

*Criminal Justice
Sentencing Policy Statement*

2005



National Council on Crime and Delinquency

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November, 2005



National Council on Crime and Delinquency

Executive Summary

Periodically, the NCCD board of directors puts forth major policy statements on critical issues facing the nation's justice system. These statements reflect the findings of the best research and the judgments of the nation's top professionals in the field. Recent United States Supreme Court cases have cast into uncertainty the status of the state and federal sentencing guidelines and have reopened the critical question of judicial authority. It is time to seriously reevaluate the "sentencing policy experiment" that began in the United States in the late 1970s.

Early sentencing reforms, although originally intended to create a more equitable system of sentencing through structured guidelines, gave way to increasing emphasis on punishment as the main goal of imprisonment, with the adoption of "tough on crime" attitudes and legislation. The implementation of politically-motivated ideas such as Three Strikes, mandatory minimums, and "truth in sentencing" have helped fuel an unprecedented swelling of the prison population in America, despite a simultaneous and persistent decrease in the crime rate. These policies have had an undue negative impact on minority communities and women. Prison construction has been rampant since 1980. Furthermore, the costs of supporting this enormous system have skyrocketed to over \$167 billion in 2004. The United States now locks up more than 2.2 million of its citizens. This represents one of the highest imprisonment rates in the world.

NCCD Positions on the Reform of Sentencing

NCCD takes the following positions in the interest of creating a more just system of criminal sentencing.

- Make offenders and not offenses the subject of sentencing.
- Adopt objective criteria designed to make discretion visible and to promote the accountability of government officials at every stage of the sentencing process.
- In the sentence of the court, account for: 1) the offender's current risk to public safety, 2) offender rehabilitation and treatment needs, 3) the gravity of the offense, and 4) the relative costs-benefits of each available sanction.
- Direct sentences to serve a number of goals, including rehabilitation and treatment.
- Expand and use less expensive and more effective forms of criminal penalties; encourage innovation.
- Reserve prison sentences for three types of offenders: 1) first-time felons that have committed a violent or serious crime, 2) repeat felons whose new crimes

involve a substantial threat to public safety, and 3) felons whose crimes involve substantial violations of the public trust.

- Sentence repeat felony offenders or those convicted of very violent or other serious crimes to maximum terms that allow the possibility of parole.
- Devise a plan for reentry at the time of sentencing.
- Reestablish and reinvigorate parole and the pardon processes.
- In general, impose short and determinate sentences for nonviolent felons.
- Repeal mandatory minimum sentences and three strikes laws.
- Abolish the death penalty.
- Scrutinize and monitor all sentencing propositions and implementation to prevent an unjust impact on women.
- Adopt sentencing legislation only after completing a fiscal impact statement on the likely effects of proposed legislation on prisons, jails, probation, parole, court resources and dockets, and public safety.
- Establish national standards for the conditions of confinement.
- Scrutinize and monitor all sentencing propositions and implementations to prevent an unjust impact on minority communities.
- Retain juvenile offenders in a separate juvenile justice system specifically designed to meet the needs of young people.
- Address victims' interests apart from the sentencing decision.
- Conduct rigorous research to evaluate the effects of various sanctions on offenders, the corrections system, and crime reduction.
- Periodically review sentencing statutes and practices to assure compliance with the spirit of legislation and relevant court decisions.

Conclusion

It is incumbent upon us to look with an intelligent and critical eye to our justice policies and the goals they intend to accomplish. The above-outlined positions of NCCD are closely aligned with those set forth by the Kennedy Commission of the American Bar Association as it answered Justice Kennedy's challenge to revisit and analyze current practices.

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Introduction

The National Council on Crime and Delinquency (NCCD) conducts research and initiates programs to reduce crime and delinquency. The Council seeks to influence public policies to improve the criminal justice, juvenile justice, and child welfare systems. NCCD encourages citizen involvement in effective, humane, fair, and economically sound solutions to the problems of crime and delinquency.

Periodically, the NCCD board of directors puts forth major policy statements on critical issues facing the nation's justice system. These policy statements reflect the findings of the best research and the judgments of the nation's top professionals in the fields of academia, direct service provision, and advocacy, among others. We believe that these policy statements merit the immediate attention of elected officials and public administrators.

This booklet presents a revision of an NCCD statement on criminal sentencing published in 1992. Recent United States Supreme Court cases—*Blakeley v. Washington*, *United States v. Booker*, and *United States v. Fanfan*—have cast into uncertainty the status of the state and federal sentencing guidelines and have reopened the critical question of judicial authority. In this unique era, high incarceration rates and declining fiscal revenues are plaguing most states and the nation. We have an unprecedented opportunity to craft and activate reasoned reforms guided by the moral imperative to move toward a more just society.

It is time to seriously reevaluate the “sentencing policy experiment” that began in the United States in the late 1970s. After 30 years of living with the repercussions of phenomenal rates of incarceration, there is an urgent need for reform and a return to rehabilitation as a primary objective of corrections (Krisberg, Craine, and Marchionna, 2004). We must not lose sight of the reality that the vast majority of prisoners return to the community. As one observer noted, “Whom would you rather sit next to on the bus, a guy that has just gotten out of prison, angry and without prospects, or one that is on his way to work?”

In 1992 NCCD set forth its views on a more rational response to offenders. NCCD believes that now is the time for a comprehensive reevaluation of our entire system of sentencing. We need to craft a response to offenders that is not simply constitutional, but is infused with the wisdom available from the last thirty years, during which time the experiment has unfolded in its many varieties. If we have learned anything, it should be that the shortsightedness of a reactive quick fix is detrimental to the whole of our justice system and the whole of our society. As renowned penologist, Milton Rector observed, “In our zeal to punish criminals, we should be careful not to punish ourselves.”

