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## State Sentencing Policy and New Prison Admissions

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# STATE SENTENCING POLICY AND NEW PRISON ADMISSIONS

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Ben Trachtenberg\*

*As the academy's focus has turned to sentencing in the wake of Blakely v. Washington and United States v. Booker, most commentators have continued their benign neglect of actual sentencing practices as they occur in state courts, not to mention whether and how such policies are effective in achieving the goals of criminal justice.*

*This Note examines trends in state sentencing policies and prison populations from the perspective of a would-be state reformer hoping to decrease her state's prison budget. Economic pressures, efficiency arguments, and social justice claims have combined to cause some states to desire lower prison populations, but few empirical studies exist of how states actually go about reducing their prison costs.*

*This Note begins with an examination of twenty years of prison admissions data, tracking the trends of new admissions into state prison systems. After identifying outlier states—those states whose low admissions defied national and regional trends—the Note presents three state case studies evaluating the policy choices contributing to the lower admissions. Next, recommendations are made for would-be reformers based on these results.*

*In addition to incarceration alternatives, special focus is placed on North Carolina's "fiscal note" program, which, coupled with computer modeling of expected prison populations, has helped the state conduct informed debate about criminal sentencing. In the wake of sentencing reforms, the state has moved from having the nation's top incarceration rate to a place in the middle of the pack, an impressive result given the continued priority of tough sentences for violent offenders.*

## INTRODUCTION

The 1980s and 1990s saw a tremendous expansion in America's prison population, which grew much more quickly than the population at large.<sup>1</sup> The accompanying growth in state prison budgets

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1. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, KEY FACTS AT A GLANCE: CORRECTIONAL POPULATIONS (2003), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm> (on file with the University of Michigan Journal of Law Reform) (listing

has many policymakers seeking explanations as well as solutions for the phenomenon.<sup>2</sup> Many factors indirectly influence prison populations, such as crime rates, police vigor, prosecutorial discretion, and sentencing policy.<sup>3</sup> At the most basic level, however, only two factors affect prison population directly: prisoners coming in and prisoners going out. This Note focuses on a subset of the first cause—persons entering prison as a result of new convictions. This category excludes those readmitted to prison for parole violations

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the total U.S. state prison population as 319,598 in 1980, 743,382 in 1990, and 1,316,333 in 2000, which shows that the total has more than quadrupled in twenty years); *cf.* U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790 TO 2000 A-1 (Sept. 2002) available at <http://www.census.gov/prod/2002pubs/pol02marv-pt1.pdf> (listing total U.S. population as 227 million in 1980, 249 million in 1990, and 281 million in 2000, showing a 24% increase over the same period). Including local jails and federal prisons brings the American incarceration total to over 2 million. PAIGE M. HARRISON & JENNIFER C. KARBURG, U.S. DEP'T OF JUSTICE, NCJ 203947, PRISON AND JAIL INMATES AT MIDYEAR 2003 1 (2004) (reporting 2,078,570 persons incarcerated).

2. See, e.g., Ralph Thomas, *Additional Expenses Grow State Budget*, SEATTLE TIMES, Nov. 28, 2003, at B1 (describing an increase in prison costs despite state efforts to reduce populations by early release of some offenders); Debra Jasper, *Prison Expenses Straining Budget: Some Lawmakers Consider Alternatives to Incarceration*, CINCINNATI ENQUIRER, May 28, 2001, at 1A ("Faced with a weakening economy and a Supreme Court mandate to fix public schools, some lawmakers are questioning whether Ohio can afford to keep locking up drug users or other nonviolent offenders."); Fox Butterfield, *With Cash Tight, States Are Reassessing Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1 (listing actions taken by states to reduce costs, such as Michigan's renunciation of mandatory minimums for drug offenders, Colorado's reduction of re-incarcerations caused by "technical parole violations," and Missouri's decision to allow property offenders to apply for release after serving only four months).

3. See generally Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, in PRISONS (Michael Tonry & Joan Petersilia eds., 1999); Michael Tonry, *Why are U.S. Incarceration Rates so High?* 10 OVERCROWDED TIMES, June 1999, at 1 (discussing how crime rates naturally affect prison populations because criminals comprise the "supply" of potential prisoners, although this ignores the occasional incarceration of innocents). An investigation of what drives crime rates lies beyond the scope of this Note. Suffice it to say that scholars diverge on this question. See, e.g., Eric D. Gould et al., *Crime Rates and Local Labor Market Opportunities in the United States: 1979-1997*, 84 REV. ECON. & STAT. 45 (2002) (arguing that low wages and unemployment drive young, unskilled men to crime); William Spelman, *What Recent Studies Do (And Don't) Tell Us About Imprisonment and Crime*, 27 CRIME & JUST. 419 (2000) (noting that the decrease in crime rates following the national quadrupling of prison capacity makes a prima facie case that incarceration reduces crime, but cautioning that "just as prison affects crime, so does crime affect prison, and it is difficult to isolate one effect from the other"); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 24 (1998) (collecting studies concluding that increased incarceration has a negligible effect on crime and studies concluding the opposite, that "each additional prisoner averts about fifteen index crimes"); Yair Listokin, *Does More Crime Mean More Prisoners? An Instrumental Variables Approach*, 46 J.L. & ECON. 181, 184 (2003) (using abortion data from the 1970s to normalize crime and imprisonment data from the 1990s and finding that "a 1% change in crime leads to a corresponding 1% change in admissions"); John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON. 379 (2001) (attributing at least 50% of the drop in the U.S. crime rate during the 1990s to legalization—and consequent greater use of—abortion in the 1970s following *Roe v. Wade*, 410 U.S. 113 (1973)).

or other similar reasons.<sup>4</sup> Comprehensive policy-oriented analysis of prison populations requires investigating not only sentencing policy but also other policy choices affecting sentence length, such as charging behavior by prosecutors and the availability of parole.<sup>5</sup> Nonetheless, the number of offenders entering prison each year obviously affects prison populations and, consequently, state corrections budgets. With political pressures mounting in favor of so-called “truth in sentencing” (TIS) laws,<sup>6</sup> as well as the demand for harsh treatment of violent offenders,<sup>7</sup> controlling whether certain offenders enter prison at all—as opposed to regulating how much time they serve—remains an important means of controlling the population. This Note examines the patterns of new admissions in state prison systems, identifying those states that have exhibited unusual drops in new admissions over a sustained period. After using an empirical analysis of admissions statistics to find the outlying states, the Note examines case studies of the outliers, seeking explanations for their unusual results. This Note argues that, given states’ desires to reduce prison costs, they should adopt certain

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4. The National Archive of Criminal Justice Data (NACJD), founded in 1978 as part of the Inter-University Consortium for Political and Social Research (ICPSR) and supported by the Bureau of Justice Statistics (BJS) and the National Institute of Justice (NIJ) in the U.S. Department of Justice, maintains records of prison populations. See NACJD, *NACJD Front Page*, at <http://www.icpsr.umich.edu/NACJD/index.html> (on file with the University of Michigan Journal of Law Reform). Each year’s data set includes files of “Prison Admissions Data,” “Prison Releases Data,” and “Parole Releases Data.” See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NATIONAL CORRECTIONS REPORTING PROGRAM, 2000 (2003).

5. See L. TRUITT ET AL., ABT ASSOCIATES, INC., MULTI-SITE EVALUATION OF SENTENCING GUIDELINES: FLORIDA AND NORTH CAROLINA, FINAL REPORT, EXECUTIVE SUMMARY 2 (2000) (on file with the University of Michigan Journal of Law Reform) (“One cannot study sentencing guidelines without examining truth in sentencing and other release policies that also affect time served and, consequently, demand on correctional resources.”).

6. See PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 170032, SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 1 (1999) (defining truth in sentencing laws as those that “require offenders to serve a substantial portion of their prison sentence,” usually restricting or eliminating parole and other early release programs); WILLIAM J. SABOL ET AL., URBAN INSTITUTE JUSTICE POLICY CENTER, THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS iii (2002) (describing federal incentives for state enactment of TIS laws, such as grant money to cover the added costs of incarcerating violent offenders for additional time).

7. See SABOL ET AL., *supra* note 6, at 1 (describing spending under the federal Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants to “ensure that [prison] cell space is available to incarcerate violent offenders”); Chet Kaufman, *A Folly of Criminal Justice Policy-Making: The Rise and Demise of Early Release in Florida, and its Ex Post Facto Implications*, 26 FLA. ST. U. L. REV. 361, 381 n.92 (1999) (observing pressures on Florida lawmakers and noting that “[m]any states around the country chose to deal with the increase in crime over the past twenty years by enacting more punitive penal laws. In a number of states like Florida, that led to prison overcrowding and court-ordered prison population ceilings.”).

practices used successfully in North Carolina and Connecticut, specifically the robust funding of non-prison alternative sanctions, the use of computer modeling of prison costs, and the requirement of “fiscal notes” accompanying proposals to amend criminal sentencing laws.

Part I discusses general trends in new admissions and prison populations over the past two decades. It reviews the major factors affecting prison populations and explores some of the major developments in sentencing policies. Part II explains the methodology of case study selection, including the use of index years and normalization to allow more relevant comparisons among the states. Part III investigates selected cases and evaluates the results in hope of providing guidance to would-be state reformers desiring to reduce their state’s new admissions. Because the states have adopted so many varied approaches in response to this problem, an examination of some states that have achieved the intended result should prove helpful.

This Note contributes to the ongoing sentencing debate highlighted by the Supreme Court’s decisions in *Blakely v. Washington*<sup>8</sup> which invalidated certain provisions of Washington’s criminal sentencing laws and cast doubt on the constitutionality of other state systems,<sup>9</sup> and *United States v. Booker*,<sup>10</sup> which invalidated certain uses of the United States Sentencing Guidelines. Whatever the resolution of the constitutional issues, states will need to know what

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8. 124 S. Ct. 2531 (2004).

9. Some have expressed worry that North Carolina’s sentencing system, which receives favorable reviews *infra*, may suffer under *Blakely*’s progeny. State judges had been finding aggravating sentencing factors in ways quite similar to the Washington practice repudiated by *Blakely*. See, e.g., Benjamin Niolet, *Judges’ Sentencing Latitude Restricted*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 9, 2004 (“[I]t is unclear whether thousands of inmates will have grounds for new sentences.”); Douglas A. Berman, *The Blakely Earthquake Hits North Carolina*, SENTENCING LAW AND POLICY, Sept. 7, 2004, available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2004/09/the\\_emblakelyem.html](http://sentencing.typepad.com/sentencing_law_and_policy/2004/09/the_emblakelyem.html) (“[T]wo different appellate panels found, without much hesitation, that *Blakely* rendered unconstitutional aspects of North Carolina’s state sentencing system.”). See also *State v. Harris*, 602 S.E.2d 697, 702 (N.C. Ct. App. 2004) and *State v. Allen*, 601 S.E.2d 299, 305–06 (N.C. Ct. App. 2004). Whatever the eventual conclusion of the post-*Blakely* cases, the specific policies lauded *infra* should not be affected. For example, the fiscal note requirement and the diversion of non-violent drug offenders away from prison face no constitutional threat. The Sixth Amendment questions, while quite interesting, are therefore nonetheless tangential to the focus of this Note (unless, of course, someone found that the practices at issue in *Blakely*, *Booker*, and their progeny have predictable effects on prison admissions, a theory the author has not seen articulated).

10. 125 S. Ct. 738 (2005).

works when crafting their criminal codes.<sup>11</sup> Supreme Court doctrine may constrain the choices available to state legislators; it cannot change the facts about what works.

## I. TREMENDOUS GROWTH IN AMERICA'S PRISONS

### *A. Dissatisfaction with Indeterminate Sentencing—Moves Toward Reform*

In the 1970s and 1980s, states moved away from the indeterminate sentencing and rehabilitative justice models that had dominated American criminal jurisprudence for much of the twentieth century.<sup>12</sup> Whereas in 1970 the federal system and every state criminal justice system had adopted some kind of indeterminate sentencing<sup>13</sup>—in which judges and correctional officials possess broad latitude regarding sentencing and release decisions—the following decades saw nearly every state, as well as the federal government, restrict discretion in favor of predetermined sentences. As the Supreme Court noted in *Mistretta v. United States*,<sup>14</sup> the enactment of the United States Sentencing Guidelines accompanied a shift in American policymakers' beliefs about the purpose of imprisonment.

Both indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society. It obviously

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11. For a refreshing break from the usual academic neglect of state sentencing, see Symposium, *Sentencing: What's at Stake for the States?*, 105 COLUM. L. REV. (forthcoming May 2005).

12. See Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 414–18 (2003) (outlining the rise of more punitive policies).

13. See Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS. 99, 99 (Summer 2003). Under indeterminate sentencing, judges often had the option of sentencing a convict to anything from probation to the statutory maximum sentence, which could be decades of incarceration. Also, sentences imposed at trial usually contained a range, allowing corrections or parole officials to determine how much of the potential sentence would actually be served. Judges and parole boards attempted to base their decisions on a prisoner's chances for "rehabilitation," meaning that a judge would sentence a convict deemed a good candidate for rehabilitation to a lighter sentence, and the parole board would release the convict when it judged her rehabilitation completed.

14. 488 U.S. 361 (1989).

required the judge and the parole officer to make their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation. As a result, the court and the officer were in positions to exercise, and usually did exercise, very broad discretion.<sup>15</sup>

Once the belief in rehabilitation as a goal—or even a realistic possibility—disappeared, the justification for indeterminate sentencing evaporated too.<sup>16</sup> For indeterminate sentencing was not without its drawbacks: similar offenders could receive drastically different sentences before different judges, or even before the same judge on different days.<sup>17</sup> Researchers also documented so-

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15. *Id.* at 363.

16. Disbelief in rehabilitation grew from experience with the realities of imprisonment. Rehabilitation-based models of sentencing presume two things (among others): First, that rehabilitation is indeed possible in prison, and second, that judges (and others involved in the sentencing process) can evaluate individual convicts' prospects for rehabilitation. Unless those beliefs are true, it makes little sense to speak of judges giving sentences aimed at preparing prisoners for their return to society. After all, if judges cannot accurately distinguish between prisoners, then their sentencing disparities cannot be easily justified. *See* S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 (rejecting these beliefs and claiming that "every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances"). The report also stated:

In the federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the parole commission is to determine when to release the prisoner because he is 'rehabilitated.' Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.

*Id.* *See also* FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 24–43 (1974); *Mistretta*, 488 U.S. at 364–66 (noting the senate report's evaluation of sentence disparities absent realistic hope for rehabilitation as "shameful"). *But see* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979) (casting doubt on previous conclusions by Martinson and others that rehabilitation does not work, and finding some examples of successful programs).

17. Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentencing Disparity and its Reduction*, 43 U. CHI. L. REV. 109, 110 (1975) (arguing that disparate sentences actually *hinder* the goal of rehabilitation by angering and confusing prisoners, and quoting the Bureau of Prisons director as arguing that a "prisoner who must serve his excessively long sentence with other prisoners who receive relatively mild sentences under the same circumstances cannot be expected to accept his situation with equanimity"). The Bureau of Prisons director went on to speculate that disparate sentences are among the "major causes of prison riots" and "one of the reasons why prisons so often fail to bring about an improvement in the social attitudes of their charges." *Id.* at 111. *See also* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21 (2000) (discussing continuing problems of disparity).

cioeconomic and racial disparities in sentencing.<sup>18</sup> When Florida, for example, decided to draft its own sentencing guidelines, a stated goal was “to examine the extent and causes of sentencing disparity.”<sup>19</sup> The combination of disbelief in rehabilitation, perception of unfairness under the status quo, and desire to punish crime severely, led to increasingly determinate sentencing rules across the country.

Rising crime rates also help explain the desire for more punitive sentencing. From 1950 to 1965, the national homicide rate grew rather slowly from 4.6 per 100,000 people to 5.1.<sup>20</sup> By 1972, the rate had climbed to 9.0, and it remained around that level or higher until 1995.<sup>21</sup> Actual increases in crime, as well as public perception that crime was out of control, prompted enactment of harsher sentencing regimes.<sup>22</sup> Additionally, the well-publicized crack cocaine

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18. See Blake Nelson, *The Minnesota Sentencing Guidelines: The Effects on Determinate Sentencing on Disparities in Sentencing Decisions*, 10 LAW & INEQ. 217, 219–20 & n.8 (1992) (describing liberal fears of bias as well as “law and order” fears of lenient sentences); see also Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1307 (1997) (reminding critics who decry the disparities under the Guidelines of the “ugly memory” of biases under pre-Guidelines indeterminate sentencing); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 237 & n.28 (1989) (describing public outrage at disparities “synonymous with discrimination on the basis of sex, race or social class,” and collecting studies documenting such disparities). Whether overt discrimination accounted for much or little of the disparities is of course impossible to determine with any certainty—the answer lies within the heads of countless judges, many now deceased. Regardless, the phenomenon of disparities among racial groups engendered support for sentencing reform among many. See Nelson, *supra*, at 220 & n.8 (collecting studies documenting disparities and noting influence on sentencing reforms).

