," he says.

Whether the FSA continues to do what the legislature hoped it would do back in 1979 remains to be seen. For now, here's a summary of what's happened during the first four years, based on Clarke's preliminary findings.

Sentencing Patterns

Before the Fair Sentencing Act went into effect July 1, 1981, there was some concern that it might encourage judges to impose active sentences instead of suspended sentences (see Glossary, p. 48) with probation. However, Clarke's data show the statute had little effect in this regard. The percentage of felons receiving active sentences (including split sentences, with some prison time and some probation) remained at 59 or 60 percent each year both in the five years before the act became effective and four years afterward. Even when the figures are adjusted to compensate for changes that might have been masked by small shifts in the mix of felony cases (for example, the proportion of cases more likely to bring active sentences), the model suggests that at most, active sentences may have increased by 9 percent, but this change may not be attributable to the FSA. In any event, Clarke concludes, the FSA "more than compensated for any resulting increase in imprisonment by substantially reducing the length of active sentences."[5]

In the five years preceding the 1981 law, the average sentence length for all felons was 103 to 110 months. In the first year Fair Sentencing was in effect, the average sentence dropped to 85 months. The mean sentence declined very slightly for the next three years, reaching 81 months in 1984-85. Overall, average sentences for the four-year period after the FSA became law dropped 22 percent from the mean for the five years preceding the act (see Table 1, p. 44).

Clarke says the decline in sentence length can be attributed only to the Fair Sentencing Act. "It is highly unlikely that this is a result of changes in attitude of judges or prosecutors, because such attitudes would change more gradually," he writes.[6] The reduction in sentences would probably not have been as dramatic—or even have occurred at all—if the presumptive sentences established by the Fair Sentencing Act in 1979 had not been reduced 25 percent by an amendment in the 1981 legislature before the act went into effect later that year.

The punishment of criminals should be of use; when a man is hanged he is good for nothing.

—Voltaire

"That's what's done it," says Representative Hackney. "When the Fair Sentencing Act landed in the Judiciary I Committee in 1981, we heard statistics not from critics but from the Department of Correction that it would increase the prison population if we didn't reduce the presumptives." After a confusing debate in which it became clear that no one knew for certain what the impact of the FSA would be on prison overcrowding, the legislature did reduce the sentences in the act.[7] Thus the amendments reducing the presumptive sentences were incorporated into the Fair Sentencing Act before it took effect, and they have had a direct impact on reducing sentences and holding down overcrowding.

In addition to reducing the length of sentences, the act also resulted in more uniformity in sentencing, according to Clarke's figures. After the FSA went into effect, the median sentence was closer to the presumptive sentence, and the standard deviation between sentences decreased from a level of 141 to 162 months, to a new level of 113 to 128 months. "In other words, sentences became less dispersed," writes Clarke.[8]

One of the greatest concerns expressed by

early skeptics, including Clarke, was that judges would use "loopholes" in the law to vent their frustrations about a system that often allows prisoners to be released after serving only a third of their sentences. The FSA allows judges to deviate from the presumptive sentence by considering the aggravating and mitigating circumstances of the crime. It also allows judges to use consecutive prison terms for multiple offenses, enabling them to stack one presumptive sentence atop another to lengthen the actual time served.

"We had reservations about the Fair Sentencing Act, because in other areas of the country (with presumptive sentences) the prison populations are up," says Lao Rubert of the N.C. Prison and Jail Project in Durham. "We didn't know if judges would stick closely to the presumptive," says Rubert, but Clarke's figures allayed her fears on that point.

For the most part, says Clarke, judges have not taken advantage of legal provisions allowing them to deviate from the presumptive sentence. His figures show that after the FSA, sentences were longer when defendants had multiple offenses, but the multiple offenses did not increase the total sentence length as much as they would have before the FSA. "These results suggest that judges did not systematically attempt to evade FSA presumptives by exercising their discretion to make sentences for multiple offenses run consecutively," Clarke writes.[9]

However, that trend may be reversing, Clarke cautions. For example, the length of sentences for break-ins decreased in the first two years after the FSA went into effect. But in the last two years, median sentences for break-ins increased more than 20 months. Similarly, the median sentences for common-law robbery increased by 10 months from 1983-84 to 1984-85. Only time will tell if judges will increasingly look for ways to avoid strict adherence to the presumptive sentences in order to assure that the defendant spends more time in prison.

... Well, the city supplied a public defender but the judge was mean John Brown

He came into the courtroom and stared poor Johnny down

Well the evidence is clear, gonna let the sentence son fit the crime

Prison for 98 and a year and we'll call it even Johnny 99...

— from "Johnny 99"
Bruce Springsteen

Stevens H. Clarke

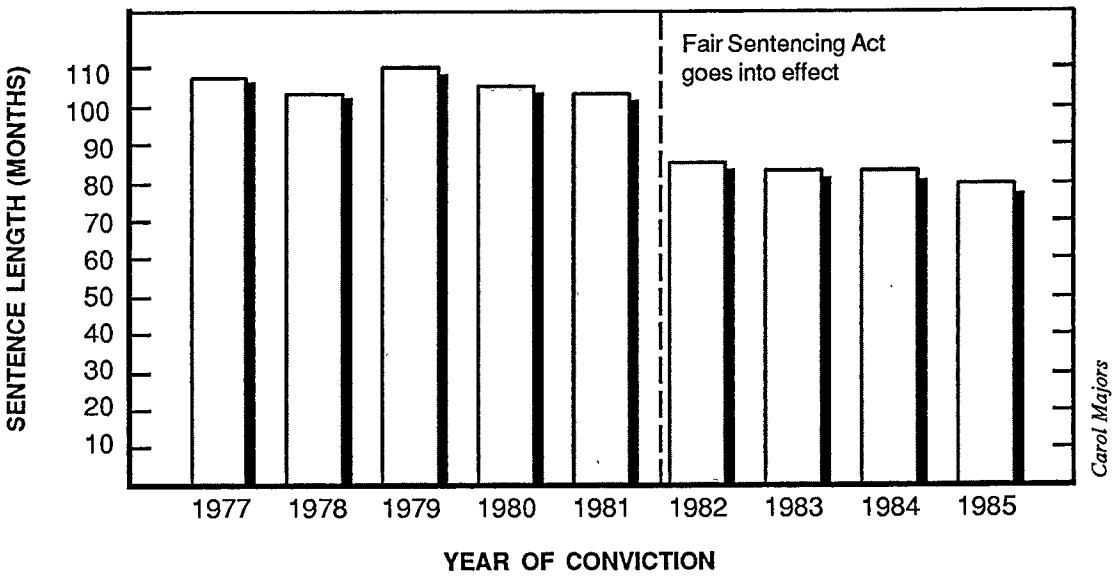
Jack Betts

Time Actually Served

Clarke's analysis on the length of time actually served is limited by the availability of data. It does not include felony sentences of three years or more, because not enough time has passed since the FSA took effect to analyze sentences of that length. However, the analysis of sentences of 36 months or less shows that the FSA did *not* increase the length of time actually served in prison. After FSA, there was actually a drop in the average percentage of a sentence served, but this may be due to a continuation of a long-term trend, started years earlier in response to a concern about prison overcrowding, Clarke notes.

Perhaps even more significant is the reduction in the variations of the percentage of the sentence actually served. The standard deviation—the differences from the average sentence—in actual time served dropped from 15 percentage points or more before the FSA to 9 percentage points post-FSA. "These results suggest that there was much less variation in the process of earning good time than there was in the pre-FSA parole process," writes

Table 2. Mean Total Active Maximum Prison Sentence Length, in Months, by Year of Conviction, for All Felons



Source: Stevens H. Clarke, Institute of Government, University of North Carolina at Chapel Hill. "Indeterminate and Determinate Sentencing in North Carolina, 1973-85: Effects of Presumptive Sentencing Legislation."

Clarke.[10]

Under the FSA's "good time" provision, prisoners are automatically given one day's credit for each day served without a conduct violation. "Gain time" allows an inmate to receive additional credit for working or attending classes. As a result, a prisoner who both worked and exhibited good behavior could reduce his actual sentence considerably. For example, a felon ordered to spend 15 years in prison for second degree murder is likely to serve a little more than six years, or 41 percent of his sentence. A rapist (second degree) sentenced to 12 years may spend less than five behind bars (see Table 1, p. 44)

Before the FSA, the length of time actually served was determined largely by the N.C. Parole Commission and the Secretary of Correction. Under FSA, "good time" and "gain time" are dictated by statute.

"Parole decisions were based not only on prison conduct, but also on factors much more difficult to define and measure," writes Clarke. These included the degree of risk an inmate posed to the public, the public's reaction to the prospect of his or her release, and the inmate's readiness for release in terms of employment and housing.

Predictability of Sentences and Time Served

In addition to reducing variations in sentence length and in actual time served, the FSA apparently made sentences more predictable in a statistical sense, Clarke says. His model concludes that before FSA, 95 percent of the statistically predicted sentences were within 145 months of the actual sentence, while after FSA, 95 percent of the predicted sentences were within 91 months of the actual sentence. Thus, after the FSA, predictions are still quite inaccurate, but are considerably less inaccurate than they were before the FSA. Clarke says predictions might be improved if better data were available. "If there were richer data concerning more of the aggravating and mitigating factors that could, under FSA, be considered by the judge in sentencing," he writes, "it would probably be possible to make ex-post-facto [after the fact] predictions of FSA sentences much more accurately." What about the predictability of time actually served in prison, given the sentence? Clarke concludes that FSA's "good time" and "gain time" statutory requirements made predictions of time served "less inaccurate than under the parole sys-

tem that the FSA abolished."[11]

Still, judges continue to complain that they don't really know how much time a defendant is likely to serve. Representative Hackney, an attorney, says there's ample information available on the subject. "If they don't know, it's because they haven't tried to find out," says Hackney. "It's much better than it used to be."

Lao Rubert, from the Prison and Jail Project, agrees. "Clarke's study shows sentences are more certain than they used to be," she says. "A lot of judges don't believe that, but the data bears it out. Now you do know with a reasonable amount of certainty how long they will serve. With parole, that wasn't the case."

Judge Collier says the problem lies not so much with the judge's lack of knowledge as with the public's misunderstanding of what a sentence really means. "The public is fed up that a 10-year sentence ends up being only three or four years," Collier says.

Disparities In Sentencing Reduced

According to Clarke, the Fair Sentencing Act had no effect on the disparities between blacks and whites and men and women in terms of whether they would receive active prison sentences. Blacks still are more likely than whites to receive active sentences, and men are more likely to get prison terms than women.

What did change, however, were the disparities in actual time served. For example, Clarke's figures show that, before the FSA, blacks typically served 1.04 months longer than whites. But after the FSA, that difference was reduced by 1 month —virtually wiping out the disparity. Similarly, women historically served 11.8 percent less time in prison than men. After FSA, the time served by women increased by 11.6 percent, thereby erasing the disparity. These changes are probably attributable to replacing discretionary parole with statutory good time and gain time, he says.

Plea Bargains vs. Jury Trials

Before the Fair Sentencing Act went into effect, some court officials were worried that it would result in an increase in already overloaded trial dockets. The fear was that more defendants would opt for jury trials, willing to gamble that they would at worst end up with the presumptive sentence, which, thanks to the 1981 legislature, was substan-

Glossary

Active Sentence
A sentence requiring the defendant to serve time in prison or jail.

Suspended Sentence
A conditional sentence that allows a defendant to remain out of prison or jail while on probation.

Good Time
A feature of the Fair Sentencing Act that allows an inmate to earn one day off his or her sentence for every day of good behavior.

Gain Time
A similar feature allowing the inmate to earn time off an active sentence for working at a prison job.

Presumptive Sentence
A set length of active prison time that all parties in a case may presume will be given unless there are aggravating factors that would lengthen a sentence or mitigating factors that would shorten it.

Mean
In this article, a mean sentence is the average sentence for a certain crime or for all crimes examined in the study.

Median
A statistical term representing the midpoint, with an equal number of sentences longer than the median sentence and an equal number shorter than the median.

Standard Deviation
A statistical term that tells how all scores —or in this case sentences—are spread out in relation to the mean, or average. Put another way, it is a kind of average of the differences between individual sentences and the average of all sentences.

tially shorter than typical sentences handed down before the FSA. But Clarke's analysis of a survey of 12 counties shows[12] the opposite outcome: Trials occurred less frequently with the FSA than before it. Trials declined from 6.7 percent of felony dispositions to 4 percent. Guilty pleas accounted for about the same rate of dispositions (58 or 59 percent) in the year before FSA as they did in the year after the FSA went into effect.

However, the FSA apparently did encourage plea bargaining, since the presumptive term made the outcome more predictable. Clarke's analysis shows that the rate of defendants entering written plea bargains increased in the first post-FSA year from 33 to 39 percent in the 12 counties surveyed. This led to one other unexpected FSA benefit: Thanks in part to the increase in pleas, the median time required to dispose of the case from the day of arrest declined in the same 12 counties from 58 to 48 days.

Despite the clear record of the FSA, there remain calls for restructuring the act, for education campaigns to inform the public what to expect from presumptive sentences, and even a return to the uncertain days when the N.C. Parole Commission had virtually unlimited discretion to release prisoners at any time. Others have called for a "cap" on the amount of good time that can be earned, and still others suggest that a disclosure statement be filed at the time of sentencing so that everyone would know how soon a defendant might be released from prison.

In December 1986, the Governor's Crime Commission recommended changes in the Fair Sentencing Act in an effort to restore what the group called "Truth in Sentencing" to the act. The Commission proposed eliminating good time credits, giving much more discretion to the Parole Commission, and changing statutory definitions from "prison term" to "supervision term," to include both a prison term and a parole term. Judge Collier declared the changes would have no effect on prison overcrowding, but the commission proposal drew fire from Sen. Robert Swain (D-Buncombe). "I don't believe this will be population-neutral, because the judges still have discretion," he said. "If there is a prison bed, we will fill it."

The 1987 General Assembly has the chance to debate all these issues, but if legislators are concerned about alleviating prison overcrowding, they should think twice before they make any substantive changes in the Fair Sentencing Act. Otherwise, the state may wind up with longer sentences —and more inmates behind bars.

FOOTNOTES

[1]N.C.G.S. 15A-1340, enacted as Chapter 760 of the 1979 Session Laws.

[2]"Indeterminate and Determinate Sentencing in North Carolina, 1973-85: Effects of Presumptive Sentencing Legislation," by Stevens H. Clarke, Institute of Government, UNC-Chapel Hill, October 1986 (draft copy).

[3]Memo from Stevens H. Clarke, Institute of Government, UNC-Chapel Hill, to N.C. legislative Special Committee on Prisons, Sept. 15, 1986, based on statistics from U.S. Department of Justice, Bureau of Justice Statistics.

[4]"Service of North Carolina Prison and Jail Sentences: Parole Eligibility, Good Time, and Gain Time," Administration of Justice Memorandum by Stevens H. Clarke, Institute of Government, UNC-Chapel Hill, March 1984.

[5]Indeterminate And Determinate Sentencing, p. 6.

[6]*Ibid.*, p. 7.

[7]Chapter 63 and Chapter 1319, 1981 Session Laws, now codified as G.S. 15A-1340.

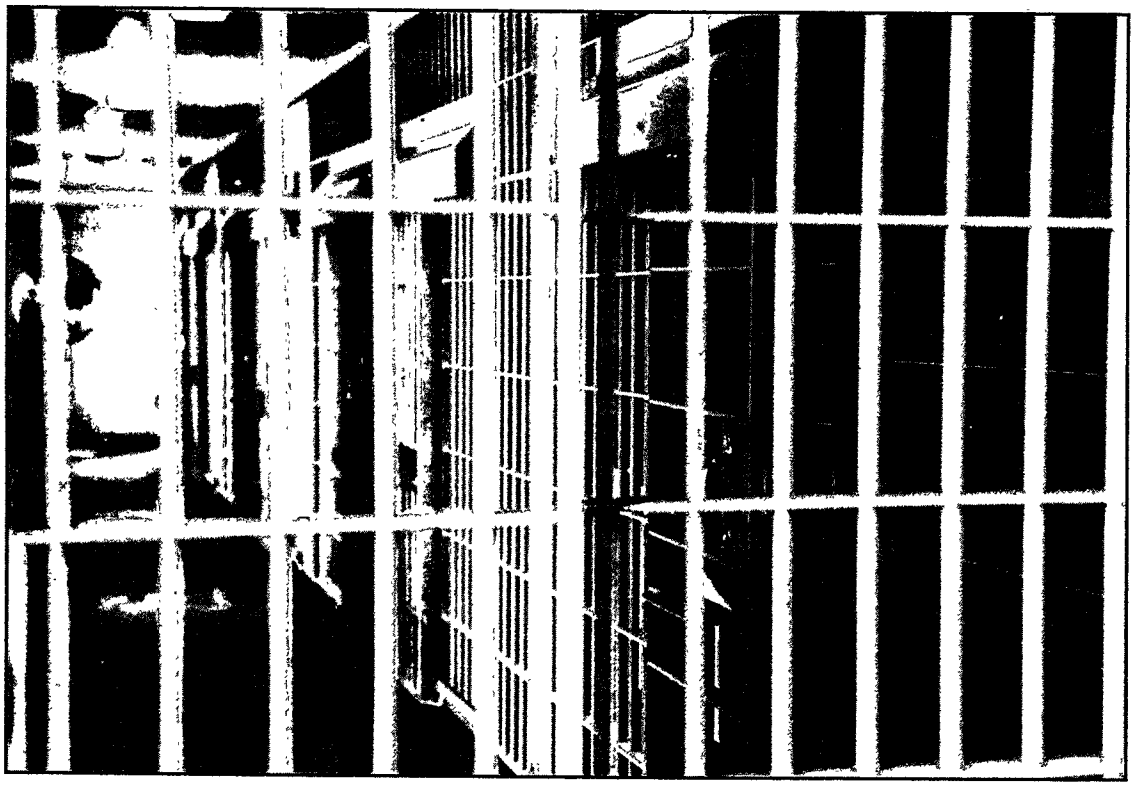
[8]Indeterminate and Determinate Sentencing, pp. 8-9.

[9]*Ibid.*, p. 11.

[10]*Ibid.*, p. 14.

[11]*Ibid.*, p. 17-18.

[12]Mecklenburg, New Hanover, Buncombe, Rockingham, Craven, Harnett, Rutherford, Anson, Cherokee, Granville, Pasquotank, and Yancey counties.



Fledgling Programs Forced to Grow Up Fast

by Bill Finger

Since 1983, N.C. state government has funded three major community-based programs for adult criminal offenders—community penalties, intensive probation and parole, and community service. This article examines how these three programs have evolved and what their future might be, in the context of the current prison overcrowding crisis and from the viewpoint of a unified system of community-based punishments.

Because the state has more than 18,000 inmates in space designed for fewer than 17,000, programs providing alternatives to incarceration have taken on increasing importance. This article contains nine recommendations which attempt to link the growth of alternatives to incarceration to the broader context in which these programs function. These include recommendations that the 1987 General Assembly enact an emergency cap on inmates in the prison system; that the parole system seek national accreditation; that the state develop a better treatment system for drunken drivers; and that the state send misdemeanants to county jails, as the large majority of states do, rather than to state prisons.

On a dreary fall morning, 16-year-old Eliot Johnson sits fidgeting in Wake County District Court. He's been in trouble with the law before, but this time he broke into a car, and the charges are more serious—one felony count of breaking and entering and two misdemeanor counts of possessing stolen property.

Even though Eliot (not his real name) is only 16, the seriousness of his crime means that he is treated as an adult under the N.C. criminal justice system. Nearly one of every three people in the N.C. prison system is under age 25. Because Eliot is in the adult *judicial system, he has no special juvenile court counselors, only his lawyer, 46-year-old Sally Scherer.*

"The first thing I did when I got the case was call Cindy and ask for help," explains Scherer, motioning to the petite woman at her side during the long wait for the District Court docket to clear. "Attorneys just aren't able to adequately do the kind of background work that Cindy can do at ReEntry."

Cindy Hill, a forensic social worker, picks up the story. "When I first saw him, he was still locked up," she begins, pointing upstairs to the Wake County jail. ReEntry, a nonprofit organization serving Wake County, develops alternative sentencing plans for nonviolent, prison-bound felons, people like Eliot Johnson.

"I got him enrolled in school and gathered the records on his history—criminal justice records from other states and in-patient hospitalizations for substance abuse (drugs and alcohol)," explains Hill. She met with Eliot's mother (his father was not in the home), school officials, and Wake County Drug Action. She learned that Eliot was a kid with some serious problems. "Every previous study of him had recommended some kind of residential out-of-home group situation. I contacted a private group home here which decided he qualified for the home. They put him on the waiting list."

For six weeks, Hill had gathered information on Eliot's history and current situation, which helped attorney Scherer in negotiating the case with Assistant District Attorney Tony Copeland. Throughout the morning, Scherer and Copeland continue to confer, between the parade of cases before Judge Russell Sherrill.

Even if Scherer can finalize the plea and alternative sentencing plan with Copeland, the case still has to go before Judge Sherrill, known for his tough sentences. He could reject any proposal Scherer and Copeland work out. Finally, at 12:50 p.m., Judge Sherrill turns to Eliot's case, the final business on the morning calendar.

Since the late 1970s and early '80s, ReEntry and similar programs in Fayetteville, Asheville, Hickory, and Greensboro have sponsored efforts designed to punish and rehabilitate offenders in a community setting. Overcrowding of the state's aging prisons triggered these early efforts and prompted a greatly expanded system of punishments *outside* of prison. Thus far, only 350 people actually *headed for prison* have been diverted into community-based penalty programs. Yet the overcrowding continues. As of December 1986, the 86 state prisons held over 18,000 people, an all-time record (for more on overcrowding, see article on page 4).

The severe overcrowding has prompted far-reaching lawsuits in federal court. In 1985, the state settled a class-action suit covering 13 prison units, and in 1986 the Attorney General's office began defending a class-action suit covering another 48 units (for more on how this litigation affects prison policy, see page 29). These and other lawsuits spurred Gov. James G. Martin into action.

"It is critical that an ambitious prison construction program be adopted which will mitigate against Federal Court intervention," reported the Governor in a 10-year plan released by his Department of Correction in March 1986. "The total capital cost of this 10-year expansion plan to add 10,000 beds is $202,000,000. This is a substantial investment that will be required unless some effective alternatives to incarceration can be developed."[1]

This magical phrase—*effective alternatives to incarceration*—has taken on significant meaning. In the context of the current litigation, the most obvious measurement of "effective" is whether alternatives help solve the overcrowding problem. Overcrowded prisons have come to be the driving force behind the growing system of community-based sanctions, known loosely as alternatives to incarceration. But a truly "effective" system of alternatives to incarceration must be viewed independently of an overcrowding crisis.

Bill Finger is editor of North Carolina Insight.

"We need a unified concept of alternatives, a framework for North Carolina," says Lattie Baker, assistant secretary for Programs and Personnel Development in the Department of Correction, and former president of the N.C. Correctional Association. "Without a framework, existing programs don't work well together. Programs tend to compete against each other for scarce resources."

To determine clear purposes for a system of alternatives *to prison*, one must first articulate goals for prison itself, which has been the traditional penalty for lawbreakers. Historically, in the American criminal justice system, prison has been viewed as serving four purposes: 1) to protect the public safety; 2) to seek retribution for criminal acts; 3) to be a deterrent against more crime; and 4) to rehabilitate the offender (for more on these purposes, see pp. 2-3).

To meet these four purposes today, people from all political persuasions are looking beyond prison to community-based programs. Overcrowding, lawsuits, and massive capital expenditures by state legislatures around the country have resulted in the endorsement of alternative programs by a broad consensus of opinion-makers, from the American Bar Association to conservative U.S. Senators William L. Armstrong (R-Colo.) and Sam Nunn (D-Ga.). "Penal imprisonment is not always an appropriate punishment for certain types of criminal offenses," Armstrong and Nunn wrote in a recent anthology, released by a conservative think tank.[2] Other contributors making similar points include U.S. Rep. Jack Kemp (R-N.Y.) and Delaware Gov. Pierre du Pont, both candidates for the 1988 Republican presidential nomination. Community-based sanctions as well as prison are now considered as viable penalities for lawbreakers.

Litigation in federal court has prompted the 1987 legislature to consider major policy initiatives in the prison area. "We know the federal courts are looking over our shoulders," says state Sen. Tony Rand (D-Cumberland), who chairs the Senate Appropriations Base Budget Committee. Rand and other legislative leaders will decide how available dollars are divided among alternative programs and prison construction. "I would hope that they [alternatives and construction bills] would come together so we can look at everything as a package deal."

Given this scenario, the 1987 General Assembly has an opportunity to go beyond the short-term overcrowding crisis to clarify the long-term goals of community-based penalities. A framework of alternative programs should have four components, says Lattie Baker. They should:

- have local direction;
- include a state-level inducement to promote such programs;
- contain an enforcement mechanism to penalize municipalities and counties that do not divert appropriate offenders into community-based programs; and
- define target groups for the alternative programs.

The overriding theme for all these components is *targeting the appropriate offender* through inducements and enforcement mechanisms. But how does a prosecutor and judge determine who is "appropriate"? Two critical steps in the entire criminal justice process occur when a prosecutor decides the charge against an offender and when the judge imposes the sentence. Even so, sentencing is only part of a system which many analysts believe has gotten out of kilter in North Carolina.

"I would hope they [alternatives and construction bills] would come together, so we can look at everything as a package deal."
—State Senator Tony Rand (D-Cumberland), Chair Senate Appropriations Base Budget Committee

"When I review the DOC's (Department of Corrections) 10-year plan, I am struck with the lack of any explicit, coherent philosophy or the lack of any coherent statement of objectives for the correctional system," says Joseph E. Kilpatrick, assistant director of the Z. Smith Reynolds Foundation, which has funded many alternative programs over the years. "By default, we have settled for the objectives of 'incapacitation' and 'punishment' based on the theory that deprivation of freedom is synonymous with punishment to those offenders who are incarcerated."

Then Kilpatrick takes his argument beyond the short term issues. "But what bothers me is our failure to factor in the *social cost* of not rehabilitating more nonviolent offenders, who are

released from the prison system within five years or less. The real issue is not whether incarceration or even prison overcrowding is bad per se, but rather our failure to deal more effectively with those offenders who have the potential to be rehabilitated and thereby diverted from the prison system."

Deeply involved in helping to develop community-based penalty programs for six years, Kilpatrick goes on to explain his concern over the current framework for discussing these programs. "Community sanctions should not be understood solely in reference to prisons or prison overcrowding. They should be judged on the basis of how well they accomplish our criminal sanction objectives."

In 1987, the General Assembly, the Martin administration, and the judicial branch have two separate but related tasks. In the short term, they must determine how and to what extent these community-based programs—viewed with building state prisons and county jails, altering sentencing laws, and related issues—can address the crisis of overcrowding. But for the long term, policymakers might also attempt to articulate an overall criminal justice policy (see article on page 17 for more). For the most positive results, the role of community-based penalties must be examined within that larger policy discussion.

