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The North Carolina Community Penalties Act: A Serious Approach to Diverting Offenders From Prison

BY MARC MAUER

Assistant Director, The Sentencing Project, Washington, DC

Introduction

PRISON POPULATIONS throughout the country have been increasing dramatically since 1973 and are currently at an all-time high.[1] This surge in population has led to a serious crisis of prison and jail overcrowding, to which policy-makers have attempted to respond in a variety of ways. One major thrust of both criminal justice reformers and corrections officials has been the development of alternatives to incarceration.

While proponents of alternatives have suggested a range of goals for their programs, a common theme is the possibility of diverting offenders from a sentence of incarceration. That is, an alternative sentence should be designed for an offender who would otherwise be incarcerated if not for the presence of the program. These programs are thus attractive to policy-makers who are seeking cost-effective solutions to overcrowding, as well as to those who believe that many offenders can be appropriately sentenced to a community program.

Unfortunately, the goal of diverting offenders from institutions has proven to be much more difficult to attain than its early supporters imagined. In some cases, program directors have become so overwhelmed by the day-to-day issues involved in operating a program that they no longer ask themselves whether they are diverting offenders from incarceration. Other programs still profess to be serving as "true" alternatives, but no real means exist by which to evaluate their performance. Finally, there is the much-discussed phenomenon of "widening the net," whereby offenders who would likely receive a sentence of probation or non-incarceration become clients of the alternatives program. The programs thus increase the "net" of social control while having no impact on prison populations.

The experience of alternative programs in the state of North Carolina since the early 1980's provides a refreshing example of an experiment in developing alternatives to incarceration that is at once cost-effective, humane, and viable for a significant number of criminal offenders. A look at that state's experience shows that its programs are not without their problems and are far from the complete answer to prison overcrowding. Yet they are having a demonstrated impact on the state's corrections system and are developing increasing public support.

What follows is an examination of the history and implementation of the Community Penalties Act in North Carolina and an assessment of its relevance for other states. In particular, the focus is on two main issues:

1. The structural aspects of the Community Penalties programs that increase their prospects for serving as a "true" alternative to incarceration, and
2. The ways in which the programs have had to adapt their styles and procedures from their original "grass-roots" base to one that can respond to the demands and interests of a state bureaucracy.

History

North Carolina is rarely accused of being a state that is "soft on crime." For many years, its rate of incarceration has remained one of the highest in the country. Its current state prison population is over 18,000, including more than 2,700 prisoners serving misdemeanor sentences of 6 months or more.[2]

Yet, although the state has been "tough" in sending large numbers of people to prison, for some time now there has also existed a small, but effective, lobby for non-incarcerative options. A network of reformers in different parts of the state, centered around the North Carolina Prison and Jail Project, has been active for over 10 years in promoting the concept of alternatives to incarceration and in developing programmatic responses to prison and jail overcrowding.

The basis for the developement of the Com-

[1] Bureau of Justice Statistics, "Prisoners in 1986," *BJS Bulletin*, May 1987, p. 1.

[2] North Carolina Department of Correction, "Quarterly Statistical Abstract, January-March, 1987," p. 28.

munity Penalties programs dates back to 1980 with the establishment of the Citizens' Commission on Alternatives to Incarceration.[3] The Commission developed from the impetus created by the reformers' network in the state, which succeeded in gaining funding from the Z. Smith Reynolds Foundation for a study of the state's prison system and prospects for the development of alternatives.

Chaired by Judge Willis P. Whichard, formerly of the State Court of Appeals, the Commission included representatives from major components of the criminal justice system, as well as prominent legislators and influential citizens. Its final report,[4] issued in 1982, called for a range of alternative programs to be established, including the Community Penalties Program. The report was welcomed by the state legislature, which proceeded to adopt the Community Penalties Act of 1983 (N.C.G.S. S143B-500 through 507). The Act called for the creation of locally based programs and provided initial funding of $210,000 each year for 2 years. The legislation specified that funding would be provided for programs working with prison-bound misdemeanants and non-violent, prison-bound felony offenders (those offenders "facing an imminent and substantial threat of imprisonment"). The felony offenses were classified as categories H, I, and J under the state statutes and included such offenses as attempted burglary, forgery, receiving and possessing stolen goods, and breaking and entering a motor vehicle.