19. Kaufman, *supra* note 7, at 374.

20. U.S. FBI, UNIFORM CRIME REPORTS, 1950–65. The Bureau of Justice Statistics maintains a web page about homicide statistics with this and other data. BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S., available at <http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm>.

21. U.S. FBI, *supra* note 20, at 1965–95. Homicide serves as a good indicator of crime in general for several reasons. First, homicide statistics are the most accurate of all crime statistics because homicides are nearly always reported, are tracked carefully by police, and are rarely fabricated. They also serve as an indicator for other violent crimes. See Ana Joanes, *Does the New York City Police Department Deserve Credit for the Decline in New York City's Homicide Rates? A Cross-City Comparison of Policing Strategies and Homicide Rates*, 33 COLUM. J.L. & SOC. PROBS. 265, 283–84 (2000) (“Police statistics tend to fully enumerate this offense because an overwhelming majority of homicides lead to arrests.”); Alfred Blumstein, *Violence Certainly is the Problem—And Especially with Hand Guns*, 69 U. COLO. L. REV. 945, 947 (1998) (“Probably the two crimes that are best measured in the UCR are homicide and robbery, largely because the definition of these offenses is reasonably well defined and stable over time.”).

22. See Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 623 (2002) (“[P]erception that law and order were suffering created political pressure.”); Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y



epidemic further convinced the public that getting tough on crime, especially drug crime, made sense. As Alfred Blumstein notes, “[T]he fear of crime and the anxiety over the possibility of being victimized certainly fuels the public concern and the political rhetoric—each of which, in turn, fuels the other.”<sup>23</sup> Thus, actual crime, the public’s fear of crime, and politicians’ need to answer public concern combined as forces for change, all pushing for greater determinacy in sentencing and stiffer punishments.<sup>24</sup>

### *B. Paths to Determinacy: How States’ Policies Changed*

The trend of reform, at least to some degree, is manifest in every state’s criminal justice system as well as in the federal system. Through mandatory minimums, sentencing guidelines, and other policies, each jurisdiction has limited judicial discretion in sentencing. By far the most controversial restrictions are the United States Sentencing Guidelines (USSG), which cover federal crimes and mete out sentences through a complicated grid.<sup>25</sup> Loosely following

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REV. 9, 9–10 (1999) (noting that “the ‘get tough’ movement has contributed to the United States’ current position as a world leader in the use of incarceration,” and arguing that “data are not very supportive of a strong relationship between locking up offenders and reducing crime”). Further inquiry into whether rising incarceration rates actually reduce crime is beyond the scope of this Note, which aims to assist those who have already decided to reduce prison admissions—presumably after deciding that benefits are outweighed by financial burdens—and wish to find ways of doing so. Interested readers might see Blumstein, *supra* note 21, at 965–67.

23. Blumstein, *supra* note 21, at 945.

24. Scholarship evaluating the normative arguments for indeterminate sentencing, rather than merely reviewing its history, would point out that despite its shortcomings, indeterminate sentencing has some important strengths. For example, it allows sentencing judges to tailor their decisions to the special circumstances presented in individual cases.

25. See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (Nov. 2004), available at <http://www.ussc.gov/2004guid/gl2004.pdf> (on file with the University of Michigan Journal of Law Reform). The Guidelines are promulgated under authority granted in 28 U.S.C. § 994(a) (2000). For an explanation of how judges apply the Guidelines to specific cases, see Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. REV. 1471, 1480–82 (2000). Because the USSG apply nationwide within the federal system, they receive much attention from legal scholars. See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); Kirby D. Behre & A. Jeff Ifrah, *You Be the Judge: The Success of Fifteen Years Under the United States Sentencing Guidelines*, 40 AM. CRIM. L. REV. 5, 5 (2003) (noting that “the unabated debate continues regarding the fairness and success of the Guidelines system”); Jennifer L. Cordle, *The Imagination is a Fertile Stomping Ground: Non-Enumerated Grounds for Departure from the United States Sentencing Guidelines Under § 5K2.0*, 47 CLEV. ST. L. REV. 193, 200–05 (1999) (discussing cases in which judges depart from sentences recommended by the USSG); Nancy Gertner, *Federal Sentencing Guidelines: A View From the Bench*, 29 HUM. RTS. 6, 6 (2002) (“[C]riticism of the federal sentencing guideline regime has come

the system of Minnesota—the first state to use guidelines<sup>26</sup>—Congress created the United States Sentencing Commission, which promulgates the USSG, with the Sentencing Reform Act of 1984.<sup>27</sup> Many states have since formed their own commissions or enacted guidelines through direct legislative action, yielding a variety of sentencing schemes. The state systems have generally been better received than the federal Guidelines.<sup>28</sup>

The simplest form of determinate sentencing is the mandatory minimum, and by 1996 each state had enforced some kind of mandatory minimum covering offenses ranging from violent crimes to habitual crimes to drug crimes.<sup>29</sup> Most jurisdictions had enacted at least one mandatory minimum well before that, the vast majority by the early 1980s.<sup>30</sup> Although mandatory minimums were not an invention of the late twentieth century—federal statutes mandated minimum sentences for some crimes in the late 1700s<sup>31</sup>—the prevalence of such laws spanning varying jurisdictions

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from all corners of the legal profession, including the judiciary and academia.”); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998) (discussing role of prosecutors and plea bargaining); Cassandra S. Shaffer, *Inequality Within the United States Sentencing Guidelines: The Use of Sentences Given to Juveniles by Adult Criminal Court as Predicate for the Career Offender Provision*, 8 *ROGER WILLIAMS U. L. REV.* 163 (2002).

26. See Act of April 5, 1978, ch. 723, art. 1, § 9, 1978 Minn. Laws 761, codified at MINN. STAT. § 244.09 (2003) (creating Guidelines Commission); see generally MINNESOTA SENTENCING GUIDELINES COMMISSION, MINNESOTA SENTENCING GUIDELINES: BACKGROUND INFORMATION AND SUMMARY STATISTICS (May 2001), available at <http://www.msgc.state.mn.us/Data%20Reports/background.pdf>.

27. Pub. L. No. 98-473, 90 Stat. 1837 (codified at 18 U.S.C. § 3551 *et seq.*). See *Mistretta v. United States*, 488 U.S. 361, 363–67 (1989) (upholding the Guidelines as constitutional, and tracing the history of their enactment).

28. Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 10 *FED. SENTENCING REP.* 46, 46 (1997) (“Unlike the deeply troubled federal guidelines, state sentencing guidelines reforms are thriving.”) [hereinafter Frase, *States*]. Some of the state guidelines, such as those in Minnesota, predate the USSG.

29. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, NCJ 169270, 1996 NATIONAL SURVEY OF STATE SENTENCING STRUCTURES 29 (1998) (describing mandatory minimums that “target habitual offenders (‘two or three strikes and you’re out’) and the crimes of possession of a deadly weapon (‘use a gun—go to prison’), drunk driving, and possession and/or distribution of drugs”). One should be careful about ascribing too much importance to the mere existence of mandatory minimums. If they cover conduct rarely prosecuted, or conduct likely to receive harsh treatment absent minimums, their actual impact can be small. The pattern of their enactment shows more about attitudes toward sentencing than about how convicts received sentences.

30. Beale, *supra* note 12, at 414 & n.5 (referencing MICHAEL H. TONRY, U.S. DEP’T OF JUSTICE, *SENTENCING REFORM IMPACTS 25* (Issues & Practices in Criminal Justice, 1987)) (reporting that forty-nine states applied mandatory minimums by 1983).

31. See, e.g., An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112 (1790) (requiring, among other specific sentences, the death penalty for piracy and treason). The amended statute now assigns life imprisonment to pirates. See 18 U.S.C. § 1651 (2000).

and modes of criminal behavior marked a substantial departure from past practices.

About half of the states use sentencing guidelines, basing sentences primarily on the conviction offense as well as the convict's prior criminal history.<sup>32</sup> The mechanics of sentencing vary from state to state, with some using two-dimensional grids and a smaller number of states using narrative rules for each offense.<sup>33</sup> The states vary considerably in their ranking of the severity of various offenses, their determinations of criminal histories, and the factors that permit departure from the recommended sentence.<sup>34</sup> Additional differences include whether a state has abolished parole, whether trial court sentences are subject to appeal, whether guidelines are mandatory or voluntary, whether they cover misdemeanors or only felonies, and whether they aim to be descriptive (i.e., to inform judges of common practice) or prescriptive (i.e., to change sentencing practices).<sup>35</sup> States without guidelines have instituted their own determinate sentencing laws. Techniques included "three strikes and you're out" policies,<sup>36</sup> cut-backs in parole, and broader definitions of criminal behavior.<sup>37</sup>

The states' treatment of juvenile offenders has seen similar trends toward determinacy and tough sentencing. A large majority of states has passed laws facilitating the transfer of juveniles to the adult criminal justice system, with its accompanying stiff penalties described above.<sup>38</sup> This phenomenon, seen mostly in the 1990s,

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32. Frase, *States*, *supra* note 28, at 47. As of 1999, seventeen states have guidelines on the books, and at least eight more were considering their adoption. Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENTENCING REP. 69 (1999) [hereinafter Frase, *Minnesota*]. See Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington: Practical Applications for State Sentencing Systems*, 17 FED. SENTENCING REP. 60 (2004).

33. Grid systems plot offenses along one edge of a chart and mitigating and aggravating factors along another edge. A judge sentencing a convict would follow the row for the convict's offense until she reached the appropriate column for other sentencing factors (e.g., past criminal history). The cell at the row and column's intersection would contain the guideline sentence or sentencing range.

34. See Frase, *States*, *supra* note 28, at 47.

35. See Frase, *Minnesota*, *supra* note 32, at 70 (displaying state practices on a table).

36. These are known more technically as "recidivist statutes" or "career criminal" policies. See, e.g., 18 U.S.C. § 3559(c)(1) (2000) (imposing mandatory life sentence for certain three-time offenders); Fla. Stat. Ann. § 775.084 (setting penalty for "habitual felony offender"); see also 16B AM. JUR. 2D *Constitutional Law* § 656 (collecting caselaw).

37. See RYAN S. KING & MARC MAUER, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT 2 (2002) [hereinafter FISCAL RESTRAINT] (describing states' responses to the consequences of such policies).

38. PATRICIA TORBET ET AL., OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3, 59-61 (1996) ("Since 1992,

expands the reach of determinant sentencing to offenders likely to suffer the most from long-term incarceration.<sup>39</sup>

### C. Effects of the Determinacy Trend

As noted above, an explosion in America's prison populations has accompanied the rise of determinate sentencing.<sup>40</sup> Put simply, American prisons hold more offenders than ever, and convicts serve sentences far longer than those convicted of similar crimes in the past.<sup>41</sup> From 1991 to 1997 the total prison population increased by over 50 percent.<sup>42</sup> With an incarceration rate of 702 prisoners per 100,000 residents, the United States now leads the world, surpassing the previous leader, Russia, which incarcerates 628 of every 100,000.<sup>43</sup>

At the federal level, determinate sentencing has been criticized for exacerbating—rather than ameliorating—disparities in sentencing.<sup>44</sup> Federal drug sentencing causes the spilling of much

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all but 10 States adopted or modified laws making it easier to prosecute juveniles in criminal courts.”)

39. See generally JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NCJ 182503, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT x—xi (2003), available at <http://www.ncjrs.org/pdffiles1/bja/182503-1.pdf> (on file with the University of Michigan Journal of Law Reform) (finding “little evidence of efforts to customize [prison] programs for youthful offenders” and that a majority of states house youthful offenders with adults).

40. This rise is attributable, of course, not only to determinate sentences. The move toward more punitive sentencing regimes in the federal system and in the states is a major factor.

41. See Beale, *supra* note 12, at 415.

42. Mauer, *supra* note 22, at 10 (observing rise from 825,559 to 1,244,554).

43. THE SENTENCING PROJECT, U.S. PRISON POPULATION—TRENDS AND IMPLICATIONS 1 (2001) [hereinafter THE SENTENCING PROJECT], available at <http://www.sentencingproject.org/pdfs/1044.pdf> (on file with the University of Michigan Journal of Law Reform).

44. See, e.g., Louis Oberdorfer, *Mandatory Sentencing: One Judge's Perspective—2002*, 40 AM. CRIM. L. REV. 11, 13–14 (2003) (describing the bind felt by judges sworn to uphold the Constitution yet morally shocked by the Guidelines, and comparing their situation to that of judges forced to uphold fugitive slave laws). Scholars disagree about why the Guidelines have exacerbated the racial disparities in sentencing, but the widening of the gap between sentences given to whites and minorities is well documented. See Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 247 (1999) (“Surprisingly, the difference in average sentences between whites and African-Americans and Hispanics has grown greater in the federal system since the introduction of sentencing guidelines.”); DOUGLAS C. McDONALD & KENNETH E. CARLSON, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 181 (1993); Christopher M. Alexander, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 S. CAL. L. REV. 1717, 1730 (1997) (describing Guidelines' failure to ameliorate the disparate impact of imprisonment on black men); Floyd D. Witherspoon, *The Devastating Impact of the Justice*

academic and judicial ink, especially regarding the disparate treatment of crack and powder cocaine offenders.<sup>45</sup>

*System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 40 (1994) ("On average, black offenders sentenced to prison during this period had imposed sentences that were 41% longer than for whites (21 months longer)."). Blacks make up 40.3% of the federal prison population. FEDERAL BUREAU OF PRISONS, QUICK FACTS (Jan. 2004), available at <http://www.bop.gov/fact0598.html> (on file with the University of Michigan Journal of Law Reform). In 1995, blacks made up 35.6% of the federal prison population. See JAMES J. STEPHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 164266, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES 3 Tbl. 4 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/csfcr95.pdf> (on file with the University of Michigan Journal of Law Reform) (sorting inmates "by race/Hispanic origin and region"). One explanation for the racial disparities in federal incarceration concerns the "war on drugs." Drug offenders constitute 55% of federal inmates (as opposed to 20.4% of state prisoners), and black prisoners (in both the federal and state systems) are far more likely than their white counterparts to be incarcerated because of a drug offense. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, NCJ 200248, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2002 10–11 (2003) [hereinafter PRISONERS IN 2002], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf> (on file with the University of Michigan Journal of Law Reform). See generally HUMAN RIGHTS WATCH, UNITED STATES, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (May 2000, Vol. 12, No. 2 (G)), available at <http://www.hrw.org/reports/2000/usa/> (on file with the University of Michigan Journal of Law Reform) (detailing the impact of the war on drugs on nationwide prison population growth, and describing the disparate impact thereof on racial minorities). Of state prisoners admitted in 1996 for drug offenses, 62.6% were black. *Id.* Thus, the Guidelines' stiff penalties for drug offenses will exacerbate blacks' disproportionate presence in federal prisons. Whether this represents racist policymaking—Does law enforcement pick on blacks, or do blacks simply commit drug crimes at higher rates?—is perhaps debatable. Nonetheless, the effect of harsh drug sentences on the demographics of the federal prison population is not.

45. See HUMAN RIGHTS WATCH, *supra* note 44 ("The discrepancy in the treatment of those who traffic in crack cocaine versus powder cocaine traffickers is the most serious vice in the Guidelines today."); Froyd, *supra* note 25, *passim*. *Contra*, Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1225, 1266–67 (decrying a Minnesota case striking down a state law punishing crack-users more harshly than powder-users, and arguing that while black criminals may suffer disparate harms under such a scheme, law-abiding blacks—the vast majority of black citizens—enjoy disparate benefits as their communities suffer greatly from the crack epidemic); Kate Stith, *The Government Interest in Criminal Law: Whose Interest is it Anyway?*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 137, 153 (Stephen E. Gottlieb ed., 1993) ("[I]f dealers in crack cocaine have their liberty significantly restricted, this will afford greater liberties to the majority of citizens who are the potential victims of drug dealing and associated violent behaviors."). Drug offenders face other unintended difficulties created by the Guidelines. For example, the Guidelines allow departures from mandatory minimums for convicts who provide "substantial assistance" to federal investigations. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."). But, because most minor offenders, such as drug couriers, possess little knowledge of the grand plans of criminal enterprises, they rarely benefit from § 5K1 motions. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211–12 (1993) (describing the "cooperation paradox" in which major offenders benefit more often from sentence reductions). This paradox hits women especially hard because they often play minor roles at the behest of husbands, boyfriends, or other drug dealers who believe (correctly) that law enforcement will eye women less suspi-

State prisons, which hold the vast majority of incarcerated Americans,<sup>46</sup> saw similar increases in populations and sentence length. Because states adopted policies different from the federal government and from one another, specific effects varied among jurisdictions. But a few cases illustrate the pattern fairly well and show that many state reforms yielded unintended costly and arguably unjust consequences. In 1994 California initiated a “three strikes” law, which gives sentences of twenty-five years to life for offenders convicted of a third felony.<sup>47</sup> Analysis of the system demonstrates that despite the targeting of the law at the state’s most dangerous career criminals, the majority of the 50,000-plus convicts admitted to prison under the law committed non-violent crimes.<sup>48</sup> Offenders sentenced under the “three strikes” law have committed crimes as trivial as the petty theft of a can of beer and the jimmying by a homeless man of a church kitchen door.<sup>49</sup>

Florida eliminated parole in 1983 and implemented a habitual offender law in 1988.<sup>50</sup> It later reduced and then eliminated early release programs that rewarded good behavior, passed a

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ciously than men. *See* Froyd, *supra* note 25, at 1495 (“Men who have central roles in drug conspiracies are eligible for substantial assistance departures below the mandatory minimum guideline range, while women mules and couriers are subjected to lengthy mandatory sentences.”).