Regarding penalties outside of prisons, policymakers might consider such questions as these: Do alternative programs divert *prison-bound* offenders or serve to "widen the net" of state sanctions over persons who otherwise would not go to prison? Do alternatives reduce recidivism? Do alternatives enhance rehabilitation? Which people now in prison—and going to prison in the future —would be better off in a community-based program, for themselves and for society at large?

A true "package-deal" approach, as Sen. Rand puts it, can clarify the short-term and long-term goals of the prison *and* the alternative programs. To do that, however, first requires an understanding of how the current system of alternative programs has evolved.

Alternatives Take Hold in North Carolina

"Alternatives to incarceration" is a term that has come to mean many things to many people. In North Carolina, its entrance into the lawmakers' vocabulary dates from November 24, 1982, when Judge Willis Whichard, then on the N.C. Court of Appeals and now a N.C. Supreme Court justice (see page 91), released the report of the Citizens Commission on Alternatives to Incarceration. Whichard chaired the two-year study by this blue-ribbon commission, which moved alternatives from a fledgling community-based movement into the mainstream of the criminal justice system.

"Alternative penalties are clearly not appropriate for all offenders, but they can be responsible forms of punishment for most nonviolent crimes," explained the Citizens Commission in its 138-page report. "Alternative penalties are punishments that do not rely primarily on confinements in prison or jail."[3]

Before the formation of the Whichard Commission, advocates of alternatives had few highly visible supporters in government, with a few notable exceptions. As early as 1977, for example, the General Assembly had funded some restitution officer positions, a community-based program endorsed by Gov. James B. Hunt Jr., who served from 1977 to 1985. "We're not used to having so many allies in high places," said Lao Rubert, director of the N.C. Prison and Jail Project, at the time.[4]

The Whichard Commission report, through the legislative leadership of state Rep. Joe Hackney (D-Orange), played a significant role in the 1983 legislative session. In that pivotal year, the General Assembly put into place a system of state-sanctioned alternatives to incarceration that remains the framework for proposals in 1987. Two separate movements dovetailed in 1983—the alternatives-to-incarceration movement and the groundswell to curb drunk driving through Governor Hunt's campaign for the Safe Roads Act.[5]

This coincidence—the same legislature acting on the Whichard Commission recommendations and on the Safe Roads Act—resulted in a three-part *institutionalized* structure of alternatives to incarceration. In 1983, the legislature:

- passed the Community Penalties Act and funded the five existing community-based alternative sentencing programs through a grant system.[6] In order to receive state funds, these programs could work *only* with prison-bound offenders charged with nonviolent misdemeanors and nonviolent felonies in "H", "I", and "J" classifications (the least "serious" felonies under the Fair Sentencing Act);[7]
- passed enabling legislation for an "Intensive" Probation and Parole system, facilitating a much more personalized approach than regular "supervised" probation and parole;[8] and
- established the Community Service Program to manage the anticipated high volume of DWI

convictions (which usually include community service) under the Safe Roads Act.

Ironically, about the time the N.C. General Assembly launched this three-pronged system, scholars were beginning to express doubts on how most alternative efforts around the country were being implemented. "A careful review of the research literature on alternatives to incarceration suggests that their promise of reducing the prison population has remained largely unmet," wrote James Austin and Barry Krisberg of the National Council on Crime and Delinquency, in an influential paper developed for the National Academy of Sciences Panel on Sentencing Research.[9]

"Sentencing alternatives, such as restitution and community service, were found to enhance the sanctions of probation and fines *instead of replacing incarceration,*" continued Austin and Krisberg. "Similarly, post-incarceration release programs, such as work release and work furlough, often escalated the level of control over clients and served *primarily to control populations* within prison systems" (emphasis added). The authors go on to explain how alternatives have created wider nets—i.e., causing *more* people, not fewer, to come under state sanctions, if not in prison, then in programs such as community service. Hence, while prison populations continued to increase, the number of people in new community-based programs, such as community service and drunk driving schools, also grew. *Put another way, alternatives seemed to take on their own momentum, but without any clearly articulated goal other than to reduce overcrowding, which they meanwhile were failing to do.*

"Ten years ago in North Carolina, you had two basic systems—probation and prison," says Rubert, of the N.C. Prison and Jail Project. Alternatives came out of those existing options. The hope was that alternatives would reduce the prison population, because prisons were overflowing all over the country. We wanted the programs to be alternatives to *prison* rather than an alternative to *probation.* But we've got to be careful of unintended and undesirable consequences—increasing the portion of persons whose behavior is regulated by the state."

The Whichard Commission recommendations walked a fine line: incorporating a sophisticated "client-specific" system (designed to produce proper sanctions and rehabilation for each *individual* headed for prison) yet remaining attuned to the political realities of elected officials who want to avoid appearing soft on crime. One compromise inherent in the Communities Penalties Act was restricting the program to *nonviolent* offenders in the least "dangerous" felony categories. No distinction was made between a violent *offense* (such as a manslaughter case in a fit of passion) and a violent *offender* (a person with a violent pattern who poses a genuine threat to society).

Stevens H. Clarke of the Institute of Government in Chapel Hill, known for his extensive research in the criminal justice field, points out an important issue regarding violent offenders. "Violent felons become recidivists less often, and less seriously, than other offenders," he explains.

The Rand Corporation, a highly respected research group often concentrating on criminal justice issues, released two reports in 1982 examining behavior patterns and policy implications for incarceration rates.[10] The studies developed a method of determining criminal behavioral tendencies, labeling the most serious category of offender as a "violent predator." This crime pattern included some combination of robbery, assault, and drug-dealing. Violent predators typically begin committing crimes, especially violent crimes, well before age 16. Sentencing judges often are not able to determine whether a defendant is a "violent predator" or a generally nonviolent person who committed a violent crime, the studies found.

Such distinctions go beyond the casual labels of "violent" and "nonviolent" offenses. But with the implementation of the Fair Sentencing Act (1981) and the Community Penalties Act (1983), the legislature cast in concrete the violent and nonviolent criteria. Looking behind labels like "violent" and "nonviolent" is only one of the many complex issues before the 1987 General Assembly.

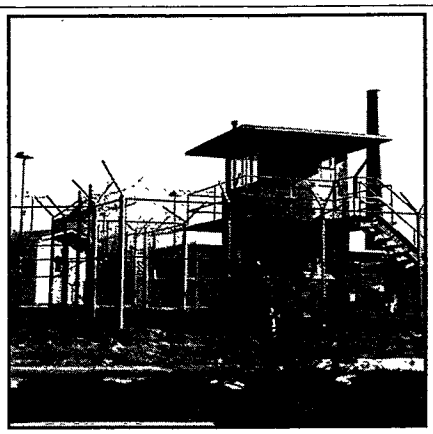
"The legislators have an incredible problem on their hands," says Rubert. "Because of the litigation, they can't move leisurely ahead. But when

they expand overnight, they don't solve the problem. They have to walk the tightrope between the litigation, severe overcrowding, and expanding alternative programs very quickly on the one hand, and moving ahead very carefully and in a targeted fashion on the other."

Since 1983, a three-part *state government* system has evolved—community penalties, intensive probation and parole, and community service. Other related community-based programs exist, such as halfway houses and dispute settlement centers. But the statewide system is building on these three programs. Policymakers now turn to the task of molding these three into an integrated, cooperative whole. Perhaps most importantly, state officials will face an increasing pressure to adjust this very young state system to the needs of counties and local communities.

AN ALTERNATIVE

Community Penalties



In 1983, the legislature appropriated $210,000 for a grant system for the existing nonprofit programs in Raleigh, Greensboro, Fayetteville, Asheville, and Hickory. The 1986 legislature expanded the program to four additional judicial districts, centered in Statesville, Wilmington, Winston-Salem, and a five-county area south and east of Asheville (29th judicial district).

These programs have a four-part statutory responsibility: 1) to target prison-bound offenders; 2) to prepare a detailed community-based penalty plan and to present the plan to the sentencing judge through the defense attorney; 3) to arrange for the services specified in the plan; and 4) to monitor the progress of the offender placed under the community plan.[11] As Cindy Hill did with Eliot Johnson, a staff person develops an alternative sentencing plan, working with the defense attorney and increasingly with the district attorney's office as well. Usually, the case comes before a superior court judge, who rotates from county to county within a superior court division (district court judges sit in the same district where they are elected).

"We're trying to convince sentencing judges—usually visitors to a community—that a particular community will support a community sentence," explains Dennis Schrantz, the former director of Repay, the Hickory program, and now the statewide grants administrator of the community penalties program. "We produce a document, an alternative sentencing report, that basically says, along with the experts in the community, 'Hey, judge, give it a shot.' That's why community ownership makes a difference in what we do."

The North Carolina community penalties legislation is unusual, because the act focuses on prison-bound felons, explains Malcolm Young of The Sentencing Project in Washington, D.C. "What makes it unique is that the defense counsel is supposed to use the resources funded by the act to propose alternatives." Other states have failed to provide real alternatives to prison, explains Young, because the people running the programs are not motivated to produce the alternative. North Carolina has the "only statutory scheme that specifically allocates the resources of the act to the court and to the defense counsel. After all, the defense lawyer has the job of getting the best deal he can for his client, which usually means the least prison time." The resources of the act, for example, paid Cindy Hill to help Attorney Sally Scherer develop an alternative sentencing plan for Eliot Johnson.

"If the alternative programs can be realistic in their evaluations and assessments, they will gain and keep credibility."

—Jim Kimel
Guilford County
District Attorney

But if some perceive this program design to be a strength, others have criticized community penalties for working too closely with defense lawyers. Consequently, the programs have worked hard at building good communication with the District Attorneys' offices and with the judges.

"The community alternative program should walk a fine line and not be seen as a defense attorney program," says Jim Kimel, Guilford County District Attorney. "It is a sentencing tool used by the presiding judges to form appropriate sentences. Many times, judges have adopted the exact plan proposed by One Step Further [the alternative program in Greensboro]. Many times, we have given the defendant a split sentence, with some time and a suspension on probation. If the alternative programs can be realistic in their evaluations and assessments, they will gain and keep credibility."

Austin and Krisberg, in their paper on the "unmet promise" of alternatives, called for advocates to "test their ideologies through rigorous research." In what he says is the only such research in the country, Stevens Clarke has carefully studied two of the five original community penalty programs, Repay in Hickory and One Step Further in Greensboro. In both studies, Clarke compared the clients served by an alternative sentencing plan with a control group that got no assistance from the program (resources were too limited to allow the programs to develop a plan for every person who falls under the program guidelines).

In both studies, Clarke found that those offenders who were served by the community penalties program spent significantly less time in prison. After explaining the technical findings, Clarke puts the results in layman's terms. "Being in the [Repay] service group meant that the defendant was likely to receive a *much less severe sentence* than he would have received if he had been in the control group [which received no Repay services], regardless of all other factors considered" (emphasis added).[12]

A June 9, 1986 *Newsweek* story, "Punishment Outside Prison," led with Clarke's research in Hickory. In the story, Clarke emphasized the cost savings of programs successfully diverting a person from prison. "If you can deter and control offenders less expensively by keeping them in the community, then everybody gains," he told *Newsweek.* A person outside prison costs about one-fourth what an incarcerated offender costs the state, about $8 versus $32 a day, not counting huge capital construction costs (for more, see page 71).

Clarke's research does not examine how well community penalties plans work *after* sentencing —for example, how the community sanctions affect the recidivism rates of offenders. The programs have not been around long enough for such a study. A large body of research on recidivism in general does exist, with both encouraging and depressing results. Studies have shown, for example, that financial assistance and using ex-probationers to assist professionals have helped to lower recidivism rates but not to the degree that one might expect.[13]

Clarke's studies break new ground, specifically regarding how judges and prosecutors use programs to divert prison-bound offenders at the sentencing stage. "This is significant because much of the criminal justice literature assumes that prosecutors and judges will not use these programs properly," says Joel Rosch, coordinator of the criminal justice program in the Department of Political Science and Public Administration at N.C. State University. But Rosch remains cau-

"[The community penalties program] is just a piece of the pie. You're going to have to keep intensive probation, look at the misdemeanants, expand residential centers, and consider more release options."

—Dennis Schrantz
Statewide Coordinator
Community Penalties Program

tious about how the research results speak to areas where judges or DA's *do not* have an investment in using the program. "There must be a supportive DA and some enlightened judges. How do we ensure that others are that responsible? What incentive does any judge or DA have to use it properly?"

Building community support for the program seems to be the key to answering these questions. "The involvement of the community is really crucial," says Superior Court Judge Forrest Ferrell, who is on the board of directors for Repay. "If the community is interested in alternative methods of sentencing, then the judiciary and judges are more confident of its success. Without community support, it's difficult to have a really viable, meaningful alternative sentencing program."

Maintaining direction of the programs through local boards is considered critical to the success of expanding the program. Currently, every community penalties board includes either a superior court judge, chief of police, or sheriff. The boards have incorporated the leadership of such heavyweights as Sen. Tony Rand (Fayetteville), Sen. William Martin (Greensboro), and senior resident Superior Court Judge Robert A. Collier (Statesville), also chairman of the Governor's Crime Commission Committee on Sentencing. Finally, the boards include influential local citizens, ranging from county commissioners to civic and religious leaders.

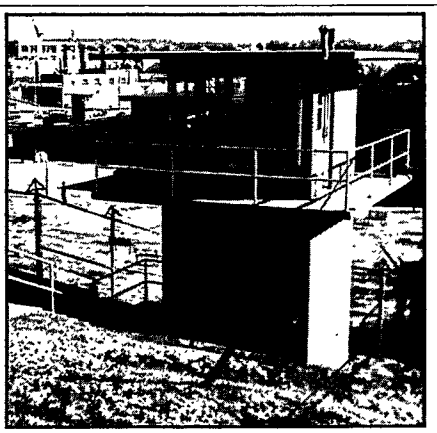
"A state bureaucracy cannot incorporate community resources as well as programs with local boards," notes Lao Rubert.

The Department of Crime Control and Public Safety, which oversees the community penalties programs, has proposed in its 1987-89 budget to add programs in 10 more judicial districts in each of the next two fiscal years, going from nine to 29 programs in two years (see Table 1, p. 58, for the counties currently covered). The budget would increase from $550,000 in 1986-87 to $2 million by 1988-89. Under this level of expansion, Schrantz estimates, the number of defendants diverted from prison would climb to 665 in 1987-88 and 1,121 in 1988-89.

"It starts to add up," says Schrantz. "But it's just a piece of the pie. You're going to have to keep intensive probation, look at the misdemeanants, expand residential centers, and consider more release options."

AN ALTERNATIVE

Intensive Probation and Parole



After nine years as a traditional probation officer, Morty Jayson last fall became an "intensive" probation officer. From carrying an average caseload of 115 (and working alone), Jayson went to a maximum caseload of 25, working with a surveillance officer. The numbers suggest the many differences in the job—and in the goals of the two programs. A probation officer, because of such a large caseload, does well to keep a face associated with the papers he must shuffle. Were the community work hours completed? Were drug clinic fees paid? Was the judge's restitution order met?

An intensive probation officer deals more with people, with felons convicted of more serious crimes. "It's like I'm in the commercial where they change hats," says Jayson. "I'm a counselor, a referral coordinator, then put on a community service hat, then a law enforcement hat."

Officers in the intensive program can carry a weapon. "It's there for self defense only," says Jayson. "We don't carry it openly. The majority of our work is at night, often by ourselves. In most instances, it's an environment that is sometimes not exactly sociable."

In 1983-84, the Division of Adult Probation

— continued on page 60

Table 1. Community-Based Programs for Adult Criminal Offenders, 1987

Counties	Intensive Probation and Parole[1]	Community Penalties[2]	Community Service[3]	Alcohol and Drug Programs			
				TASC[4]	ADETS[5]	DWI Assess.[6]	Drug Ed.[7]
Alamance	●		●	●	●	●	●
Alexander		○	○		●	○	○
Alleghany			○		●	●	○
Anson			●		●	○	●
Ashe			●		●	●	○
Avery			○		●	●	○
Beaufort	●		●		●	●	○
Bertie			○		●	○	○
Bladen			○		●	●	○
Brunswick			●	○	●	○	○
Buncombe	●	●	●	●	●	●	●
Burke	●	●	●		●	●	○
Cabarrus	●		●		●	●	○
Caldwell	●	●	●		●	○	○
Camden			○		○	○	○
Carteret	●		●		●	●	○
Caswell	●		○	○	●	○	○
Catawba	●	●	●		●	●	●
Chatham			○		●	○	○
Cherokee			●		●	●	○
Chowan			●		●	○	○
Clay			○		○	●	○
Cleveland	●		●		●	●	○
Columbus			●	○	●	●	○
Craven	●		●		●	●	●
Cumberland	●	●	●	●	●	●	●
Currituck			○		○	○	○
Dare			●		●	○	○
Davidson	●	○	●		●	●	○
Davie		○	○		●	●	○
Duplin	●		○		●	●	○
Durham	●		●	●	●	●	●
Edgecombe	●		●		●	●	○
Forsyth	●	●	●	●	●	●	●
Franklin			○		●	○	○
Gaston	●		●		●	●	○
Gates			○		○	○	○
Graham			○		○	●	○
Granville			●		●	○	○
Greene			○		●	○	○
Guilford	●	●	●	●	●	●	●
Halifax	●		●		●	●	○
Harnett	●		●		●	●	○
Haywood			○		●	●	○
Henderson		○	●		●	●	○
Hertford			●		●	●	○
Hoke		○	○		●	○	○
Hyde			○		●	○	○
Iredell	●	●	●		●	●	○
Jackson			●		●	●	○

KEY: ● Program is located in the county.
○ Program serves this county.

FOOTNOTES: see page 60.

Table 1. Community-Based Programs for Adult Criminal Offenders, 1987, *continued*

Counties	Intensive Probation and Parole[1]	Community Penalties[2]	Community Service[3]	Alcohol and Drug Programs			
				TASC[4]	ADETS[5]	DWI Assess.[6]	Drug Ed.[7]
Johnston	●		●		●	●	○
Jones			○		●	○	○
Lee	●		○		●	●	○
Lenoir			●		●	●	●
Lincoln			●		●	●	○
Macon			○		○	○	○
Madison			○		●	●	○
Martin	●		●		●	○	○
McDowell		●	●		●	○	○
Mecklenburg	●		●	●	●	●	●
Mitchell			○		●	●	○
Montgomery			○		●	○	●
Moore	●		●		●	●	●
Nash	●		●		●	●	●
New Hanover	●	●	●	●	●	●	●
Northampton	●		●		●	○	○
Onslow	●		●		●	●	○
Orange	●		●		●	●	○
Pamlico			○		○	○	○
Pasquotank			●		●	●	●
Pender		○	○		●	○	○
Perquimans			○		○	○	○
Person			○		●	○	○
Pitt	●		●	●	●	●	●
Polk		○	○		○	○	○
Randolph	●		●		●	●	○
Richmond	●		○		●	○	○
Robeson	●		●		●	●	○
Rockingham	●		●		●	●	○
Rowan	●		●		●	●	●
Rutherford		○	●		●	●	●
Sampson	●		●		●	○	○
Scotland			●		●	●	○
Stanly	●		●		●	●	●
Stokes			○	○	○	○	○
Surry			●		●	●	○
Swain			○		○	○	○
Transylvania		○	●		●	○	○
Tyrrell			○		●	○	○
Union	●		●		●	●	●
Vance			●		●	●	○
Wake	●	●	●	●	●	●	●
Warren			●		●	○	○
Washington			●		●	○	○
Watauga			●		●	●	●
Wayne	●		●		●	●	○
Wilkes			●		●	●	○
Wilson			○		●	●	○
Yadkin			●		●	●	○
Yancey			●		●	●	○

KEY ● Program is located in the county.
○ Program serves this county.

FOOTNOTES: see page 60.

Table 1. Community-Based Programs for Adult Criminal Offenders, 1987, *continued*

FOOTNOTES

[1]*Intensive Probation/Parole.* This program began in 1983, located in seven counties and was expanded to an eighth county in 1984 (Buncombe, Cumberland, Forsyth, Guilford, Mecklenburg, New Hanover, Rowan, and Wake). In 1986, the program was expanded to supervise felons living in 43 counties (45 teams). Judges in all 34 judicial districts may sentence a person to intensive probation, so as a *sentencing* system, it covers offenders from all 100 counties. But the people on intensive probation or parole must live in one of the 43 counties.

[2]*Community Penalties.* As a state-funded program, it began in 1983 in five judicial districts (Buncombe, 28th; Burke, Caldwell, and Catawba, 25th; Cumberland and Hoke, 12th; Guilford, 18th; and Wake, 10th). The 1986 legislature funded four additional judicial districts (Forsyth, 21st; New Hanover and Pender, 5th; Alexander, Davidson, Davie, and Iredell, 22nd, to be covered by 1987; and Henderson, Polk, McDowell, Rutherford, and Transylvania, 29th, to be covered by 1987).

[3]*Community Service.* This is a 100-county system. Community service staff work out of offices located in 65 counties and travel to court locations in all 100 counties.

[4]*Treatment Alternatives to Street Crime (TASC).* This is a federal program, funded through the Department of Justice. It now funds 10 agencies serving 14 counties in North Carolina. The agencies get funds from other sources as well. Of the 10, six are private nonprofit groups and four are area mental health centers. The six groups are: Drug Action of Wake County, Cape Fear Substance Abuse Center (Brunswick, Columbus, and New Hanover counties), Drug Counseling and Evaluation (Durham County), High Point Drug Action (Guilford County), Open House (Mecklenburg County), and Step One: The Center for Drug Abuse (Forsyth and Stokes counties). The mental health centers with TASC programs are in Alamance/Caswell, Buncombe, Cumberland, and Pitt counties.

[5]*Alcohol and Drug Education Traffic Schools (ADETS).* There are ADETS schools located in 89 counties, which serve people from all 100 counties. These programs are run through the 41 area agencies on mental health, mental retardation, and substance abuse services; the agencies may contract for those services.

[6]*Driving While Impaired (DWI) Substance Abuse Assessment.* Contact persons for this program are located in mental health centers in 64 counties and are supposed to serve all 100 counties. Many of the people listed as "contact persons" for the DWI assessment program are the same people listed as the contact person or instructor in the ADETS program.

[7]*Drug Education Schools (DES).* This program is designated to serve all 100 counties through the 41 area agencies on mental health. Currently, 23 counties have one of these schools.

Sources: Memoranda from Departments of Correction, Crime Control and Public Safety, and Human Resources.

Table compiled by Alethea Williamson and Bill Finger

and Parole (Department of Correction) launched this program with nine intensive supervision teams in urban areas with the highest concentration of felons sent to prison (see footnote 1 to Table 1). A team consists of an intensive officer and a surveillance officer. Intensive probation officers must have worked as a probation officer and have college training; surveillance officers, who work under the intensive officer's supervision, usually come from a law enforcement background.

In 1986, the legislature expanded the program, appropriating funds for an additional 36 teams, including the position now held by Morty Jayson. The 45 teams are located in 43 counties (see Table 1). Judges from all 34 judicial districts may place persons on intensive probation; as a sentencing alternative, this program now functions statewide. But the person on intensive probation must live in one of the 43 counties. As of Dec. 31, 1986, there were 335 people on intensive probation and 20 on intensive parole. The new teams are expected to gear up to full capacity by mid-1987, so that intensive probation/parole could manage up to 1,215 people at one time.

The program has three functions: 1) to oversee felons who pose no major public risk; 2) to provide intensive counseling to help convicted felons get themselves back into the mainstream of society; and 3) to provide strict surveillance (five to seven times a week) to be sure the offenders are meeting the terms of their probation, which could include everything from restitution and community service to drug counseling.

Usually, an intensive officer works first with the district attorney's office, rather than the defense attorney. "We also work closely with the community penalties people," says Doug Pardue, the lead intensive probation officer on one of the original nine teams. Unlike community penalties staff, intensive officers have regular, often daily contact with their clients. Intensive probation/parole is not restricted to H, I, and J felons; it can include offenders who have been convicted of violent crimes. Finally, intensive probation is a state-run system, with staff reporting through an administrative structure that answers to Secretary of Correction Johnson. Community penalties staffers report to a nonprofit board of directors composed of community leaders, while following standards developed in the Department of Crime Control and Public Safety.

"The main emphasis is keeping them on the street," says Pardue. "I go into their homes, allow them to tell me face-to-face how things are going. If they have curfew violations, we usually give

"We're paroling more than anybody has ever paroled before."

—Bruce Briggs
Chairman
N.C. Parole Commission

them extra community service. You don't want to send them back to prison just for missing curfew one night, but we don't want them to get away with it either."

Of his current case load of 23, Pardue says five should be in drug counseling, but only one is going regularly. "Some of them we have are not motivated to work," he says. "A lot of these people don't have anything, and that's part of the reason they committed the crime. I try to keep them on the street, but if they don't have any self motivation, I'm not going to burn a lot of night oil."

Some 30 states have begun some type of intensive probation system, some of which (not North Carolina) rely on "house arrest."[14] In North Carolina, people placed on intensive probation (as well as regular probation) must pay a $10 a month supervision fee. They may be moved "down" to traditional "supervised" probation by the court upon the recommendation of the intensive officer. (A third general category is "unsupervised" probation, under which an offender does not have a probation officer but is on probation as part of a sentence.)

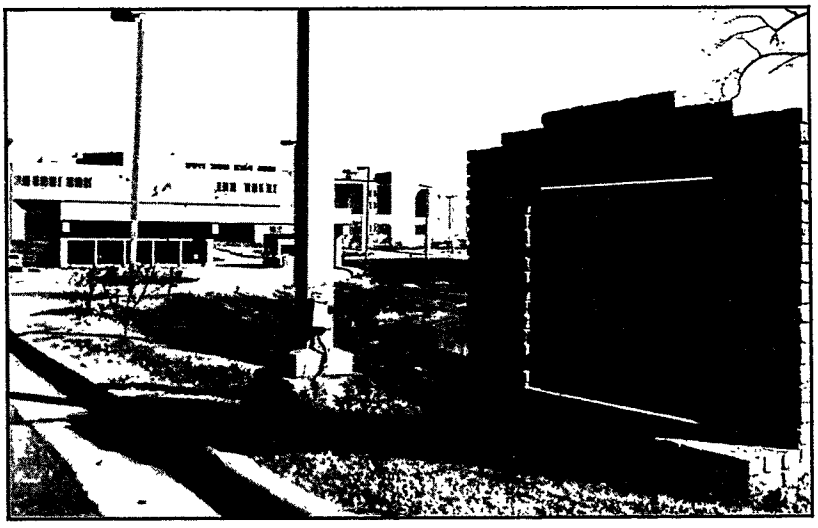
The original probation system was *the* alternative to going to prison. In the early days, officers were usually male social workers, on a career track that paralleled the female case worker in the welfare system. The best probation officer wanted to rehabilitate the offender. But today, with a caseload of about 115, a probation officer by necessity processes papers more than people. In the wake of prison overcrowding over the last 20 years, probation has become equally "overcrowded." The mission of probation officers has been overwhelmed by the caseload, resulting in little "client-specific" attention.