Five program offices were initially selected for funding by the Act. Of the five, four were alternative sentencing programs that had been independently organized between 1981 and 1983 in communities of the state and funded by the Z. Smith Reynolds Foundation. The first, in Fayetteville, was established in 1981 as a pilot project of the National Legal Aid and Defender Association's Alternative Sentencing/Sentencing Advocacy Project, and served as a regional office of the National Center on Institutions and Alternatives (NCIA).[5] The other four programs, located in Raleigh, Asheville, Greensboro, and Hickory, were also based on the Client Specific Planning (CSP)[6] model developed by NCIA (see below). State funding for the programs has since been expanded to cover a total of 12 jurisdictions.

Program Design

As stated above, most of the Community Penalties programs operate on a modified Client Specific Planning model. The basic premise of this approach is that each offender is an individual whose background and personal circumstances must be taken into account in designing a sentencing alternative. The programs begin with the idea that the source of the criminal action lies in personal and social problems of the offender which can best be addressed through the use of community resources. In addition to responding to the rehabilitative needs of the offender, the CSP model also addresses the need to satisfy the court's interest in incorporating punitive sanctions in a sentence. This generally takes the form of a period of probation, payment of fines and/or restitution, and a period of community service.

One of the most significant features of the CSP model as developed by NCIA is the intensive nature of the sentencing plan and process. Typically, a case developer will spend 30 to 40 hours in the preparation of a comprehensive plan for an offender. Once the plan is developed, a sentence "package" is presented to the judge in the form of a cover memorandum accompanied by a detailed description of the proposed conditions of the sentence and any relevant supporting letters and documentation.

The North Carolina programs modify the CSP approach in two ways. First, they place greater emphasis on coordinating their efforts with other agencies of the criminal justice system, such as probation and prosecution, than does the general CSP approach. The other modification is the inclusion of post-adjudication followup with their clients.

The Community Penalties programs look for prison-bound cases in one of two ways:

1. "Attorney" referrals—Most of the programs rely on defense attorneys, either in a public defender office or through assigned counsel, to refer appropriate cases to them.
2. "Solicited" referrals—Some North Carolina programs systematically examine grand jury lists and indictments to select the cases that fit their criteria. They then contact the attorney for the defendant in the case and offer to make the program's services available.

Each of these referral methods has its advantages and disadvantages, and there is also some crossover in the means by which each program operates. The attorney system operates on the assumption that the defense attorney is in the best position to determine

[3] *Report: Citizens Commission on Alternatives to Incarceration,* Durham, N.C., Fall 1982.

[4] Ibid.

[5] Malcolm C. Young, "Results from the Alternative Sentencing/Sentencing Advocacy Project—1982," National Legal Aid and Defender Association, p. 3.

[6] Leonard Berman and Herbert Hoelter, "Client Specific Planning," 45 *Federal Probation,* 1981, p. 37.

the likelihood that his or her client is facing a significant threat of prison time. Its main drawback is that it depends on an active and concerned defense bar. In any jurisdiction, there will always be at least some defense attorneys who are unaware of the program or not sufficiently supportive to refer their clients to it.

The "solicited" system attempts to respond to this problem by screening all potential cases and then contacting the attorneys directly. Its main disadvantage is that the staff time required to monitor all potential cases in a large jurisdiction can make the system unworkable.

Program staff members are not generally required to use one method or the other exclusively. Those using the "attorney" model report that when the number of referrals they are receiving from attorneys is down, they get on the telephone or show up at the public defender office to ask individual attorneys if they have any appropriate cases. They also engage in ongoing attorney education regarding the program and sometimes attend arraignments to identify potential cases. Generally, the dropoff in referrals is merely due to the pressing number of cases which the attorney is handling and his or her lack of time to consider making referrals. In jurisdictions where there is no public defender system, sentencing program staff members find it necessary to continually be in touch with assigned counsel in order to educate them about the program's services.

Diverting the Prison-Bound Offender

The most significant feature of the Community Penalties programs is the strong commitment of staff and attorneys to serving as "true" alternatives; that is, to divert those felony offenders who would most likely be sentenced to prison if not for the availability of the program. In order to accomplish this objective, the programs have combined the resources of the academic world with the day-to-day working knowledge of the criminal justice system that defense attorneys and sentencing staff have developed.

As part of the state's comprehensive examination of its prison situation, the North Carolina Institute of Government, a research unit of the University of North Carolina at Chapel Hill, undertook a study of state felony sentencing during 1981-82.[7] Out of the range of offense and offender characteristics studied, the Institute's researchers isolated four variables that were most directly correlated with a prison sentence. These variables were: 1) current probation status; 2) total number of pending indictments; 3) number of days in pretrial confinement; and 4) number of prior convictions. They then ascertained the relative weight of each variable in influencing the sentence and developed a formula that could predict the likelihood of incarceration in any individual situation.