46. PRISONERS IN 2002, *supra* note 44, at 1 (reporting the total number of adults under state or federal supervision as 1,449,655, of which the federal system held 163,528). For comparison, note that Texas and California each held around 162,000 adult prisoners, and the top four states—California, Texas, Florida, and New York—had a combined population nearly three times as large as the federal prisons. *Id.*

47. CAL. PENAL CODE §§ 667(d), 1170.12(b) (West 2002). The law imposes mandatory penalties for those who, after being convicted of two serious felonies, commit another felony. The final felony need not be a serious one. *See* Alex Ricciardulli, *The Broken Safety Valve: Judicial Discretion’s Failure to Ameliorate Punishment Under California’s Three Strikes Law*, 41 DUQ. L. REV. 1, 2 (2002).

48. RYAN S. KING & MARC MAUER, AGING BEHIND BARS: “THREE STRIKES” SEVEN YEARS LATER 3, 8 (2001) [hereinafter THREE STRIKES], available at <http://www.sentencingproject.org/pdfs/9087.pdf> (on file with the University of Michigan Journal of Law Reform) (describing the law’s unintended consequences, including the tremendous cost of housing a prison population growing increasingly old as a result of long sentences).

49. *Id.* at 9–10. Voters rejected a 2004 ballot measure that would have limited “three strikes” penalties to those whose third offense was “violent” or “serious.” *See* CALIFORNIA SECRETARY OF STATE, OFFICIAL VOTER INFORMATION GUIDE: PROPOSITION 66, available at <http://www.voterguide.ss.ca.gov/propositions/prop66-title.htm> (on file with the University of Michigan Journal of Law Reform) (summarizing the fiscal impact as “[n]et state savings of potentially several tens of millions of dollars initially, increasing to several hundred million dollars annually, primarily to the prison system”); *see also* Editorial, *The Schwarzenegger State*, L.A. TIMES, Nov. 4, 2004, at B14 (describing a successful effort by the governor to defeat an “initiative that would have modified the three-strikes law so that a minor, nonviolent third strike would not send someone to prison for life”).

50. FLA. STAT. ANN. § 775.084 (West 2004) (defining punishments for “habitual felony offender” and “habitual violent felony offender”).

truth-in-sentencing law requiring prisoners to serve at least 85 percent of court-imposed sentences, and enacted a variety of mandatory minimums and sentence enhancements for specific crimes.<sup>51</sup> The state's policies have necessitated tremendous prison expenses, and have resulted in enormous human cost borne by the prisoners and their families. Tough economic times have forced what the St. Petersburg Times called a "long overdue" reevaluation of laws such as "mandatory-minimum sentences of 25 years for illegally carrying a pillbox-worth of drugs such as Oxycontin, a medication used to treat chronic pain that has been abused by the dance-club set."<sup>52</sup>

Rising costs have overwhelmed the states.<sup>53</sup> From 1985 to 1996, state correctional and prison expenses rose by an average of about seven percent annually, more quickly than costs for education and health care.<sup>54</sup> States spent an estimated \$38 billion on corrections during fiscal year 2001, an increase of 5.2 percent from the previous year.<sup>55</sup> As studies cast doubt upon the link between incarceration and public safety, states began seeking ways to reduce these costs.

#### *D. Efforts to Reduce Prison Populations and Expenses*

States desiring to reduce their prison budgets have two options: lower the prison population, or lower the per capita cost of hous-

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51. See FLORIDA DEPARTMENT OF CORRECTIONS, HISTORICAL SUMMARY OF SENTENCING AND PUNISHMENT IN FLORIDA (Mar. 2003), available at <http://www.dc.state.fl.us/pub/history/> (on file with the University of Michigan Journal of Law Reform) (charting changes in laws over time).

52. Editorial, *The Huge Costs of Harsh Sentences*, ST. PETERSBURG TIMES, Dec. 22, 2002, at 2D (directing legislators to fill the "gaping hole in the budget" through corrections reform).

53. See Robin Campbell, DOLLARS AND SENTENCES: LEGISLATORS' VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS 2 (2003), available at [http://www.vera.org/publication\\_pdf/204\\_398.pdf](http://www.vera.org/publication_pdf/204_398.pdf) (on file with the University of Michigan Journal of Law Reform) (recording roundtable of legislators facing "the worst budget crisis in a generation").

54. JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, NCJ 172211, BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 1996, at 1 (1999) [hereinafter STATE PRISON EXPENDITURES], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe9b.pdf> (showing growth of per capita expenses on prisons outpacing expenses for "health," "education," "public welfare," and "natural resources"). For comparison, note that the U.S. inflation rate (as measured by the Consumer Price Index) was below 6% during each year between 1985 and 1996 and usually fell below 4%. See ECONOMIC HISTORY SERVICES, WHAT WAS THE INFLATION RATE THEN?, at <http://www.eh.net/hmit/inflation/> (displaying Department of Labor CPI data from 1913-2002).

55. FISCAL RESTRAINT, *supra* note 37, at 11.

ing prisoners. Because the latter option bears immediate fruit—the moment one stops funding a corrections program, money returns to the general budget—states have moved quickly to house prisoners more cheaply. Unfortunately for prisoners and corrections officials, few magic bullets exist to lower costs without worsening prison life for inmates and staff. Illinois decided to cut college classes for 25,000 prisoners, despite evidence that prisoners who graduate exhibit far lower recidivism rates than the general population.<sup>56</sup> Florida cut prisoner education and drug treatment programs, and California reduced by 200 beds the size of a substance abuse facility.<sup>57</sup> Other states postponed or cancelled the construction of new prisons, leaving corrections officials to manage overcrowded facilities or find some way to lower the total populations, such as abandonment of programs “designed to smooth the process of reentry,” a choice Ohio’s prison head predicted would cause “a commensurate increase in crime.”<sup>58</sup> Many states simply cut corrections staff.<sup>59</sup> Connecticut considered sending more prisoners out of state, where they can be housed more cheaply.<sup>60</sup>

States also sought ways of reducing the prison population, often at the same time they investigated reductions in per capita expenses.<sup>61</sup> Many options considered and implemented consisted of repealing recent punitive sentencing laws. Connecticut, at the same legislative hearings at which the governor promoted shipping prisoners to Virginia, considered lessening the punishment for probation violators and increasing the availability of parole for prisoners near the end of their sentences.<sup>62</sup> In 2003, about half the states eliminated some of their mandatory minimums, reinstating parole and early release programs while offering treatment to

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56. *Id.* at 13 (reporting that graduates are recidivists 41% less often than the state prisoner average).

57. *Id.* at 12 (noting that Gov. Gray Davis proposed cuts aimed at saving \$3 billion over two years).

58. *Id.* at 11–15.

59. *Id.* (describing job losses for guards, as well as mandatory transfers and cuts in tuition assistance).

60. Dwight F. Blint, *Speakers Discuss State’s Crowded Prisons*, HARTFORD COURANT, Apr. 4, 2003, at B7 (quoting the governor and the corrections commissioner as supporting the idea).

61. See Jon Wool & Don Stemen, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003 (2004), available at [http://www.vera.org/publication\\_pdf/226\\_431.pdf](http://www.vera.org/publication_pdf/226_431.pdf) (on file with the University of Michigan Journal of Law Reform).

62. *Id.* (reporting testimony suggesting that “chairman of the board of parole be given the authority to transfer an inmate from prison to an approved public or private facility any time within 18 months of the inmate’s release date”).



some drug offenders rather than imprisonment.<sup>63</sup> Kansas mandated treatment instead of prison for first-time drug offenders not committing violent crimes.<sup>64</sup> Mississippi repealed its TIS law for non-violent offenders, allowing them parole after serving one quarter of their sentences as opposed to the eighty-five percent requirement under TIS.<sup>65</sup> Alabama prosecutors raised the monetary threshold for pursuing property offenders in hopes of reducing new prison admissions.<sup>66</sup> These law changes combat prison populations at both ends of the cycle—admissions and departures. Increased use of parole and “good time” policies moves prisoners out of the system more quickly, and non-prison alternatives such as drug treatment and work release prevent offenders’ entrances altogether.<sup>67</sup>

## II. METHODOLOGY OF CASE STUDY SELECTION

This Part explains how the states were selected for case study analysis. The goal was to find states with promising policies that could be adopted by sister states seeking to reduce their prison costs. Section A discusses the choice of new admissions as a measure of state policy, and Section B explains how states’ new admissions data were compared to one another. Section C identifies the selected case studies and demonstrates how they stood apart from other states. Analysis of the chosen cases appears *infra* in Part III.

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63. See Butterfield, *supra* note 2, at A1 (“Taken together, these laws ‘represent a real turning point,’ said Joseph Lehman, the secretary of the Washington Department of Corrections.”).

64. *Id.* at A15.

65. FISCAL RESTRAINT, *supra* note 37, at 5 (noting the requirement that drug felons undergo treatment to become eligible for release).

66. Butterfield, *supra* note 2, at A15 (observing the threshold rising from \$250 to \$500).

67. Because this Note focuses on new admissions data, states attacking prison budgets on the release end (through parole, good time, etc.) will not have their actions counted by this analysis. Only policies affecting how many offenders enter prison fall within the scope of this project.

A. *Why New Admissions and Not Total  
Population or Corrections Budgets?*

This Note's goal is to examine states that have successfully reduced new admissions to their prisons. Given that new admissions are but one factor contributing to prison population rates, and that prison populations themselves do not wholly determine corrections budgets,<sup>68</sup> some explanation for this emphasis is necessary. This Note examines trends affecting population rather than simply evaluating corrections expenditures because many efforts to cut per capita costs involve shortsighted decisions. Cutting education and drug treatment programs for prisoners might save money today, but the near certain boost in recidivism will plague the corrections budget in the future. Additionally, the human misery caused by recidivism argues against such policies even if they do not affect future budget cycles.

Identifying the appropriate measure of population data was more complex. The most obvious candidate was the total population of each state's prison system.<sup>69</sup> Subsets of this data set include release data, readmissions because of parole and probation violations, and new admissions, as well as phenomena affecting these numbers such as the crime rate. This Note eschews total population data because so many factors contribute to a state's total prison population. A state effectively moving prisoners out of its system quickly, perhaps by instituting parole, could go unrecognized in a study using total population if the state's new admissions or readmissions had a concurrent rise. The reverse is also clearly true. The choice among smaller data sets was somewhat arbitrary—another researcher could easily choose to write about release rates. But new admissions does have a few arguments in its favor. First, changes in policy that affect new admissions will likely cause measurable results almost immediately upon their enactment. For example, the elimination of a mandatory minimum sentence for a given crime—allowing judges to sentence offenders to work release or treatment rather than prison—should noticeably affect the

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68. Changes in per capita prisoner costs affect corrections budgets even when prison populations remain constant. See *supra* Part I.C.

69. Other studies evaluate state sentencing policies using total population statistics. See, e.g., Robert P. Mosteller, *New Dimensions in Sentencing Reform in the Twenty-First Century*, 82 OR. L. REV. 1, 11–14 (2003) (contrasting the substantial growth in Oregon's total population with the national trend of "leveling off"); David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 94–96, 104, 114 (discussing reforms' effects on Washington state prison population).

following year's new admissions rates and have a sustained impact over the following years. Conversely, release policies will often phase in slowly as offenders already in prison meet the relevant criteria. Additionally, there is some appeal in tracking efforts to reduce the number of Americans who go to prison at all, which seems a worthy goal given America's current status as the world's incarceration leader.<sup>70</sup>

### *B. Comparing New Admissions Data Across the Several States*

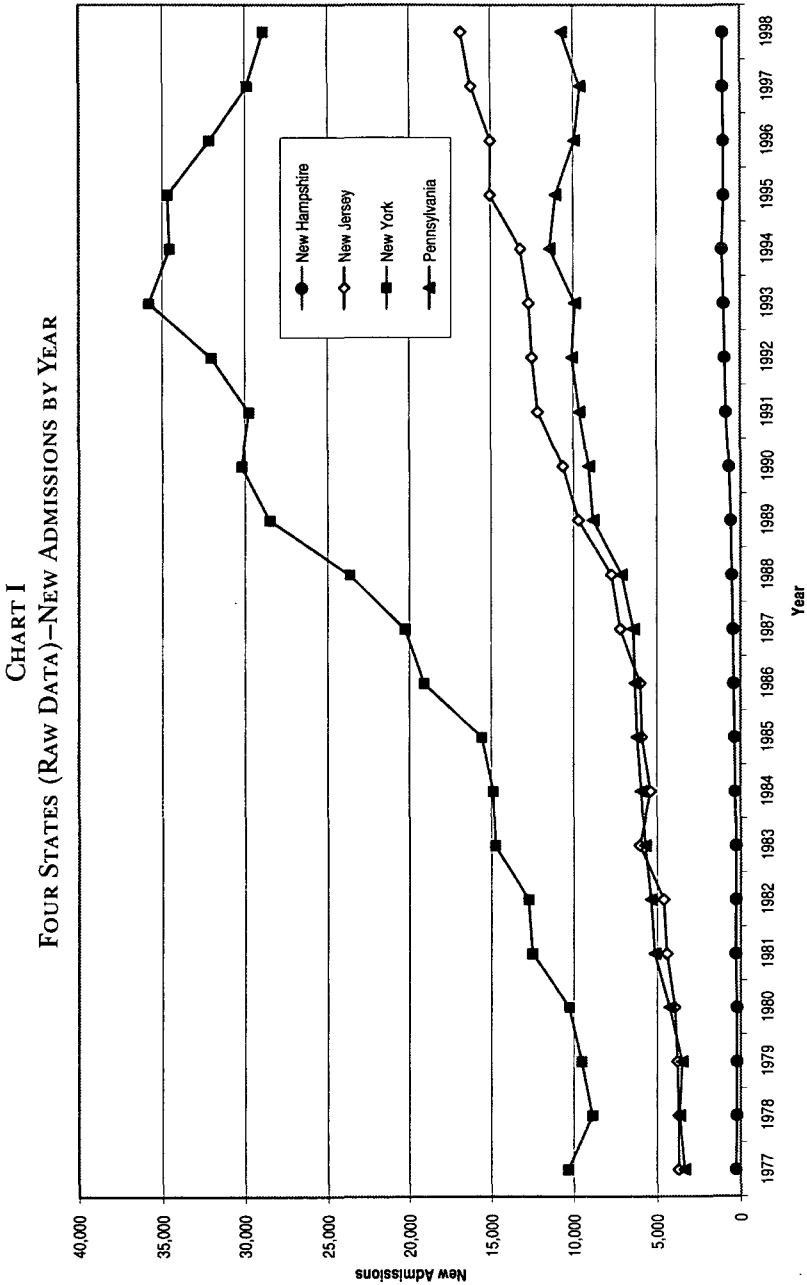
Because states vary in size and experience national trends at different times,<sup>71</sup> comparing prison admissions data across jurisdictions is a complicated business. The selection of case studies therefore required a multi-step analysis of admissions data. First came an examination of the raw data, which were converted into a graph for each jurisdiction.<sup>72</sup> Chart I demonstrates the difficulty of this comparison. Although all four states represented on the chart saw similar trends in new admissions over the relevant time period, the difference in scale makes sensible analysis nearly impossible.

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70. See Listokin, *supra* note 3, at 184 & n.10 (discussing the pros and cons of using new admissions as opposed to total prison population for a study comparing crime rates to imprisonment).

71. For example, a national uptick in crime might begin in the Northeast and then spread nationwide. Or a kind of sentencing reform might take hold in the South before being copied by states in other regions.

72. Each graph had years on the x-axis ranging from 1977 to 1998. Entries on the y-axis represented the annual new admissions. Because the state prison systems vary so starkly in scale, graphing multiple states on the same set of axes provided no useful basis for comparison. In addition to each state's graph, graphs were prepared for four regions (Northeast, Midwest, South, and West) as well as for the state prisons as a whole; these helped establish a basis for deciding what constituted a "normal looking" graph.