Probation has evolved into its own system of community sanctions, functioning more like a system of controls than of rehabilitation. In some instances, supervised probation might still be an alternative to prison, but rarely is a prison-bound felon (or misdemeanant) diverted from an active sentence only because of the traditional probation system. Most alternatives to *prison* rely on probation *along with* other community-based sanctions such as community service. On an average day, the Division of Adult Probation and Parole has responsibility for some 59,000 people under probation, plus another 3,500 on parole, and 350 on dual probation/parole (usually under the supervision of a probation officer).

The intensive and surveillance officers are set up to cover people on *parole* as well as probation. This is important to note in the context of alternatives in general. The *parole* system is considered an "exit alternative" to prison—simply put, a system designed to get people out of prison and, only secondarily, to reintegrate them into the society. Officers working strictly with parolees have a caseload of 61, compared to the caseload of 115 a probation officer carries. Parole officers spend about half their time supervising parolees; the other time goes to investigating persons being considered for parole. A five-member Parole Commission, appointed by the governor, decides who may be paroled, acting on requests of its own staff (which is separate from the parole officers themselves).

Among the three central alternative systems launched by the state in 1983, only intensive parole is an *exit alternative*—that is, it can function to reduce the *existing* prison population. Community penalties and intensive probation, in contrast, can reduce *admissions* to the prison system through alternative sentencing plans. As of Dec. 1, 1986, there were 18,000 people in prison and only 20 on intensive parole—one tenth of one percent of the overcrowded prison population. This exit alternative alone seems woefully inadequate to address in a serious fashion the *existing* prison overcrowding, which has prompted the litigation.

In 1981, when the Fair Sentencing Act took effect, the parole system lost much of its flexibility over who could be paroled. This act eliminated discretionary parole for *all future felons*, with a few notable exceptions, such as some youthful offenders. Three subsequent legislative actions, however, have returned some degree of



discretion to the Parole Commission, by allowing inmates to be eligible for parole earlier than prescribed in the Fair Sentencing Act. The legislature:

- in 1983 passed the Emergency Powers Act, which allowed the Parole Commission to release felons 180 days before their release date;[15]
- in 1984 authorized community service parole, which allowed felons serving their first active sentence of more than 12 months to perform community service while in the regular parole system, after serving one-fourth of their sentence;[16] and
- in 1986 increased the thresholds in the two acts named above, lengthening the Emergency Powers Act provision from 180 to 270 days[17] and effectively reducing the community service eligibility threshold period from one-fourth to one-eighth of the person's sentence (which can shorten a sentence by more than 270 days).[18]

In 1985, Secretary of Correction Aaron Johnson formally invoked the Emergency Powers Act; the Parole Commission then issued regulations for implementing the act.[19] "It has been used continuously since the rules were first adopted in April of 1985," says Ben Irons, attorney for the Department of Correction. The community service parole authority, on the other hand, was used "very seldom at first," adds Irons, but "it is being used more often now."

Under this new authority, the Parole Commission still bases its review of inmates on sentence length and projected release date supplied by the Division of Prisons computer system and determined under the Fair Sentencing Act. "We can't release them before they become eligible," says Parole Commission Chairman Bruce Briggs, but the new laws have "accelerated the eligibility."

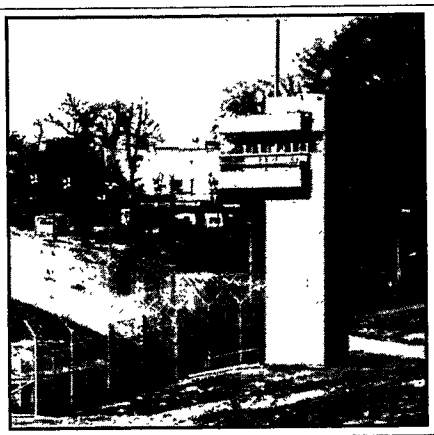
In addition to the discretionary powers for paroling felons, the Parole Commission can also parole misdemeanants, whether sentenced to the state prison or local jails. As of September 1986, nearly *one of every five* people in the state prison system was convicted of a misdemeanor, not a felony (3,299 of 17,708). The Parole Commission concentrates more on felons because it reviews those cases more times. Because of short sentences and the rapid turnover of the misdemeanant population, most misdemeanants come up for parole review only once or twice.

The new flexibility from these three legislative actions makes parole an important tool for policymakers to consider while overcrowding continues. The 1986 law alone, which changed the two thresholds, could apply to as many as 2,000 of the 18,000 people now in prison. But Commissioner Briggs warns against depending upon parole to relieve overcrowding. "We're paroling more than anybody has ever paroled before," says Briggs. In 1986, the commission paroled 11,312, a record for North Carolina. (Of those, 8,768 were paroled from the state prisons and 2,544 from local jails.)

Even putting the restrictions of this act aside —which could be done through further emergency powers—an exit alternative alone meets only one criteria of an "effective" alternative to incarceration. It can help relieve prison overcrowding. But what about the larger questions of an effective penalty? If proper attention is not given to the individuals paroled, recidivism might undermine the value of this alternative. The parole system alone is not equipped to work with large new numbers of parolees to reintegrate them into a productive life and hence—for many—to avoid future problems with the law.

AN ALTERNATIVE

Community Service Work and Related Programs



In North Carolina, the term "community service" has a dual meaning in the context of alternatives to prison. Traditionally, the term refers to the *actual work* a person performs in the community as part of a sentence. Since 1983, the term has also come to refer to the statewide *system* prompted by the Safe Roads Act. The community service system—run by state employees based in all judicial districts—has four parts: 1) driving while impaired (DWI) community service, 2) non-DWI community service (usually includes people going through the community penalties and intensive probation programs), 3) first-offender programs, and 4) community service parole. Clients come into the program as a condition of probation or of parole, through a "prayer for judgment" (an informal deferral of a case, which is dismissed after community service is completed), through a deferred prosecution agreement, or through a sentence to perform community service (as through community penalties or intensive probation programs discussed above).

Strictly speaking, neither the community service system nor an individual community service work plan is an alternative to incarceration. Community service is either a *component* of an alternative sentencing plan (i.e., through community penalties or intensive probation) or is the main sanction for DWIs and first offenders, that is, for people *not* going to prison. "The community services program does not intend to deal primarily with prison-bound people," says Lao Rubert. "That's why it's not an alternative to prison. It's an additional sanction available to the judge."

Before the Safe Roads Act, the five community alternative programs (Asheville, Fayetteville, Greensboro, Hickory, and Raleigh) included a community service component, which also concentrated on restitution. For three years (1981-83), the General Assembly appropriated funds (in the form of grants) to these groups and about 20 other nonprofit groups across North Carolina. The 1983 Safe Roads Act included community service as a mandatory component of a DWI conviction and had a $2.7 million appropriation to establish a statewide system to administer this sanction. The original community service programs left their community-based board structure and moved under the jurisdiction of the Division of Victim and Justice Services in the Department of Crime Control and Public Safety.

The General Assembly, one should note, funded this system *not* as an alternative to prison but as a *new* community sanction for a person convicted of driving while impaired. The public outrage over drunk drivers, heightened by strong backing from Governor Hunt and other high-profile politicians, added a new, institutionalized system of sanctions, effectively widening the net of persons under state control.

In its three years of operation, the community service work program has collected $4.2 million in fees, which have reverted to the General Fund. Most persons sentenced to community service must pay a $100 fee to the program. "These fees have largely been successful in offsetting the cost of the program," Robert Hassell, director of the Division of Victim and Justice Services, told the legislature's Special Committee on Prisons on Dec. 5, 1986.[20]

"The increase in fees from $50 to $100 for community service, passed during the last [1986] legislative session, made it possible to offset the expenses needed for additional staff to meet projected client growth for FY 86-87." The division, Hassell said later in an interview, is adding 36 additional staff members for an expected client growth from 35,000 to 46,000 in FY 86-87.

The additional fee might justify the new positions but it has quite a different effect at the street level. "We used to set up the schedule and monitor all the community service ourselves—in nursing homes, the Raleigh Rescue Mission, Goodwill, police stations, libraries, you name it," says Intensive Probation Officer Pardue, referring to his caseload. "Now, we have to send them through the community service office and they have to pay the fee." In effect, the system has caused another state employee to become involved with a person on intensive and supervised probation. Hence, in most cases, two offices and two different state employees are keeping track of whether a person completes community service.

"All the probation officer does is check on a form whether the community service is completed," says Hassell. "Our field staff arrange the community service, make all the community contacts, keep up with the schedule, and keep up with a person's progress. If the probation officer and the community service officer are keeping the same kind of records on a person, then we should eliminate that duplication."

Currently, a community service worker has an average caseload of 145 people, compared to the probation officer's load of 115. In fiscal year 1985-86, 34,495 people were sentenced to the community service work programs—*73 percent of them for DWI offenses*—where they had to work from 24 hours to hundreds of hours. Imagine *every resident* of McDowell County (pop. 36,000, including the towns of Marion, Old Fort, Dysartsville, Little Switzerland, and Nebo) under a state-run bureaucracy (with 107 case workers), which required *free work.* That's what the Safe Roads Act spawned in just three years.

"If it hadn't been for them, I would've been here a lot of nights by myself," chuckles Frank Miller, a retired Army man who runs the Greensboro Urban Ministries shelter for homeless people. At 4 p.m. on the first chilly night of the fall, the concrete floors in what had been a grocery store look stark and bare. In four hours, "about 70 people will be here," says Miller. "I'll put two volunteers at the door to record names and shake them down. Another will serve the coffee and sandwiches. Another will put the mats down and help keep the peace." Miller or a staff assistant will supervise the court-ordered workers (and volunteers from churches and colleges). The community service office calls Miller first, telling him about the client, who then sets up his own work. "We're a popular one, because a person can get 12 hours at a time. I only accept those who will work all night."

Government officials, like people working for nonprofit groups, recognize the value of this pool of free labor. "Our courthouse has never been so clean," says Frances Walker, who chairs the Currituck County Board of Commissioners.

The free labor seems to be the key element that sells community service to the public, rather than some sense that the person is repaying society for his crime (or being rehabilitated). "Community service and restitution were linked together in the early 1980s," explains Dennis Schrantz, who ran Repay in Hickory at the time. "But community service was a lot easier to service. There was more of a clamor for free labor than for labor that someone had to pay for." For a person to pay restitution, he needs to have a paying job, explains Schrantz. In two years (1985 and 1986), community service hours were worth over $6 million to nonprofit and governmental organizations. In making the estimate of the value of the work performed, the legislature's Fiscal Research Division assumed a rate of $3.35/hr., the federal minimum wage rate.[21]

But the most heated debate over this system is whether it duplicates the role of traditional probation officers to some extent, thus creating an unnecessary layer of bureaucracy for various state officials to regulate and within which offenders must function. A series of operational audits from the State Auditor triggered this debate in the broader context of pointing out the fragmentation involved in the criminal justice field (for more, see article on page 17).[22]

The community service system is not the only new sanction that has emerged in recent years. The Division of Mental Health, Mental Retardation, and Substance Abuse Services in the Department of Human Resources administers four programs used as a community sanction. The sanctions are invoked as a requirement of probation or as part of a multi-faceted, community-based sentencing plan.

One of these programs, the Treatment Alternatives to Street Crimes (TASC), is significantly different from the other three. It began as part of a federal emphasis on drug treatment in the 1970s and now operates in 11 N.C. urban areas which have significant crime rates. The TASC program works through grants to nonprofit organizations (see Table 1). When Cindy Hill was trying to develop a community-based plan for Eliot Johnson, she used Drug Action of Wake County, which gets funds from the TASC program. Clients in the TASC-funded programs can be misdemeanants or

felons convicted of a nonviolent offense. The programs provide treatment as an alternative to more restrictive action by the courts.

The other three programs are administered more directly by DHR, through the 41 area mental health agencies, and in theory are available statewide:

■ Alcohol and Drug Education Traffic Schools (ADETS) — 89 schools designed to *educate* first-offender DWIs about the dangers of alcohol (they don't offer treatment), usually a required sanction under a DWI conviction. The director of this program testified before the Special Committee on Prisons that preliminary data indicate that this program has not had positive results with regard to reducing recidivism: "This [program] is a noble and desirable goal but it is unrealistic to expect [such an] educational program to impact on 15-20 years of drinking and driving experience."

■ DWI Substance Abuse Assessment — designed as an intervention and treatment program for repeat DWI offenders, problem offenders (persons registering over .2 alcohol content in the blood in the breathalyzer analysis), or offenders refusing the breath test. The same person in a local mental health center sometimes runs the ADETS and assessment programs, which can tend to blur the distinctions between the two programs.

■ Drug Education Schools (DES) — an education program for first-offenders convicted of drug possession (not repeat offenders or drug sellers), usually for young persons.

"We put more misdemeanants into our state system than nearly any other state. The only way to deal with this problem is to change the law so that no misdemeanant could be sent to the state prison system."

—Lao Rubert
N.C. Prison and Jail Project

What Future for Alternatives to Incarceration?

Within the increasingly complex system described above, where will the 1987 legislature look to relieve overcrowding and to chart a clear sense of purpose for prison and for community-based punishments? The lawmakers will face no tougher question this year. To answer it in the most innovative and fundamental sense, they must consider not only prison conditions, federal litigation, and alternatives but also local jail overcrowding, changes in sentencing statutes, and other related issues.

State government actions regarding alternatives to prison can be boiled down to three components: 1) *entrance* alternatives, i.e., diverting prison-bound people at the sentencing stage; 2) *exit* alternatives through parole; and 3) altering sentencing laws so as to reduce the prison populations. This third component may well hold the key to the overcrowding problem.

The sentencing laws—and how judges use sentences in relation to community-based penalties —have the greatest long-term impact on the prison population. Parole, even with the added flexibility discussed above, remains confined within the parameters of a person's sentence. Consider that in the N.C. prison system:

■ *one of every 25* (4 percent) was convicted of a DWI offense (another 2 percent had other traffic offenses such as hit and run and death by motor vehicle);

■ *one of every 20* (5 percent) is a "committed youthful offender" (CYO) with no prior incarceration, in for a property offense (CYOs are under age 25 and are in a special parole category, where they can be considered for parole anytime during their sentence);

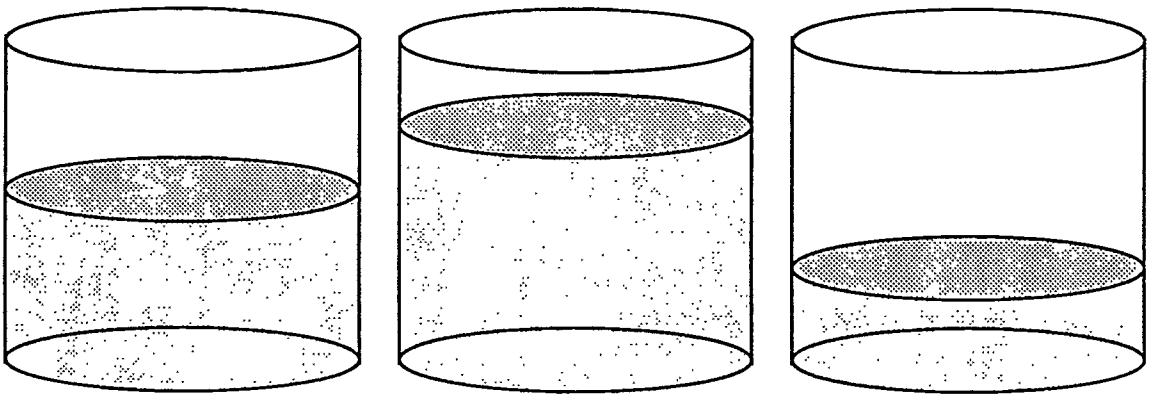
■ *nearly one of every five* (19 percent) was convicted of a misdemeanor (only seven states, including North Carolina, routinely put large numbers of misdemeanants in state prisons;[23]

■ *almost one of every three* (30 percent) was convicted of a felony property offense; and

■ *almost two of every five* (37 percent) are serving time under an H, I, or J felony.

Making sweeping recommendations based on these numbers can be misleading. To take the

Imagine a glass of water — Admissions, Sentences, Lengths, and Releases



If you take out the same amount you put in, the level of water remains the same.

When *admissions* = *releases*, the population remains the same.

If you take out less water than you put in, the level of water in the glass increases.

When *releases* are lower than *admissions*, the population increases.

If you take out more water than you put in, the level of water in the glass decreases.

When *releases* are higher than *admissions*, the population decreases.

Source: N.C. Prison and Jail Project

Carol Majors

most common theme among newly won converts to the alternatives approach, what about diverting more "nonviolent" offenders? "The distinction between the 'nonviolent' and 'violent' offender is a bogus one in terms of protecting the public," says Joel Rosch of N.C. State University. "A drug addict who breaks into a house that happens to be unoccupied is classified as a 'nonviolent' offender [under the Fair Sentencing Act] while a 45-year-old alcoholic with no criminal record who murders his wife is 'violent'. As a member of the public, I fear the drug addict more."

Another faulty assumption is that the Parole Commission can target all the groups mentioned above, such as property offenses or H, I, and J felons. With the notable exception of the CYOs, offenders are eligible for parole only according to the amount of time served. If a person got a bad sentence—was charged and tried in a crime category that overstated his danger to the public, for example—the parole process does not have the discretion to alter that sentence.

The prison population is a fluid system. That is, people are entering and leaving it every day. Since so many factors affect this fluid system, from sentencing to parole, analyzing any single point in time is difficult. To simplify this task, Lao Rubert likens the system to a glass of water (see graphic above). The level of water, i.e., the number of people in prison, rises or falls depending upon how much water you put in or take out. Only when releases are higher than admissions does the "water level" drop.

Community-based penalty programs attempt to decrease admissions to prison, while incorporating the four traditional purposes of punishing offenders. To enhance the success of this effort, offenders need to be targeted at the sentencing stage. Three general criteria can be used to target those offenders who most logically could be diverted from prison: property offenders, "public order" offenders (such as traffic or drug offenders), and offenders with limited prior incarceration.

Applying these three criteria to CYOs, misdemeanants, and felons results in 20 groups of offenders (see Table 2). Ken Parker, manager of re-

search and planning for the Department of Correction, has analyzed these 20 categories according to the number of offenders flowing through the system in a year. Parker assumed that 80 percent of the offenders in each category might be appropriate for a community-based penalty plan or for sentencing to a local jail, and that 70 percent of those diverted from the prison system would not re-enter the system for at least three years. Using 1986 population levels in the 20 categories, Parker calculated that the net prison population could be reduced by 1,940 (see Table 2).

Parker is quick to point out, however, that these calculations used "paper" categories, and that any wholesale actions would require a close look at each individual. "What you see from looking at the list is that there aren't too many Boy Scouts in there," he says. "Furthermore, you would have to process over 7,600 cases each year [in these 20 categories]," says Parker, "about half the number who come to prison."

Parker's research shows what is possible over a span of time, which is the proper way to examine a fluid, constantly changing system. But the 1987 legislature has to deal with the short-term overcrowding crisis. In its last meeting before the legislature convened, the Special Committee on Prisons adopted a recommendation to impose a cap on the prison population at 18,000. Rep. Anne Barnes (D-Orange), co-chair of the committee, said, "We are working as fast as we can on developing the mechanism for implementing that cap." Barnes announced to the committee that the Governor, Lieutenant Governor, and Speaker of the House had agreed to the concept of the cap.

If the legislature approves the cap, it will face the tough job of finding a mechanism to keep the prison population below 18,000. In the short run, it might have to give Secretary Johnson and the Parole Commission further emergency parole powers. Emergency early release programs have been used successfully in other states, notably in Illinois.[24] But for the long run, the legislature will have to take a close look at sentencing laws.

"The only way you really will address prison overcrowding is through sentencing," says David Jones, director of analysis for the Governor's Crime Commission, which routinely recommends legislative action. Over the years, the recommendations of the Crime Commission have been important guideposts for action.

This year, the Crime Commission has proposed several minor changes designed to reduce the state's prison population. For example, the commission recommended that the legislature prohibit

Table 2. Potential Reduction in Prison Population, by Inmate Type

Inmate Type*	Population Level, 1986	Potential Reduction
A. NO PRIOR INCARCERATIONS		
Property Crimes:		
1. Committed Youthful Offender	893	500
2. Misdemeanant	362	203
3. Felon with less than presumptive sentence	81	45
4. Felon with presumptive sentence	265	148
5. Split sentence	143	80
Public Order Crimes:		
6. Committed Youthful Offender	72	40
7. Misdemeanant	477	267
8. Felon with less than presumptive sentence	55	31
9. Felon with presumptive sentence	106	59
10. Split sentence	133	74
B. ONE PRIOR INCARCERATION		
Property Crimes:		
11. Committed Youthful Offender	150	84
12. Misdemeanant	193	108
13. Felon with less than presumptive sentence	40	22
14. Felon with presumptive sentence	162	91
15. Split sentence	52	29
Public Order Crimes:		
16. Committed Youthful Offender	9	5
17. Misdemeanant	189	106
18. Felon with less than presumptive sentence	6	3
19. Felon with presumptive sentence	28	16
20. Split sentence	52	29
TOTALS	**3,468**	**1,940**

*Felons are sentenced under the Fair Sentencing Act and may receive less than the presumptive sentence if mitigating factors are involved. A judge can also issue a sentence longer than the presumptive length if aggravating factors exist.

Source: N.C. Department of Correction

Overcrowded Jails—Are "Satellite" Detention Centers An Answer?

County jails, like state prisons, are overcrowded, in large part because of state legislative actions. In the late 1970s, the legislature first addressed the misdemeanant prison population by allowing the use of jails for prisoners with sentences of up to 180 days. In 1986, the General Assembly eliminated the 180-day cap, allowing a judge to order work release and jail for any misdemeanant.

Perhaps the most dramatic new pressure on jails came in 1983 with the Safe Roads Act, which required jail (or prison) time for repeat drunk drivers. Judges also began to order drunk drivers to spend weekends in jails, creating uneven bed needs and bad overcrowding on weekends. The 1986 legislature also mandated that most misdemeanant motor vehicle offenders receiving an active sentence go to a local jail, unless previously jailed on similar charges.

The state has helped the counties absorb this added expense. The state pays the counties $11 per day for every *man* from the prison system who is kept in a local jail. The 1986 legislature boosted the reimbursement to $12.50. Holding a person in a minimum security prison costs the state about $20 a day, so the state is saving money. But should the state assist counties in building more jail facilities? And if so, how?

Mecklenburg County Sheriff C.W. Kidd has provided the state with a widely publicized and financially successful model—a minimum security detention center called a "satellite" jail, operating seven days a week as a work-release center. While under fire for some of his administrative decisions, Kidd's financing system has held up under close scrutiny. In 1985, the satellite jail netted the county some $200,000 in profits, says Kidd, through an $11 per day fee from the inmates themselves, a $25 per day fee for federal prisoners housed in the facility, and the $11 (now $12.50) daily reimbursement from the Department of Correction. The per-bed cost in the satellite jail was only $5.60. The facility, a renovated school building, can accommodate 150 offenders, allowing them to keep their jobs (or stay in school), an incentive easily worth the $11 per day fee.

Other satellite jails have begun to sprout around the state, recognizing that the Mecklenburg model can save money and meet the needs of the inmates. "It's awfully hard to find or keep a job if you're in a minimum security prison," says Senator Rand, who helped secure some state money for a pilot project in Cumberland County. "Working in his own county is much better for the person, the family, and the system."

The state is covering the daily costs of *housing* misdemeanants, but the overcrowding of jails requires assistance generating capital as well. The Crime Commission's sentencing committee developed a recommendation which could assist the sentencing of a misdemeanant to a state prison "unless the defendant has first served an active term in jail or prison, or has been or currently is on supervised probation." Jones admits that this "unless" clause minimizes the impact this recommendation can have on overcrowding.

Getting the misdemeanants out of the state system presents hard policy, administrative, and financial choices for the legislature. "You have a problem with misdemeanants who are charged as felons and get the charge reduced through a plea bargain," says Sen. Rand, a Fayetteville criminal defense attorney. "The sentencing concession [in the plea down to a misdemeanor] is often that the client get some active time. I don't think the jails can pick up that expense."

Lao Rubert, reflecting on the challenges ahead for advocates like herself, also worries about a solution here. "We put more misdemeanants into our state system than nearly any other state. The only way to deal with this problem is to change the law so that no misdemeanant could be sent to the state prison system. But local community programs and local resources need to be in place if misdemeanants aren't going to the prison system."

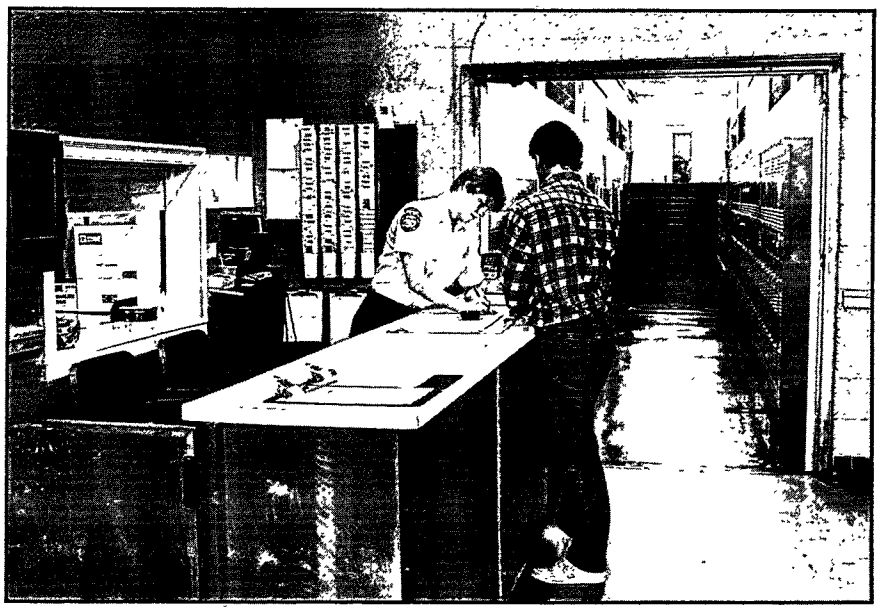
"Local resources" is one of the key elements

with this need. First, to avoid any grey areas in the law, the Crime Commission recommends the legislature give sheriffs clear authority to establish and maintain minimum custody detention facilities, commonly known as satellite jails or work/study release centers. Second, the commission recommended that the legislature establish a statewide construction/renovation assistance program through funds generated by tax-exempt revenue bonds.[1] The facilities would be leased to the local unit of government, which would repay the bond costs from its profits (fees exceed costs, at least in the Mecklenburg model) and would assume ownership of the facility when the bonds are repaid.

FOOTNOTE

[1]"Truth in Sentencing — A Report to the Governor," Governor's Crime Commission, Department of Crime Control and Public Safety, February 1987.

Security Officer Joe Carter mans the entrance desk to the Mecklenburg County Satellite Jail. Down the hallway are the dorms where the prisoners live.



Don Sturkey, © 1987 The Charlotte Observer

in the entire alternative picture—from minimum security detention centers where people can work or go to school during the day in their own communities (called "satellite" jails) to a local community-based punishment system. Simply pushing misdemeanants out of the state prison system into county jails, while it might relieve the overcrowded prison system, can create new problems. The jail system is overcrowded itself and might be worse off for a prisoner than a minimum security prison. Many jails are in a county courthouse, and the inmates cannot even go outside to get some fresh air. Moreover, many people who might be punished better in a community setting would still be incarcerated. The legislature's Special Committee on Prisons has recommended that the state set up a $20 million fund for capital grants to counties to develop misdemeanant work-release "satellite" jails (see sidebar above).