The formula is now used by all the Community Penalties programs as their primary determination of the class of prison-bound offenders. Using some basic information about the current charge and criminal justice history of the defendant, program staff can quickly calculate whether the referral is an appropriate one. The statistical measure is not foolproof, of course, and is only used as a basic guide. For instance, it can report that most third-time burglars who have already been to prison are very likely to receive another sentence of imprisonment. There are always isolated cases, though, in which an offender in this situation would not be sentenced to prison, even without the services of a sentencing program. Nonetheless, the measure does provide a reasonably strong assurance that the clear majority of program participants face a substantial threat of imprisonment.

The second stage in the determination is the human element. Sentencing staff members review each case individually to determine if there is any reason to believe that the formula is "over-predicting" or "under-predicting" in a particular case. For example, a first-time offender who scores well below the threshold of 1,000 points (the prison-bound cutoff) would normally be rejected by a sentencing program. However, if the defendant is charged with possession or sale of "crack," the highly addictive cocaine derivative, sentencing staff in many jurisdictions may correctly assess that the sentencing judge is interested in "sending a message to the community" by incarcerating all such offenders. Similar considerations are made when a defendant is charged with a sex offense (those sex offenses which fall under the "HIJ" class in the felony code) or is a prominent member of the community and therefore may face an increased or decreased chance of imprisonment depending on the nature of the offense and the community. Finally, any offender who has previously been incarcerated is automatically eligible for the program, regardless of the point system.

The other critical human element is the assessment of the defense attorney. Program staff consider

[7] Stevens H. Clarke, Susan Turner Kurtz, Elizabeth W. Rubinsky, and Donna J. Schleicher, "Felony Prosecution and Sentencing in North Carolina, A Report to the Governor's Crime Commission and the National Institute of Justice," Institute of Government, University of North Carolina at Chapel Hill, May 1982.

the attorney's judgment in sensing whether a defendant is prison-bound. Sometimes, this assessment is merely a report that the prosecutor is determined to recommend a substantial term of incarceration and is not at all inclined to bargain. In general, the determination is made as a result of the attorney's working knowledge of the local system—the sentencing judge, the defendant's history, the nature of the offense, and general sentencing patterns. Since referral to a sentencing program requires a certain additional amount of work for the defense attorney, there is a built-in check against inappropriate referrals. Unless the attorney believes that his or her client faces a term of incarceration, it is not an efficient use of time to refer a case to the sentencing program.

Are the Programs Working?

There are two types of measures which need to be used in determining whether the Community Penalties programs are "working." The first is one that would be used in any social services program, whether the program is meeting its goals for providing services in an efficient manner. The second relates to the main concern of corrections interests, whether the program is actually diverting the prison-bound offender.

Although the North Carolina programs are relatively new, some preliminary judgments can be made. Five of the programs have been in existence for a period of 3-5 years and are now beginning regular evaluation cycles by staff of the Division of Victim and Justice Services of the Department of Crime Control and Public Safety, the state agency which administers the program grants.

As a general rule, the programs have established themselves and are operating efficiently. Although there is considerable variation among the five original programs in the extent to which they are fulfilling their annual goals, the state has been satisfied that, on the whole, they are accomplishing their primary objectives.[8] Most programs are finding that the rate at which their sentencing plans are accepted by the courts is about 85 percent.[9] To the extent that they have been able to follow up on these cases, there appears to be an equally high rate of successful completion of the sentence. There are additional cases in which the sentencing plan is rejected by the judge, but is subsequently used as a parole plan once the offender has served some time in prison.

Although the sentencing plans are being accepted and carried out, some of the programs are experiencing difficulty in getting the volume of cases for which they have contracted. This is cause for some concern, with various theories being proposed as to the source of the problem. There is some feeling that the fault lies with local attorneys, who do not take enough advantage of the programs. Others feel that this will always be a problem and that it is up to the programs to aggressively seek out attorneys and recruit for appropriate referrals.