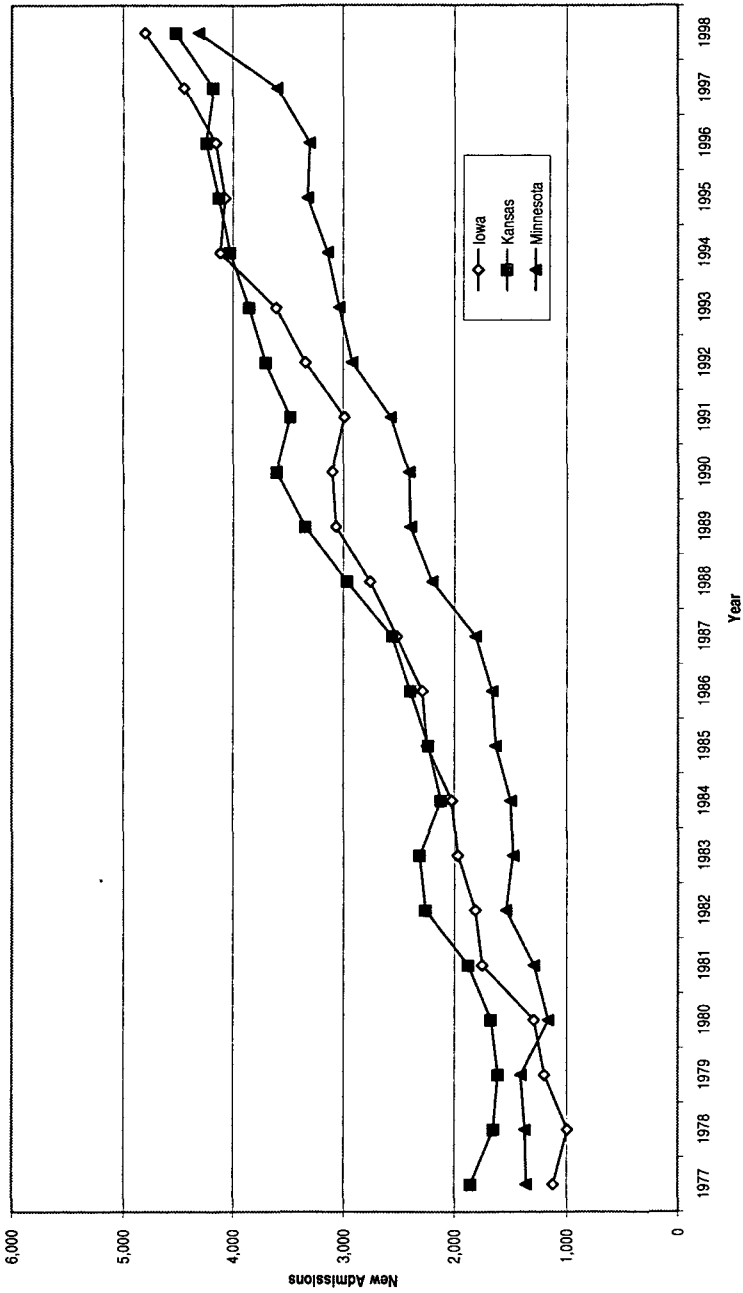
Despite the impracticality of direct comparisons through graphing states' data on the same sets of axes, the raw data provide valuable insight.<sup>73</sup> Graphing each state's data individually (with the values on the y-axis adjusted to fit the graph onto a standard page) allowed one to compare the basic shape of the curves. Most of the states looked somewhat like those represented on Chart II.<sup>74</sup> The normal pattern displayed steady growth over the entire period. Some small dips and spikes appeared, but the general trend appeared almost linear.

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73. These graphs display data gathered by the Bureau of Justice Statistics. *See* COLIECE RICE & PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SENTENCED PRISONERS ADMITTED TO STATE OR FEDERAL JURISDICTION (Aug. 8, 2000) [hereinafter *NEW ADMISSIONS*], available at <http://www.ojp.usdoj.gov/bjs/data/corpop13.wk1>. When one graphs the fifty states' prison admissions individually over time (as well as those of the District of Columbia), one gets a feel for the "normal" appearance of the curve. Such comparisons by their nature lack scientific exactitude, but they provide a good method for spotting major outliers, which are the focus of this Note.

74. The chart displays data for Iowa, Kansas, and Minnesota, which were chosen because their data curves looked like the "normal" result and because they have prison systems of comparable size, allowing them to be graphed together intelligibly.

CHART II  
"NORMAL" STATE PATTERN—NEW ADMISSIONS BY YEAR



In contrast, three states showed unusual results. Each had a sharp spike in new admissions around the second half of the 1980s, followed by a steep drop lasting for four or more years. The data from those states—Connecticut, Florida, and North Carolina—appear below. Each is graphed separately because of the huge disparities among these states in the size of their prison systems. In 1998, the last year represented on the graphs, Connecticut prisons housed 17,605 offenders, compared with 31,961 in North Carolina and 67,224 in Florida.

CHART III.A  
CONNECTICUT—NEW ADMISSIONS BY YEAR

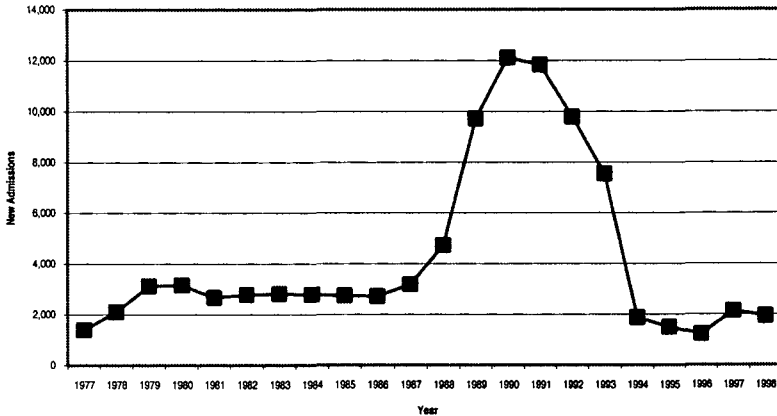


CHART III.B.  
FLORIDA—NEW ADMISSIONS BY YEAR

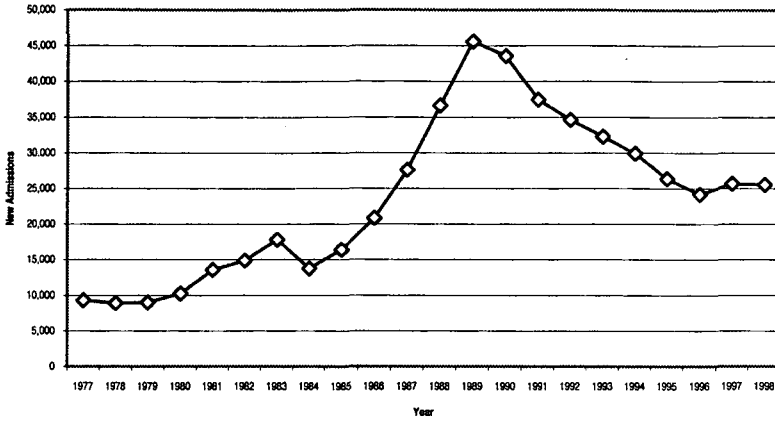
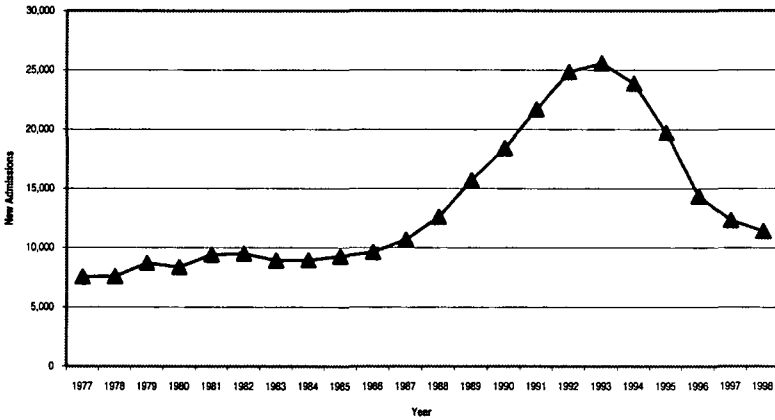


CHART III.C  
NORTH CAROLINA—NEW ADMISSIONS BY YEAR



At first glance, something about these states' results seemed odd. Rather than showing the relentless rise common nationwide, the numbers in all three states dropped sharply, implying that some state-specific factors caused them to buck the trend. Further investigation confirms this initial suspicion.



To allow for more rigorous comparisons across states, adjustments were required to account for differing population sizes and nonconcurrent experience of national trends. In other words, it is necessary to compare big states with little ones and to compare states with similar looking curves shifted over a few years from one another.<sup>75</sup> First, each state received an “index year,” which denoted the year it began what best approximated the normal results seen across the states.<sup>76</sup> Once a state had an assigned index year, its data were reevaluated beginning with that year (on a graph on which the index year was “year zero”).<sup>77</sup>

Chart IV is a graph of four states whose data have been indexed and normalized.<sup>78</sup> These states—New Hampshire, New York, New Jersey, and Pennsylvania—are the same as those whose raw data were displayed together in Chart I. Comparisons across the four states are now much more useful.

The four states appear to have experienced similar trends in new admissions. Each has seen its numbers increase substantially, and there appears to be a general moderation—a leveling of the curve—near the end of the data set.

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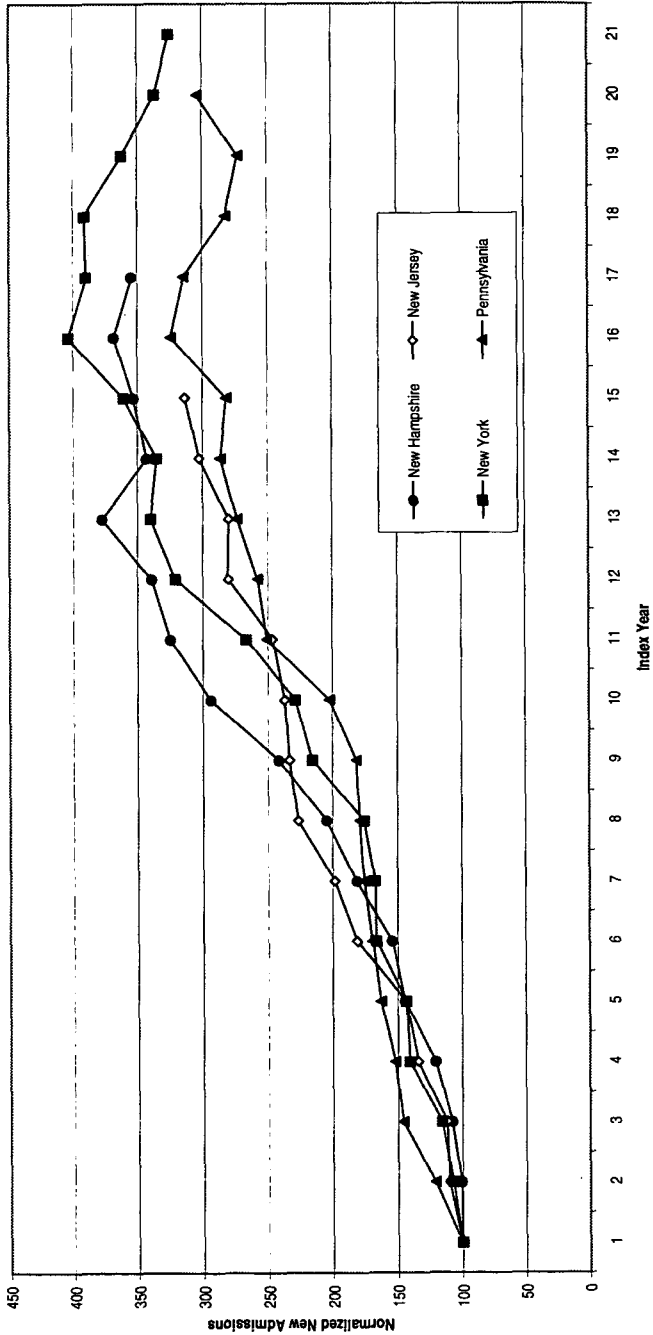
75. Imagine two states with curves of similar shape (e.g., a slow, almost flat increase for a few years, followed by more robust increases for the rest of the time period). If one state begins its robust growth in year  $x$  and another does so in year  $x+4$ , the states will appear on the surface to have rather different results. If, however, the second state's later growth resulted from a national trend experienced in the first state a few years before the second (e.g., rising economic hardship contributing to crime rates), then the differing results will have little to nothing to do with the states' comparative policy decisions.

76. For most states, the index year represents the time at which the state began experiencing faster growth in new admissions, and the years before the index year saw slower—often nearly flat—growth. Index years hovered around 1984, which accords with trends in national criminal justice policy. *See supra* notes 25-29 and accompanying text (describing policy changes, such as the enactment of mandatory minimums, occurring in the early 1980s).

77. To foster useful comparisons among states of varying magnitudes, each state's numbers were “normalized.” Each state's numbers were divided by a constant, chosen so that its new admissions in “year zero” equaled one hundred. With the states indexed and normalized, one could compare any group of states on the same set of axes, compare a state to the total results for its region, or compare states to the U.S. state prison new admissions as a whole.

78. *See supra* note 77.

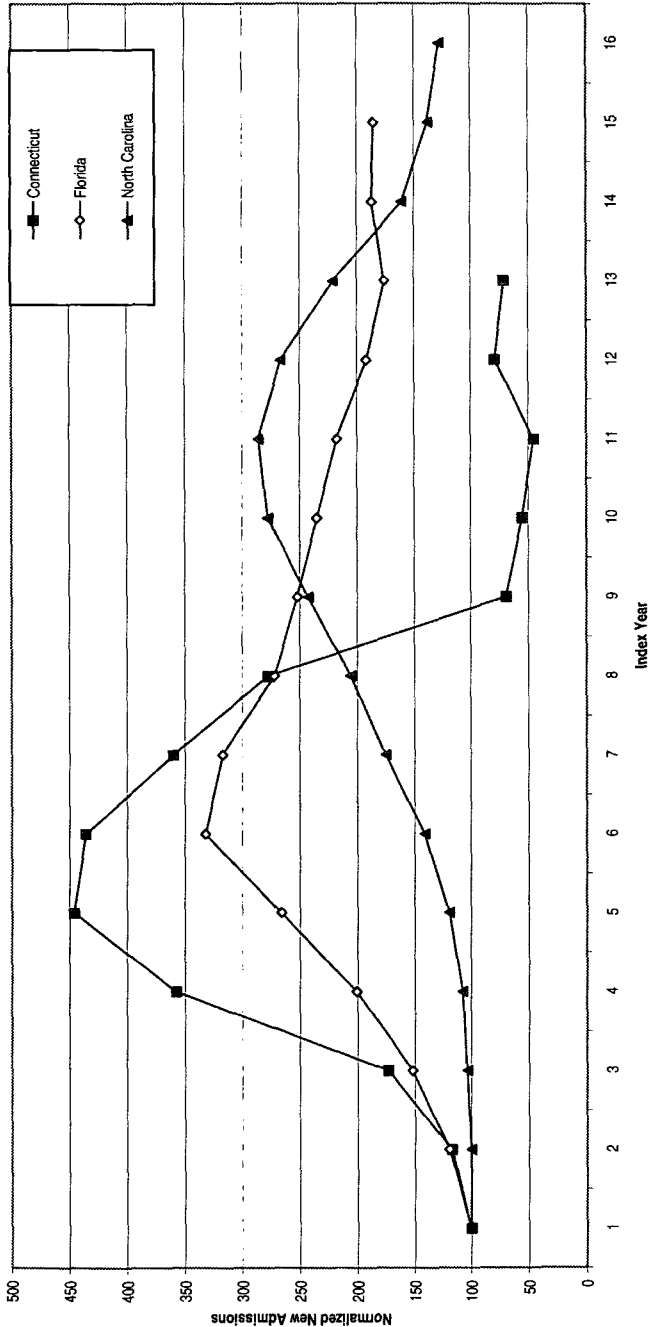
CHART IV  
NEW ADMISSIONS BY YEAR IN FOUR STATES —INDEXED AND NORMALIZED



Three states stood apart upon post-indexing, post-normalizing analysis: Connecticut, Florida, and North Carolina. Their normalized and indexed data appear in Chart V.

A more thorough investigation supports the suspicion drawn from the raw data. Each displayed sharp drops in new admissions over a sustained period in the early to mid-1990s, unlike other states in their regions and nationally, which tended to exhibit steady growth with small, if any, reductions in new admissions coming near the end of the data set.