"The state needs to provide technical assistance to counties to develop more alternative programs for the people in jails and for people headed to prison," says Stephanie Bass, executive director of the N.C. Center on Crime and Punishment. "But how do you develop these programs to meet the varying needs of different communities? We

need residential centers, drug treatment facilities, and many other things. What does a community do besides jail? The answer is not just more jails."

One thing that all these issues—exit alternatives, sentence diversions, changes in sentencing laws, community service, satellite jails—have in common is the involvement of the judicial and law enforcement systems. Alternative programs are also expanding in an effort to keep problems from ever getting into the complicated and expensive judicial system. The best example, perhaps, are the dispute settlement centers that have spread into at least 10 North Carolina towns. These groups have joined together into the N.C. Association of Community Mediation Programs.

Too often, however, the array of community-based programs related to the criminal justice system evolve without any overall direction. Developing a community corrections *policy* is "often an afterthought" to community corrections *programming*, says Patrick McManus, the federal court's "special master" for the Tennessee corrections system. "This, in fact, may be why the [prison systems in the] United States are in a mess. Overriding community corrections policy rarely happens without federal court intervention."

In looking at all the potential purposes of an "effective" system of community-based penalties, policymakers are "really asking questions about the very nature of crime and punishment," says Malcolm Young. (For specific recommendations for 1987, see pages 72-73.)

"Sadly enough, criminal courts are very impersonal places, a system where people get pushed through," continues Young. "It's a poor place to provide social services and rehabilitation. But we're better off anytime we stop and pay attention to the individuals in that system"—individuals like Eliot Johnson.

Eliot walks through the swivel gate into the attorney area and sits beside Sally Scherer at the defendant's table on the right. Judge Sherrill asks Tony Copeland, the assistant DA, to proceed.

Rising on the left, Copeland reviews the charges and then announces, "We've worked out a plea, your honor." He then presents the agreement—the felony and two misdemeanors reduced to a single misdemeanor, with a six-month suspended sentence; two years probation; a fine of $100 and court costs (which include attorney fees), to be paid by Eliot; and his placement in the group home.

Cindy Hill, of ReEntry, had arranged for Eliot to move off the waiting list and into the structured living situation he needed.

Judge Sherrill begins shuffling through his papers. Eliot, a full head shorter than Scherer and looking barely out of junior high school, stands beside his attorney. Scherer reaches over and rubs his back as they wait for the decision. At last, Sherrill looks up. His sleepy-eyed countenance belies his bite.

"Are you trying to become a career criminal before you're 25?" Sherrill barks.

"No sir," the 16-year old manages.

"This case will make a fool out of one of us," the Judge continues. "And I hope it's me. If you show up in this courtroom again, you know who the fool will be?"

"Yes sir."

Then the Judge passes his sentence, agreeing to the plan that Scherer and the assistant DA worked out, using the background information and community placements developed by Hill. In agreeing to the community-based penalty plan, Sherrill was making tradeoffs among the four classic purposes of criminal punishments. Would the public be protected with Eliot in the community? Would the system provide sufficient retribution through the combination of fines, probation, and restrictions in a group home? Would such a sentence deter further crime from Eliot? Will the sentence help to rehabilitate Eliot?

Then Sherrill, true to his hard-line reputation, adds, "Your probation officer must take you on a tour of Central Prison during your first 30 days on probation. And that's where I'll send you if I see you back in this courtroom. I'll have your dunce cap ready."

In another setting, the line might have sounded corny, but not from Judge Sherrill. His steel-grey eyes peer wide for the first time during his crowded morning session.

Eliot bursts into a smile and walks through the gate to join his mother. Scherer and Hill follow them outside the courtroom. Dragging long and deep on a cigarette, he says he felt "better" when the Judge agreed to the suspended sentence. "I thought he might send me to prison. I spent 11 days in jail here before I got out," Eliot says.

Cindy Hill's next step is to take Eliot over to the group home, the kind of structure that—unlike the bars of a prison cell—might enhance his chances in life.

How Much Do Taxpayers Pay?

Incarceration

1. Average cost per inmate in state prison:
   $31.63 per day **$11,500** per year
2. Average cost of construction per cell (designed for one person) in a new, medium-security prison:
   $60,000 to $72,000

Alternatives to Incarceration

1. Cost per person sentenced through community penalties program:
   $1,000 per person
2. Cost per person on intensive parole or probation:
   $7.13 per day **$2,602** per year
3. Cost per person on traditional probation or parole:
   $1.25 per day **$456** per year

Data compiled by N.C. Center on Crime and Punishment

FOOTNOTES

[1]"Corrections at the Crossroads—Plan for the Future," developed by the N.C. Department of Correction and released March 6, 1986, p. 1.

[2]William L. Armstrong and Sam Nunn, "Alternatives to Incarceration: The Sentencing Improvement Act," in *Crime and Punishment in Modern America*, Institute for Government and Politics of the Free Congress Research and Education Foundation, pp. 337ff.

[3]"Report: Citizens Commission on Alternatives to Incarceration," released by this 21-member commission through the Prison and Jail Project of North Carolina, Durham, N.C., Fall 1982, p. 65.

[4]Public sentiment in North Carolina on crime and punishment appears to be in flux. In a 1982 survey of 1,506 people, the North Carolina Citizen Survey, part of the N.C. Office of Budget and Management, included a significant section on crime issues. "Although North Carolinians take a fairly 'hard line' on the subject of prison sentences in general (44 percent think they're too short), there is considerable support for alternatives to prison sentences for certain types of offenders," reported the office. Then in 1986, the N.C. Center on Crime and Punishment conducted a 25-minute telephone survey of 621 randomly selected citizens. The survey indicated that North Carolinians would rather use alternative punishments than build more facilities to solve prison overcrowding.

[5]Chapter 435 of the 1983 Session Laws, now codified as N.C.G.S. 20-179.

[6]Chapter 909 of the 1983 Session Laws, now codified as N.C.G.S. 143B-500 to 507.

[7]The Fair Sentencing Act established a 10-tier classification system for felonies, linking presumptive and maximum sentences to each tier. Here are some of the felony categories that can be dealt with through the community penalities program: "H" (maximum 10 years, presumptive three years)—attempt to commit burglary, felonious larceny, felonious breaking or entering, felonious receiving or possession of stolen goods, embezzlement, manufacture or sale of "schedule I or II" controlled substances; "I" (maximum five years, presumptive two years)—breaking and entering into a motor vehicle, forgery, manufacture or sale of schedule III-VI controlled substances, possession of a schedule I controlled substance, welfare and Medicaid fraud; and "J" (maximum three years, presumptive one year)—credit card theft and fraud, forgery, unlawfully transporting a child out of state, and all felonies not specifically classified by the Fair Sentencing Act.

[8]Chapter 682 of the 1983 Session Laws, now codified as N.C.G.S. 143B-262(c).

[9]James Austin and Barry Krisberg, "The Unmet Promise of Alternatives to Incarceration," *Crime & Delinquency*, July 1982, pp. 374ff.

[10]Jan M. Chaiken and Marcia R. Chaiken, "Varieties of Criminal Behavior: Summary and Policy Implications," The Rand Corporation, publication R-2814/1-NIJ, August 1982; and Peter W. Greenwood with Allan Abrahamse, "Selective Incapacitation," The Rand Corporation, publication R-2815-NIJ, August 1982.

[11]N.C.G.S. 143B-503.

[12]Stevens H. Clarke, "Effectiveness of the Felony Alternative Sentencing Program in Hickory, North Carolina: Report on a Controlled Evaluation," prepared for Repay Inc., Institute of Government, University of North Carolina at Chapel Hill, February 1986, p. 11; see also, W. LeAnn Wallace and Stevens H. Clarke, "The Sentencing Alternative Center in Greensboro: An Evaluation of Its Effects on Prison Sentences," Institute of Government, January 1987.

[13]A valuable source on recidivism and related studies is *Crime and Public Policy*, James Q. Wilson, editor, ICS Press (San Francisco, Ca.), 1983. In this anthology, see particularly Daniel Glaser, "Supervising Offenders Outside of Prison," pp. 207-228. Another excellent background book on how well alternative programs work is James Q. Wilson, *Thinking About Crime* (revised edition), Basic Books, Inc. (New York, N.Y.), 1983.

[14]For a summary of a 50-state survey of house arrest programs, with special emphasis on the Florida program, see "House Arrest: Florida's Community Control Program," publication RM-764, Council of State Governments, 1986. In North Carolina, a pilot house arrest project has begun in Winston-Salem for *juveniles*. This article focuses on alternatives for persons tried and convicted in adult court.

[15]Chapter 557, sec. 4, 1983 Session Laws, now codified as N.C.G.S. 148-4.1.

[16]Chapter 1098, sec. 1, 1983 Session Laws (2nd session, 1984), now codified as N.C.G.S. 15A-1371.

[17]Chapter 1014, sec. 197 (HB 2055, p. 157), 1985 Session Laws (2nd session, 1986), which amended N.C.G.S. 148-4.1(c) and 15A-1380.2(c). This was a "special provision" to a budget bill. For more on this issue, see Ran Coble, *Special Provisions in Budget Bills: A Pandora's Box for North Carolina Citizens*, N.C. Center for Public Policy Research, June 1986.

[18]Chapter 960 of the 1985 Session Laws (2nd session, 1986), which amended N.C.G.S. 15A-1371(h) and 15A-1380.2(h).

[19]For the rules issued by the Secretary of Correction, see 5 NCAC 2F .2000; for the regulations issued by the Parole Commission, see 5 NCAC 4C .1800.

[20]See "Response of the Department of Crime Control and Public Safety to the Report of the State Auditor Entitled 'Restructuring of Offender Programs in the Criminal Justice System'," p. 14, part of a 70-page packet sent with a cover letter from Governor Martin, dated Dec. 1, 1986.

[21]"Community Service Work Programs," in "Programs of Incarceration and Community Alternatives in North Carolina," Fiscal Research Division, N.C. General Assembly, p. 25.

[22]The Office of the State Auditor put out three major operational audit reports in 1986—on the community services program, on the probation and parole system, and on restructuring issues (see resources, page 83).

[23]For background on how all 50 states use local jails for incarceration, see "Incarceration Practices," an annotated survey report compiled by the Fiscal Research Division, N.C. General Assembly, 1986.

[24]See *Crime & Delinquency*, Vol. 32, No. 4, October 1986, a special collection of articles devoted to the early release program used in Illinois.

Conclusions and Recommendations

The *existing* three-part system of alternatives to incarceration cannot reduce the *existing* prison population in any large-scale way. Only intensive parole can affect people already in prison. Currently, only 20 people are on intensive parole, *less than one-tenth of one percent* of the prison population of 18,000. The community penalties program could have an increasingly large effect on future prison populations; this program has its impact at the sentencing level for offenders not yet incarcerated. Intensive probation, likewise, is used to divert prison-bound offenders. Changes in sentencing laws regarding misdemeanants or other classes of offenders also affect admissions to the prisons.

As soon as possible, officials must take some bold, major steps that will address the *existing* overcrowding problem. In the process, they can also work to put into place a comprehensive community penalties policy and program. The prison population is fluid, with people entering and leaving every day. Hence, admissions to the prison system, as well as releases from it, can affect the overcrowding problem. The greatest challenge before the legislature and the Martin administration is to develop a more coherent system of criminal sanctions that will also relieve overcrowding.

The recommendations below, viewed as a package, move towards a more comprehensive system of community-based programs.

1. *The 1987 General Assembly should enact an emergency cap on the prison system.* North Carolina has about 18,000 prison inmates, but houses them in a space that, officially at least, can hold less than 17,000 inmates. (Experts say the system has an actual capacity of less than 14,000 inmates, if a humane standard is used.) The Special Committee on Prisons recommended an emergency cap of 18,000 in its report to the 1987 legislature. This is a bold political step which should be applauded. It accomplishes two important purposes: 1) helping to prevent the possibility of a federal court taking over control of much of the state prison system; and 2) forcing an examination of what kind of person is incarcerated (and released from prison).

To keep within the cap, the legislature should empower the Secretary of Correction and the Parole Commission for two years to release prisoners in 20 categories (see Table 2 for a guidepost)—*at any point during their sentence.* No mechanism exists to keep within the cap at the entrance level; only emergency release can keep the system within the 18,000 limit.

2. *The legislature should require the parole system to seek national accreditation and to oversee a comprehensive system of community-based volunteers.* For an emergency cap with a release valve to have any lasting impact on the size of the prison population, a major effort must be made to monitor the parole system itself. The American Correctional Association accredits parole systems according to national management standards; such accreditation can indicate to the federal courts that a state's parole system can help with overcrowding. North Carolina has not asked that such an accreditation study be done.

The parole system should make a concerted effort to incorporate existing community-based resources in assisting parolees back into society. The parole officers would remain accountable for the parolees' activities, but the community resources could help personalize the system. In the long run, utilizing ex-probationers, investing resources in a large-scale education program within communities and among churches, and other non-traditional efforts could reduce recidivism and thus save money on expensive new prison beds. Over time, a county-by-county volunteer network could be formed.

3. *The legislature should take coordinated actions to reduce the misdemeanant population in the state prison system and to assist counties in coping with misdemeanant offenders.* Put another way, the legislature should move the punishment location for misdemeanants to the county level but should pay the counties to absorb this additional cost.

(a) *The legislature should prohibit misdemeanants sentenced to less than two years (even for repeat offenses) from going to the state prison system.* North Carolina is one of only seven states that sends large numbers of misdemeanants to the state prison system. Currently, 19 percent of the

18,000 inmates were convicted of misdemeanors; most belong either in a local jail or in a system of community-based penalties. A local jail can keep a misdemeanant, who often serves a short sentence, close to his community, possibly in a work-release situation so that he can keep his job.

(b) *The legislature should include in the 1987 appropriations act a one-time $20 million fund that provides capital grants to counties to build work-release, satellite jails.* This recommendation of the Special Committee on Prisons contains thorough background material on how the funds would be distributed. This fund will help counties cope with overcrowded jails and relieve the overcrowded state system. The General Assembly should take this approach rather than using tax-exempt revenue bonds, as recommended by the Governor's Crime Commission.

4. *The Lieutenant Governor and the Speaker of the House should reauthorize the Special Committee on Prisons for two years, directing it to monitor the growth of the existing alternative systems.* This would serve as a continuing forum and research base, much like the Mental Health Study Commission, for a new and growing area of government programs. How the three systems discussed in this article relate to each other and to local communities is a vastly complex and still-unfolding equation needing further study.

5. *The Administrative Office of the Courts (AOC) and the Institute of Government at UNC-Chapel Hill should begin providing education and training for judges and prosecutors regarding the community penalties program and intensive probation system.* The AOC and Institute of Government, utilizing the expertise of the existing community penalties and intensive probation/parole staff, should provide formal training on how these programs function, the philosophy behind the programs, and the impact these programs could have on the overall corrections system. Such training requires two related steps:

(a) *The AOC should monitor which judicial districts—and if possible, which judges and prosecutors—are not utilizing these alternative systems.* Currently, no agency monitors how often these two programs are used in sentencing in district and superior court. Such monitoring is particularly needed in light of the proposed cap on the prison population.

(b) *The AOC and Institute of Government should target training resources on judges and prosecutors in the judicial districts that have low rates of using community penalties and intensive probation.*

6. *The community penalties program should be expanded gradually, adding programs to more judicial districts every year, and it should remain a community-based system, accountable to local boards of directors.* If this program moves too fast, it could lose some of the vested interest of communities in helping to keep offenders near their homes. Likewise, if the system is standardized into a state-run program, the different needs in local areas would become more difficult to address.

7. *In the long run, N.C.G.S. 143B-501(5) should be amended to allow community penalties programs to consider some felons outside the H, I, and J categories as potentially eligible for the program.* This amendment would allow some persons who have committed violent crimes *but who do not have a pattern of violent behavior* to be punished in a community setting. This amendment should be enacted after the community penalty programs have had a chance to get established in more parts of the state and to develop strong local boards of directors.

8. *A treatment system for drunk drivers should be established.* Currently, drunk drivers are either in prison, serving community service, and/or attending an alcohol *education* school (which even the program director says cannot change long-established drinking habits). The number of drunk drivers *in the community service program* has grown dramatically in just three years, last year totaling about 25,000 (73 percent of the entire program). Careful study should be given to incorporating a *treatment* program within the existing programs so as not to establish a new bureaucracy.

9. *The General Assembly should enact legislation directing the Special Committee on Prisons to study the need for a statewide community penalties act.* Working through this committee, the legislature could expand and monitor community-based punishment programs in a more systemic approach. While the proposals above (to train judges, expand the community penalties program, and establish a treatment system for drunk drivers) should proceed forward on their own merits, they should be monitored in the context of a more comprehensive system.

—Bill Finger

Businesses Want a Piece of the Rock

By Elizabeth Leland

Most businessmen don't want anything to do with being in prison, but some entrepreneurs are trying to break into North Carolina's prison system. It's not that they want to be behind bars; in this new twist on the "privatization" theme, these businessmen want to build and operate those prisons on a for-profit basis—and the notion has stirred heated debate here and throughout the nation.

There's nothing new about privatization, the contracting with private companies to provide services normally performed by government.[1] Some private companies collect garbage under government contracts. Some mend roads. Others run sewage treatment plants and provide an array of other services. But incarcerating humans in pursuit of corporate profits has turned the trend toward privatization into a moral and constitutional debate —one that is sure to be argued by the 1987 General Assembly.

Proponents say privatization may be North Carolina's answer to legal and financial pressures on the prison system. Opponents say privatization may only compound existing problems. They call it "prostitution" and "dungeons for dollars," among other disparaging names. This hot debate is running nationally as governments seek new solutions to old problems in prisons. More than three-fourths of the states have been directed by state and federal court orders to improve prison conditions, and North Carolina has pledged to spend millions to improve prisons in the Southern Piedmont region as a result of one lawsuit (see table, p. 17, for more.)

One of the groups hoping to capitalize on the prison problem is a Nashville-based company called Corrections Corporation of America. CCA, as it's known, already has offered to build and run a 200-bed minimum-security prison in North Carolina, and Correction Secretary Aaron Johnson and Gov. James G. Martin have discussed for-profit prisons with CCA and other companies (see box, p. 77, for list of private-prison companies).

Martin blames the current controversy over private prisons on those who "are timid about innovations. Some argue that licensed private prisons might cut corners to hold down costs, yet that is what the state has done—cutting corners in ways that have created problems we now have to solve."[2]

North Carolina's experiment with privatization goes back more than a century. More than 100 years ago, some states, including North Carolina, gave private contractors control of prisoners, substituting prison labor for the slave labor that existed up through the Civil War. But because of abuses—from long hours to inadequate food—the practice ended in the 1920s. More recently, private organizations have run halfway houses, foster homes, training schools, group homes, and community centers. The state Department of Human Resources has contracted with the Eckerd Foundation of Florida to run the Eckerd Wilderness Camps for troubled youth, a forerunner to the state's proposed private prisons experiment. And CCA already runs one private correctional institute in North Carolina—a 24-bed treatment center in Fayetteville for the Federal Bureau of Prisons.

As part of Martin's 10-year plan to improve prisons, the state would contract with private industry for three state prison facilities: a 250-bed treatment facility for drunk drivers, a 250-bed

Elizabeth Leland is a reporter for The Charlotte Observer.

rehabilitation program for young male offenders, and a 200-bed minimum security facility for adult males nearing release from prison.[3] The plan would affect only 4 percent of the prison population—700 inmates at the maximum—and would be tried on an experimental basis. "Right now, we believe it is a viable solution to a very touchy problem for a limited number of people," says John J. Higgins III, deputy correction secretary for plans and policies. "We wouldn't want to go further until we get experience under our belt."

State correction officials agree with the entrepreneurs' claim that private business could save taxpayers money. Their argument is simple: a private company could build prisons faster and cheaper by avoiding government red tape, and could operate those prisons more efficiently for the same reason. But opponents, including the National Sheriffs Association, the National Conference of State Trial Judges, the National Association of Criminal Justice Planners, the American Bar Association, and the Association of Federal, State, County, and Municipal Employees, aren't so sure that private firms could run prisons more cheaply and more efficiently. And they question the propriety, legality, and constitutionality of for-profit prisons.

Stone walls do not a prison make, nor iron bars a cage.
—English author Ralph Lovelace

Law enforcement officials aren't the only opponents. Rep. Bertha Holt (D-Alamance), chairman of the House Appropriations Expansion Budget Committee on Justice and Public Safety, has read extensively on prisons for profit, and she doesn't like what she's learned. "I am not against privatization of everything," she explains. "I can understand how you can contract out for garbage collection, but I don't know how you can equate people with garbage."

Secretary Johnson doesn't equate prisoners or people with garbage, but he does equate private prisons with other private institutions. During a panel discussion of innovations in criminal justice at N.C. Central University in Durham in 1985, Johnson remarked, "Private schools are used for many children and there is no reason why we should not trust care of our prisons to some aspects of private industry," Johnson said.[4] Adds Ben Irons, Johnson's executive administrative assistant: "None of these questions can ever be resolved unless someone experiments. The department proposes only to experiment by contracting for the housing and care of a limited number of minimum custody prisoners. The department would require that the private company house and care for inmates in a manner that complies with standards promulgated by the American Correctional Association . . . . It is the department's position that prison overcrowding is an urgent problem and that we should allow private companies to help us to address that problem."

Other opponents of for-profit prisons include the American Bar Association (ABA), which has called for more study before the state turns control of prisoners over to private businesses. The ABA notes, among other things, that there is little track record on which to base a decision. The ABA adopted a resolution in February 1986 urging that "jurisdictions that are considering the privatization of prisons and jails not proceed to so contract until the complex constitutional, statutory, and contractual issues are developed and resolved."[5] And State Auditor Edward Renfrow said in an operational audit of the Department of Correction in June 1986, "Additional research and planning [on private prisons] are necessary."[6]

The CCA Connection

Just a few years ago, no one could have imagined that fried chicken, hospitals, and Tennessee politicians could have anything to do with solving North Carolina's continuing prison overcrowding problems. But that was before CCA was organized. The company was formed in Nashville in 1983 with the help of a wealthy investor named Jack Massey, the man who bought Kentucky Fried Chicken from Colonel Harlan Sanders in 1961. Massey later helped found Hospital Corporation of America, the leading for-profit hospital chain in America and one of the biggest in North Carolina. HCA owns six for-profit hospitals in North Carolina, manages eight more under contract, and leases one.[7] Massey became a major investor in CCA at the request of CCA President Thomas Beasley, former chairman of the Tennessee Republican Party and a close friend of then-Tennessee Gov. Lamar Alexander. By November 1986, CCA operated nine correctional facilities with 1,645 beds, including two centers for illegal aliens in Houston and Laredo, Texas; two county jails in Bay County, Fla. and Santa Fe, New Mex.; two juvenile facilities, both in Memphis; two work

camps, both in Chattanooga; and the Fayetteville halfway house. The company also said in November that it was working on contracts for 6,000 more beds.

Visitors to the CCA facilities generally have reacted as Correction Secretary Aaron Johnson did when he visited the CCA facility in Houston last year: They like what they see. The buildings are clean and efficient. Some units, such as the Silverdale Detention Center in the Chattanooga suburbs, look like government-run prisons. That prison has guard towers and concertina-wire fences around the men's compound. Other units don't have the same appearance. For example, the 300-bed dormitory-style immigration center that CCA built in an industrial park near Houston International Airport looks like an office building—complete with landscaping.

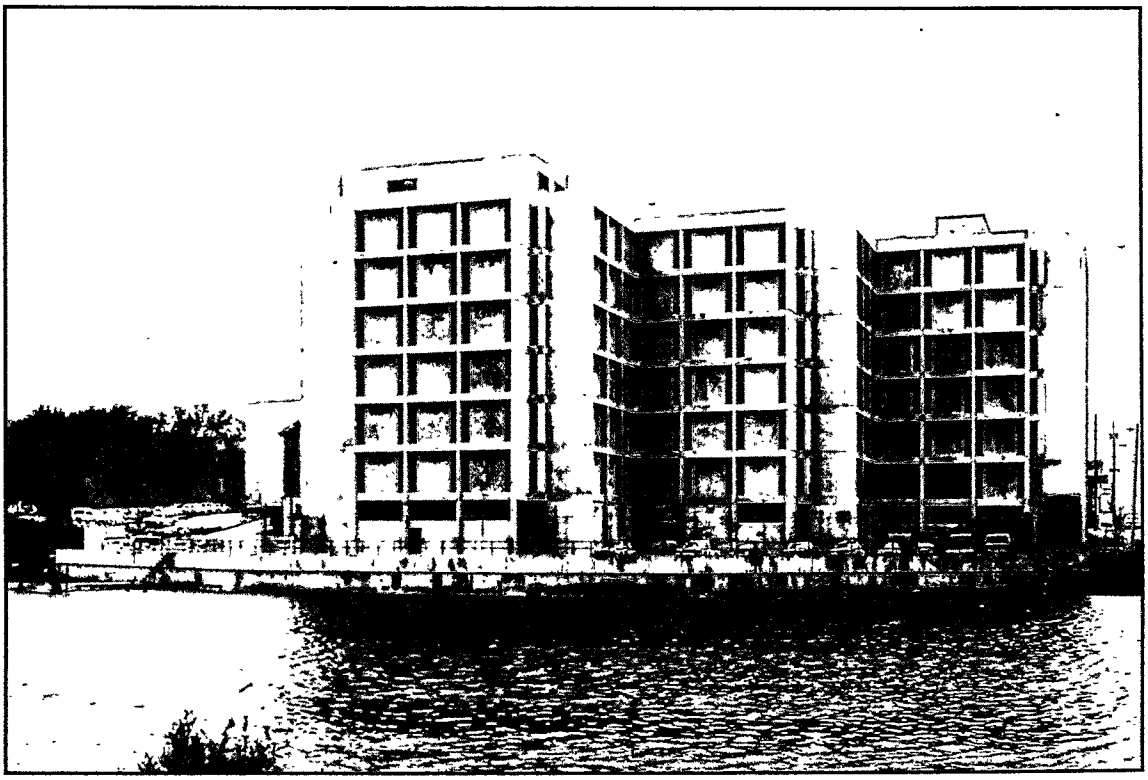
In Bay County, Fla., along the Gulf Coast in the Florida Panhandle, CCA remodeled the county jail and built a new, $3.5 million work camp that opened in October 1985 for 194 inmates. Officials there generally have been pleased with their brand of privatization. "It's worked real good," Bay County Manager Al Cape says. "There have been no problems except the sheriff didn't like his jail being taken away from him."

