

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.

Dee Reid, a frequent contributor to The Independent, is a freelance writer and editor who lives in Pittsboro.

■ 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

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

—Hammurabi Code

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

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 formula⁴, 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 man- slaughter, 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

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

—Voltaire

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.

"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,

Stevens H. Clarke



Jack Belts

*... 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

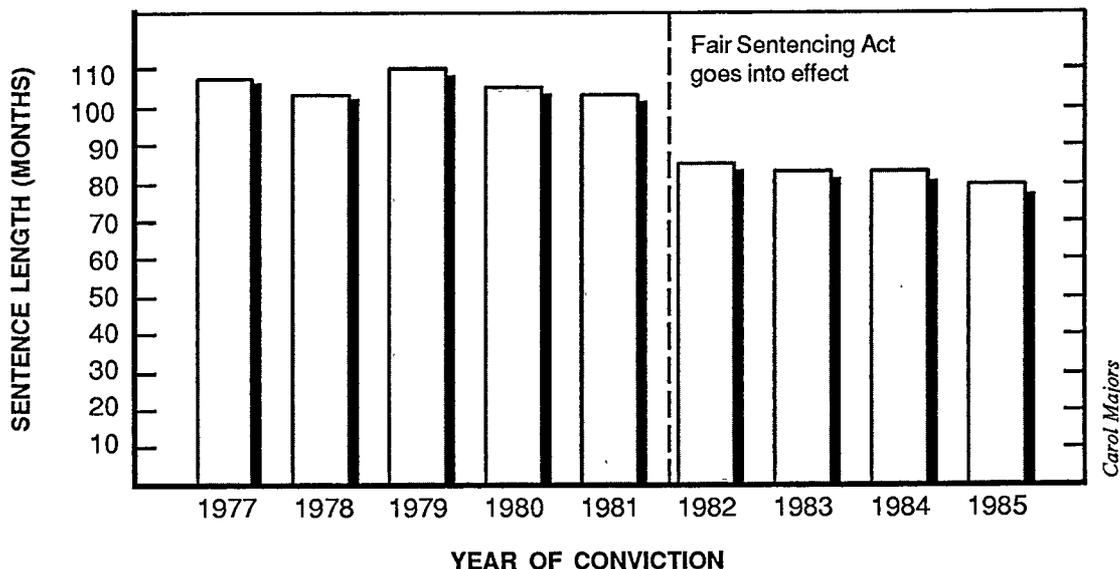
median sentences for break-ins increased more than 20 months. Similarly, the median sentences for common-law robbery increased by 10 months from 1983-84 to 1984-85. Only time will tell if judges will increasingly look for ways to avoid strict adherence to the presumptive sentences in order to assure that the defendant spends more time in prison.

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 shows¹² 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

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

²Indeterminate 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).

³Memo 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.

⁵Indeterminate And Determinate Sentencing, p. 6.

⁶*Ibid.*, p. 7.

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

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

⁹*Ibid.*, p. 11.

¹⁰*Ibid.*, p. 14.

¹¹*Ibid.*, p. 17-18.

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

◇

PUBLICATIONS UNLIMITED

*Dedicated to the efficient, economical, and
innovative preparation of your publications*

DESIGN / TYPESETTING / LAYOUT

P.O. Box 10486 ◇ Raleigh, NC 27605 ◇ (919) 782-8948