CHART V  
NEW ADMISSIONS IN THREE SELECTED CASE STUDY STATES—INDEXED AND NORMALIZED



### III: CLOSE EXAMINATION OF THREE STATES WITH DROPS IN NEW ADMISSIONS

The remainder of this Note concerns less scientific, more descriptive investigations of the three chosen states showing drops in new admissions. This Part aims to report what policy changes—if any—caused the unusual drops in new admissions discovered in the research discussed in Part II. Additionally, it will discuss the political and social contexts of any relevant policy choices. After reporting the case studies, this Part concludes with a discussion of what general lessons one can learn from the three states surveyed as well as the national trends in admissions and sentencing discussed in Part II. It argues that diverting minor criminals to non-prison alternatives leads to reductions in new admissions. Additionally, it reports that the choices made by North Carolina when armed with computer projection data in fiscal notes led to reductions as well, demonstrating the ability of states to act deliberately when making sentencing policy.

#### *A. North Carolina—Computers and Fiscal Restraint*

Like every other jurisdiction, North Carolina applied indeterminate sentencing in the 1960s, with no statutes, court decisions, or court rules guiding sentencing.<sup>79</sup> Since then it has repeatedly revised its sentencing policies, engaging in much legislative debate, establishing commissions, and experimenting with varieties of sentencing strategies.<sup>80</sup> It followed the national trend of enacting

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79. See Louis B. Meyer, *North Carolina's Fair Sentencing Act: An Ineffective Scarecrow*, 28 WAKE FOREST L. REV. 519, 530 (1993). For a colorful history of North Carolina's sentencing laws before this time, see *id.* at 521–25 (describing the use of prisoners to meet the labor needs of the highway department, the use of stocks in colonial times, and the reliance during the antebellum era on corporal punishment methods deemed “archaic and excessive” in other states).

80. An abundance of commentary about the state of sentencing policy in 1993 exists in Symposium, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 181 (1993), an entire issue devoted to sentencing policy. For more on North Carolina specifically, see Ronald F. Wright & Susan P. Ellis, *A Progress Report on the North Carolina Sentencing and Policy Advisory Commission*, 28 WAKE FOREST L. REV. 181, 421, 421 (1993) (calling the “system for sentencing prisoners in North Carolina . . . too bad to ignore”). One should remember that in 1980 North Carolina ranked first among the states in incarceration rates (i.e., the percentage of its residents locked up in prison), implying that some sort of reform was needed. See PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INCARCERATION RATES FOR PRISONERS UNDER STATE OR FEDERAL JURISDICTION,

mandatory minimums in the early 1980s by passing the Safe Roads Act of 1983, which includes mandatory prison time for some drunk drivers.<sup>81</sup> More significantly, the state enacted, after several years of debates, revisions, and postponements, the Fair Sentencing Act (FSA), which went into effect in 1981.<sup>82</sup> The FSA stipulated presumptive sentences for felonies, allowing judges to depart from the recommended range (within, of course, the statutory minimums and maximums) only in limited cases.<sup>83</sup> Judges departing from the presumptive punishments were required to provide written justification of their decisions, listing every aggravating and mitigating factor that led to the departure.<sup>84</sup> The FSA also eliminated parole for adults (with the exception of a ninety-day reentry period before release), thereby increasing the importance of various “good time” and “gain time” options.<sup>85</sup>

The FSA achieved some of its goals in the years immediately following its enactment.<sup>86</sup> Early results indicated that the FSA was saving courts time, yielding less disparate sentences for similar crimes, and causing a slight reduction in sentence severity.<sup>87</sup> This conclusion, that serious offenders were not likely to avoid prison altogether but prisoners would on the whole receive more moderate punishment,<sup>88</sup> accords with the data on new admissions. North Carolina admitted 9,402 prisoners in 1981. Over the next five years, the state averaged 9,257.2 new admissions annually, meaning new admissions remained basically constant. Thus the legislature

PER 100,000 RESIDENTS (June 13, 2000) [hereinafter INCARCERATION RATES], available at <http://www.ojp.usdoj.gov/bjs/data/corpop25.wk1>. Then again, someone has to come first.

81. Wright & Ellis, *supra* note 80, at 431 (“One effect of mandatory sentencing in the DWI, as well as in certain drug offense contexts, has been to retain in the prison population a significant segment of low-risk, nonviolent offenders.”)

82. N.C. GEN. STAT. § 15A, art. 81A (1983) (repealed 1993).

83. See Meyer, *supra* note 79, at 545–48 (discussing efforts to balance judicial discretion with a legislative desire to see certain criminals receive specific punishments).

84. *Id.* at 549–51 (listing potential aggravating and mitigating factors).

85. *Id.* at 552 & n.214 (noting that “[g]ood time is treated as being earned more or less automatically,” but “[a]ll gain time awards under the FSA involve considerable discretion by prison officials, especially awards of ‘meritorious’ gain time”).

86. See *id.* at 519 (listing goals such as “diminution of sentencing disparity, racial disparity, and prison population”); David G. Lerner, Comment, *North Carolina’s Fair Sentencing Act: Is It Fair?*, 20 WAKE FOREST L. REV. 165, 174 (1984) (quoting the statute’s four stated goals, which include the imposition of “a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender’s culpability”); N.C. GEN. STAT. § 15A-1340.3 (1983) (repealed 1993).

87. Meyer, *supra* note 79, at 560 n.270 (“The data indicated that of the 20 felonies for which convictions most frequently occurred, time served in prison generally decreased and varied less for those sentenced after the Act than for those sentenced prior to its passage.”).

88. The FSA aimed to ensure that prison space would remain for new violent criminals by moderating the sentences given to other convicts.

achieved its desire to punish serious offenders while not clogging state prisons with smaller time criminals.

Another factor contributing to this success was the state's implementation of the Community Penalties Program, which diverted less dangerous offenders to non-prison punishments. The program was adopted in 1983, and a 1990 study found it "had succeeded in targeting those defendants likely to receive substantial prison terms without program intervention and sharply reducing, for those defendants, the use of prison sentences of twelve months or longer."<sup>89</sup> Anything that diverts offenders from the prison system obviously serves to reduce new admissions numbers. Additionally, because Justice Department statistics define "prisoners" as those admitted for sentences longer than one year, the Community Penalties Program further reduces new admissions data when it leads to sentences of less than one year.<sup>90</sup>

Unfortunately for the prison budget, the benefits of the FSA were short-lived. Judges soon discovered that promised appellate review of sentences under the FSA came rarely, and legislative and judicial changes combined to alter the law's effect.<sup>91</sup> The law's positive effects "seem[ed] to have 'worn off' in the five years [after] the Act went into effect: felony sentences . . . gradually lengthened, and the range of variation . . . gradually widened. By 1985-1986, the length and variation of sentences appeared to be returning to their pre-[FSA] levels."<sup>92</sup> Judges returned to past practices once they realized the FSA would not stop them.<sup>93</sup> New admissions data support the theory that moderate sentencing became more rare around 1985 or 1986. From 1987 to 1991, admissions doubled from 10,692

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89. Wright & Ellis, *supra* note 80, at 428-29.

90. This might seem at first like a cheap substitute for actually reducing new admissions; however, because offenders sentenced to less than one year traditionally serve their time in local jails or other facilities—and may enjoy some form of work or study release—the reduction in prison budgets is as real as a sentence of no time at all.

91. Wright & Ellis, *supra* note 80, at 426-27 (noting that judicial frustration with the results of "good time" and "gain time"—which combined to cause many offenders to serve only fractions of their sentences—led judges to "find" more aggravating factors so they could impose harsher sentences).

92. Meyer, *supra* note 79, at 563.

93. Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 CRIME & JUST. 39, 39 (2002) (explaining judges' behavior by noting that the "statute lacked any enforcement mechanism"). Some of the judges' frustrations resulted from the acts of their brethren on the federal bench. North Carolina enacted emergency measures to reduce its prison population after federal litigation forced the state to eliminate "triple bunking" and to provide more square footage per prisoner. *Id.* at 48-51. See *Small v. Hunt*, 98 F.3d 789, 792 (4th Cir. 1996) (reviewing history of litigation).

to 21,696.<sup>94</sup> They would eventually peak in 1993 at 25,577 annual admissions.<sup>95</sup>

As flaws in the FSA became apparent and public dissatisfaction with the state's criminal justice system rose, North Carolina prepared to implement sweeping reforms. A 1990 law created the North Carolina Sentencing and Policy Advisory Commission (Commission), a body instructed to "make recommendations to the General Assembly for the modification of sentencing laws and policies, and for the addition, deletion, or expansion of sentencing options as necessary to achieve policy goals."<sup>96</sup> It began meeting in 1991 and presented reports leading to the passage of the Structured Sentencing Act, which created structured sentencing guidelines covering crimes committed on or after Oct. 1, 1994.<sup>97</sup> The new law increased prison terms for violent offenders and kept more trivial offenders out of prison.<sup>98</sup> Much of the drafting debates concerned costs—the legislature wanted to avoid meeting the corrections department's massive budget requests.<sup>99</sup> For example, the Commission scaled back "ideal" recommended punishments so that its proposed guidelines would not require massive prison construction.<sup>100</sup> Computer projections of prison demand aided the commissioners in their work.<sup>101</sup>

Although the Commission drew on the experience of other guidelines states such as Pennsylvania and Minnesota, North Carolina's system instituted ideas of its own. For example, the Commission argued that only by diverting minor criminals from prison could the state ensure that scarce prison resources would be available to house violent offenders—so that even in tough budgeting times the state would not be forced to release dangerous criminals early. To sell this idea politically, the Commission included a wide array of non-prison punishments, including some

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94. NEW ADMISSIONS, *supra* note 73.

95. *Id.*

96. N.C. GEN. STAT. § 164–36 (2003). *See also* North Carolina Sentencing and Policy Advisory Commission, at <http://www.nccourts.org/Courts/CRS/Councils/spac/> (linking to summaries of structured sentencing laws, sentencing grids, and background information about Commission).

97. An Act to Classify Misdemeanors and to Reclassify Some Felonies as Recommended by the North Carolina Sentencing and Policy Advisory Commission, 1993 N.C. Sess. Laws. ch. 539, H.B. No. 278.

98. *See* Wright, *supra* note 93, at 39.

99. *Id.* at 41 ("[M]oney became the universal solvent of sentencing disputes.").

100. *Id.* at 70–72 ("It was now clear, for the first time, that the current capacity of the prison system would place some constraint on the system the commission would recommend.").

101. *Id.* at 75.



involving intense supervision.<sup>102</sup> Additionally, the guidelines granted no departure power to judges—unlike under the disliked FSA—meaning that “tough on crime” voters could be sure that whatever the guidelines required would actually be applied to offenders.<sup>103</sup> This also reassured cost-conscious legislators that upward departures could not junk a careful weighing of the costs and benefits of imprisonment.

To prevent piecemeal meddling with the guidelines after their initial passage, the legislature required that any new criminal sentencing bill be accompanied by a “fiscal note,” which included estimates of how the proposal would affect prison populations and corrections budgets.<sup>104</sup> This requirement helped the state legisla-

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102. *Id.* at 78–79 (describing how judges choosing to divert an offender from prison are often required by the guidelines to sentence convicts to non-prison alternatives more rigorous than mere probation, which involves little actual supervision). *See, e.g.*, North Carolina Dep’t of Correction, Electronic House Arrest & Electronic Monitoring, at <http://www.doc.state.nc.us/dcc/EHA/index.htm> (describing “frequent face to face contacts” between offenders and state agents to “ensure compliance” with the terms of supervision); Division of Alcoholism and Chemical Dependency Programs, North Carolina Dep’t of Correction, DART: Drug Alcohol Recovery Treatment Program, at <http://www.doc.state.nc.us/substance/dart.htm> (“The program is a five week term of intensive treatment for alcohol and drug addiction in independent residential facilities for approximately 100 offenders per facility.”). For a more general discussion of non-prison punishments, especially regarding states’ efforts to give long prison sentences to serious offenders while keeping total prison populations in check, see Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 CRIME & JUST. 199, 200 (1998) [hereinafter Tonry, *Intermediate*] (“Legislators in a number of states, notably including North Carolina (Wright 1997), Ohio (Rauschenberg 1997), and Pennsylvania (Kempinen 1997), have enacted laws that will increase . . . prison sentences . . . for violent offenders while reducing use of prison sentences for nonviolent offenders and diverting them into sanctions programs.”).

103. Wright, *supra* note 93, at 93.

104. N.C. GEN. STAT. § 164–43(h) (2003) (requiring that the Sentencing Commission “include in its report on a bill [affecting sentencing] an analysis based on an application of the correctional population simulation model or the Department of Juvenile Justice and Delinquency Prevention facilities population simulation model to the provisions of the bill”). *See also* Penelope Lemov, *Justice by the Grid*, GOVERNING MAGAZINE, Mar. 1994, at 30 (quoting Sentencing Commission chairman Judge Thomas W. Ross describing the purpose of fiscal notes: “The idea of being able to stand up and be tough on crime without worrying about how to pay for it has got to stop”). Other states require fiscal notes as well. *See, e.g.*, NEV. REV. STAT. § 218.272(1)(b) (2003) (requiring a note for any bill that “increases or newly provides for a term of imprisonment in the state prison”); OHIO REV. CODE ANN. § 101.30(C)(1) (2001) (declaring fiscal notes to be public records in state whose Legislative Service Commission considers fiscal impacts of sentencing bills). Worth mentioning is that not all states with general fiscal note requirements apply them to sentencing bills (i.e., a bill appropriating money for prison construction would require a note, but a bill increasing sentences and thereby increasing demand for prisons would not). *See* DAVID B. KOPEL, CATO POLICY ANALYSIS NO. 208, PRISON BLUES: HOW AMERICA’S FOOLISH SENTENCING POLICIES ENDANGER PUBLIC SAFETY (May 2004), available at [http://www.cato.org/pub\\_display.php?pub\\_id=10678full=1](http://www.cato.org/pub_display.php?pub_id=10678full=1) (on file with the University of Michigan Journal of Law Reform) (suggesting that the fiscal note requirement be supplemented with “prison impact assessment” in states now ignoring this factor). Once a good number of states have had such

ture maintain sentencing and fiscal discipline across parties and gubernatorial administrations, even when high profile crimes drove public demand for tougher sentences.<sup>105</sup> Additionally, the state granted real funding to community corrections programs administered by the counties, which provided needed beds and added credibility to non-prison sentence alternatives.<sup>106</sup> By sticking with its plan—tough penalties for violent offenders and alternatives for most other convicts—North Carolina markedly reduced the incarceration rate for property and drug offenders while keeping the incarceration rate for violent criminals fairly constant from 1993–94 to 1999–2000.<sup>107</sup> Offenders sentenced to active prison terms have received longer average sentences under the guidelines than did comparable pre-guidelines offenders.<sup>108</sup>

North Carolina's structured sentencing has thus far succeeded far longer than did the FSA, and although the future remains uncertain, some lessons seem clear from the differing choices and results, as well as from ways North Carolina's choices contrast with those of other states. Since the enactment of the new system, North Carolina has moved from first among U.S. states in percentage of population in prison to the middle of the pack.<sup>109</sup> The fiscal note idea, dependent on a Commission respected for honest evaluation of proposals, seems particularly sound. It allows the people's representatives to weigh explicitly the costs and benefits of proposed

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policies in place for long enough, a worthy future project would involve analysis of their impact across several regions and periods of time.

105. KOPPEL, *supra* note 104, at 80–84 (describing Republican capture of the state House for the first time since Reconstruction, and the sensational murder of basketball legend Michael Jordan's father by a released convict).

106. See, e.g., KAREN JONES & JOHN MADLER, NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, COMPENDIUM OF COMMUNITY CORRECTIONS PROGRAMS IN NORTH CAROLINA: FISCAL YEAR 2001–2002, at 1, available at <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/compendium2001-2002website.pdf> (on file with the University of Michigan Journal of Law Reform) (listing many non-prison alternatives funded by state grants).

107. Wright, *supra* note 93, at 87 tbl. 4 (showing that the rate for property offenders fell from 45% to 27.8% while the rate for violent offenders decreased from 66% to 60.4% over same time period). The availability of supervised drug treatment programs, such as those run by the Division of Alcoholism and Chemical Dependency Programs, made it reasonable to keep drug offenders out of state prisons.

108. See Tonry, *Intermediate*, *supra* note 102, at 203 (noting that in the guidelines' first year, "[f]or all imprisoned felons, the mean predicted time to be served increased from sixteen to thirty-seven months," a trend that continued in the following year).