The Constitutional Question

Sheriffs are not the only ones who are unhappy about private prisons. Legal skeptics question whether it is constitutional for governments to turn over prisons to private business, but so far the courts haven't ruled on the question. The main question is whether state laws allow the state and local governments to turn over the jailing of prisoners to for-profit companies—or any organization that is not a federal, state, or local government. Attorneys general in several states, and legal scholars elsewhere, have reached differing conclusions. In Tennessee, the home state of CCA, state authorities still have their doubts even though several private prisons are already in operation. The Office of the Attorney General declared in November 1985, "The state may not delegate or contract away its policy powers or obligations imposed upon the state by the Constitution." The attorneys concluded that "a department may not transfer its sovereign powers to another entity, governmental or non-governmental, [without] constitutional authorization."[8] The Tennessee legislature evidently agreed, adopting a three-year moratorium in 1986 on further adult prison privatization.

They see things differently in South Carolina,

Bay County, Florida Correctional Facility



however. There, the Office of the Attorney General found no apparent constitutional barriers but advised state officials to develop a case or controversy so a court could decide the issue.[9] In similar thinking, the U.S. Justice Department's National Institute of Corrections advises its members that prison privatization can be used with appropriate safeguards. William C. Collins, a Washington state legal expert, says in a legal brief prepared for the institute, "There are inherent constitutional limitations which probably prohibit a *complete* jail operations contract as being an excessive delegation of governmental powers. However, where government retains sufficient supervisory and monitoring authority and policy direction over the jail operation, an operations contract probably will pass constitutional muster, especially if there is specific statutory authority for contracting."[10]

Specific statutory authority—therein lies the rub. In 1986, the Tennessee and Pennsylvania legislatures rejected bills that would have allowed the state to contract with private companies to operate adult state prisons—even though Tennessee does have privately run detention centers for youths and women in Chattanooga and Memphis. Arizona Gov. Bruce Babbitt vetoed a bill that would have given his corrections department the authority to enter into contracts with private operators. Florida approved the practice in 1985, and New Mexico and Texas have laws allowing some private prison management and construction.[11]

In North Carolina, Secretary Johnson asked the Office of the Attorney General in 1985 for an opinion on whether North Carolina could contract for private prisons. The answer was no and yes. Sylvia Thibaut, an associate attorney general,

Corporations Engaging in Private Prison Business

Behavioral Systems Southwest
300 S. Park Ave.
Suite 750
Pomona, Cal. 91769
714-623-0604

Buckingham Security Ltd.
P.O. Box 631
Louisburg, Pa. 17837
717-523-3210

Corrections Corporation of America
28 White Bridge Rd.
Suite 206
Nashville, Tenn. 37205
615-356-1885

Eckerd Youth Alternatives
P.O. Box 7450
Clearwater, Fla. 33518
813-461-2990

Eclectic Communications Inc.
P.O. Box 970
Ojai, Cal. 93023
805-646-7229

Pricor Inc.
440 Metroplex Dr.
Suite 100
Nashville, Tenn. 37211
615-834-3030

RCA Service Company
Government Services
Route 38
Cherry Hill, N.J. 08002
609-338-6521

268 Center Inc.
Route 1
Cowansville, Pa. 16218
412-545-2807

Volunteers of America Inc.
2825 E. Lake St.
Minneapolis, Minn. 55406
614-721-6327

The Wackenhut Corporation
1500 San Remo Ave.
Coral Gables, Fla. 33146
305-666-5656

Stephanie Bass, Executive Director N.C. Center on Crime and Punishment. In a survey, the Center found that many people had concerns about the liability, cost, risk, and propriety of private prisons.

wrote an opinion dated Oct. 23, 1985 advising the Department of Correction that under North Carolina law, the state cannot contract for *housing* for *adult male* inmates.[12] The state can, however, contract for housing for *young males and women*, and contract for *treatment* programs for all types of inmates, the memo noted. With regard to adult male prisons, Thibaut wrote, ". . . [T]here is no statutory authority for the provision of contracts with private agencies for the housing of adult male prisoners. Weighing the statutes . . . as a whole, I would not recommend that the Secretary of Correction enter into such a contract without the express approval of the legislature." However, Thibaut went on, "It appears that one of the main reasons for the desire to contract with private agencies to house prisoners is to relieve the crowding problem in our prison system. There are seven youthful offender prisons and two women's prisons in the North Carolina prison system. If those prisons were converted to adult male prison facilities and private agencies were allowed to provide housing, by contract, for female prisoners and youthful offenders, it would appear that the overcrowding problem in our prison system could have some relief."

The Moral Ground

Beyond the constitutional and legal concerns, there are philosophical concerns. Some people just don't think it's right for a private business to run a prison. "This is the prostitution of punishment," says E. M. Adams, Kenan professor of philosophy at UNC-Chapel Hill.[13] "Some things are not a moral option for the sake of economy. In a politically organized society, only the government has the authority to define crime and punish criminals, for only the government is the moral voice and arm of the people. A state cannot contract out to private corporations its lawmaking, judicial, or police responsibilities, for it cannot invest in them the moral authority to perform these tasks."

Mark A. Cunniff, executive director of the National Association of Criminal Justice Planners in Washington, describes imprisonment as "the ultimate sanction that a state has available to it to enforce laws. Because only the government can promulgate and enforce the laws, only government should be involved in provision of those services."

The Bottom Line

But the bottom line, and perhaps most controversial issue, is cost. Private companies say they can save the government money and provide better service. The companies point out that they don't have to fuss with civil service regulations and that they have lower pension and benefits costs. "We can address the problem very quickly and we can use our own capital to do it," says CCA's Beasley. "Government won't have to come up with new capital to finance a facility. Government will not pay anything unless it actually utilizes a facility."

The National Institute of Corrections surveyed correctional administrators in 1984, and seven out

Arguments For and Against Private Prisons

Arguments For	Arguments Against
Private businesses can run prisons more effectively than government.	Profits have no place in a system designed to dispense justice.
Private companies can build prisons quicker and cheaper than government.	The state could be liable for the actions of private company guards.
Private prisons can save tax dollars by operating cheaper than government prisons.	Private firms may not deliver on promised level of service, and prices may rise in future.
Private prisons must operate under accepted standards of care.	Building more jails will not alleviate problems of criminal justice administration.
Private companies have more flexibility in management in hiring and promotion, and can provide better-trained personnel.	Public employees' jobs are adversely affected by hiring private company workers.
Privatization of prisons has been tested and thus is not a new concept.	Private firms could exploit the constitutional rights of inmates for the sake of profits.
Private companies have a profit incentive to do a better job of running prisons than the government.	Private firms may skimp on costs and provide a lower quality of service.
Private companies may make money for investors.	Private prisons may be in conflict with existing state laws.
Private companies are taxpayers.	Private prisons may be used to circumvent moratoriums on prison construction.

Source: "Private Jails: Contracting Out Public Service," The Council of State Governments, Lexington, Ky., April 1985

of 10 of the respondents identified cost savings as a major benefit of for-profit prisons.[14] Supporting their views is Charles H. Logan, professor of sociology and criminology at the University of Connecticut. Logan found that operating costs may be one-fourth to one-third less in a privately run prison than in a public prison.[15] *Fortune Magazine* in 1985 cited the example of the Immigration and Naturalization Service detention center that CCA operates in Houston. There, the magazine reported, costs are 9 percent lower—$23.84 a day per detainee in 1984, compared to the average $26.45 it costs the INS to operate its own detention centers elsewhere.[16]

No hard-and-fast comparative data exist that could help North Carolina lawmakers with their difficult choice on private prisons, says Stephanie Bass, executive director of the N.C. Center on

Crime and Punishment in Raleigh. That group has compiled some limited financial data but has not released the results. "Making a comparison is difficult," says Bass. "The fact is that North Carolina's prisons are already run pretty cheaply—perhaps too cheaply—but there just is no adequate basis for comparison because private prisons are still too new."

North Carolina could save $12 million to $15 million up front in capital costs depending upon the type of facility needed, contends Higgins, the deputy correction secretary. The state also would save on the cost of housing prisoners. It now costs the state about $35 per day to house a prisoner, he said, including about $30.38 in correction department costs, and the rest for such expenses as attorneys, administration, and renovation. However, those with questions about private prisons point out that the average daily cost for minimum custody inmates—which is what the Martin administration proposes to contract private prisons for—is about $22 per day—some 33 percent less than the overall average for all classes of custody.

Higgins would not say for what price the private firms had offered to do the job in North Carolina, but he said offers by several companies for certain types of inmates were less than what it costs the state. "They know that we're not interested in going into this venture with them and have it cost the state more money than what we can do for ourselves," says Higgins. "They have to do it for less and with no downgrading of programs."

Most studies have concluded that a private company could build a prison faster than the state because it is not encumbered by competitive bidding procedures and other red tape. They also found that the company would have more flexibility in hiring and firing. But Cuniff, the justice planner, says those are not necessarily advantages. "The red tape is there for a reason," he says. "Red tape, for better or worse, is a check against corruption. We have competitive bidding so that the powers that be do not give away contracts to their buddies. If the problem is too much red tape, let's look at the problem of red tape—not substitute a panacea."

Critics fear that once the state is dependent upon a private firm, the firm might demand higher prices. They also fear hidden costs—monitoring by the state auditor's office, for instance, or the costs of legislative oversight. But Higgins said the cost of monitoring could be included in a contract, and ceilings on cost increases could be established.

Yet another concern is that revenues would vary with the number of prisoners and the length of incarceration. Critics say that private companies would have an incentive to keep more people in prison, and keep them there longer—thereby exacerbating the problem that private prisons were supposed to solve. "If you're paying them by the head, why would you ever want to reduce the number of prisoners?" asked Representative Holt. "That means you have a conflict of interest. It is the interest of the state not to have a whole lot of prisoners, but the interest of the private, profit-making institution is to have a whole lot of prisoners."

But Beasley says that complaint is unfounded. "We're totally accountable to government. We have got to do better than government (prisons) in order to make our business grow. We've got to operate according to the contract and, if we don't,

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Well I had just got out of the county prison doing 90 days for non-support.

Tried to find me an executive position but no matter how smooth I talked, they wouldn't listen to the fact that I was a genius — the man said that we got all that we can use.

Now I got them steadily depressing, low-down mind messin', workin' at the car wash blues.

—from "Workin' at the Carwash Blues"
by Jim Croce

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we could be fired and replaced by somebody else." And Richard Crane, CCA vice president for legal affairs, adds, "If that is a concern, we would be willing to go with a flat-rate contract" that would not base the company's revenues on a private-prison head count, but on a flat fee for operating a prison of a certain capacity.

Logan also contends such fears are groundless. "Most profit-makers do attempt to drum up business," he conceded, "On the whole, however, businesses succeed not by stimulating spurious demand, but by accurately anticipating both the nature and level of real demand."

The Liability Question

Another unresolved issue is who is liable for what happens in privately run prisons. For instance, who is responsible if a prisoner's civil rights are violated—the private company running the prison, or the state? In Tennessee, the attorney general says the answer is unclear.[17] "It may be possible for a set of circumstances to arise which would thrust liability upon the state," wrote Michael Cody, the attorney general. "It is also probable that the state could end up paying for civil rights judgments."

Once again, because the notion of private prisons is so new, there is no case law on which to rely. The National Institute of Justice notes, "There is ... no legal principle to support the premise that public agencies will be able to avoid or diminish their liability merely because services have been delegated to a private vendor. Just as juveniles are wards of the court, inmates can be considered wards of the state, and a private contract essentially acts as an extension of the state. Thus, if the contractor errs, the state has retained its authority and may share the liability."[18]

Both the Institute of Justice and Collins, in his report for the National Institute of Corrections, noted that the burden on the state would be eased by insurance that companies would be required to carry. Governor Martin, in his 10-year plan, said private companies would hold the state "harmless for any and all costs."[19] And CCA's Beasley emphasized that point, too. "The government's responsible, and we're responsible to government. We [will] hold government harmless. We indemnify government for our operation. We have multi-million dollar insurance." Crane, the CCA vice president for legal affairs, adds that there are some court precedents supporting this view, most notably the 11th Circuit Court of Appeals decision in 1985 in *Ancata v. Prison Health Services Inc.*,[20] which held a private health provider, not the state, liable for claims for inadequate health care in Florida.

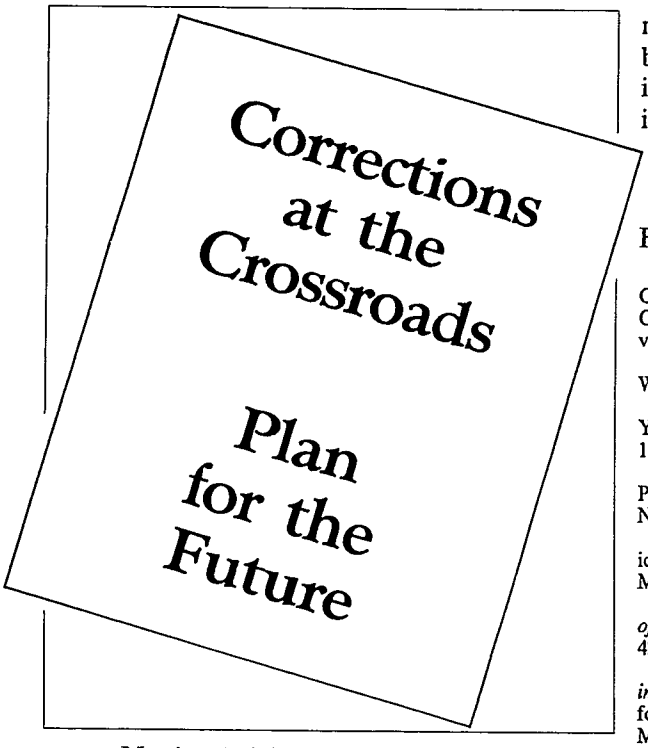
Another question stems from the liability issue. In the event of a prison insurrection, could private prison employees use force if necessary to maintain public safety? To what extent, and how far off prison grounds? The National Institute of Justice says there's no reason why they could not use force. Already, many states license private security firms, and rules set forth how and when those private guards may use force. But State Auditor Edward Renfrow, in an operational audit report of the Department of Correction, doubted whether "in the event of an emergency, such as an escape attempt, . . . the State [can] delegate its authority to use force if necessary to maintain public safety."[21] Renfrow also asserted, "Private correctional officers do not have any special rights or privileges in the area of law enforcement as conferred upon public correctional officers."

Aside from the pros and cons of private versus government-run prisons, there is a broader question: Should states build more prisons? Some say governments should look instead to alternatives to incarceration (see article on p. 50 for more). "The most reasonable conclusion to be drawn from all this is simply that the citizens and legislatures of our Southern states should avoid the new 'dungeons for dollars' game like the plague," wrote Harmon L. Wray Jr. in the September 1986 issue of *Southern Changes*, a magazine published by the Southern Regional Council in Atlanta. "The privatization debate distracts us from the real issue of our society's failure to deal with crime in any way other than a knee-jerk repressive fashion."[22]

The Buck Stops at the Legislature

The decision ultimately will be up to North Carolina legislators, many of whom gave Martin's proposal a cool reception when it was released in March 1986. After last fall's hard-fought election, when Martin campaigned against Democratic legislators, the reception in 1987 may be downright frigid. "I don't believe the leadership of the General Assembly will endorse it," Sen. Robert Swain (D-Buncombe) said at the time Martin unveiled his private prisons proposal. Swain was right then, and his views have not changed since.

That doesn't mean the idea's dead, however. While the legislature has been cool, the public seems to like the idea better. The N.C. Center on



Martin administration's 10-year plan for prison system

Crime and Punishment, a private, nonprofit research and education organization, polled 621 registered voters by telephone in February 1986.[23] The Center found that three out of four were willing to consider private prisons as a potential solution to the state's prison woes. One out of three respondents thought the state definitely should contract with a private firm. The survey found, however, that support for the concept was not unwavering. The same respondents, quizzed about six potential drawbacks of privatization, were less likely to support it. Many had concerns about liability, cost, risk, and propriety.

Those concerns are shared by many rank-and-file legislators, including Rep. Anne Barnes, co-chairman of the Special Committee on Prisons, which examined a variety of prison issues in 1985 and 1986, and which has reported to the 1987 General Assembly. "This whole idea needs more study," Rep. Barnes says. The 1986 short session of the legislature made sure that time would be provided for that study. It enacted a special provision (Section 204, Chapter 1014) banning prison privatization until the Joint Legislative Commission on Governmental Operations reports to the General Assembly. But neither the commission, nor a subcommittee on private prisons, met during 1986 to study the issue. Unless the Martin administration can come up with the figures and the arguments to persuade lawmakers otherwise, that may be just the sentence that the 1987 legislature gives it—another six months to a year doing hard time in a legislative study commission lockup.

FOOTNOTES

[1]For more, see "Public or Private? The State of North Carolina: Getting Down to Business," by Bill Finger and George Frink, *North Carolina Insight*, Vol. 8, No. 2, November 1985, pp. 2-21.

[2]"N.C. May Use Private Prisons Firm," by Katherine White, *The Charlotte Observer*, March 31, 1986, p. 1B.

[3]*Corrections at the Crossroads, Plan for the Future*, 10-Year Plan by the N.C. Department of Correction, March 6, 1986.

[4]"Lawyer Urges Caution in Mixing Penal System With Private Enterprise," by Diane Fiske, *The Durham Herald*, Nov. 16, 1985.

[5]*Summary of Action of the House of Delegates*, American Bar Association, 1986 Midyear Meeting, Baltimore, Maryland, Feb. 10-11, 1986, p. 12

[6]*Operational Audit Report, North Carolina Department of Correction*, Office of the State Auditor, June 1986, p. 43.

[7]For more, see *The Investor-Owned Hospital Movement in North Carolina*, a report by the North Carolina Center for Public Policy Research, edited by Elizabeth M. "Lacy" Maddox, July 1986, p. 130.

[8]Opinion #85-286, W. J. Michael Cody, Attorney General, Nashville, Tennessee, Nov. 27, 1985.

[9]Opinion, The Office of the Attorney General, South Carolina, Aug. 8, 1985.

[10]"Contracting for Correctional Services: Some Legal Considerations," legal brief written by William C. Collins, National Institute of Corrections, U.S. Justice Department, November 1985.

[11]"N.C. May Use Private Prisons Firm," by Katherine White, *The Charlotte Observer*, March 31, 1986, p.1B. See also "Prisons for Profit: The Private Alternative," *State Legislatures* magazine, April 1984, p. 9.

[12]Memorandum from Sylvia Thibaut to Andrew A. Vanore Jr., Oct. 23, 1985, re: Authority to Contract with Private Agencies for Housing Prisoners, pp. 1-3.

[13]"Prisons for Profit," by E. M. Adams, *The Triad Spectator*, Greensboro, N.C., April 23, 1986, p. 5.

[14]"The Private Sector in Corrections," by Robert B. Levinson, *Corrections Today* magazine, published by the American Correctional Association, College Park, Md., August 1984, pp. 42-43.

[15]"The Persuasive Case in Favor of Prisons for Profit," by Charles H. Logan, *The Charlotte Observer*, Jan. 17, 1986, p. 17A.

[16]"When Public Services Go Private," by Jeremy Main, *Fortune Magazine*, May 27, 1985, pp. 96-102.

[17]Tennessee AG Opinion #85-286, p. 2.

[18]*The Privatization of Corrections*, by Joan Mullen, Kent John Chabotar, and Deborah M. Carrow, an analysis written for the National Institute of Justice, U.S. Department of Justice, February 1985, pp. 76-77.

[19]*Corrections at the Crossroads*, Section IX, p. 2.

[20]*Ancata v. Prison Health Services Inc.*, 769 F 2d 700 (11th Cir., 1985).

[21]*Operational Audit Report*, p. 43.

[22]"Cells For Sale," by Harmon L. Wray Jr., *Southern Changes* magazine, Southern Regional Council, Atlanta, Ga., September 1986, pp. 3-6.

[23]"Citizens Support Prison Alternatives," Analytical Report by Hickman-Maslin Research, Washington, D.C., for N.C. Center on Crime and Punishment, May 17, 1986. For a review of polling techniques, see "What To Look For in a Good Poll," by J. Barlow Herget, *North Carolina Insight*, Vol. 7, No. 2, October 1984, pp. 12-13.

SELECTED RESOURCES

Many resources on criminal justice and corrections policy appear in the footnotes to the articles in this issue of North Carolina Insight. *Listed below are some of those resources plus others which provided important background material, both on correction policy in general and on North Carolina's specific situation.*

Alternatives to Incarceration

"Citizens Commission on Alternatives to Incarceration Report" (also known as the "Whichard Commission Report"), Fall 1982. This report served as the basis for much of the legislature's first major actions regarding alternatives to incarceration. The information in the report is helpful in understanding historical background and the need for such programs.

"Community Service Alternative Punishment, Restitution, and Inmate Work Release Centers, Report to the 1987 General Assembly of North Carolina," Legislative Research Commission, Dec. 12, 1986.

"Directory of Sentencing Options," N.C. Center on Crime and Punishment, Raleigh, N.C., Jan. 15, 1986. A valuable directory of potential sentence structures that could be issued in state courts as part of alternative sentences for criminal offenders.

"Programs of Incarceration and Community Alternatives in North Carolina," report prepared by the Fiscal Research Division, N.C. General Assembly, March 10, 1986. A valuable assessment of prison and alternative programs.

"The Unmet Promise of Alternatives to Incarceration," by James Austin and Barry Krisberg, *Crime & Delinquency* journal, July 1982 (Vol. 28, No. 3), pp. 374-409. An examination of the progress of efforts to establish alternatives to incarceration in the United States. Also see "Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy," by James Austin, *Crime & Delinquency*, October 1986 (Vol. 32, No. 4), pp. 404-502.

General Resources

Attorneys General of Tennessee, South Carolina, and North Carolina Opinions on Privatization of Prisons, including: Opinion #85-286, W. J. Michael Cody, Attorney General, Nashville, Tennessee, Nov. 27, 1985; Opinion, The Office of the Attorney General, South Carolina, Aug. 8, 1985; and Memorandum from Sylvia Thibaut to Andrew A. Vanore Jr., Oct. 23, 1985, re: Authority to Contract with Private Agencies for Housing Prisoners, pp. 1-3.

"Citizens Support Prison Alternatives," Analytical Report by Hickman-Maslin Research, Washington, D.C., for N.C. Center on Crime and Punishment, May 17, 1986, based on citizen survey on attitudes on prison issues.

"Corrections at the Crossroads: Plan for the Future," Recommendations of Gov. James G. Martin to 1986 General Assembly, March 6, 1986. The report serves as the narrative framework for Governor Martin's 10-year plan for correction and criminal justice programs.

"Operational Audit Report, Adult Probation and Parole as Administered by the Department of Correction and the Parole Commission," by Office of the State Auditor, February 1986. This audit, with the following three audits by the State Auditor, provides invaluable background on the state's prison, correction, and criminal justice programs, and puts forth provocative recommendations for improvement. Other audits are: "The Community Service Program as Administered by the Department of Crime Control and Public Safety," February 1986; "North Carolina Department of Correction," June 1986; "Restructuring of Offender Programs in the Criminal Justice System," December 1986.

Response of Gov. James G. Martin to Auditor's Recommendations, Dec. 1, 1986. This contains the objections of the Governor and top officials of the Departments of Correction, of Crime Control and Public Safety, and of Human Resources to the State Auditor's recommendations for restructuring criminal justice programs.

"Special Committee on Prisons, Interim Re-

port to the 1985 General Assembly of North Carolina," 1986 Session, May 19, 1986; and "Special Committee on Prisons, Report to the 1987 General Assembly of North Carolina," February 1987.

Statistical Abstract, North Carolina Department of Correction, published quarterly by the N.C. Division of Prisons. These reports contain useful and specific demographic information on the state's prison population.

Publications

The Independent, Durham, N.C., "Breaking Out of the Prison Crisis," by Barry Yeoman, Vol. IV, No. 2, Jan. 31-Feb. 13, 1986, pp. 1-14.

Policy Studies Review, "Privatization and Corrections Policy," by Dennis J. Palumbo, Vol. 5, No. 3, February 1986, pp. 598-605.

Popular Government, Institute of Government, UNC-Chapel Hill. Good resource with frequent articles on prisons and corrections, especially "Alternatives to Incarceration in North Carolina," by Judge Willis P. Whichard, Summer 1982, pp. 8-11; "Restitution: How Some Criminals Compensate Their Victims," by William N. Trumbull, Summer 1982, pp. 17-22; "North Carolina's Fair Sentencing Act: What Have the Results Been?," by Stevens H. Clarke, Fall 1983, pp. 11-40; "Alternatives to Regular Supervision for Low-Risk Probationers: A Study in Baltimore," by James J. Collins, Charles L. Usher, and Jay R. Williams, Fall 1984, pp. 27-33; and "Innovations In North Carolina Prisons," by Michael R. Smith, Summer 1985, pp. 1-53.

Public Administration Review, Washington, D.C., "Law and Public Affairs," including various articles on prison privatization, punishment, prison population projections, and criminal justice reform, Vol. 45, Special Issue, November 1985.

State Legislatures, National Conference of State Legislatures, Denver, Co. Good general resource for what various states are doing in corrections field.

State Policy Reports, Alexandria, Va., "The Continuing Crisis in Corrections," Vol. 4, Issue 24, Dec. 31, 1986, pp. 18-26; See also "Corrections," Vol. 2, Issue 6, March 21, 1984, pp. 1-20.

Sentencing

"Felony Prosecution and Sentencing in North Carolina, A Report to the Governor's Crime Commission and the National Institute of Justice," by Stevens H. Clarke, Susan Turner Kurtz, Elizabeth W. Rubinsky, and Donna J. Schleicher, Institute of Government, UNC-Chapel Hill, May 1982. An assessment of North Carolina's prosecution and sentencing of felons prior to the adoption of the Fair Sentencing Act in 1981.

"Indeterminate and Determinate Sentencing in North Carolina, 1973-85: Effects of Presumptive Sentencing Legislation," draft report by Stevens H. Clarke, Institute of Government, UNC-Chapel Hill, October 1986. An excellent resource examining how the state's new Fair Sentencing Law has worked, especially its effect on holding down the rate of prison population growth.

"Legislative Commission on Correctional Programs" (known as the "Knox Commission Report"), Final Report, North Carolina General Assembly, 1977. This report examined, among other things, disparity in sentencing in North Carolina and led directly to passage of the Fair Sentencing Act.

"Truth in Sentencing: A Report to the Governor," report of the Governor's Crime Commission, Department of Crime Control and Public Safety, February 1987.

Organizations and Agencies

American Civil Liberties Union, 1616 P St. NW, Washington, D.C. 20036, (202) 544-1681.

American Correctional Association, 4321 Hartwick Road, Suite L-208, College Park, Md. 20740, (301) 699-7600.

Bureau of Justice Statistics, U.S. Department of Justice, National Institute of Justice, Box 6000, Rockville, Md. 20850, (800) 851-3420 or (301) 251-5500.

Division of Youth Services, N.C. Department of Human Resources, 705 Palmer Dr., Raleigh, N.C. 27603, (919) 733-3011. For background on juvenile justice issues.

National Council on Crime and Delinquency, 77 Maiden Lane, Fourth Floor, San Francisco, Ca. 94108, (415) 956-5651.

National Institute of Corrections, 320 First St. NW, Washington, D.C. 20534, (202) 724-3633.

National Institute of Justice, 320 First St. NW, Washington, D.C. 20534, (202) 724-2942.