Regarding the question of diversion from prison, there are a variety of indicators that point to the success of the programs in meeting this goal. The most objective measures are two studies conducted by researchers at the Institute of Government, one on the Repay, Inc. program in Hickory[10] and the other on the Sentencing Alternatives Center in Guilford County (Greensboro).[11]

In both studies, analysts compared an experimental group which received sentencing services to a control group of similar offenders which did not receive any services other than what the defense attorney would normally provide. (Note: In response to questions regarding the ethics of withholding services from eligible defendants, program staff asserted that the limitations imposed on the program in terms of funding and staff size necessitated that not all defendants could be served in any case.) In the Repay study, the Institute of Government concluded the following:

1. Repay clients received prison sentences about two-fifths as often as did the comparable control group; and
2. Repay clients received prison sentences of 12 months or more about half as often as the control group.[12]

The Guilford study reached similar conclusions, finding that 46 percent of the clients in the Sentencing Alternatives Center received prison terms, compared to 63 percent in the control group.[13]

Legislative confidence in the programs' ability to divert offenders from prison and to develop effective sentencing plans has been expressed through the increased appropriations which the Community

[8] North Carolina Department of Crime Control and Public Safety, Division of Victim and Justice Services, "Annual Management Audits, 1987."

[9] North Carolina Department of Crime Control and Public Safety, Division of Victim and Justice Services, "Nine Month Report: Goals vs. Performance, Community Penalties Program," April 1987.

[10] Stevens H. Clarke, "Effectiveness of the Felony Alternative Sentencing Program in Hickory, North Carolina," Institute of Government, University of North Carolina at Chapel Hill, 1986.

[11] W. LeAnn Wallace and Stevens H. Clarke, "The Sentencing Alternatives Center in Guilford County, North Carolina: An Evaluation of its Effects on Prison Sentences," Institute of Government, University of North Carolina at Chapel Hill, April 1987.

[12] Clarke, p. 11.

[13] Wallace and Clarke, p. 1.

Penalties programs have received over the past several years. The budget for fiscal year 1987 has increased to over $500,000 and, with the expansion of the program to 12 sites in 1988, will reach nearly $750,000.

Program staff members also point to many instances in which they were unsuccessful in convincing the sentencing judge to accept the plan, and the offender was sentenced to prison instead. While disappointing to the program, this offers additional evidence that the clients were indeed prison-bound.

One issue that needs to be addressed in assessing these programs is whether the programs are targeting the "right" offenders, but "widening the net" by proposing sentences that are stiffer than necessary. An example of this was offered by one program staff person who indicated that, in its desire to fashion a sentence that would meet the court's interest in punishment, the program often recommends that a very high number of hours of community service be completed. In many cases, the sentencing judge will accept the plan but actually reduce the number of community service hours, believing that the number of hours imposed are either overly punitive or unrealistic.

The Contradictions of Success

One of the more interesting aspects of the Community Penalties history in North Carolina is the pressure for change in the programs' structure and values that has come about as a result of the successful track record which has been established.

The primary way in which this conflict has been expressed results from the grass-roots nature of the programs being confronted with the reality of state funding and oversight. The five original programs all began with a certain sense of mission and reformers' zeal, with funding from various sources. Although the programs eagerly sought state funding for their efforts, with it have come increased bureaucratic demands and layers of accountability. It should be emphasized that the nature of these bureaucratic pressures are by no means totally baseless or in conflict with the programs. Rather, they result from the interest of the legislature and state administrators in evaluating the success of the program in accomplishing its objectives. While program staff do not quarrel with this need, complaints are still voiced regarding the amount of "paperwork" and reporting that is now required. Essentially, the program people are saying, "We have been doing a good job for five years, why is all this now necessary?" The state responds by saying, "We assume you've been doing a good job, but how do we know that you still are unless we can monitor your progress?" There is a certain amount of justice on both sides of this issue. Researchers may want to examine this issue over the next several years and attempt to analyze the tradeoffs between program "independence" and formal evaluation systems.

A related issue is that of the future control of the Community Penalties programs. A general sense exists that at some point in the future there will be pressure to incorporate the programs within a state department, rather than receive annual grants from the state as is currently the case. This incorporation could be with either the Department of Crime Control and Public Safety or with the Department of Correction. Many program staff would resist any move in this direction, believing that the programs' strength and credibility rests on their community base and independence from the corrections bureaucracy.

Other Issues

The brief, but relatively successful, history of the North Carolina Community Penalties programs raises a number of issues for reformers in other states to consider. Some of the more relevant ones are the following:

Alternatives for the Serious Offender?

The legislation establishing the Community Penalties programs specifically limited the programs to working with prison-bound misdemeanants and the less serious (HIJ) prison-bound felony cases. The rationale for excluding more serious offenses from consideration was essentially the belief that both the public and the legislature had to be "sold" on the concept before they would risk the release of felons perceived to be violent to a community sentence.