109. PAIGE M. HARRISON & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, NCJ 203947, PRISON AND JAIL INMATES AT MIDYEAR 2003 3 tbl. 2 (2004) (showing North Carolina ranking 33rd in 2003 among all states and coming next-to-last among Southern states); NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, SCORECARD ON CRIME AND JUSTICE 1990–1995, at 4 fig. 1 (1997) (ranking 17th in 1995, 22nd in 1990).

modifications to the sentencing scheme. It also offers legislators a form of political cover that may help protect the system during future public clamors for toughness on crime (e.g., if crime rates rise again nationally and within the state). By allowing legislators to show their constituents the precise costs of proposals that nearly everyone might support in principle—such as the long-term imprisonment of sex offenders—the people can intelligently choose between greater incarceration and other goods paid for by the state budget, such as public education and roads.<sup>110</sup>

*B. Florida—High Crime Rates, High Prison Costs,  
and “Tough on Crime” Politics*

Florida also began the 1980s with indeterminate sentencing,<sup>111</sup> and it has made many changes to its criminal laws since then, including decreasing the discretion of sentencing judges and other officials. The state legislature created a Sentencing Study Commission in 1982 to recommend changes, eventually superceding that body with the Sentencing Commission,<sup>112</sup> which drafted proposed guidelines for the state. The guidelines went into force Oct. 1, 1983.<sup>113</sup> As of that date, parole was abolished for most

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110. Fully evaluating the utility of incarcerating offenders lies beyond the scope of this Note. Although this Note proceeds from the assumption that a would-be state reformer wishes to reduce new admissions (in an effort to reduce the prison population), one should recognize that some scholars argue that decreasing imprisonment will spur crimes—with a cost to society greater than the amount saved by reducing prison expenses. See, e.g., James Q. Wilson, *Criminal Justice in England and America*, THE PUBLIC INTEREST, Winter 1997, at 3 (attributing the decline in the U.S. crime rate to incarceration and the increase in the British crime rate to soft treatment of criminals); John J. DiIulio, Jr., *Zero Prison Growth: Thoughts on the Morality of Effective Crime Policy*, 44 AM. J. JURIS. 67, 69–70 (1999) (collecting studies justifying “incapacitation” value of prisons—keeping prisoners who would otherwise commit multiple crimes off the streets—but rejecting same argument for “drug-only felons,” for whom he prescribes treatment and intense non-prison supervision). But see JENNI GAINSBOROUGH & MARC MAUER, SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990s (2000) *passim*, available at <http://www.sentencingproject.org/pdfs/9039.pdf> (denying the strong link between increased incarceration and reduced crime rates, and finding “[m]uch of the explanation for the reduction in crime in the 1990s is due to economic expansion, changes in the drug trade, and new approaches to policing”).

111. FLA. DEP’T OF CORRECTIONS, FLORIDA’S CRIMINAL PUNISHMENT CODE: A COMPARATIVE ASSESSMENT 3 (2002) [hereinafter FLORIDA’S CRIMINAL PUNISHMENT CODE], available at [http://www.dc.state.fl.us/pub/sg\\_annual/0102/index.html](http://www.dc.state.fl.us/pub/sg_annual/0102/index.html) (on file with the University of Michigan Journal of Law Reform) (listing the maximum sentences available before October 1983, and noting the “wide range of judicial discretion”).

112. 1982 Fla. Laws ch. 82–145.

113. 1983 Fla. Laws ch. 83–87 § 2 (codified at FLA. STAT. ch. 921.001). The guidelines aimed to “eliminate unwarranted variation in the sentencing process by reducing the subjec-

crimes, and judges sentenced criminals based on nine separate worksheets governing various offense categories such as murder and drug offenses.<sup>114</sup> The worksheets prescribed sentences based on the gravity of the conviction offense as well as the offender's prior criminal history, and judges could depart from guideline sentences only if they provided written reasons.<sup>115</sup> With no parole available, the guidelines would have provided "truth in sentencing" absent intervening factors. That is, prisoners sentenced under the guidelines had little chance to reduce their sentences under the law then in force.<sup>116</sup>

But intervening factors did present themselves, affecting both new admissions and Florida's ability to maintain TIS under the 1983 guidelines. The state's population swelled from 9,746,961 in 1980 to 12,937,926 in 1990, an increase of 32.7%.<sup>117</sup> Additionally, the state suffered an epidemic of crack cocaine abuse, which peaked in 1989.<sup>118</sup> Felony drug arrests skyrocketed in the late 1980s, rising from 13,396 in 1984 to 61,128 in 1989—an increase of over 450%.<sup>119</sup> These factors strained the prison system and prevented inmates from serving their full sentences. The legislature also compounded the correction department's difficulties by enacting new mandatory minimum laws.<sup>120</sup>

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tivity in interpreting specific offense-related and offender-related criteria and in defining the relative importance of those criteria in the sentencing decision." FLA. STAT. ch. 921.001(4).

114. See FLORIDA'S CRIMINAL PUNISHMENT CODE, *supra* note 111, at 4.

115. *Id.*

116. Because the 1983 guidelines continued the use of "gain time"—under which prisoners knocked time off their sentences as they served time—the guidelines did not mandate a true TIS system. But because gain time accrues largely automatically absent particularly bad behavior, a sentenced prisoner could calculate his likely "real sentence" upon hearing the judge's sentence. That sentence could not be lowered by parole. See Kaufman, *supra* note 7, at 375–77 ("If a prisoner did not forfeit basic gain time and regularly earned incentive gain time, the actual service of a sentence was cut to roughly forty percent.").

117. See U.S. CENSUS BUREAU, POPULATION OF COUNTIES BY DECENNIAL CENSUS: 1980 TO 1990, available at <http://www.census.gov/population/cencounts/fl190090.txt> (on file with the University of Michigan Journal of Law Reform).

118. See FLA. DEP'T OF CORRECTIONS, COMMUNITY CORRECTIONS BUREAU OF PROGRAMS AND QUALITY: ANNUAL REPORT JULY 1, 1998–JUNE 30, 1999 41 [hereinafter CORRECTIONS REPORT], available at <http://www.dc.state.fl.us/pub/PQAnnual/1999/index.html> (on file with the University of Michigan Journal of Law Reform) ("The crack cocaine epidemic caught both law enforcement and corrections by surprise . . .").

119. *Id.* at 42. See also *id.* at 44 (graphing drug admissions to state prison as a percentage of total admissions, with the rate peaking in 1989–90 at 36.1%).

120. Florida's attraction to mandatory minimums continues to this day. See, e.g., Desiree M. Cuason, Note and Comment, *Another Three Strikes Law: An In Depth Look at Florida's Prisoner Release Reoffender Punishment*, 10 ST. THOMAS L. REV. 627, 628 & n.11 (1998) (discussing the sentencing law effective as of May 1997, FLA. STAT. ch. 775.082, mandating minimum sentences for offenders committing certain crimes within three years of release from

By 1989, the average prisoner served 34% of her sentence.<sup>121</sup>

Florida's problem was simple: As the state underwent a massive increase in crime, it enacted more punitive sentencing laws without expanding its prison capacity. Thus the state—already under a consent decree resulting from a lawsuit alleging that prison overcrowding violated the Eighth Amendment's guarantee against cruel and unusual punishment<sup>122</sup>—set the stage for further strain on the prison system. As drug arrests rose, the state increased the percentage of drug offenders sentenced to prison.<sup>123</sup> Desiring to appear tough on crime while not breaking the bank or violating federal consent decrees, state politicians allowed Florida courts to mete out long sentences which the state could not, and would not, enforce.<sup>124</sup>

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prison); FLA. DEP'T OF CORRECTIONS, 10–20-LIFE CRIMINALS SENTENCED TO FLORIDA'S PRISONS: THE IMPACT OF GOVERNOR BUSH'S INITIATIVE ON ARMED FELONS 1 (Aug. 2004), at <http://www.dc.state.fl.us/pub/10-20-life/index.html> (on file with the University of Michigan Journal of Law Reform) (describing the 1999 enactment of mandatory minimums of ten years, twenty years, and twenty-five-to-life for various gun-related crimes, as well as a "new mandatory 3-year prison term for any felon who even possessed a gun, regardless whether the felon used the gun during a crime"). The report attributed reductions in crime to the mandatory minimums. "The results under 10–20–Life are impressive. In only five years, from 1998–2003, 10–20–Life has helped drive down violent gun crime rates 28% statewide." *Id.* Worth noting is that while most states did not enact laws similar to Florida's, gun crime dropped sharply nationally during 1998–2002. The United States had 557,200 "non-fatal firearm incidents" (gun crimes) in 1998. In 2002, there were 353,880. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, KEY FACTS AT A GLANCE: NONFATAL FIREARM-RELATED VIOLENT CRIMES, 1993–2003 (2003) [hereinafter FIREARM-RELATED], available at <http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfataltab.htm> (on file with the University of Michigan Journal of Law Reform). Like many successes, the drop in gun crime has many would-be fathers. See, e.g., Bill Clinton, *Radio Address of the President to the Nation* (Mar. 20, 1999), available at <http://clinton6.nara.gov/1999/03/1999-03-20-radio-address-on-gun-violence.html> (stating that "[a]s a result" of Clinton Administration policies, "[g]un crimes have declined by more than 25%"). The trend President Clinton and Governor Bush would both take credit for began nationally in 1993.

121. See FLORIDA'S CRIMINAL PUNISHMENT CODE, *supra* note 111, at 4.

122. U.S. CONST. Amend. VIII; Costello v. Wainwright, 397 F. Supp. 20, 38 (M.D. Fla. 1975) ("A free democratic society cannot cage inmates like animals in a zoo or stack them like chattels in a warehouse and expect them to emerge as decent, law abiding, contributing members of the community. In the end, society becomes the loser."), *aff'd as modified*, 525 F.2d 1239 (5th Cir. 1976), *aff'd in relevant part on rehearing en banc*, 539 F.2d 547 (5th Cir. 1976). See also, Kaufman, *supra* note 7, at nn.44–49 and accompanying text.

123. See Kaufman, *supra* note 7, at 380 & n.91 (citing reports showing that the rate of incarcerations per guilty adjudications rose from 20% to 30% between 1980 and the first four months of 1989 while guilty dispositions rose from 43,200 to 125,218 between 1980 and 1988). In the same time period, drug admissions rose more than 500%, and drug offense incarceration rates rose from 11% to 25%. *Id.*

124. See ROGER HANDBERG & N. GARY HOLTEN, REFORMING FLORIDA'S SENTENCING GUIDELINES: BALANCING EQUITY, JUSTICE, AND PUBLIC SAFETY 32 (1993) (quoting a prosecutor calling the policy "a new form of deceit").

As might be expected, Florida's new admissions to prison rose starkly during the late 1980s. The state admitted 13,739 new prisoners in 1984.<sup>125</sup> It then admitted 16,416 in 1985, 20,879 in 1986, 27,590 in 1987, 36,656 in 1988, and 45,611 in 1989.<sup>126</sup> Admissions nearly tripled over a five-year period.

Struggling with prison overcrowding and concurrently upset with early release programs, Florida legislators enacted new sentencing guidelines in 1994.<sup>127</sup> The 1994 guidelines created a point system for sentencing, with points accruing based on the seriousness of the primary conviction offense, any secondary offenses committed, and the offender's prior criminal record.<sup>128</sup> In 1995 the state amended the 1994 guidelines to increase punishment for most offenses but did not change the underlying structure of the system.<sup>129</sup> Fortunately for the state's prison space problem, the ebb of the crack epidemic ushered in years of decreasing drug arrests.<sup>130</sup> Because drug criminals had constituted a sizeable portion of new admissions, Florida saw a drop in new admissions after 1989.<sup>131</sup> While the state admitted 45,611 new prisoners in 1989, six consecutive annual decreases led to the admission of only 26,335 new prisoners in 1995.<sup>132</sup> New admissions then remained stable until 1998.<sup>133</sup> The state overhauled its sentencing regime again with the enactment of the Criminal Punishment Code in 1998;<sup>134</sup> because the data analyzed in this Note ends in 1998, the effects of the new code lie beyond the scope of this study.

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125. NEW ADMISSIONS, *supra* note 73.

126. *Id.*

127. 1993 Fla. Laws ch. 93-406, amending FLA. STAT. ch. 921.001 (1992). See also Kaufman, *supra* note 7, at nn.216-31 and accompanying text.

128. See FLORIDA'S CRIMINAL PUNISHMENT CODE, *supra* note 111, at 5-6 (describing the recommitment to "truth in sentencing" through repeal of "basic gain time," replacement of separate worksheets present under 1983 guidelines with single point system based on ranked list of various crimes' severity, and method of calculating sentences).

129. *Id.* at 6.

130. CORRECTIONS REPORT, *supra* note 118, at 37 (showing a drop of over 25% in felony drug arrests between 1989 and 1993).

131. NEW ADMISSIONS, *supra* note 73. Comparatively, Florida's non-drug crime rate remained fairly constant between 1989 and 1994. See FLA. DEP'T LAW ENFORCEMENT, CRIME IN THE U.S. INDEX OFFENSES 1972-2003 (2004) [hereinafter INDEX OFFENSES], available at [http://www.fdle.state.fl.us/FSAC/Crime\\_Trends/download/pdf/fed\\_ucr.pdf](http://www.fdle.state.fl.us/FSAC/Crime_Trends/download/pdf/fed_ucr.pdf) (showing total "index crimes" in Florida at 1,115,617 in 1989 and 1,151,121 in 1994—a difference under 5%). Index crimes are counted in the FBI's Uniform Crime Reports. They include murder, negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. See U.S. FBI, CRIME IN THE UNITED STATES 2002 9 (2003).

132. NEW ADMISSIONS, *supra* note 73.

133. *Id.*

134. See FLORIDA'S CRIMINAL PUNISHMENT CODE, *supra* note 111, at 6-7.

Florida's experience demonstrates the difficulty of evaluating criminal sentencing policy on the basis of prison populations and admissions. The state's sharp jump and subsequent quick drop in new admissions surrounding the peak admissions year of 1989 seem to have been caused more by crime rates than by the state's sentencing of convicted criminals.<sup>135</sup> Also, given the constant state of crisis endured by the state prison system in the 1980s and 1990s, Florida now seems like a poor choice for a case study in successful policymaking. Reduced new admissions in the early 1990s proved insufficient to reduce the total prison populations (although perhaps the reduction in admissions can be said to have prevented a further increase in the total population), and the state's sentencing policy decisions appear to have been driven by a desire by politicians to have everything at once (tough on crime policies) without paying for it (prison construction and maintenance). Overall, Florida offers little in the way of good examples for would-be reformers in other states.

### C. Connecticut—Sentencing Without Guidelines

As in Florida, the spike and drop in new admissions in Connecticut seem at least partially attributable to changes in the state's crime rate. Connecticut's new admissions peaked in 1990, with a sharp rise between 1987–1990 and a quick reduction between 1990–1994.<sup>136</sup> Similarly, incidence of index crimes in Connecticut rose steadily in the late 1980s, peaked in 1990, and has been decreasing ever since.<sup>137</sup> Incidence of rape, robbery, aggravated assault, and burglary all peaked around 1990.<sup>138</sup> Further evaluation

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135. Of course one need not see the phenomenon in quite this way. Were a researcher to control across states for crime rate, then perhaps Florida's sentencing policies could be contrasted more easily with those of other states. Additionally, the continuing academic doubt concerning the precise relationship between crime rates and imprisonment rates should make one wary of drawing sweeping conclusions based on drug arrests and the Uniform Crime Reports.

136. See NEW ADMISSIONS, *supra* note 73 (showing admissions around 3,000 annually between 1981 and 1986, followed by an increase to peak at 12,107 in 1990, followed by a drop to 1880 in 1994, followed by admissions around 2,000 annually until 1998).

137. See INDEX OFFENSES, *supra* note 131; PRISON & JAIL OVERCROWDING COMM., A REPORT TO THE GOVERNOR AND LEGISLATURE 5–7 (2004), available at <http://www.ct.gov/doc/lib/doc/PDF/PDFReport/PJOC2004.pdf> (graphing decreases in various measures of crime rate from 1993–2002).

138. See INDEX OFFENSES, *supra* note 126, at 5–7. Murders peaked slightly later, reaching a high of 215 in 1994. *Id.*

of this theory—that crime rates cause Connecticut’s oddly shaped new admissions data curve—follows the review of the state’s criminal sentencing policies.

Until 1981, Connecticut used indeterminate sentencing.<sup>139</sup> The state then moved to determinate sentencing, requiring judges to assign fixed sentences rather than ranges.<sup>140</sup> In addition to creating sentencing ranges for various crimes—within which judges would assign fixed sentences to particular convicts—the 1981 reforms abolished parole for most offenders, reduced accrual of “good time,” and created a supervised home release (SHR) program.<sup>141</sup> The state increased the severity of determinate sentences by about twenty-five percent in 1984.<sup>142</sup> Additionally, the state enacted a variety of mandatory minimums in the early 1980s,<sup>143</sup> and it adopted piecemeal increases in drug sentence severity throughout the 1980s and 1990s.<sup>144</sup> With crime on the rise in the 1980s<sup>145</sup>—particularly drug crime<sup>146</sup>—these laws translated into great stress on the prison system.