National Moratorium on Prison Construction, 309 Pennsylvania Ave. SE, Washington, D.C. 20003, (202) 547-3633. Publishes *Jericho*, quarterly newsletter on prison construction issues.

N.C. Association of Chiefs of Police, 5 W. Hargett St., Suite 1100, Raleigh, N.C. 27601, (919) 821-1435.

N.C. Association of Community Mediation Programs, P.O. Box 217, Pittsboro, N.C. 27312.

N.C. Center on Crime and Punishment, Stephanie Bass, Executive Director, 530 N. Person

St., Raleigh, N.C. 27604, (919) 834-7845.

N.C. Civil Liberties Union, P.O. Box 3094, Greensboro, N.C. 27402, (919) 273-1641.

N.C. Conference of District Attorneys, Patton Galloway, Executive Secretary, 19 W. Hargett St., Raleigh, N.C. 27601, (919) 733-3484.

N.C. Correctional Association, James M. Chesnutt III, President, P.O. Box 55, Raleigh, N.C. 27602.

N.C. Felony Alternative Sentencing Associates, Louise A. Davis, Program Administrator, 336 Fayetteville St. Mall, Suite 945, Raleigh, N.C. 27602, (919) 828-9674.

N.C. Law Enforcement Officers Association, P.O. Box 25428, Raleigh, N.C. 27611, (919) 828-3861.

N.C. Prison and Jail Project, Lao Rubert, Co-Director, 604 W. Chapel Hill St., Durham, N.C. 27701, (919) 682-1149.

N.C. Prisoner Legal Services, 112 S. Blount St., Raleigh, N.C. 27611, (919) 828-3508.

N.C. Sheriff's Association, 210 N. Person St., Raleigh, N.C. 27602, (919) 821-4600.

Prison Overcrowding Project, operated by the Center for Effective Public Policy, 1411 Walnut St., Suite 935, Philadelphia, Pa. 19103, (215) 569-0347.

The Supremes: Seven-Part Harmony

by Katherine White

This column normally examines an important court case or interesting aspect of judicial policy-making, but this time, Insight *takes a look at the people who sit on North Carolina's top court —including two new Court members and a new Chief Justice—and tells you things you never knew before about the Supreme Court of North Carolina.*

CHIEF JUSTICE JAMES EXUM gained the top post in November 1986 after one of the most fiercely contested elections in the N.C. Supreme Court's history. It was an election in which Gov. James G. Martin, a Republican, drafted candidates to run against the Democratic incumbents on the Court. State Democrats countered by asking two judges—then-Associate Justice Exum, and Court of Appeals Judge Willis Whichard—to vacate their secure positions to run for the higher offices. November 4, 1986 was a Democratic sweep, boosting Exum to the chief's seat and cutting appointed-Chief Justice Rhoda Billings' tenure to one of the shortest on record. In all, five of the seven Supreme Court positions were open to challenge, but the Exum-Billings scrape attracted the most publicity, partly because of the hardball politicking—Exum was forced to defend his record on death penalty cases—but also because the Chief Justice oversees the state's entire judicial system. Ironically, although he has been out of office for nearly two years, Gov. James B. Hunt Jr. figured strongly in the makeup of the new Court. Because he originally had appointed six of the seven justices—all but Exum—to the Supreme Court or the Court of Appeals, the new Supreme Court is very much a Hunt Court—and not a Court of Jim Martin, who campaigned hard but unsuccessfully to give it a more Republican nature. It remains entirely Democratic.

Exum,[1] 51, retired in August 1986 from the associate justice seat he had held since 1975. Prior to the November election, he was the only member of the Court to have reached that post by election instead of appointment. Before he retired in order to run for Chief Justice, Exum was the most senior justice, a position that traditionally would have gotten him the appointment from the governor when Chief Justice Joseph Branch retired. But Exum's a Democrat and Martin's a Republican, and Martin named Republican Associate Justice Billings to the post instead.

Exum often is viewed as the court's most intellectual justice as well as its most liberal member. Exum much prefers the term "progressive" to liberal, and he points out that in politics, the term liberal is "the kiss of death." He was a Morehead Scholar at Chapel Hill, a Root-Tilden Scholar at NYU School of Law, and he clerked for a predecessor, the late Chief Justice Emery B. Denny. In the N.C. Center's 1980 evaluation of the North Carolina judiciary, Exum was ranked good or outstanding by nearly 94 percent of the lawyers who appeared before him in court.[2] "He studies independently," says a lawyer who's known Exum since his early days of practice in Greensboro. "He looks around the country" to identify trends in court practice.

A Snow Hill native and avid quail hunter and tennis player (who met Billings on the courts while they were together on the Court), Exum de-

Katherine White is a Raleigh writer and lawyer in the Attorney General's office. Photographs by J. Gregory Wallace.

scribes his judicial approach as that of a "traditionalist, a moderate." But more often than other justices, Exum has written opinions that move the state into line with more progressive legal positions accepted in other states.[3]

Exum also has a reputation for having had the largest backlog of cases to write—a situation he's tried to correct in recent years. "The last time we checked it out I probably was doing more work (than other justices) in terms of my writing," Exum says. Exum does take on a heavy case-writing load. "I was writing more dissents. The truth of it is I'm not slow. I work very hard." When he took the new post in November, Exum had only one case pending. He says, with some heat, "I'm not behind anymore." And he adds, "I'm looking forward to keeping it that way." So are his colleagues, some of whom told *Insight* they plan to take it up with the Chief Justice if Exum begins to lag on opinion-writing chores. Exum also has dropped his plans to teach at the UNC-Chapel Hill School of Law this spring because, he notes,"I decided I had to clear the decks."

Despite the political furor that surrounded his fall campaign, Exum has the least political ties of any justice. He was elected to the Supreme Court after eight years as a Superior Court judge in Guilford County, and he had worked for one of the state's largest law firms before that. In his new role as Chief Justice, he would welcome an invitation to address the General Assembly in a State of the Judiciary address, presenting the state court's budgetary needs and also commenting on the impact that various pieces of legislation would have on the courts—a "judicial impact statement" of sorts. "Many times I think it would be helpful for legislators to know the impact of legislation on the judicial system" in terms of increased workload, says Exum. An example of a law which had great impact is the equitable distribution law of 1981, which changed the way divorcing spouses divide their marital property. That law put more of a burden on District Court judges, who must resolve these cases. Exum's predecessor, Chief Justice Branch, also wanted to give a similar address but never pushed for it. "The initiative for that would have to come from the General Assembly," Exum says.

The new Chief Justice has one other goal—to hang onto the trophy symbolizing the Supreme Court's mastery over the Court of Appeals in their annual tennis match. Named appropriately enough for a former member of the Court of Appeals who had a reputation for usually upholding trial courts in criminal cases, the award is called the Francis M. Parker No Error Tennis Trophy.

JUSTICE LOUIS MEYER,[4] 53, is the senior associate judge on the Court, and is universally acknowledged by his colleagues as the court nitpicker who raises questions about loose language and grammar found in others' opinions. He also is considered one of the hardest workers on the court —and the most consistent conservative, holding fast to past court decisions when the majority wants to move forward to further develop the law.

It's hard to predict how the court will line up on the more controversial issues, but Justice Meyer has at least a small sense that he may be firing off more dissents than he has in the past. For that reason, Meyer says he tries to be a consensus builder, much like former Chief Justice Branch, whom Meyer regarded as a father figure when he was a child growing up in Enfield. Another reason he works toward a unified court position on some opinions, he says, is because "I am sometimes by myself on issues. I don't like labels but it's probably correct to say I am more conservatively oriented than the other members of the Court."

Justice Harry Martin, however, doubts that Meyer is "going to be alone or cut adrift or that the rest of the Court is going to march off and leave him." Exum, with whom Meyer has had the broadest differences of opinion in cases, adds, "With Louis in the capacity as senior associate justice, I certainly intend to rely on his experience and his wisdom." As for dissents from Justice Meyer—or anyone else for that matter—Exum says, "A certain amount of disagreement is not an unhealthy thing because it demonstrates, I think, to people who read these decisions that both sides have been aired."

Justice Meyer faced a tough re-election campaign last fall against Arthur Donaldson, a Salisbury lawyer who subscribes to more liberal legal positions than Justice Meyer, but like other Democratic candidates for Supreme Court, Meyer won easily. A number of prominent civil and criminal lawyers actively campaigned against Justice Meyer in favor of Donaldson, who also got the editorial endorsements of some North Carolina newspapers. "Much of the problem that I encountered in my election arose from the judgment of some lawyers that I was unwilling to reach out or expand the law, and that criticism is certainly justified," Meyer says. "Having practiced law for almost 20 years, I came to appreciate the necessity for the

law being certain and for lawyers being able to depend on what the law is."

An Army veteran and former FBI agent, Meyer has often joined the majority in changing the law—for example, disallowing lie detector tests and hypnotically induced testimony as evidence in criminal trials.[5] But, he cautions, "That was law that applied only to future cases." Generally, he says, "It's not that I'm against the law expanding. That's for the legislature. I strongly believe the legislature should tackle the social problems and I'm strongly of that view when it occurs in the workplace." In some recent decisions the Court, with Meyer dissenting, has made it easier for workers to pursue claims for injuries in employment.[6]

Beneath his serious exterior—and his judicial robes—lies a soul who does have fun. One accomplishment he cites with pride is the outcome of a suspender war he waged with Justice Martin. Meyer says it began when he wore a pair of maroon braces to the office, and Martin took up the challenge, countering with a set of rainbow-hued galluses. But Meyer held up his end with a pair of red silk suspenders with a small figured pattern. "I won it," beams Meyer.

JUSTICE BURLEY MITCHELL,[7] 46, the youngest justice on the court and now five years into his second stint as an appellate judge (he served on the Court of Appeals from 1977 to 1979), has decided he likes his job. He says now he wants to stay on the court until retirement. Fleeting thoughts of statewide political campaigns and the accompanying interminable chicken dinners have given way to satisfaction with the more contemplative lifestyle a Supreme Court justice assumes.

For Mitchell, retirement could come seven years from now at age 54 instead of the mandatory retirement age of 72. In that year, 1994, Mitchell will have the necessary 24 years in government service to qualify for judicial retirement at 75 percent of his salary. Mitchell acknowledges, "I will be in the enviable position of being able to decide if I want to have an entire second career." Whether he'll leave, or what that career might be, Mitchell isn't saying.

At present, Mitchell says, "I'm enjoying what I'm doing. This is a good job for a lawyer. It has more regular working hours than I've ever had in my life, and I'm coming to find that I enjoy a little privacy."

Justice Mitchell calls himself a hardliner on criminal cases, an outgrowth of his experience as Wake County District Attorney from 1972 to 1977. But because of the repetitive legal issues that the court considers in criminal appeals, Mitchell prefers to write opinions in civil matters, such as his opinion in which the court declined to allow citizens to claim damages for "wrongful life" and "wrongful birth."[8] He avoids most utility rate cases because they involve "a tremendous volume of material you have to familiarize yourself with, and they are terribly tedious—which means boring."

Justice Mitchell's interest in the academic aspect of life came long after he dropped out of Raleigh's Broughton High School at age 15 and joined the Marines in 1956. He had almost finished boot camp when the the Corps discovered he was underage and sent him home. He went back to school, but only until age 17, when he was old enough to join the Navy. Later, after getting a high school equivalency certificate, Justice Mitchell graduated from N.C. State University and then from UNC Law School. In the Center's 1980 rankings of the judiciary, based on his service from 1977-79 on the Court of Appeals, Mitchell was rated good to outstanding by nearly 58 percent of the lawyers who appeared before him.

The seeds for a legal career were planted during his rough-and-tumble adolescence. "Some people are able to influence events more than others, and lawyers seemed to be one of those," he says. "I was not a crusader. I was a person who questioned authority and mindless adherence to rules without remembering the reason for the rules," he says.

Despite the sedentary life of the Supreme Court justice—or perhaps because of it—Mitchell still responds to the call of the wild. On his office wall hangs the head of a 250-pound wild boar who charged the justice last winter while Mitchell was searching for a good swan hunting site. It took Mitchell three shots—the last at 12 feet—from his 12-gauge shotgun to down the beast. Mitchell donated the carcass to Agriculture Commissioner Jim Graham for his annual Wild Game Dinner, but Mitchell had the head mounted as a trophy. Offsetting that trophy in Mitchell's office is another, courtesy of Justice Meyer: a trophy for the "Biggest Bore," which was awaiting Mitchell in his office when he returned from the wild boar hunt.

For JUSTICE HARRY MARTIN,[9] 67 in January and the oldest member of the Court, age has always been a curious state of affairs. In the early 1950s, as he argued two cases back-to-back before the Supreme Court, then-Justice (and later U.S. Senator) Samuel J. Ervin Jr. leaned over the bench and drawled at Martin, "I've been sitting here wondering if you're a young-looking old man, or an old-looking young man." Martin cannot recall responding, but he remembers well the feeling that Ervin's remark "just about finished my argument."

Even today, his sparse silver hair and diminutive stature belie the vigor and spark that Martin brings to his duties. He's pursuing a way to remain on the Court past the state's mandatory retirement age of 72—even to the point of writing Rep. Claude Pepper (D-Florida) for a copy of a recently enacted law sponsored by Pepper that restricts the government's use of mandatory retirement laws. "If that mandatory age is set aside, as long as I'm happy in this work, enjoying myself, having a good time, and health goes along with that, I would hope to stay," he says. And just in case others feel he's stayed beyond his years, Martin hopes they'll drop him a note saying it's time to leave and make room for another justice.

Martin, a Lenoir native, has the longest tenure among Supreme Court justices in the state court system. He began as a Superior Court judge in 1962, moved to the Court of Appeals in 1978, and was appointed to the N.C. Supreme Court in 1982. Martin was rated good to outstanding by nearly 78 percent of the lawyers in the Center's 1980 survey of the state judiciary. As a Buncombe County trial judge, Martin streamlined jury service, limiting most jurors' time away from their normal pursuits to one day or one case—a system now used statewide. Martin has kept up with national judicial trends, earning his master of laws in judicial process from the University of Virginia in 1982—at age 62. He liked the program so well that he drafted Justice Willis Whichard into it as well. Whichard is now pursuing his doctorate in the same discipline.

Martin is known on the Supreme Court as the expert on procedure, helping frame issues so that the court doesn't stray beyond the immediate questions posed. "Maybe that springs from being on the Superior Court for a long time where you learn to stay inside the pasture and not go grazing in territories you don't have to," he says. "Sometimes there's an inclination among some people, including myself, to say, 'Let's just go ahead and decide this issue.'" Deciding such issues when the court doesn't have to means that later, "You may find yourself wishing you hadn't said what you said," adds Martin.

When he writes opinions in his booklined, paneled office, he pulls a green eyeshade down over his forehead to filter the fluorescent light above. The shades are not a badge of eccentricity, Martin says. They help keep his eyes from tiring and drying. If anything about him is eccentric, Martin believes it's his weekend walks through the courtroom. "Sometimes I'll come here on a Saturday or Sunday to look at the mail and then I'll just walk around the Court and just kind of think about all the old people who've served on the Court, and I really have a feeling for the institution of the Court itself. I think it's so great to be a part of it and how so few people in our state have had the opportunity to serve."[10]

JUSTICE HENRY FRYE,[11] 54, has served on the Court for nearly four years. He still doesn't know if he wants to be a Supreme Court justice for the long haul, and delays making that career decision one year at a time—usually each January. "At one point I was trying to master the job (before deciding whether to stay). I've given up on that. And, I guess some of the factors are, if I left, what would happen here? How would decisions come out? And, frankly, whether another black would be appointed to the Court, and not just another black, but a person who's well qualified," he says. "The other factor is what do I want to do for the rest of my life?"

Justice Frye's frustration with mastering the job is not reflected in his opinions. He has received solid reviews from lawyers for the opinions that he's written in complicated cases—including one that details how some small corporations resolve disputes between majority and minority stockholders.[12] Rather, Justice Frye's frustration lies within himself. "I had thought by about three years I would be able to sort of work normal hours and make decisions a lot easier," says Frye. "I suppose the deeper you dig into cases the more you

realize you'll never be comfortable about it."

Frye carries a reputation as a liberal on this traditionally conservative Court, meaning that he is more willing to impose judicial interpretation on legislative acts than the more conservative justices, such as Justice Louis Meyer, who tend to stick to historic interpretations. This trait surfaces particularly in cases involving potential restrictions on an individual's liberty. Frye says his philosophy in such cases developed "from my own personal experiences and from seeing the operation of government and power at many different levels, and I believe that three or four guilty people should go free rather than one innocent one be convicted."

At the same time, Frye says, he's learned to appreciate more conservative views than his. "There are sides to the cases I haven't thought about," he explains. "Part of it may be my growing process, but part of it may be that I'm getting a little older, a little more conservative." A Court colleague observes, "Everyone tends to evolve toward the center as we stay up here, and that's true for Henry."

As for being the first black justice on the Court, the Ellerbe native says, "I've been through this so much. I've been the first [black] in a lot of things, so I've gotten over that." Still, Frye takes enormous pride that he was the first black assistant U.S. attorney in North Carolina (appointed in 1961 by President John F. Kennedy), along with being the first black legislator (in 1969) since the turn of the century. An honors graduate of UNC Law School, Frye was a member of the state House from 1969 to 1980 and the state Senate from 1981 to 1982. During his terms in the legislature, Frye was well-regarded. In the Center's annual survey of legislative effectiveness, (in which legislators, lobbyists, and the Capital Press Corps are asked to rank each member), Frye ranked 11th in the 120-member House in 1977, 13th in effectiveness in the House in 1979, and 13th in the 50-member Senate in the 1981 survey.

JUSTICE JOHN WEBB,[13] 60, never set out to be a lawyer. "I just drifted into it," he says. But with that decision made, Webb had a role model: his great uncle Willie, also known as N.C. Chief Justice William A. Devin (1951-1954). "I admired him a great deal," he says. A Rocky Mount native, Webb came to the Court after six years as a trial judge and nearly a decade on the N.C. Court of Appeals. Before becoming a judge he was in private practice, starting at a prestigious New York City law firm which once had employed a young patrician barrister named Franklin D. Roosevelt. "We both left after two years," says Webb. "I'm that much like President Roosevelt."

On the Court of Appeals Justice Webb generally was identified with one of two factions on the court, the practical crowd that included the late Justice Earl Vaughn when he was a member of the Appeals Court, and who was a close personal friend of Webb. (The Supreme Court's most junior justice, Willis Whichard, was a part of the other group, whose work was perceived by lawyers and other judges as more academic.) While he was a member of the Court of Appeals, Webb was rated good to outstanding by nearly 66 percent of the lawyers, according to the Center's 1980 judicial evaluation.

Webb foresees some change in his new role from his past judicial experience. "Each Court of Appeals judge handles many more cases than a Supreme Court justice. I anticipate I'll have more time to spend on each opinion, and hopefully I'll do a better job." Each Court of Appeals judge averages about 100 opinions per year, while a Supreme Court justice handles about 25-30 annually.

Webb began his appellate career courtesy of former Governor Hunt, who had been a law partner of Webb in Wilson. Webb, who was elected to the court in November 1986, believes that in deciding cases, an appellate court should follow a neutralist principle. "I'm not going to the Supreme Court with any program to push," Webb says. "The Court is not a democratic institution in the sense that you go by majority rule (of the electorate) in the decision of cases . . . . It's not like the legislature. A court's duty at times is to go against the popular will if that is necessary to protect a litigant's rights. For this reason, an appellate judge should be very careful in following established principles . . . [and] the mandate of the legislature."

Like his colleagues, Webb tends to enjoy writing decisions on civil matters because they are "more interesting intellectually." And although he doesn't intend to shirk his duties, he does intend to follow the Court's tradition of picking the easiest case to write first. The Supreme Court follows a rotation system in which each justice gets stuck with the most difficult decision to write once every seven months. "I'm not looking for extra work," says Webb. At the same time, he notes, "I get

more satisfaction from handling a hard case."

With the new position and lighter case load, Webb has a chance to develop another talent that has its genesis in yet another relative. Webb's uncle was Gerald W. Johnson, one of the top reporters and writers in the United States after beginning his newspaper career at the *Lexington Dispatch.* He later became editor of the *Greensboro Daily News* and hit his journalistic peak at *The Baltimore Sun.* Webb keeps his uncle's photograph in his office, with excerpts of Johnson's work that includes this observation: "If [a man] comes out of college without the capacity to form an opinion of the way the world is going, and the nerve to stand on that opinion in the face of stout opposition, he remains an ignoramus, though his degree may take up half the letters of the alphabet."

JUSTICE WILLIS WHICHARD,[14] 46, came to the N.C. Supreme Court in November after unseating Republican Justice Robert R. Browning, who was appointed by Governor Martin in September 1986. Although he is seven months older than Justice Mitchell, Whichard is the most junior justice for seniority purposes, and thus serves as the Court's secretary—keeping track of the votes on cases and signing orders of the Court. He also gets to vote first on which way the court should rule in a particular case. Court tradition requires this, just as tradition requires his secretarial services. As Chief Justice Walter Stacy once explained to then-young Justice Sam Ervin, "All votes were taken in inverse order of seniority to remove the possibility that junior justices might be unduly influenced by their seniors."

Whichard, born and reared in Durham, served in the state House from 1970 to 1974 and in the state Senate from 1974-1980. He ranked high in the Center's evaluation of legislators' effectiveness, placing 5th in the 50-member Senate in the 1977 session and 6th in the 1979 session.

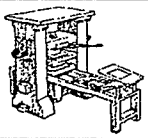
For Whichard, who came to the Court with six years on the Court of Appeals, the shift to the state's highest Court means his work product will be more carefully reviewed by his colleagues. "My sense is that much more time is spent preparing cases for argument and conference (as opposed to writing opinions in the Court of Appeals), determining what will be heard, [and] on the Supreme Court the opinion is much more the product of the Court rather than the individual writer, as tends to be the case on the Court of Appeals." Whichard earned a reputation for solid scholarship during his Court of Appeals tenure. He was academically oriented early on, often taking history exams administered by his father—who taught high school history in Durham—just for the fun of it.

Whichard also was viewed as something of a liberal judge, though, like Exum, he dislikes the term because it has nearly lost its original meaning of being broad-minded. One case that Court observers believe is indicative of his philosophy addressed the constitutionality of a statute that set out time limits for filing claims for injuries in the workplace.[15] Usually, judges look for other reasons to decide a case before reaching questions of constitutionality. Court of Appeals Judge Whichard had held the law to be unconstitutional, but on review, then-Associate Justice Exum wrote a decision[16] modifying and affirming Whichard's opinion. Exum, reversing one of Whichard's findings, concluded that Whichard did not need to reach the constitutional question to decide in favor of an injured worker. Whichard describes his legal philosophy as follows: "I think it is the Court's function to ascertain as best it can the legislative intent and to implement it. When it comes to the common [unwritten] law, I think the doctrine of *stare decisis* [following precedent] has served our system well."

Still, there are times when Whichard does believe court-made law is appropriate and sometimes necessary. In workers' compensation cases, for example, his judicial record shows he subscribes to the long-held view—established by court-made law in the 1930s—that the Court should construe state laws "with the view towards providing compensation for injured employees."

The first time Whichard showed an interest in the law was for an eighth grade English assignment from his teacher, Miss Elizabeth Valentine, on what he wanted to be when he grew up. In his essay, the student writer outlined a new ambition: to become a lawyer. Before then, "I wanted to be a fireman or policeman—all the things little boys want to be." His father influenced his choice because he had wanted to be a lawyer but chose teaching in exchange for free tuition at UNC-Chapel Hill during the Depression. Long talks with his grandmother and other relatives about public events intrigued him further. "I got the sense very early in life that lawyers were people who got involved in politics and helped make

— continued on page 99



ON THE PRESS

Newspaper Coverage of the 1986 Senate Race: Reporting the Issues or the Horse Race?

by Paul Luebke

This regular Insight *feature examines how the North Carolina news media go about covering state government and public policy issues. This column examines how newspapers—not radio or TV—covered the 1986 race for the U.S. Senate between former Gov. Terry Sanford, the former president of Duke University, and U.S. Sen. James T. Broyhill, who had been appointed to a vacant Senate seat following a long career in the U.S. House of Representatives.*

Every Tar Heel political junkie can recall the contrasts between the Broyhill-Sanford race of 1986 and the Hunt-Helms confrontation two years before. Last year featured a blissfully short campaign, with "only" $9 million expended, a minimum of negative advertising, and both candidates rooted in the center of their political parties. The 1984 race actually began during the spring of 1983, when Sen. Jesse Helms' newspaper ads attacked Governor Jim Hunt's connection to Rev. Jesse Jackson in a preview of the racial bitterness that would erupt in the nation's most expensive U.S. Senate race. That race cost the two camps $26 million (nearly three times what the 1986 campaign would cost) (see article on campaign finance, p. 100, for more), thrived on personal attacks, and juxtaposed New Right and moderate-Democratic ideologies.

What also differed between the two campaigns was the level of the press' interest. North Carolina newspaper editors assigned fewer resources toward coverage of the Broyhill-Sanford contest than they had two years earlier, when the state's papers were chock-full of stories about the campaign—including many pieces written by the national press and picked up locally. Newspapers in 1986 ran somewhat fewer stories, but a review of press clippings during the fall—Labor Day through Election Day—indicates that newspapers vigorously reported the essence of the campaign, noting changes in Broyhill or Sanford strategy almost immediately. Not all of the state's dailies have the same coverage style, to be sure. But through a combination of daily reports of events (known to journalists as "spot news") as well as more reflective pieces not tied to a press deadline, North Carolina's major dailies served the reading public well in letting them know what was happening in the candidate's campaigns. The state press was most adept at covering this *horse race* aspect of the campaign—gauging how the campaign was going, who was leading, what the strategy was, and what voters the candidates were courting. But did the press delve into *policy issues* adequately? Did the press tackle some larger issues which were not directly connected to the two campaigns? An examination of more than 800 clippings from North Carolina newspapers during the fall indicates that by and large, these less-exciting but equally important aspects of the campaign were ignored in the heat of reporting on *events, trends, and character issues.*

In retrospect, Sanford's unexpectedly aggressive campaign style may have contributed the most to his victory over Broyhill, and it certainly boosted interest in the campaign and sharpened

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press reporting of both camps. This theme emerges clearly in the daily reporting. Until well after Labor Day, the campaign had been somnolent, and press reporting of what little was going on was equally dull. But all that changed—and so did the reporting—in late September. Up until then, Sanford himself seemed unsure whether he wanted to deviate from the soft-sell "special leader" rhetoric which had helped him win the May 1986 Democratic primary. The state's reporters quickly noted this ambivalence. Seth Effron, Raleigh reporter for the *Greensboro News & Record,* wrote September 17 that "key (Democratic) party officials were fretting privately that Democrat Terry Sanford isn't campaigning aggressively and isn't visible enough."

Two weeks later, the press had more of the story when Sanford decided to take off the gloves against Broyhill. Rob Christensen, chief capital correspondent of *The News and Observer* of Raleigh, noted on October 2: "Terry Sanford, increasingly assuming the role of aggressor, said Wednesday that the record of . . . James T. Broyhill showed that he was 'no friend of education.'" A similar story appeared in the same day's *Winston-Salem Journal* (without a byline) quoting Sanford as going "on the offensive to pierce the '30-second electronic shield' of Broyhill's television ads."