While not diminishing the seriousness of violent crime, one can question the efficacy of defining the non-violent or violent nature of an offender solely by the offense charged against him or her. For example, there have been a number of well-publicized cases in recent years of women with no criminal histories fatally attacking their husbands or boyfriends after long patterns of abuse. Do these women pose a greater threat to the safety of the community than do drug dealers (some of whom would fall under the HIJ felony category)?

The irony of the situation is evidenced by the fact that some of the original five programs, prior to their receiving state funding, had been working with defendants charged with serious felony offenses. While the numbers of such cases had not been large, there

had been no undue negative publicity or crime problems associated with these cases.

Proponents of the limitation believe that it is necessary not only because of legislative intent and legislators' concern, but also because it is programmatically useful. They point to the fact that most programs are not currently reaching all the potential HIJ cases in their jurisdictions, anyway (which account for almost two-thirds of all prison admissions), and until they do so, there is no good reason to go beyond these categories. Some program staff members, believe, though, that one reason the programs may be having difficulty in meeting their quota of cases is because of the limitation, and feel that being permitted to selectively work with more serious felony cases would improve the programs' impact.

Defense Advocates or Court Agents?

Another issue that surfaces frequently is the role of the Community Penalties programs within the criminal justice system. The early history of the programs was one of reformers who viewed their role as being an arm of the defense attorney and an advocate for the defendant. The Community Penalties Act reflects this, calling for the preparation of "detailed community penalty plans for presentation to the sentencing judge by the offender's attorney." But state officials now hold the view that the program staff are agents of the courts; in effect, an advocate for community sentences, and not for the defendant. While the distinction may appear to be a subtle one, it has some significant practical implications.

One of these concerns the role of victims and law enforcement in the development of a sentencing plan. It is the view of the state that both these parties need to be contacted to ascertain their views for incorporation in the sentencing plan. Some of the program staff members and defense attorneys are quite reluctant to do this, believing that it is not inappropriate for some agency to contact these parties, but that it is not their responsibility to do so. They would prefer to see the prosecutor's office or an independent agency work with the victims to provide emotional or financial assistance.

Relationships Within the Criminal Justice System

Related to the above issue is the way in which sentencing programs are viewed by other parties in the criminal justice system. The programs vary considerably in the amount and type of cooperation they receive from other parts of the system. Some operate in a fashion that calls for consultation with the prosecutor in the development of a sentencing plan, in order to determine if some agreement can be reached that can then be presented to the judge. In at least one jurisdiction, though, the prosecutor is fairly hostile to the program, and almost always argues for a term of incarceration.

A similar range of relationships can be found with other parts of the criminal justice system, including probation. The programs have received strong official support from probation at the state level, and the local probation branch managers generally serve on the board of directors of the Community Penalties program in their county. The programs have also initiated a regular series of local meetings with probation personnel to discuss issues that arise in their operation. Because some individual probation officers remain unconvinced of the programs' value or react defensively to it, though, the programs usually try to identify two or three probation officers in each office who will agree to handle most of the Community Penalties cases. This has generally worked out well across the state.

Conclusion

Although the Community Penalties Act of North Carolina has far from solved the crisis of prison overcrowding, it nevertheless stands as a policy option that bears examination by other states. In fact, the success of the Act in North Carolina has been one factor that has led that state to a relatively aggressive look at its prison system and the range of options available to state decision-makers. Among other policies, this process led to the adoption of legislation in early 1987 that placed a "cap" on the state's prison system.

For policy and program people in other states, there are several primary lessons that can be learned from the North Carolina experience. These are:

1. Even in a relatively conservative state, progressive and somewhat experimental reforms in corrections can take place if the proper political and public support is mobilized.
2. The Community Penalties programs have succeeded *because* they have consciously asked themselves whether they were "true" alternatives to incarceration, and not by ignoring the issue.
3. Another element of the programs' success has been their aggressiveness and ability to

"sell" the programs' concept. Program staff have aggressively pursued referrals from attorneys, presented plans to judges, sought public and media attention, and developed local political influence for their efforts.

4. The close relationship between the sentencing programs and defense attorneys has resulted in presentation of sentencing plans that have combined the best elements of legal arguments and community resources.

The next several years will prove interesting to corrections efforts in North Carolina as the state moves to expand the number of Community Penalties programs. For, in the face of the large number of commitments to the North Carolina prison system, it remains to be seen whether the programs can begin to have a real impact on the prison population. Beyond that is the question of the programs' ability to affect the way in which issues of crime and corrections are viewed by the criminal justice system and the public at large.

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