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139. LEGISLATIVE PROGRAM REVIEW & INVESTIGATIONS COMM., CONN. GEN. ASSEMBLY, FACTORS IMPACTING PRISON OVERCROWDING ch. 1 (2000) [hereinafter FACTORS], available at <http://www.cga.ct.gov/pri/archives/2000fireport.htm> (“Under an indeterminate sentence, a convicted offender received a sentence with a minimum and maximum term and was eligible for parole release after completing the minimum term less any ‘good time’ credits earned while in prison. Since most inmates were paroled at their first eligibility date, the minimum term minus ‘good time’ became the de facto sentence length.”). See also CONN. GEN. STAT. § 53a-35 (2003) (describing the “indeterminate sentencing” regime still in force for “any felony committed prior to July 1, 1981,” the effective date of Connecticut’s first determinate sentencing laws).

140. See CONN. GEN. STAT. § 53a-35a (2003) (“For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence.”); 1980 Conn. Acts 80-442.

141. See FACTORS, *supra* note 139, at ch. 1.

142. See *id.*

143. See *id.* The state has quite a few mandatory minimums in force. See, e.g., CONN. GEN. STAT. § 21a-278(a) (2003) (mandatory five-to-twenty year prison term for certain drug sales, including vastly disparate treatment of crack and powder cocaine); CONN. GEN. STAT. § 21a-277 (2003) (awarding lesser punishments for drug sales by drug addicts).

144. See FRED V. CARSTENSEN ET AL., UNIV. OF CONN., CONN. CTR. FOR ECON. ANALYSIS, A DYNAMIC ECONOMIC IMPACT ANALYSIS OF ALTERNATIVES TO INCARCERATION IN CONNECTICUT AS PROPOSED BY SB 1083 AND SB 1428 13–19 (2001) (recounting the history of drug criminalization in Connecticut, and collecting state statutes and penalties by offense).

145. See *supra* notes 137–138 and accompanying text.

146. Connecticut saw a 267% increase in drug arrests between 1980 and 1988. CONN. PRISON & JAIL OVERCROWDING COMM., FACTORS IMPACTING PRISON OVERCROWDING graph 1 (1989). There were comparable increases in persons confined for drug offenses. *Id.* at graph 2.



Connecticut prisons quickly filled beyond their capacity.<sup>147</sup> Lacking the political will to declare an “overcrowding emergency,” yet nonetheless forced to deal with burgeoning populations, the state depended upon SHR and released many prisoners who had served only fractions of their court-imposed sentences.<sup>148</sup> This failed to provide a satisfactory solution. Courts lose credibility when their sentences become nearly completely divorced from the reality of punishments served by offenders, and citizens supporting politicians’ enactment of tough sentencing laws are not impressed when those laws don’t keep convicts off the streets. Additionally, even though the system let prisoners out very early, it nonetheless kept rising in cost.<sup>149</sup>

The state responded by introducing “alternative sanctions,” which diverted some offenders from prison.<sup>150</sup> A new Office of Alternative Sanctions, formed in 1990 by the state’s chief court administrator as a way to get “more effective sanctions” for “less money,” kept some non-violent offenders out of prison, thereby allowing more space for serious offenders serving hard time.<sup>151</sup> Non-prison alternatives include “Alternative to Incarceration Centers,” run by private nonprofit agencies, which provide supervision, substance abuse treatment, job training, and other services.<sup>152</sup>

As the state started diverting low-level offenders away from the prison system in the early 1990s, the state began enjoying the na-

147. See GEORGE HILL & PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS UNDER STATE OR FEDERAL JURISDICTION (2000) [hereinafter PRISONER POPULATION], available at <http://www.ojp.usdoj.gov/bjs/data/corpop02.wk1> (showing the state prison population more than doubling between 1977 and 1986, rising from 3094 to 6905). Connecticut established a Commission on Prison and Jail Overcrowding in 1981. 1981 Conn. Acts 81-437 § 1 (codified at CONN. GEN. STAT. § 18-87j, k (2003)). The commission produces an annual report called Factors Impacting Prison Overcrowding.

148. See FACTORS, *supra* note 139, at ch. 1 (“Due to the lack of beds, most sentenced inmates were serving only about 10 percent of their court-imposed sentences before being released on SHR. Because of this, many offenders opted for prison sentences over community supervision, such as probation.”). Because SHR affects the “prisoners going out” side of total prison population, the state’s reliance on SHR did not slow the growth of new admissions. To keep its population down—and save prison costs—the state would have needed some combination of front-end and back-end factors.

149. See PATRICK J. COLEMAN ET AL., U.S. DEP’T OF JUSTICE, NCJ 172870, PRACTITIONER PERSPECTIVES: CONNECTICUT’S ALTERNATIVE SANCTIONS PROGRAM 3 (1998), available at <http://www.ncjrs.org/pdffiles/172870.pdf> (describing citizen frustration with lack of truth in sentencing as well as \$1 billion-plus outlay on prison construction in late 1980s).

150. See 1989 Conn. Acts 89-383 (codified at CONN. GEN. STAT. § 53a-30(a)(8) (2003)) (allowing certain offenders to “participate in an alternate incarceration program”).

151. See COLEMAN ET AL., *supra* note 149, at 4 (describing proposals by Judge Aaron Ment).

152. *Id.* at 2 (listing other non-prison options like electronic monitoring, “day incarceration centers,” community service, and inpatient drug and alcohol treatment).

tional decrease in crime beginning at that time.<sup>153</sup> New admissions fell swiftly. In 1990, the state admitted 12,107 new prisoners, and it then admitted 11,832 in 1991, 9,778 in 1992, 7,538 in 1993, and 1,880 in 1994.<sup>154</sup> Admissions remained below 2,000 annually through 1998.<sup>155</sup>

After the supply of criminals had dropped in the early 1990s, Connecticut toughened its truth in sentencing policies in 1994 and 1995.<sup>156</sup> The tougher sentencing was made possible by the 1994 completion of a corrections building program<sup>157</sup> as well as Congress' passing the Violent Crime Control and Law Enforcement Act of 1994, which gave states money if they kept violent offenders in prison for eighty-five percent of their sentences.<sup>158</sup> Because these policies largely affected the sentence length of prisoners already destined for incarceration before the changes—violent criminals are prime candidates for prison sentences—the firmer TIS standards would affect total prison population but would have little impact on new admissions.<sup>159</sup> Whether these policies should be considered successful depends on a variety of normative and empirical judgments.<sup>160</sup>

Connecticut seems to have faced problems similar to those in Florida: rising crime rates in the 1980s with accompanying high prison costs and disappointing prison system performance. But unlike Florida, which suffered high crime rates through the early 1990s (perhaps because of the state's overall increase in

153. See *supra* notes 130–133 and accompanying text. While index crime arrests fell in the early 1990s, see INDEX OFFENSES, *supra* note 131, drug arrests and convictions remained fairly constant. See CONN. LAW REVISION COMM., DRUG POLICY IN CONNECTICUT: PRELIMINARY STAFF REPORT TO THE DRUG POLICY STUDY COMMITTEE OF THE LAW REVISION COMMISSION Part II, tbl. III-6 (revised ed., 1997), available at <http://www.cga.state.ct.us/lrc/drugpolicy/DrugPolicyRpt7.htm> (showing 9,808 drug convictions in 1990–91 and 9,189 in 1994–95).

154. NEW ADMISSIONS, *supra* note 73.

155. *Id.*

156. See FACTORS, *supra* note 139, at ch. 1 (describing 1993 abolition of SHR and 1995 passage of Omnibus Crime Act). The state also changed some policies in the late 1990s, but the effects of such changes—if any—came too late to be measured in the data studied in this Note.

157. See *id.*

158. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20,102, 108 Stat. 1796 (codified at 42 U.S.C. § 13702) (offering “Truth in Sentencing Incentive Grants”).

159. A new admission counts the same for a prisoner serving two years as it does for another prisoner serving ten years.

160. To evaluate the policies, one would have to revisit the costs and benefits of incarceration in general. Additionally, federal money has an obvious skewing effect on state legislators. Much that would be considered extravagant or simply unaffordable in the state budget becomes sensible when Uncle Sam foots the bill.

population), Connecticut enjoyed the national trend of crime reduction at the beginning of the decade. Connecticut's mandatory minimums and abolition of "good time"—while still the cause of prison system stress—did not have the colossal effects seen in Florida. Whether this resulted from good fortune (e.g., people in Connecticut have higher incomes and enjoyed the 1990s economic recovery more quickly than Floridians, with accompanying decrease in incentives to commit crimes) or state policy (e.g., Connecticut ran a more effective state police department, which scared criminals into reforming or leaving the state—perhaps for Florida), cannot be answered absent much further study. Nonetheless, it seems clear that had Connecticut undergone crime rates like Florida's in the early 1990s, its sentencing policies would have proven unsustainable.<sup>161</sup>

As far as setting an example for other states wishing to lower their new prison admissions, Connecticut's primary contribution seems to come from its alternatives to incarceration. Even prison boosters in the academy support the diversion of nonviolent drug offenders away from prison,<sup>162</sup> and Connecticut has been operating such programs for nearly fifteen years.

#### IV: LESSONS FROM THE CASE STUDIES— BEST AND WORST PRACTICES

##### A. *What States Can Do*

As acknowledged *supra*, this portion of the Note lacks the emphasis on scientific measurement exhibited in Part II.<sup>163</sup> A host of factors affect prison populations and new admissions, and even case studies of selected jurisdictions can uncover only part of the story. Still, the cases of North Carolina, Florida, and Connecticut allow one to draw some tentative conclusions and give some advice

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161. It is of course possible that Nutmeg State legislators would have behaved differently had crime rates been higher; their choice to spend more money per convict may have been a sensible response to the lower supply of criminals (which made higher per-convict expenses more affordable). Conveniently, this Note need not speculate on such matters, for it aims to inform state legislators who have already decided to seek lower new admissions. Some discussion of the normative and practical deliberations behind that choice appears *infra* Part IV.B.

162. See DiIulio, *supra* note 110.

163. See *supra* Part II.

to would-be state reformers desiring to lower their annual new prison admissions.

Most clearly, North Carolina's experiences cry out for imitation by thoughtful legislators in other states.<sup>164</sup> After years of failed sentencing schemes with prisons so overcrowded as to justify federal court intervention,<sup>165</sup> North Carolina learned from the ill-fated Fair Sentencing Act and adopted sentencing reform with staying power. Most importantly, the state used computer models to evaluate potential sentencing policies.<sup>166</sup> The Commission first used the model from 1991–94, which allowed it to recommend sentencing policies the state could afford.<sup>167</sup> These policies resulted in reforms enacted in 1994.<sup>168</sup> In addition to informing the work of the Sentencing Commission, the computer model guided legislative debate on changes to state criminal sentencing laws. Unlike in Florida, where anti-crime politics prevented the state from checking prison growth, North Carolina's system included a built-in stabilizer. Whenever a legislator proposed a sentencing change, her idea would be run through the simulation. The resulting estimate of expected prison bed demand appeared in a "fiscal note" accompanying the bill. This allowed opponents of a particular bill to discuss its real costs rather than engage in a debate about who dislikes crime the most.<sup>169</sup>

Additionally, both North Carolina and Connecticut have shown that—at least during a budget and prison overcrowding crisis—politicians and the public will accept alternatives to incarceration. But these alternatives remain acceptable only so long as states provide adequate resources to the programs.<sup>170</sup> When a class of offenders presents little danger to the public and can be managed

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164. See *supra* Part III.A.

165. See *supra* note 93.

166. N.C. GEN. STAT. § 164-43(h) (2003).

167. Telephone interview with Judge Thomas Ross, former Chairman of North Carolina Sentencing Commission (Feb. 2, 2004) [hereinafter Ross Interview] ("The real key is the computer simulation models.").

168. 1993 N.C. Sess. Laws ch. 539, H.B. No. 278.

169. Ross Interview, *supra* note 167 (recounting that some legislators would abandon ideas upon seeing fiscal notes and that notes have "had a tremendous impact on the demagoguery that accompanies crime and punishment debates").

170. See COLEMAN ET AL., *supra* note 149, at 4–6 (describing the need for a broad array of sanctions backed up by the threat of prison for noncompliant offenders); Ross Interview, *supra* note 167 (saying that credibly funded alternatives have "dramatically affected the way the public views" the sentencing regime by reintroducing "a real truth" absent in eras of harsh sentences followed by early release).

for far less money outside of the prison system, it seems shortsighted for states to underfund prison alternatives.<sup>171</sup>

The fiscal notes and computer modeling employed by North Carolina have particular appeal because of their inherent trust in the democratic process. As Judge Ross notes, the state's processes do not foreordain any particular sentencing policy, nor do they even require that a given proposal fail if deemed costly by the computer model. What they do ensure is that if the legislators decide to enact policies leading to more prison construction, "they do it knowingly."<sup>172</sup> Rather than rely on "tough on crime" platitudes, North Carolina's policymakers confront the pros and cons of particular sentencing policies and adopt those that make sense to them in light of the best possible information. Other states may not choose the same policies as North Carolina, nor should all states necessarily adopt similar criminal codes. But they would be wise to follow North Carolina's example in acquiring maximal data on the effects of proposals. Armed with those data, legislators can make informed choices about the futures of their states.

### *B. Why the States—and the Readers—Should Care*

Although this Note assumes the underlying premise that some state reformers want to lower their prison budgets by reducing their prison populations, it lies beyond the scope of the Note to prove that such a policy preference should be adopted. Nonetheless, the author would be remiss were he not to devote some attention to the question. This Section articulates the primary arguments in favor of reducing state prison populations and concludes that, in general, states would be wise to lower their incarceration rates.

First, any discussion of imprisonment should begin by recognizing that incarceration represents a momentous act of state coercion and diminution of liberty. Given the small number of executions consummated each year, imprisonment constitutes the

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171. Although this trend lies beyond the years covered in this Note, one should note that Connecticut appears to be moving away recently from adequate funding of its incarceration alternatives. See KEVIN P. JOHNSTON & ROBERT G. JAEKLE, AUDITORS OF PUBLIC ACCOUNTS, STATE OF CONN., PERFORMANCE AUDIT: ALTERNATIVE INCARCERATION I (2003) ("If more eligible inmates were to be served in alternative programs, overcrowding would be eased and savings could be achieved. Connecticut appears to be moving in the other direction.").

172. Ross Interview, *supra* note 167.

harshest state action nearly any person needs to fear.<sup>173</sup> Although this truism may seem obvious, one can easily forget while discussing sentencing policy that liberty is and ought to be the baseline condition in a free society.<sup>174</sup> Thus those advocating imprisonment—whether in an individual case or as general policy—bear the burden of demonstrating the need for such dramatic state action. With this baseline, one must presume that something is wrong when the United States leads the world in per capita incarceration.<sup>175</sup> North Carolina, which led U.S. jurisdictions in imprisonment in 1980, certainly had some explaining to do.<sup>176</sup>

Myriad negative consequences accompany such high incarceration rates. The most serious include the disruption of prisoners' lives during imprisonment, the collateral impact of imprisonment on prisoners' lives after release, the economic and social hardships visited on communities from which prisoners hail, and the budget turmoil caused by prison construction and operation costs. A brief discussion of each of these follows.<sup>177</sup>

1. *Effects on Prisoners During Incarceration*—The negative consequences faced by inmates may initially seem so clear as to need no explication, but not all of prisoners' problems are obvious. First, over 1.3 million Americans sit in prison at any given time, deprived of the most basic liberties enjoyed by their countrymen.<sup>178</sup> This of

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173. Notwithstanding active debate surrounding capital punishment, one should remember that no year in modern American death penalty administration (since 1976) has seen more than one hundred executions. DEATH PENALTY INFORMATION CENTER, EXECUTIONS BY YEAR, at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (on file with the University of Michigan Journal of Law Reform) (reporting sixty-five executions in 2003). Also, because many states have no capital punishment at all, and the federal government has executed only three persons since 1976, imprisonment is the most serious judicially-sanctioned state coercion potentially affecting much of America. DEATH PENALTY INFORMATION CENTER, NUMBER OF EXECUTIONS BY STATE AND REGION SINCE 1976, at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186#region> (on file with the University of Michigan Journal of Law Reform) (showing that Texas and Virginia have conducted more than half of all American executions since 1976).

174. See, e.g., Marvin E. Frankel, *Sentencing Guidelines: A Need for Creating Collaboration*, 101 YALE L.J. 2043, 2051 (1992) (“[W]e ought to remember that punishment is an evil, and that we mean to be doing the least possible harm.”).