North Carolina's newspapers have an excellent national reputation for seeking more than just the facts. They also like to capture the smells and the flavor of the story. Perhaps more so than the state's other major dailies, *The Charlotte Observer*'s editors frequently allow their reporters to write reflective stories which focus on more than one day's spot news. An excellent example is political reporter Ken Eudy's article, also published on October 2, which noted that Sanford had "donned his old Army Airborne ring and used military imagery to suggest that he's tough and his opponent is not." Like his fellow reporters across the state, Eudy quoted Sanford's defense of his 1961 decision to advocate a new sales tax on food: "(Broyhill) just wouldn't have fit in with the men and women who risked their necks to vote for children and North Carolina's future."[1]

At this critical juncture in the campaign, Broyhill was reemphasizing his alliance with Ronald Reagan, hoping that the President's high approval ratings would carry him to victory. The press presented Reagan's message clearly during both of his brief October visits. *The News and Observer,* not usually inclined toward color photos, ran a large, page-one, color picture of Reagan on the morning after his October 8 visit to Raleigh. Correspondent Christensen's lead story cited the President's depiction of "Broyhill as a solid conservative, while portraying . . . Sanford as a champion of higher taxes." The October 29 *Winston-Salem Journal* similarly gave the President's Charlotte airport rally front-page coverage, quoting directly Reagan's assertion that Broyhill was "part of the 1980 clean-up crew for the worst economic mess since The Great Depression." These papers also took note of the attendance at the two rallies, particularly because the Raleigh crowd had been surprisingly small, given the appearance of a popular President in a Bible Belt setting. The papers avoided speculating that this was a harbinger of things to come, however.

Although both Sanford and Broyhill brought in out-of-state politicians to enliven statewide barnstorming tours, such speakers were far more important to Broyhill's strategy than to Sanford's. When television evangelist-politician Pat Robertson stumped eastern North Carolina for Broyhill, the Republican campaign received straightforward coverage enunciating the Reagan and social-issues themes. Ken Murchison of the *Rocky Mount Telegram* wrote a page-one story on September 28 conveying Robertson's blunt message to Tar Heels: "Marion G. 'Pat' Robertson . . . said a vote for Jim Broyhill in November is a vote for Ronald Reagan. Conversely, he said, a vote for Terry Sanford would be a vote for Teddy Kennedy, D-Mass., Alan Cranston, D-Cal., Howard Metzenbaum, D-Ohio, and other liberal Democrats who he said are responsible for the weakening of the moral fiber of the United States."

In the same day's Sunday *Fayetteville Observer-Times,* reporter Pat Reese stressed some of Robertson's favorite issues. "Television evangelist Pat Robertson, a likely Republican candidate for president in 1988, sounded a battle cry for war against communism, crime and drugs as he joined a three-day, $1 million fund drive for the election of Sen. Jim Broyhill." The Broyhill campaign decision to try to peg Sanford as "soft on defense" by criticizing his alleged position on draft-dodgers also received press coverage—a strategy that blew up in his face like a claymore mine when Sanford emphasized to the press his own military background. On October 20, *News & Record* correspondent Effron gave advance notice of a pro-Broyhill press conference, which prompted a stinging on-the-record rebuttal from Sanford: "Today a group of veterans, led by longtime Broyhill backer state Senate Minority Leader Bill Redman, R-Iredell, will hold a news conference to attack Sanford's record on defense and his support of amnesty for

draft evaders. Sanford, hearing of the impending attack, shoots back, 'Ask him why didn't he (Broyhill) serve in the Korean War?'"

With two weeks to go, reporters picked up on the sharp anti-Broyhill tone which emerged as key to Sanford's final offensive. *News and Observer* reporter Sally Jacobs quoted the Democrat's sports metaphor in an October 22 story: "Republican Sen. James T. Broyhill has 'struck out' in efforts to protect the textile industry, and it is time for someone else to step up to the plate, Democratic senatorial nominee Terry Sanford said Tuesday." And *Winston-Salem Journal* Washington correspondent Paul Haskins on October 30 stressed the contrast between Broyhill's attempt at pork barrel politics and Sanford's effort to hammer away at the pocketbook issues: "Sen. James T. Broyhill, R-N.C., took credit yesterday for getting a planned nuclear submarine named after Asheville, but former Gov. Terry Sanford, Broyhill's Democratic opponent in the U.S. Senate race, said that he'd prefer a new textile import barrier with North Carolina's name on it." The press was quick to note the public relations disaster for Broyhill: Effron pointed out that the area had only recently been relieved of the Reagan administration threat to create a spent-nuclear-fuel repository near Asheville, and naming a nuclear sub for the city only served to remind voters of nuclear waste.

... where newspapers can excel—and where television and radio often do not because of the difficulty of illustrating such a story in a visual and aural format—is in the analysis of policy issues. North Carolina newspapers need to do more.

The press also detected the shift in momentum toward the Democrats in the final weeks, by highlighting Broyhill's impatience with reporters and Sanford's subtle but seemingly deliberate attempts to contrast himself as a populist with Broyhill the patrician. *The News and Observer*'s political-insiders column, "Under The Dome," on October 22 ran a long story on Broyhill's press relations, stressing in the lead sentence that Broyhill, "generally considered a model of Southern reserve, got testy with reporters this week, angrily lecturing two of them Monday when they aggressively questioned him." Ironically, one had to read in *The News and Observer* that it was Effron whom Broyhill angrily poked in the chest while objecting to a story. Effron's own paper did not run an account of the chest-poking at the time of the incident but saved it for a later campaign wrap-up. In post-election reflection, Effron said writing about it immediately might have given the Broyhill campaign the false impression that the reporter was seeking to create news.

The press highlighted the differences which Sanford wanted to stress between the two men's backgrounds and experiences. In an October 19 story, *The Charlotte Observer*'s Eudy quoted Sanford at an Albemarle campaign breakfast taking a sharp poke at Broyhill's upper-crust background. "[Sanford said that Broyhill] would have taken a knife and sliced that watermelon, and shared it. [Sanford] paused, then added that Broyhill would have asked for a napkin—'a linen napkin at that.' The audience hooted." Similarly, Effron wrote in the *News & Record* of October 24 about the two candidates at Charlotte's annual Mallard Creek Barbecue. "Sanford worked the crowd in his shirt sleeves; Broyhill kept his suit coat on and buttoned."

In the campaign's final days, the press focused on voter turnout. Tim Funk, Raleigh correspondent for *The Charlotte Observer,* reported on October 30 some detailed examples of Republican turnout "tools of the trade: phone banks, mailings, even recorded telephone messages from Reagan and Gov. Jim Martin." *The News and Observer* provided the most detailed coverage of turnout and demographics, writing long stories on both black and New Christian Right electoral organizing. For example, Christensen on October 29 provided an excellent explanation of the fundamentalist-Christian vote's significance for North Carolina politics: "With . . . Broyhill locked in the political fight of his life, leaders of the Christian Right are trying to mobilize a coalition of abortion foes, conservative evangelicals and others that they hope will pull him through Tuesday's election. That coalition often has been credited with helping elect Republicans . . . Helms in 1984 and ... [former U.S. Sen. John] East in 1980. But how much the Christian Right backs Broyhill in his tight race with . . . Sanford remains a question." It was a question answered November 4, and Christensen's intimations were prescient: Fundamentalists did not turn out in 1984-sized numbers, a factor contri-

buting to Broyhill's defeat, Jacobs reported in *The News and Observer* in a November 8 vote analysis.

Reporters delivered their post-mortems on the race in the November 6 newspapers, the Thursday following the Tuesday election. The most succinct summary of Broyhill's decline came in Eudy's *Observer* story: "In interviews Wednesday, most Broyhill advisers agree the campaign derailed in mid-October, recovered late in the month, but not in time to catch Sanford, who hadn't won an election in 26 years."

In sum, North Carolina reporters deserve kudos for the careful coverage of the ebb and flow of Sanford's and Broyhill's campaigns. But a consequence of editors' assigning their reporters to file daily stories on candidates' activities, whether in Asheville or Asheboro, is that some more basic political questions remained unanswered. Examples of good stories missed include:

- An October 19 *New York Times* dispatch from Washington, D.C. reported that Jesse Jackson had come to the state to bolster black organizational support for the Sanford campaign. Yet no North Carolina newspaper carried any follow-up to that story.
- Editors, reporters, and both campaigns regularly discussed the absence or presence of "negative advertising." But no reporter defined the term "negative ad." Is a negative ad any criticism of an opponent's record, or personal attacks only, or gross distortions of a record? The Tar Heel press didn't say, leaving the distinct impression that any sort of comparative advertising is inherently sinister.
- Sanford claimed that he was a friend of education and Broyhill was education's foe. Why did reporters not compare the candidates' records and draw their own conclusions? Or for another example, on economic issues, did Broyhill, the mainstream Republican, vote any differently than Helms, the champion of the New Right? And on social issues, how different were Sanford and Broyhill, both candidates from their parties' mainstream? Such articles were missing.
- Social issues like race and abortion were central to Helms' reelection in 1984. Why were social issues debated less in the 1986 campaign? Unfortunately, the daily press didn't address these concerns in any more than a routine way.
- Did class background really matter? Does serving the people mean you can't have grown up with linen napkins? In any event, Terry Sanford, former Duke University president and ITT board member, was no stranger to Fortune 500 circles, contrary to the impression he sought to make upon reporters. Did Sanford play the press like a fine violin in the 1986 campaign?
- Broyhill had more than 20 years' seniority in the House and could have, arguably, been a much more effective senator than Sanford, who had relatively little experience as a legislator (he served in the state senate in the 1950s) but who had vast experience as an administrator. Yet, despite these apparent strengths of the candidates, few reporters examined the record to determine whether their reputations were justified. How many bills did Broyhill introduce in his career and how many passed? What were the major effects of Sanford's governorship beyond the food sales tax impact on schools?

There were, of course, some exceptions during September, October, and November. *The Winston-Salem Journal* ran a series of issues pieces that ran in six Monday editions prior to the election. *The Charlotte Observer* published question-and-answer interviews with the candidates that addressed issues in its editorial section on October 23. And *The News and Observer* ran several pieces that addressed some of these concerns, including an October 16 story on Broyhill's votes on economic issues; and September 14 coverage of the candidates' records on social issues. Too, most of the papers delved into Sanford's corporate campaign finance connections, such as *The News and Observer*'s October 26 story. But by and large, issues were not a prime ingredient of newspaper coverage of the campaign.

Unquestionably, the press reported thoroughly the horse race aspect of the campaigns. But reporting campaign events, and even reporting the color and flavor of a campaign in all its nuances and trends, is something that radio and television reporters can also do well. But where newspapers can excel—and where television and radio often do not because of the difficulty of illustrating such a story in a visual and aural format—is in the analysis of policy issues. North Carolina newspapers need to do more.

As politically interested North Carolinians begin thinking about 1988, a challenge emerges for Tar Heel newspaper editors and reporters. They need to reflect on how their generally high-quality daily coverage could be combined in 1988 with more in-depth analysis of policy issues which are not rooted in the daily routines of the candidates. All of us would benefit from an increase in that kind of political analysis.

FOOTNOTE

[1]In January, Eudy left the newspaper to become Executive Director of the state Democratic Party.

Reforming Pork Barrel, Special Provisions, and the Appropriations Process: Is There Less Than Meets the Eye?

by Paul T. O'Connor

This regular Insight *feature focuses on the makeup and process of the N.C. General Assembly and how they affect public policy-making. This column examines the results of reform measures in the budget process, in pork barrel spending, and in tying special provisions to budget bills.*

Russell Walker was angry and he was taking it out on his banana pudding.

Sen. Walker (D-Randolph), chairman of the Senate Appropriations Committee on Human Resources, had just learned that his committee's proposals had been changed considerably in a closed meeting of the legislative leadership. Six weeks of hard work by his committee—and six months of promises by the leadership that the budget process was to be reformed—had all been wiped out, so far as Walker was concerned.

So Walker sat in the cafeteria of the Legislative Building and, wielding a spoon, neatly but forcefully cleaved and scooped up the banana slices and vanilla wafers that make up the assembly's favorite dessert. Four other legislators sat with Walker on that day near the end of the 1986 session. All shared his frustration about the appropriations process. Even the presence of a news reporter didn't halt the griping and fuming.

The reason? For one thing, the 1986 session of the General Assembly was supposed to see the end of budget-making abuses that had soiled the reputation of the legislature. The Senate had adopted new rules for the operation of the appropriations committee and, the previous winter, the leadership of both houses had announced that in the future, more legislators would have a significant impact on the final state budget. The aims of these reforms were to tidy up the disarray surrounding three aspects of the budget process: the operation of the appropriations committees and subcommittees themselves; the allocation of "pork barrel" funds for local projects; and the practice of enacting substantive legislation through the guise of special provisions hidden in budget bills.

The Appropriations Powwow

Much of the work which Walker's committee had done during the six-week session was pre-empted when the Super Subcommittee, an informal group of eight, consisting of the budget committee chairmen, the House Speaker, and the Lieutenant Governor, met behind closed doors to put the final version of the budget together—despite assurances from legislative leaders earlier in the year that more legislators would be involved in the budget process, not fewer.[1]

"We had been asked to cut our budget," Walker said. "In our meeting with the Super Sub, we had been told the size of our budget. [In numerous meetings] we almost made that goal, and we presented it to them, but when they got through with it, there were things in there which we had not recommended, and some things which had not even been discussed." Walker said his committee had decided against recommending, among other things, a $125,000 appropriation for a North Carolina Cancer Registry, but the "Super Sub"

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"put it back in."[2] Walker said that $1,140,000 for additional Adult Developmental Activity Program workers in mental health facilities was also added to the budget, even though that appropriation had never been discussed by the committee.[3]

Although other budget committee chairmen contacted for this article were reluctant to speak as forthrightly as Walker, several said the lack of influence they had on the new fiscal 1987 budget frustrated them. "We made some improvements but we have a long way to go," said former Sen. Wilma Woodard (D-Wake), then-chairman of the Senate Appropriations Committee on General Government. Rep. Bruce Ethridge (D-Onslow), chairman of the House Expansion Budget Committee on Natural and Economic Resources, said, "I was disappointed in some of the things that took place."

State employees close to the budget process told of budget committee chairmen who were furious at their lack of input. "Nothing went through the committees. It all went through the Super Sub," one budget analyst ventured.

The Special Provisions Express

The budget bill that emerges from the Super Subcommittee is often likened to a fast-moving train that is "on the tracks." That is, once blessed by the legislative leadership, it is not to be changed by the membership. The leadership rushes the budget bill through committee and to the floor so quickly that many legislators can't even read it before they must vote on it. When the train leaves the station, however, it is carrying more than the budget. In the secret meetings of the Super Subcommittee, the budget not only is altered without consultation with subcommittee chairmen, it is also loaded up with special provisions.[4] Some of those provisions do relate directly to the budget and provide needed instructions to executive branch agencies as to how budgeted money will be spent.

But other special provisions have nothing to do with the budget. They are substantive changes in law, and they hop the budget train as legislative riders. In recent years, for example, special provisions were used to repeal major parts of the Administrative Procedure Act[5] and create a new N.C. Commission on Jobs and Economic Growth.[6]

A special study commission created by Lt. Gov. Robert B. Jordan III following the 1985 session was set up to curb the abuse of special provisions. Its result was Senate Resolution 861, adopted on June 11, 1986, declaring that no special provision could be included in the budget unless it related to current operations or capital improvements funded in the budget bill.[7] That resolution did provide certain exceptions, such as salary changes, program funding changes due to federal budget changes, and for modifications of an agency's functions when its funding has been transferred from one department to another.

Number of Special Provisions in Budget Bills, 1981-1986

1981 Regular Session	29
1982 Short Session	30
1983 Regular Session	65
1984 Short Session	87
1985 Regular Session	108
1986 Short Session	57
Total Special Provisions 1981-86	**376**

Source: N.C. Center for Public Policy Research

But did the new Senate rule clean up special provisions abuses? You be the judge:

- A procedure for the early release of prison inmates was created in response to demands for a way to cope with prison overcrowding.[8]
- New regulations concerning work release for inmates were written.[9]
- A new state Office of Teacher Recruitment was created.[10]
- A new program for controlling nonpoint source pollution was created.[11]
- A loophole exempting certain pork barrel expenditures for cultural activities from supervision by the Department of Cultural Resources —and thus allowing direct legislative grants to local arts groups—was approved.[12] The effect was to amend six other statutes and to override the normal departmental grant allocation criteria.

No one contends that all special provisions are evil. They often accomplish desirable ends. But because they are hidden away in budget bills, and because there usually is scant if any debate, too often no one realizes that scores and even hundreds of new laws can be adopted through undebated special provisions. In the 1986 session alone, 57 special provisions were tucked away in the main appropriations bill.

Asked if the Senate resolution had stemmed the abuse of special provisions, Lt. Gov. Jordan conceded that they had not solved the problem. "We improved," he insisted, "but we still have a long way to go." Added House Speaker Liston Ramsey, "That kind of special provision was cut back sharply in 1986 as opposed to 1985."

Rank-and-file members were not so sure. One legislator who asked not to be identified said that special provisions were abused almost as much in 1986 as in 1985, so the "reforms" had little impact. But, the legislator admitted, "I got one of mine (special provisions) in there. So I really can't complain."

The Pork Barrel Pollyanna

Legislators often complain about the special provisions and the way that special local appropriations—better known as "pork barrel"—are handled. But those complaints, and complainers, are controlled by a leadership that knows how to play Santa Claus. There's always an extra goody in the legislative stocking to help keep good little legislators in line.

That's the way the pork barrel process has worked in the past. All good senators get about $70,000 to spend on their pet projects back home, and good House members—who represent fewer constituents than senators—get about half that amount. Naughty legislators, such as most Republicans and a few Democrats who buck the leadership, don't even get sticks and ashes. However, good Republicans, such as former state Sen. Cass Ballenger (now a member of Congress from the state's 10th Congressional District), who supported Democrat Jordan in the 1984 election, do share in this pork barrel pollyanna.

But that's not the only thing that galls serious students of the legislative process. Another is the fact that the legislative leadership brings home more of the bacon—a lot more—than the average legislator. When the special appropriations bill for statewide projects was unveiled during the 1986 session, *Charlotte Observer* reporter Tim Funk sat down with his calculator to see who was eating highest on the hog. Funk found that the members of the Super Subcommittee had channeled nearly $24 million worth of state tax spending into their legislative districts.[13] On the morning that bill was released to the public, members of the Super Sub gamely fielded reporters' questions. Remarkably, the Super Subbers maintained straight faces as they argued that the massive spending in their home districts was for *statewide* projects, not simple local pork barrel projects. The projects, they contended, just happened to be located back home in their own districts.

Both Ramsey and the Appropriations Expansion Budget Committee Chairman, William T. Watkins (D-Granville), object to any characterization of such spending as porcine. They point out that it was a *statewide* capital spending bill—not just funding for local organizations—with projects for educational institutions and agricultural stations among other things. And, they say, districts with Republican representation also got a number of projects. Says Ramsey, "It is obvious to me that a lot of our people, including certain members of the press, regard capital money for our university system, our community college system, and our Department of Agriculture, as pork barrel. I do not share their views."

Still, this disparity between the pork barrel which budget leaders brought home, and that which the average legislator received, was duly noted by Republican Gov. James G. Martin during last fall's legislative campaign. In a stump speech in Smithfield, for example, Martin accused Democrats of "selling out to the Gang of Eight." For $25,000 worth of pork, Martin charged, Democrats allowed the leadership to each claim several million dollars' worth of special money. That criticism followed his earlier questioning of Democratic pork barrel spending on the basis that many such projects were unconstitutional. Martin had charged that some spending projects benefited only private groups, and thus did not meet the test of spending only for public purposes. Only one project was disapproved on that ground by Martin's budget office, however, and Martin's subsequent campaign to reform these legislative excesses met with limited success. The Governor asked voters to "Give me strength" by electing more GOP lawmakers, but when the ballots were tallied in November 1986, voters had instead taken away some of the Governor's strength, reducing the number of his legislative allies from 50 in the 1985 session to 46 for the 1987 session.

Still, legislators interviewed for this story felt that the General Assembly did make some progress in 1986 in cleaning up the pork barrel process. Sens. Aaron Plyler (D-Union) and Anthony Rand (D-Cumberland) were careful, Jordan said, to make sure "that all special appropriations met the public purpose test" [the state Constitution requires that public monies be spent for a public purpose in Article 5, Section 2, subsections 1 and 7] when drawing up the pork barrel bill. And, at the start of the 1987 session, both Jordan and Ramsey are

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talking about reforms to correct the problems described in this column. In January, the two told reporters they had agreed to major revisions in the appropriations process in an effort to let in the sunshine.

Jordan and Ramsey said they would recommend that all meetings of the Super Sub be held in public, and that the membership be expanded to as many as 23 members, including subcommittee chairmen. The two also promised to make some changes in the pork barrel process. Jordan said that he would push to limit special provisions in appropriations bills, but that he had not yet reached agreement with Ramsey on this. The Lieutenant Governor also said he had hoped to persuade Ramsey and then both the House and Senate to prevent consideration of bills after a certain date—perhaps June 1—unless they had already been approved by one of the chambers. All these reforms would shed more light on the legislative process and enhance public confidence in the legislature.

Individual budget chairmen, like Senator Walker, are optimistic that things will get better. But then, they were optimistic in March 1986, too, when the reforms were announced—and they were severely disappointed just a few months later. So the question facing the 1987 General Assembly is not just what reforms the lawmakers will adopt, but whether those reforms will stick.

FOOTNOTES

[1]For more, see "Budget Committee Chairmen Sharing New Wealth—Of Knowledge," by Paul T. O'Connor, *North Carolina Insight*, Vol. 9, No. 1, June 1986, p. 44.

[2]Section 141, Chapter 1014, 1985 Session Laws (2nd Session, 1986).

[3]Section 125, Chapter 1014.

[4]For more, see *Special Provisions in Budget Bills: A Pandora's Box for North Carolina Citizens*, by Ran Coble, N.C. Center for Public Policy Research, June 1986.

[5]Section 52, Chapter 923, 1983 Session Laws.

[6]Section 52, Chapter 757, 1985 Session Laws.

[7]"A Senate Resolution to Amend the Permanent Rules of the Senate," Senate Resolution 861, adopted by the North Carolina Senate on June 11, 1986, limiting special provisions in appropriation bills.

[8]Section 197, Chapter 1014.

[9]Section 201, Chapter 1014.

[10]Section 63, Chapter 1014.

[11]Section 149, Chapter 1014.

[12]Section 171, Chapter 1014.

[13]"Budget Authors Look After Their Districts," by Tim Funk, *The Charlotte Observer*, July 13, 1986, p. 1A. See also "N.C.'s Supersub: Hated, Envied Subcommittee Wields Mighty Budgetary Power," by Tim Funk, *The Charlotte Observer*, June 22, 1986, p. 1A.

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policy decisions." Later, after achieving his goal of becoming a lawyer, Whichard clerked for Chief Justice William Bobbitt—and the seed for subsequent service on the Supreme Court was planted that year.

FOOTNOTES

[1]UNC-Chapel Hill, A.B., 1957, Morehead Scholar, Phi Beta Kappa; New York University School of Law, LL.B., 1960.

[2]This material, as well as evaluations of other judges, appears in *Article IV: A Guide to the N.C. Judiciary*, which rated judges in the trial and appellate divisions of the state court system, published by the N.C. Center in April 1980. Copies of the guide are available for $6 each.

[3]Arthur Larson, *Workmen's Compensation Law*, Section 41. 64(d), citing *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 SE2d 359 (1983).

[4]Wake Forest University, B.A., 1955; Wake Forest University School of Law, J.D., 1960.

[5]*State v. Grier*, 307 N.C. 628, 300 SE 2d 351 (1983).

[6]*Wilder v. Amatex Corporation, et al.*, 314 N.C. 563, 336 SE 2d 74 (1985). See also "In The Courts: Opening Courtroom Doors to Lawsuits Involving Latent Diseases," *North Carolina Insight*, Vol. 9, No. 1, June 1986, pp. 42-47.

[7]N.C. State University, B.A., 1967; UNC-Chapel Hill School of Law, J.D., 1969.

[8]*Azzolino v. Dingfelder*, 315 N.C. 103, 337 SE2d 528 (1985). See also "In The Courts: Giving Birth to a New Political Issue," *North Carolina Insight*, Vol. 8, No. 3-4, April 1986, pp. 98-102.

[9]UNC-Chapel Hill, A.B., 1942; Harvard Law School, LL.B., 1948; University of Virginia School of Law, LL.M., 1982.

[10]Since the Court was created in 1819, there have been 82 justices of the Supreme Court.

[11]N.C. A&T State University, B.S., 1953 with Highest Honors; UNC-Chapel Hill School of Law, J.D. with Honors, 1959.

[12]*Meiselman v. Meiselman*, 309 N.C. 279, 307 SE2d 551 (1983).

[13]UNC-Chapel Hill, 1946-1949, Phi Beta Kappa; Columbia University School of Law, LL.B., 1952.

[14]UNC-Chapel Hill, A.B., 1962, Phi Beta Kappa; UNC-Chapel Hill School of Law, J.D., 1965; University of Virginia School of Law, LL.M, 1984.

[15]*Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 SE2d 188 (1981), interpreting G.S. 1-50(6).

[16]*Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 SE2d 415 (1982); *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 SE2d 868 (1983).

Campaign Finance Research Featured Before N.C. State Board of Elections and on Cable TV

On August 21, 1986, Ran Coble, executive director of the N.C. Center for Public Policy Research, spoke before the N.C. State Board of Elections on campaign finance issues. His remarks summarized the findings of an ongoing 18-month Center study. OPEN/net, state government's public events television network, taped the meeting, and on August 29, aired selected portions in a two-hour special on campaign finance. The show included a live 30-minute question-answer period. Ran Coble participated in the live broadcast, along with Alex K. Brock, executive director of the State Board of Elections, and Yvonne Southerland, deputy director and head of the Board's Campaign Reporting Office.

The N.C. Agency for Public Telecommunications administers OPEN/net, a cable channel covering government agency meetings and public policy issues. The August 29 campaign finance show appeared on cable TV systems serving 150 cities and towns across North Carolina.

The Center first released research on campaign finance issues in May 1985, when it sponsored a seminar in Raleigh. At the day-long event, 135 people heard campaign finance experts speak on national and state political races and on trends in campaign financing. The Center hopes to publish the results of this research project in a book-length report later this year. Below are excerpts from Coble's speech, given to the N.C. Board of Elections on August 21, televised on August 29, and edited here for space.

Let's think a minute about why campaign finance is important to every citizen in North Carolina. There are at least four reasons:

(1) because the ability to raise money affects *who can even run* for office;

(2) because the ability to raise a large amount of money *can* affect who wins, though not always;

(3) because campaign contributions can affect policy in the years to come, as candidates are inevitably affected by where their support came from; and

(4) because campaign contributions give the people who write the checks *access* to policy-makers.

What matters is not that the relationship between money and influence exists in North Carolina politics—nothing is ever likely to change that. What matters is that the connection be clearly in public view. As one candidate for governor told us, "We are going to lose the entire integrity of what democracy in this country is all about if we can't do something about the money aspect of races."

Goals of the North Carolina Campaign Reporting Act

To begin our discussion of campaign finance, let's take a quick look at North Carolina's Campaign Reporting Act.[1] The N.C. General Assembly enacted that law on April 11, 1974, perhaps in large part as a response to the Watergate scandal in Washington. Most state laws in this field were passed within a few years after Watergate.

There were two main goals these state campaign finance laws were trying to serve. Because of the secrecy surrounding contributions in the 1972 presidential campaign and the ensuing problems known as "Watergate," the state laws were first designed to disclose to the public where a candidate got the money to run for office. Second, because a few *very rich* individuals had played such a prominent role in financing both the Republican

and Democratic nominees in the 1972 election (Clement Stone for Nixon and Stewart Mott for McGovern), the laws tried to lessen the influence of a few wealthy individuals and instead enhance participation by large numbers of citizens who would give small amounts of money.

North Carolina's Campaign Reporting Act serves both of these goals. The goal of *public disclosure* is served by the requirement in our law that winning candidates must file four reports during the course of the campaign, reporting *all* contributions and expenditures. And, if someone gives more than $100 to a candidate, then the candidate's treasurer must send in the name and address of the contributor, the date and amount of the contribution, and the cumulative total given thus far by that contributor. Thus, campaign finance reports in North Carolina disclose to the voters where a candidate's financial support is coming from, before the voters have to make decisions in the primary and before the general election.

Our North Carolina law also serves the goal of *enhancing participation* in the elections process by a large number of citizens, in that our law says that no one contributor can give more than $4,000 per candidate per election. All of this information on contributions and expenditures is considered a public record, and thus anyone can walk into the State Board of Elections' Campaign Reporting Office and ask to see it.

Comparison of the N.C. Law with Other State Laws[2]

Over the past year, part of the Center's research on campaign finance has been devoted to comparing N.C.'s law with those of the other 49 states. We have analyzed those laws and sent a written copy of our analysis back to each state to let each state verify that we interpreted its law correctly. All in all, I think we would conclude that the N.C. law is a little better than average among the states.

There are several ways that North Carolina is like most other states. In all 50 states, individuals may contribute to campaigns, and campaign finance reports are public records. Like 23 other states, we limit the size of the contribution any one person can give. Here, the limit is $4,000.[3] In 17 of the 23 states, the limit is less than $4,000; 8 of these 17 have a limit of $1,000 or less.

North Carolina is in a minority of states regarding other points. We are one of 20 states that prohibit contributions by corporations, and one of only eight that prohibit contributions by labor unions. But prohibitions don't necessarily speak to enforcement. For example, in Louisiana, Gov. Edwin Edwards' response to charges that he had received illegal *corporate* contributions was, "It is illegal for them to *give* but not for me to *receive*." It turned out he was right.[4]

"Politics has got so expensive that it takes lots of money to even get beat with."

—Will Rogers

As many of you know, the 1985-86 General Assembly did consider a bill that would have allowed contributions by corporations.[5] Both the Republican Governor and Democratic Speaker of the House opposed the bill, however, so it died in the House of Representatives.

Thirteen states allow either a state tax *deduction or credit* for a contribution to a candidate. The idea behind allowing the tax deduction was to encourage citizens to participate in campaigns, even if in a small way. North Carolina allows a tax *deduction*, but the maximum is only $25. Finally, only 19 states, including North Carolina, have some system of public financing of campaigns. In our system, a taxpayer can choose to have $1 of his or her taxes to go into what is called the State Campaign Fund.[6] This fund is distributed to the Democratic and Republican parties according to how many people are registered as Democrats or Republicans. In 1984, only 16 percent of the taxpayers exercised this option, but that much involvement sent $857,391 into the fund.

Criticisms of the North Carolina Law

Our research shows that N.C.'s law is a little better than the average state law in terms of being comprehensive and reasonable. And, the Campaign Reporting Office staff report that they get about 90 percent compliance by all candidates or committees subject to the law. Even so, our interviews with candidates, election officials, news reporters, and citizens across the state uncovered three criticisms of our law.

First, all the campaign reports aren't filed in one place in North Carolina. Campaign reports on legislative races in *single*-county districts are only

filed at the county level, *not* with the State Board of Elections. Reports on legislative races from *multi*-county districts are filed with the State Board in Raleigh. To see *all* the campaign finance reports, you'd have to travel to 16 different counties, from Henderson County in the mountains to Onslow County down east.[7]

Second, our law doesn't require the campaign finance reports to list the occupation or business affiliation of contributors who give more than

Proposed Federal Changes in Campaign Finance Law

During 1987, Congress appears headed for a full fledged discussion of changes in *federal* campaign finance laws. "It is an idea whose time has come," Senate Majority Leader Robert C. Byrd told *The New York Times* on Nov. 19, 1986. Prominent Republicans, including Senate Minority Leader Robert Dole, have also indicated that changes in the financing of Congressional campaigns should be considered.

"We have strong bipartisan support for comprehensive campaign finance reform in the 100th (1987-88) Congress," says Julie Abbot of Common Cause, the group's senior political organizer for the South and Southwest. "We expect to have committee hearings in both the House and Senate and a bill reported out by both."

In 1986, Congress took some major steps toward changing the federal campaign finance laws. On August 12, the Senate voted to limit contributions by the more than 4,000 political action committees (PACs) that contribute at the federal level. In a 69-30 vote, the Senate gave preliminary approval to a plan which would limit PAC contributions to candidates for the U.S. House to $100,000 each and for the U.S. Senate on a sliding scale according to the size of the state.[1] The bill never gained final approval in the Senate and died in the 99th Congress (the House never took up the bill). New legislation has to start all over in a new session of Congress.

In 1987, Common Cause will be one of the chief advocates for comprehensive campaign finance reform. "Common Cause does not believe that public disclosure is enough," says Abbot. You need limitations in four areas, she says: a limit on overall campaign spending, a limit on how much personal wealth can be used, a limit on aggregate spending by PACs, and "the linchpin to all this—some kind of partial public financing." These four limitations would apply to candidates for both the U.S. House and Senate. Public financing would be a modified version of the public financing system currently used for presidential races, she says. Currently, federal funds match whatever funds a presidential candidate raises from individuals (not from PACs), within specified limits of various sorts.

"If we get a bill passed in 1987, it would probably apply to the 1988 elections," says Abbot.

If PAC money is limited at the federal level, and if PACs think that they cannot have much of an impact in statewide races for governor and other Council of State races (see main story), then one might logically expect an ever larger influx of PAC contributions in future *state* legislative races. The members of the General Assembly will probably have to decide whether that is a good thing or a bad thing and what lessons we should learn from our more than a decade of experience with N.C.'s Campaign Reporting Act.

FOOTNOTE

[1]Under the bill, if a candidate for the U.S. House was opposed, an additional $25,000 was allowed for both the primary and the general election. The bill limited the amounts Senate candidates could spend to a range of $175,000 to $750,000 for *each* candidate, depending on a state's population; the limit in North Carolina, under the bill, would be $35,000 x 11 Congressional districts + $25,000 if there was a runoff, or a possible total of $410,000 per candidate.

$100. Eighteen states *do* have such a requirement.

Third, the penalties we have for violating the act may be too weak. For example, if you file a report *late*, the fine is $20 per day. If you don't file a report at all, you can be charged with a misdemeanor and fined up to $1000, jailed for a year, or both. Some believe the problem in enforcement is not weak statutory penalties, but rather insufficient funding for the Campaign Reporting Office. The Campaign Reporting Office has two

The Cost of Running for Statewide Office in North Carolina: Total Expenditures for 1984 Statewide Races

Candidates on November Ballot	Contributions	Loans	Expenditures
A. Governor			
James G. Martin (R) *	$ 2,984,544.17	$ 58,000.00	$ 2,935,175.86
Rufus Edmisten (D)	3,955,207.56	423,100.00	4,453,198.21
B. Lieutenant Governor			
Robert B. Jordan, III (D) *	1,281,615.71	254,000.00	1,544,727.44
John H. Carrington (R)	183,289.85	241,657.70	421,800.59
C. Attorney General			
Lacy Thornburg (D) *	376,172.44	-0-	365,404.25
Allen C. Foster (R)	11,385.00	15,227.16	26,291.71
D. Insurance Commissioner			
James E. Long (D) *	337,102.89	11,868.70	292,220.30
Richard T. Morgan (R)	2,225.00	1,000.00	3,224.95
E. Labor Commissioner			
John C. Brooks (D) *	24,105.57	11,000.00	34,758.03
Margaret Plemmons (R)	4,159.06	-0-	4,627.25
F. Secretary of State			
Thad Eure (D) *	9,141.52	-0-	9,034.75
Patric Dorsey (R)	5,054.97	-0-	5,505.23
G. Agriculture Commissioner			
James A. Graham (D) *	69,138.05	-0-	39,422.54
Leo Tew (R)	1,855.00	320.00	2,179.42
H. State Auditor			
Edward Renfrow (D) *	62,426.94	-0-	56,683.04
James Eldon Hicks (R)	7,626.21	4,884.70	7,626.21
I. Superintendent of Public Instruction			
Craig Phillips (D) *	24,806.60	-0-	18,930.22
Gene S. Baker (R)	11,273.50	-0-	10,862.88
J. State Treasurer			
Harlan E. Boyles (D) *	4,552.00	-0-	3,556.36

Source: N.C. Center analysis of the records at the Campaign Reporting Office of the N.C. State Board of Elections, as of December 31, 1984. Amounts shown do *not* include changes from amended campaign reports filed after that date.

* Denotes winners of elections.

full-time staff people and a budget (fiscal year 1986-87) of $106,724. Those advocating more funds want the General Assembly to appropriate money to computerize the records and allow the office staff to be more than record keepers. The staff's response to this is that the *press* already serves that analytical function quite well, so why should taxpayers pay for what they already get for free?

Where the Money Comes From in North Carolina Campaigns

I'd like to switch now to comments about where the money for campaigns in North Carolina comes from, because how a state structures its campaign finance law can either encourage or discourage money from different sources. I want to talk about five possible sources of funds: (1) contributions from the candidate and his or her family; (2) large contributions from a few individuals or families; (3) small contributions from a large number of people; (4) political parties; and (5) political action committees.

Contribution From the Candidate and Family. North Carolina's campaign law allows *unlimited* contributions by a candidate and his or her family members. In 1984, the candidate for statewide office who best exemplified the advantage of personal wealth in North Carolina was Lauch Faircloth. Faircloth spent more than $2 million in his race for the Democratic nomination for governor. Of that amount, 42 percent ($882,000) came from loans to the campaign by Faircloth or members of his family. Since less than 2 percent of these loans were repaid as of the end of 1984, family wealth was obviously a real advantage.

Large Contributions From a Few Individuals. North Carolina law limits contributions from an individual *outside* the candidate's family to $4,000 per candidate per election. In the 1984 governor's race, the candidate who got the largest number of $4,000 contributions was Democratic nominee and former Attorney General Rufus Edmisten. Sixty people gave the maximum $4,000 allowed under the law to Edmisten; another 837 people gave $1,000 or more. Three families other than his own gave $47,668 to his campaign. Johnsie C. Setzer, a former Democratic National Committee member, and two members of her family gave a total of $17,000 to Edmisten. By contrast, only 19 people gave the maximum $4,000 contribution to Governor Martin, and 603 gave $1,000 or more. Like Edmisten, Martin drew large amounts of support from a few families. For example, then-Congressman James Broyhill and nine other members of the Broyhill family gave $24,084 to the Martin campaign.

Small Contributions From a Large Number of People. The original campaign finance laws were designed to reduce the influence of a few wealthy individuals and to encourage more small contributions from a large number of people. The goal was also to enhance competition for elective office. The two parties' nominees for governor in 1984 both demonstrated widespread support. More than 5,000 people (5,056) gave $100 or more to Martin's campaign; more than 7,000 (7,240) people gave $100 or more to Edmisten's campaign. People giving small amounts play a significant role in a campaign. "You need to have the $15-$25 contributors to get people involved," one candidate for governor told us. "But you also have got to have some $4,000 givers too, in order to win."

Political Parties. Our research shows political parties are not significant contributors in North Carolina elections. In both Martin's and Edmisten's campaigns, funds from county party contributions, state party contributions, and publicly financed funds coming from tax checkoffs and going to the parties, all *combined*, amounted to less than 3 percent of each candidate's total contributions.

Political Action Committees. Called PACs, these committees are significant contributors in North Carolina elections, even though they too are limited to giving no more than $4,000 per election. The number of PACs has grown in North Carolina from only 29 in 1974 to 259 in 1984. At the same time, their financial attention seems to be shifting from races for high-level statewide office to legislative races at the district level. In 1984, money from PACs was not a significant factor in either the very expensive Helms-Hunt race for the U.S. Senate or the governor's race. Ninety-five percent of Senator Helms' money came from *individual* contributions, not from PACs; 91 percent of the contributions to Hunt came from individuals. In the governor's race, only 2.4 percent of the $11 million spent came from political action committees.

The number of PACs is growing and the amount of money contributed by PACs is shifting from statewide races to Congressional and state legislative races. According to Common Cause, PAC contributions to Congressional races nationwide increased *54 percent* from 1983 to 1985. Incumbent members of the U.S. House elected in 1984 received a record 44 percent of their campaign funds

from PACs, up from 34 percent in 1980, and 37 percent in 1982, reported Common Cause.[8]

Political action committees are also a growing force in state legislative races in North Carolina. *The Charlotte Observer* spent six months researching contributions in state legislative races and found that *in 1984 legislative races, one of every four dollars came from political action committees.* In those races, 206 PACs gave a total of $511,914 to 267 candidates. The PACs ranking at the top of the spending charts were the N.C. Medical Society, which gave $36,300, and the N.C. Academy of Trial Lawyers, which gave $31,000. Other PACs ranking among the top 10 represented textile manufacturers, the realtors association, beer wholesalers, the N.C. Association of Educators, chiropractors, Duke Power Company, Carolina Power and Light Company, and Vepco Power Company.[9]

PACs give more to incumbents than challengers, thus cutting against one general goal of campaign finance laws—to enhance competition and not lock in incumbents. *Incumbent* state legislators received an average contribution of almost $2,800 ($2,792) from PACs, while *challengers* only got about $1,000 ($1,009), and thus, it should be no surprise that eight out of every 10 incumbents seeking re-election to the legislature in 1984 won. PACs also ensure that they will give to a winner by giving to both Republican and Democratic nominees.

This movement of PAC giving down toward state legislative races makes real political sense. You can get probably more bang for your buck there. For example, utility companies are regulated predominantly at the state level; the doctors, lawyers, and chiropractors are licensed or regulated at the state level; the educators' salaries, for the most part, are set by the state legislature; and a beer wholesaler's whole economic life revolves around the legislature's taxing powers over alcoholic beverages and laws setting drinking ages.

Conclusion

The Center conducted this research because we believe a strong public disclosure law governing giving and spending in political campaigns will go further than almost any other public policy to encourage integrity and openness in state government in North Carolina.

The Center is very pleased that the State Board of Elections allowed us to make this presentation, and the citizens of North Carolina should be grateful to you, the members of the N.C. State Board of Elections, for taking the time to think about and discuss how political campaigns are financed in North Carolina. I'll be glad to answer any questions. Thank you very much for your time.

"Everybody knows that half the money spent in a political campaign is wasted. The trouble is nobody knows which half."

—the late Calif. Rep. Robert W. Crown

FOOTNOTES

[1]Chapter 1272 of the 1973 Session Laws (2nd Session, 1974), now codified as N.C.G.S. Chapter 163, Article 22A. All subsequent provisions of the N.C. law mentioned in the article can be found in G.S. 163-278.6 to 163-278.40I.

[2]All data reported in this section is based on original Center research to be published in a book-length report, planned for later in 1987. The data is from responses to surveys of agencies administering the campaign finance laws in all 50 states. Some minor changes in these tabulations may be expected between publication of this preliminary data and publication of the final report.

[3]North Carolina's $4,000 limit is in G.S. 163-278.13, which allows no individual or political committee contribution to any candidate or other political committee in excess of $4,000 for an election; and allows no candidate or political committee to accept or solicit a contribution in excess of $4,000 for an election. In addition, the statute provides an exemption *to the candidate and his immediate family* and to the state, district, and county executive committee of any political party recognized under G.S. 163-96. The statute goes on to define an "election" as any primary, second primary, or general election in which the candidate may be involved, whether or not the candidate is opposed.

[4]As reported in *State Policy Reports*, Vol. 3, Issue 6, March 1985, p. 27.

[5]Considered as an amendment to a bill making various technical changes in election laws, this proposal passed the N.C. Senate 39-7 on July 2, 1985, but died on the House floor by a 6-87 vote on July 5, 1985.

[6]G.S. Chapter 163, Article 22B (163-278.41 to 163-278.45).

[7]The 16 counties are: Burke, Columbus, Cumberland, Durham, Forsyth, Guilford, Henderson, Iredell, Mecklenburg, Moore, New Hanover, Onslow, Randolph, Rowan, Wake, and Wayne. These 16 counties are single county districts for either House or Senate seats. Four other counties are also single county districts for either judicial or prosecutorial districts (Alamance, Buncombe, Gaston, and Pitt). Finally, 40 counties (all with a population of 50,000 or more, which includes all 20 counties named above) operate campaign reporting offices for elections to *county-level* positions.

[8]*Common Cause Magazine*, March/April 1986, p. 41 and May/June 1985, p. 39. Also, see *Congressional Quarterly*, June 8, 1985, p. 1117.

[9]The Center is grateful for the continuing cooperation of *The Charlotte Observer* and its partnership in conducting research on campaign financing. *The Charlotte Observer* originally published its research on contributions in state legislative races in installments in its June 16-20, 1985 editions, now available as a special eight-page reprint.

Letters to the Editor

Vol. 9, No. 2
IRBs, Consumer Protection, and the Press

I enjoyed reading the latest edition of *North Carolina Insight.* The entire issue was of interest. Bill Finger and Donald Horton did an admirable job analyzing the merits of tax-exempt bonds. The consumer protection articles were illuminating. And the pieces about the Capital Press Corps and lobbyists were quite informative.

I am particularly struck by the skill with which you communicate on complex public policy issues. It is difficult enough to find people who can analyze such concerns. But finding people who can talk about such matters *in English* is much more challenging.

It is inspiring to see the Center demonstrate such skill in rationalizing the flow of good information on public policymaking.

Edmund Rennolds, Editor
North Carolina Forum
Raleigh

First, let me say I was delighted to see the initial "On The Press" column in the September issue of *Insight.* It is not only healthy, but commendable, when members of the media begin to look toward themselves with constructive criticism in mind.

Another word of praise: You really hit a bulls-eye when you gave the nod to the UNC Center for Public Television for its coverage of the General Assembly. As you say, "What makes the UNC-TV coverage stand out is the experience of its top reporters." Not only are they good at what they do, but they make a great sounding-board for less-experienced reporters.

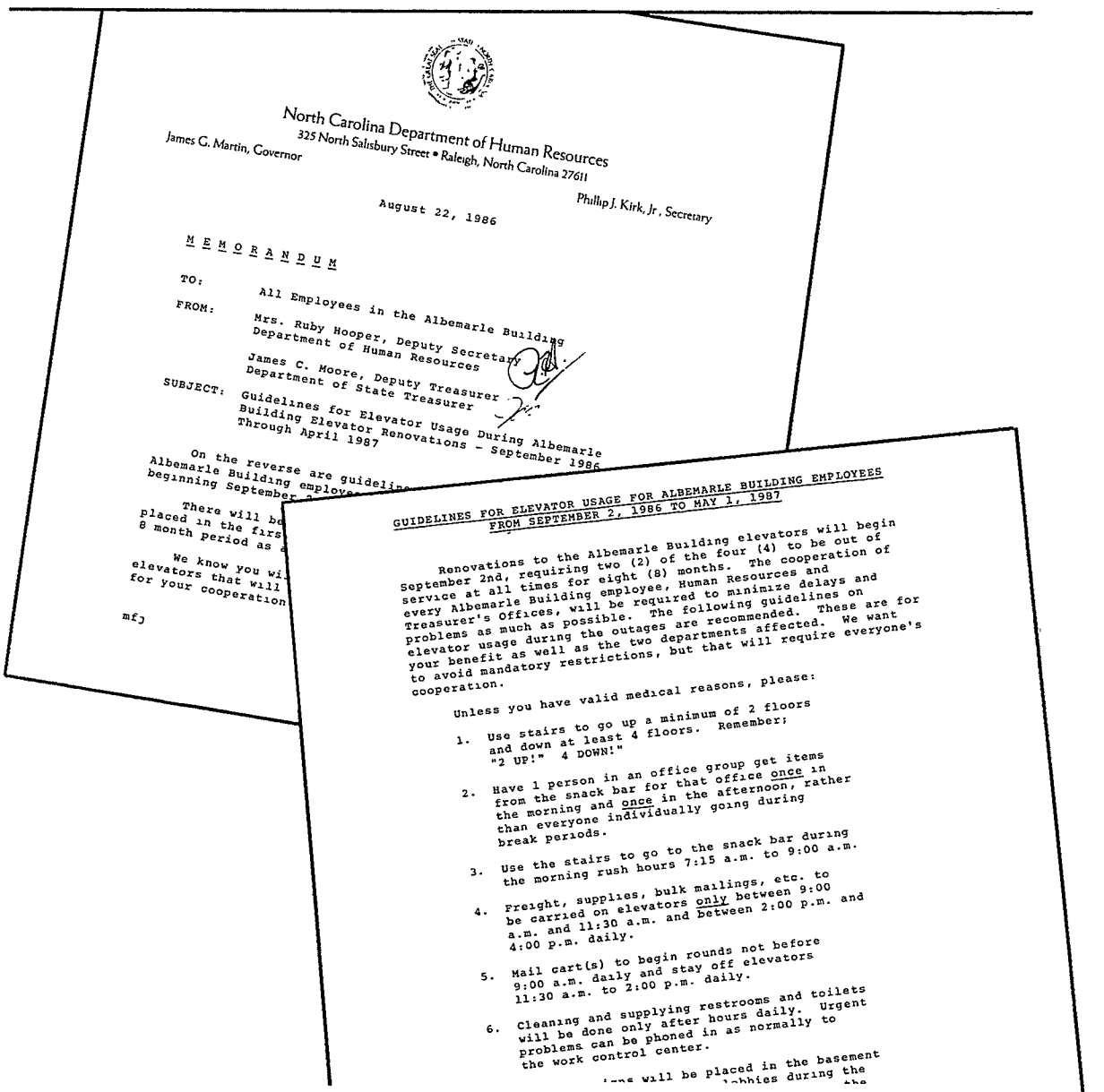
Now for a note of criticism on your criticism. I found it curious that you made only a single reference to radio journalism in the entire column. And that reference was to an event of 20-plus years ago. Granted, there are certainly more print and television journalists wandering the halls of the General Assembly than radio reporters. But I think it should have been mentioned that there are at least two radio organizations that also regularly cover the General Assembly. To wit: WPTF-AM and WQDR-FM have a single reporter assigned full-time when lawmakers are in session; and WRAL-FM/North Carolina News Network does likewise. I know, because for the 1986 short session, I was the reporter for WPTF/WQDR. And in the room right next to mine in the Legislative Building was John Bason with WRAL/NCNN. In addition, other radio stations around the state do, on occasion, send reporters to the Legislative Building to cover selected major events.

My experience, or lack of it, certainly bears out the thesis of your article, as it applies to the General Assembly. But with 10 years in radio journalism—some of it covering the legislatures in Washington, Montana, and Utah—I certainly don't feel I'm a neophyte. And John Bason brought a unique background with him to his legislative-coverage assignment: He was, for a number of years, a sergeant-at-arms in the General Assembly, thereby giving him an insightful angle that many reporters *never* get.

I happen to think that the legislative coverage offered by my two radio stations (one, a 50-thousand watt clear-channel operation), and that offered by the 80-station North Carolina News Network, probably served the North Carolina radio listener quite well, thank you. And also I happen to think that was an omission that ought not to have been made in your initial column.

Don Knott, Anchor/Reporter
WPTF-AM/WQDR-FM Radio
Raleigh

MEMORABLE MEMO



North Carolina Department of Human Resources
325 North Salisbury Street • Raleigh, North Carolina 27611
James G. Martin, Governor
Phillip J. Kirk, Jr., Secretary

August 22, 1986

M E M O R A N D U M

TO: All Employees in the Albemarle Building

FROM: Mrs. Ruby Hooper, Deputy Secretary
Department of Human Resources
James C. Moore, Deputy Treasurer
Department of State Treasurer

SUBJECT: Guidelines for Elevator Usage During Albemarle Building Elevator Renovations - September 1986 Through April 1987

On the reverse are guidelines for Albemarle Building employees beginning September

There will be placed in the first 8 month period as

We know you will elevators that will for your cooperation

mfj

GUIDELINES FOR ELEVATOR USAGE FOR ALBEMARLE BUILDING EMPLOYEES
FROM SEPTEMBER 2, 1986 TO MAY 1, 1987

Renovations to the Albemarle Building elevators will begin September 2nd, requiring two (2) of the four (4) to be out of service at all times for eight (8) months. The cooperation of every Albemarle Building employee, Human Resources and Treasurer's Offices, will be required to minimize delays and problems as much as possible. The following guidelines on elevator usage during the outages are recommended. These are for your benefit as well as the two departments affected. We want to avoid mandatory restrictions, but that will require everyone's cooperation.

Unless you have valid medical reasons, please:

1. Use stairs to go up a minimum of 2 floors and down at least 4 floors. Remember; "2 UP!" 4 DOWN!"

2. Have 1 person in an office group get items from the snack bar for that office once in the morning and once in the afternoon, rather than everyone individually going during break periods.

3. Use the stairs to go to the snack bar during the morning rush hours 7:15 a.m. to 9:00 a.m.

4. Freight, supplies, bulk mailings, etc. to be carried on elevators only between 9:00 a.m. and 11:30 a.m. and between 2:00 p.m. and 4:00 p.m. daily.

5. Mail cart(s) to begin rounds not before 9:00 a.m. daily and stay off elevators 11:30 a.m. to 2:00 p.m. daily.

6. Cleaning and supplying restrooms and toilets will be done only after hours daily. Urgent problems can be phoned in as normally to the work control center.

[illegible] will be placed in the basement [illegible] during the [illegible]

We don't usually agree with people who think state officials don't know which way is up. In fact, in this case, at least two high-level state officials do know which way is up and which way is down, and how to get there. For anyone who missed this Memorable Memo, just remember: "2 UP! 4 DOWN!"

And for those of you who saw the memo, but couldn't believe your eyes, just remember these words from Captain Kirk of the Starship Enterprise: "Beam me up, Scotty!"

Meanwhile, back on Earth, if you've got a copy of a memo you'd like to nominate for this spot, just beam it over to Insight. *No questions asked, and anonymity guaranteed. Even for Klingons and other high-level officials.*

Contributors to the N.C. Center for Public Policy Research

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