175. See THE SENTENCING PROJECT, *supra* note 43.

176. See INCARCERATION RATES, *supra* note 80.

177. The attention paid here to the harms caused by incarceration should not be seen as a failure to understand the need for incarceration in some cases. Prisons of course provide great benefits to society and constitute an essential part of the criminal justice system. See *infra* for a review of these benefits and the competing justifications for criminal punishment in general. Nonetheless, a full appreciation of the actual burdens faced by prisoners, their families, and their communities allows a more appropriate weighing of the costs and benefits of incarceration.

178. See KEY FACTS AT A GLANCE: CORRECTIONAL POPULATIONS, *supra* note 1.

course is the point of imprisonment and cannot fairly be considered a “negative consequence” of putting people away. However, convicts sentenced to prison suffer much more than mere confinement. The prevalence of prison rape constitutes a national scandal—prison officials and the public at large understand that prisoners face sexual assault regularly, yet little action ensues to ameliorate the problem.<sup>179</sup> The locations of prisons cause many convicts to serve time great distances from their families, cutting them off from familial support and further decreasing their ability to remain connected to children and intimate partners.<sup>180</sup> The list of harms accompanying confinement could go on at some length—with additional examples including limited access to education and career opportunities,<sup>181</sup> exposure to disease,<sup>182</sup> and the various problems associated with spending time with other criminals—but the point should be clear.

2. *Post-release Effects of Incarceration*—After their release, prisoners face great hardships in their attempts to rejoin society. Many jurisdictions bar former prisoners (and other convicts) from a variety of professions.<sup>183</sup> In addition to legal barriers, convicts soon discover that many employers’ policies prohibit the hiring of con-

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179. See HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (citing, for example, an internal state prison system report estimating that one-fifth of prisoners undergo involuntary sex of some kind); Daniel Brook, *The Problem of Prison Rape*, LEGAL AFFAIRS, Mar-Apr. 2004, at 27 (collecting studies estimating that 20% of prisoners undergo coerced sex and 7% suffer rape); Farmer v. Brennan, 511 U.S. 825 (1994) (holding that the failure to prevent prison rape may subject a prison to liability); Prison Rape Elimination Act of 2003, Pub. Law. No. 108-79, 117 Stat. 972, 972–89 (codified at 42 U.S.C. §§ 15601–15609) (authorizing studies of the problem and mandating reports). See generally STOP PRISON RAPE, HOME PAGE, available at <http://www.spr.org/>.

180. See, e.g., PETER WAGNER, PRISON POLICY INIT., IMPORTING CONSTITUENTS: PRISONERS AND POLITICAL CLOUT IN NEW YORK 4 (2002) (“In New York, for example, only 24% of prisoners are from upstate, but 91% of prisoners are incarcerated there.”); see also Blint, *supra* note 62 (describing Connecticut’s proposal to house its prisoners in facilities in Virginia).

181. See *supra* Part I.D.

182. See e.g., CHERYL A. ROBERTS ET AL., THE STATUS OF TUBERCULOSIS PREVENTION AND CONTROL MEASURES IN LARGE CITY AND COUNTY JAILS IN THE UNITED STATES, available at [http://www.cdc.gov/nchstp/tb/pubs/tbrelat\\_articles/StatusTB\\_jails/pdf/Exec\\_Summ\\_Jail.pdf](http://www.cdc.gov/nchstp/tb/pubs/tbrelat_articles/StatusTB_jails/pdf/Exec_Summ_Jail.pdf); Mary Deveraux Hutton et al., *Results of a 29-State Survey of Tuberculosis in Nursing Homes and Correctional Facilities*, 108 PUB. HEALTH REPS. 305 (1993) (reporting TB incidence among prisoners was 3.9 times the rate of infection among the free population of the same age).

183. See LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS (2004), at <http://www.lac.org/lac/> (on file with the University of Michigan Journal of Law Reform) (listing laws from all fifty states); AMY E. HIRSCH ET AL., EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS (2002).

victs.<sup>184</sup> American jurisdictions do not restrict employers' ability to discriminate on these grounds, unlike some other countries.<sup>185</sup> Disenfranchisement is another post-release burden receiving much recent scholarly attention. Depending on the convict's domicile, she may find herself barred from voting for life, barred for a period of years, barred from voting for the remainder of her association with the correctional system (e.g., her time on probation or parole), or discouraged from voting by bureaucratic hassles.<sup>186</sup> Given the central role of the franchise to democratic participation, denying post-release prisoners the right to vote prevents a full reintegration into the body politic.<sup>187</sup> Convicts also find themselves ineligible for many other government programs.<sup>188</sup>

3. *Burdens on Families and Communities*—In communities from which many prisoners hail, even those residents with no direct connection to any given prisoner suffer hardships. Because the U.S. Census counts prisoners as living at the location of their prisons rather than their place of origin (defined by either the location of their arrest or their reported home address), political power shifts from prisoners' home communities to those towns hosting prisons.<sup>189</sup> When state legislatures draw districts for state

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184. See LEGAL ACTION CENTER, *supra* note 183 (noting that many states prevent convicts from serving as home health aides even if their convictions resulted from offenses unrelated to such work).

185. This distinction does not imply that the American policy is necessarily inferior to those giving released prisoners more protection from discrimination. It does, however, demonstrate an additional cost of high U.S. incarceration rates—the removal of large numbers of Americans from full participation in the labor market.

186. See THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2004), available at <http://www.sentencingproject.org/pdfs/1046.pdf> (on file with the University of Michigan Journal of Law Reform) (collecting state policies).

187. See *McLaughlin v. City of Canton*, 947 F. Supp. 945, 971 (S.D. Miss. 1995) (“[T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.”). See also *Adams v. Clinton*, 90 F. Supp. 2d 35, 81 (D.D.C. 2000) (Oberdorfer, J., dissenting) (“Voting nationally has evolved from 18th century suffrage limited to white, property-owning, tax-paying males, over the age of 21, to the virtual universal suffrage today enjoyed by all but minors, felons, and the people of the District of Columbia.”).

188. See e.g., 20 U.S.C. § 1091(r) (2000) (codifying the 1998 amendment to the Higher Education Act of 1965 restricting financial aid for those with drug convictions); 42 U.S.C. § 1437d(s), (t) (2000) (allowing public housing authorities to deny admission to convicts); 21 U.S.C. § 862a (2000) (authorizing lifetime ban on receipt of food stamps by convicts).

189. ROSE HEYER & PETER WAGNER, TOO BIG TO IGNORE: HOW COUNTING PEOPLE IN PRISONS DISTORTED CENSUS 2000 (2004), available at <http://www.prisonersofthecensus.org/toobig/index.shtml> (on file with the University of Michigan Journal of Law Reform) (noting, for example, that 60% of Illinois prisoners come from Cook County, but 99% of state prison cells are in other counties).



and federal representatives, the residents of host towns receive extra clout because of the non-voting prisoners in their midst. Additionally, many government programs dole out cash based on population, meaning that prisoners bring extra money—money taken away from their home communities—without enjoying any services from their hosts.<sup>190</sup> The shift in political power from (mostly poor) home communities to (more wealthy) host communities decreases the likelihood of any reforms on this issue.

Families of prisoners experience all the problems of their communities in addition to those specifically affecting prisoners' relatives. About 1.5 million American children have a parent in prison, and a majority of prisoners are parents.<sup>191</sup> A wealth of studies documents the increased life chances of children raised by two parents.<sup>192</sup> And for those children already raised in single-parent families, a parent's going to prison often means induction into state foster care systems. Those jurisdictions housing prisoners far from their families cause additional harms both to offenders and to their children, who in effect are innocent victims of their parents' conflict with the state. The public policy gains associated with incarceration generally and remote prisons in particular—which include all the social benefits of punishment as well as the cost savings reaped by locating prisons in less expensive areas—impose concurrent social costs. Fatherless children become more likely to commit crimes, to depend upon public assistance, and to experience all sorts of negative social indicators.<sup>193</sup> They also complete less formal education and have bleaker job prospects than the overall population.<sup>194</sup> These phenomena all hurt the states both financially—through welfare programs, lost economic development, etc.—and socially.

4. *Monetary costs of prison construction and operation*—Like vampires feasting on the blood of the innocent, prisons suck money from state budgets at alarming rates. Seven percent of state reve-

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190. For example, state education money tracks reported populations, but children of (mostly urban) prisoners will not attend school in the (mostly rural) towns of their parents' prisons; responsibility for educating such children remains with the prisoners' home communities. See PATRICIA ALLARD & KIRSTEN D. LEVINGSTON, BRENNAN CENTER FOR JUSTICE, ACCURACY COUNTS: INCARCERATED PEOPLE & THE CENSUS 5–7 (2004).

191. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000), available at <http://www.cjpc.usdoj.gov/bjs/pub/pdf/iptc.pdf> (on file with the University of Michigan Journal of Law Reform).

192. See, e.g., *id.*; CHARLENE WEAR SIMMONS, CALIF. RESEARCH BUREAU, 7 C.R.B. NOTE 2, CHILDREN OF INCARCERATED PARENTS 4–6 (2000).

193. See SIMMONS, *supra* note 192.

194. See *id.*

nues support prison systems, meaning one in every fourteen dollars of state general fund expenses supports incarceration.<sup>195</sup> Because state budgeting constitutes a zero-sum game, in which each dollar directed to one project becomes unavailable to other public pursuits, even corrections officials realize that one “cannot speak about increased investment in corrections today without allowing that those dollars will have to come from policing, teen pregnancy prevention programs, pre-natal and peri-natal programs, and, increasingly, public education.”<sup>196</sup> At some point clever management and amenities cutbacks must reach their limit, meaning that state costs per prisoner will eventually rest upon a floor below which no cost savings are possible without violating the Eighth Amendment.<sup>197</sup> Thus once states reach this floor, which they must be rapidly approaching if not pressing against already, each additional prisoner represents a direct cut from another state program.

5. *Counterarguments Favoring Incarceration*—It would be unfair to present arguments such as those appearing immediately above without acknowledging the myriad arguments supporting imprisonment, even at rates as high as those in the United States, as well as the number and gravity of those commentators supporting the status quo. If nothing else, that the representatives of the sovereign people so consistently adopt policies causing high imprisonment should caution against the dismissal of such policies as foolhardy. Even if one rejects such evidence with appeals to public choice theory, the considered conclusions of scholars cannot be similarly dismissed.

The primary modern justifications for punishment are retribution, deterrence, reform, and incapacitation.<sup>198</sup> Retribution demonstrates society’s repudiation of a criminal act, giving “definite expression and a solemn ratification and justification to the

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195. CENTER ON JUVENILE AND CRIMINAL JUSTICE, CUTTING CORRECTLY: NEW PRISON POLICIES FOR TIMES OF FISCAL CRISIS (2001) (citing NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF THE STATES (2001)).

196. *Id.* at 7 (quoting Martin Horn, New York City Commissioner of Probation and former Secretary of the Pennsylvania Department of Corrections). See also STATE PRISON EXPENDITURES, *supra* note 54 (noting total state prison expenses of \$38 billion in fiscal year 2001). The \$38 billion total represents a huge increase from comparable expenditures in 1996. See *id.* at 1 (noting total expenses of \$22 billion in fiscal year 1996).

197. See *supra* note 122 and accompanying text (recounting Florida’s violations of Eighth Amendment rights of state prisoners); Wright, *supra* note 93 and accompanying text (recounting North Carolina’s interaction with federal judges decrying state prison conditions).

198. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 102, 115, 126 (6th ed. 1995).

hatred which is excited by the commission of the offense.”<sup>199</sup> Distinct from justifications focusing on changing the conduct of a given criminal or discouraging like conduct from others, retribution as a justification focuses on the society as a whole, emphasizing the public’s right and need to reify its collective moral outrage.<sup>200</sup> Deterrence aims to prevent crimes from occurring by discouraging citizens from committing them. With criminal penalties, society raises the cost of crime in hopes that would-be criminals will adopt better behavior.<sup>201</sup> Unlike the other main justifications for punishment, reform aims at the betterment of the criminal. In other words, the justification holds water only if punishment improves the state of the wrongdoer.<sup>202</sup> A rational criminal might even be expected to appreciate his punishment after the fact.<sup>203</sup> Finally, incapacitation springs from the straightforward notion that an imprisoned criminal cannot hurt others, making his incarceration a social good.<sup>204</sup> This justification has gained prominence as the belief in reform has waned and public concern over crime has waxed.<sup>205</sup> It depends on a difficult empirical question: Is

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199. JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883).

200. See EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108–09 (Simpleson trans., 1964).

201. See JEREMY BENTHAM, PRINCIPLES OF PENAL LAW for a discussion of how punishment decreases the utility of crime, thereby reducing its incidence. See also Johannes Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., CRIMINALITY & POLICE SCI. 176, 179–80 (1952) (discussing the cost of crime as a direct deterrent, punishment as creating “moral inhibition” against crime, and punishment as stimulating “habitual *law-abiding conduct*”).

202. How one should determine whether a criminal’s state has been improved presents a difficulty. Different metrics might include happiness (i.e., will the pain of punishment be outweighed by the happiness accompanying one’s later rectitude), morality (i.e., will the criminal become a better human being in the sense of, say, Kantian ethics), and religion (i.e., will the criminal become more likely to receive Grace). Difficulty in measurement does not obscure the main point, however. For example, one could hardly use reform to justify the death penalty absent a quite unusual calculation of the convict’s utility.

203. Reform as a justification enjoys little popularity today. See KADISH & SCHULHOFER, *supra* note 198, at 125–26; ALLEN, *supra* note 16 *passim*; Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1012–14 (1940) (noting “questionable assumptions” underlying the theory).

204. Indeed, a criminal’s incapacitation is a perfect public good (like national defense) in that it is available to all (except perhaps fellow convicts) and one person’s enjoyment of the benefit does not detract from another person’s enjoyment.

205. See FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 3 (1995) (“Incapacitation now serves as the principal justification for imprisonment in American criminal justice . . .”). Congress explicitly endorses the consideration of incapacitation during criminal sentencing. 18 U.S.C. § 3553 (2000) (ordering the application of sentences designed “to protect the public from further crimes of the defendant”).

the benefit of incapacitation greater than the cost of imprisonment to society (including the cost to those incarcerated)? If a full consideration of the costs and benefits, both economic and not, determines that incarceration is worth the cost, then the mission of the would-be state reformers becomes misguided because decreasing incarceration would hurt society.

6. *Final Verdict on Costs and Benefits*—Although the argument that incarceration is more than worth its cost<sup>206</sup> has merit, the balance weighs in favor of reducing imprisonment. This conclusion prevails for two primary purposes. First, it simply seems hard to believe that the United States' world-topping incarceration rate can truly represent optimum policy. Can it be that the need for retribution in the United States is greater than elsewhere, perhaps because Americans possess greater collective moral outrage than citizens of other nations? It is similarly unlikely Americans are so predisposed to criminality as to need harsher punishments as deterrents than do the would-be criminals of other nations. And, unless Americans are somehow more inherently criminal than others, reforming an American criminal should not require longer imprisonment than reforming, say, a Briton.

This leaves incapacitation as the primary plausible justification for the United States' status as the world's imprisonment leader. Because imprisonment has so many social costs,<sup>207</sup> it may be that other nations lack the ability or the will to incarcerate the number of prisoners needed to incapacitate their criminal element and thereby secure the safety of the rest of the citizenry. Deciding this controversy lies beyond the scope of this Note. The majority of scholarship, however, argues against incapacitation as a sufficient justification for American imprisonment rates and that a reasonable would-be state reformer could certainly side with the majority on this matter.

Second, as the preceding subsections demonstrate, few of the arguments against imprisonment are even *considered* by those setting policies that affect imprisonment rates, suggesting that overly high rates nearly certainly result. A state may decide that the cost of crimes committed by a freed convict outweigh the costs to society of keeping him locked up, but it probably underestimates the

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206. See *supra* note 110; see also Steven Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence From Prison Overcrowding Litigation*, 111 Q.J. ECON. 319, 319 (1996) (arguing that the cost to society of increased crimes committed by prisoners freed as a result of prison overcrowding litigation far exceeds the cost of imprisonment).

207. See *supra* Parts IV.B.1-IV.B.4.

total societal cost of incarceration. The issues discussed above in subsections 1-4 constitute but a few examples of serious problems caused by America's high incarceration rate that usually receive little attention from those making policies affecting imprisonment. This Note leaves to other scholars the project of finding the optimal rate of imprisonment, if such a thing exists. Even without it, however, the data strongly support a conclusion that current American rates are far too high, and shockingly so. States considering policy changes aimed at reducing incarceration deserve praise.

### CONCLUSION

As states reform their criminal sentencing systems to obey the post-*Blakely*, post-*Booker* constitutional requirements, information about what tactics have worked in other states should be quite valuable. My own belief that incarceration rates are too high accords with the publicly announced desires of many state officials across the country. For whatever reason—whether simply to save money or because of other objections about the status quo—state legislators want to reduce their prison admissions. The experiences described above, especially those of North Carolina, should offer useful guidance in this important effort.