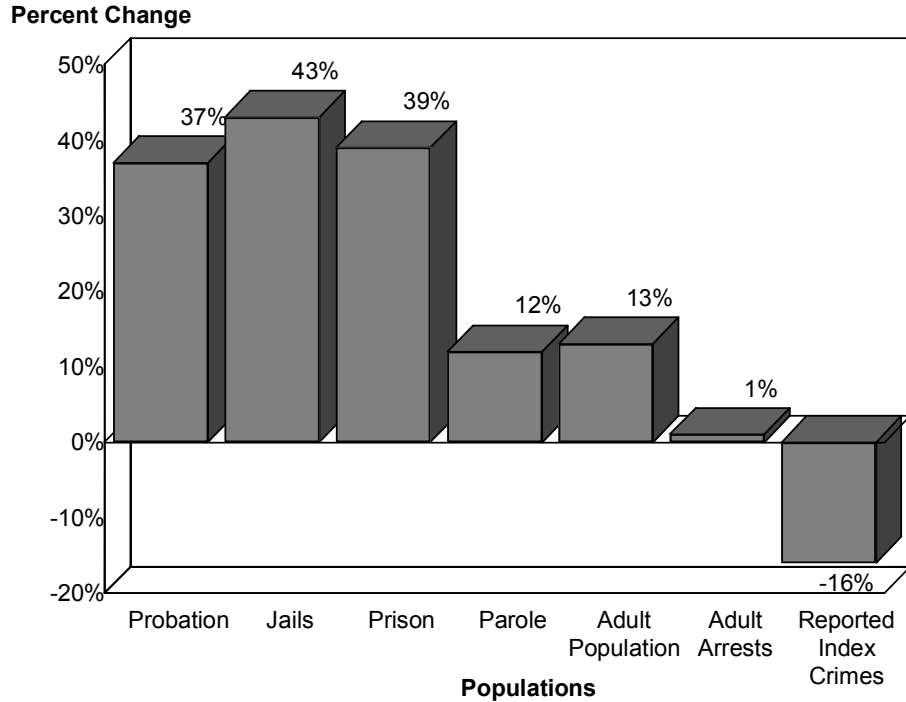
The goal of the NCCD board of directors is to encourage a vigorous national dialogue to stir appropriate action toward safer communities and extend justice to all Americans. We invite all interested citizens to review our work and communicate their reactions to us.

America’s Experiment with Sentencing Policy

For seven decades, starting around 1900, most states in the U.S. used an indeterminate criminal sentencing system that held rehabilitation as a primary goal. The roles of judges, correctional agencies, and parole officials were clearly defined. During this period, the rate of incarceration remained relatively stable, until the decade of the 1970s, which saw a revolution in sentencing policies. Washington State, Illinois, California, and Maine led the movement to more structured sentencing systems with fixed or structured penalties.

This sentencing revolution resulted from a complex interaction of factors. The perception of a vast disparity in sentences pointed to apparently limitless judicial power to determine the fate of individual citizens; judicial and parole decisions were opaque and undocumented. Judicial discretion and the actions of parole boards were perceived by conservatives to result in too much leniency and by liberals to result in unjust sentences influenced by a judge’s or a parole board member’s biases. Rising crime rates and the public’s fear of crime were concerns of elected officials. In addition, the social upheaval of the 1960s did much to undermine the public’s trust in authority in general.

Table 1
Correctional Populations
 1994-2003



	1994	2003	% Change
Probation	2,964,171	4,073,987	37%
Jails*	483,717	691,301	43%
Prison*	991,612	1,380,776	39%
Parole	690,159	774,588	12%
Totals	5,129,659	6,920,652	35%
Adult Population*	192,400,000	217,800,000	13%
Adult Arrests	6,400,000	6,500,000	1%
Reported Index Crimes	14,000,000	11,800,000	-16%

* Midyear counts

Sources:

Annual Estimates of the Resident Population by Selected Age Groups for the United States by States: July 1, 2003 and April 1, 2000, U.S. Census Bureau.

Correctional Populations in the United States, 1994, U.S. Department of Justice, Bureau of Justice Statistics.

Prison and Jail Inmates at Midyear 2003, U.S. Department of Justice, Bureau of Justice Statistics.

Probation and Parole in the United States, 2003, U.S. Department of Justice, Bureau of Justice Statistics.

Resident Population Estimates of the United States by Age and Sex: April 1, 1990 to July 1, 1999, U.S. Census Bureau

Uniform Crime Reports: Crime in the United States, 2003, U.S. Department of Justice, Federal Bureau of Investigation.

The goals of the federal Sentencing Reform Act of 1984 were to eliminate unwanted disparity; increase transparency, certainty, and fairness; and increase the proportionality of punishments. This was to be accomplished through guidelines, based on offense and offender characteristics, which sharply curtailed the discretion of judges and parole boards. Sentencing outcomes became more closely linked to the charges in the case, therefore, discretion fell de facto into the hands of prosecutors. Ironically, this did much to undermine the sought-after uniformity.

As the goals of imprisonment shifted, it became widely accepted by the media, rightly or wrongly, that “nothing works” in rehabilitation, that the very concept was a failure. Instead, the desire to control crime stressed the “get tough” goals of retribution and incapacitation over rehabilitation. This new justice model focused principally on the current crime and an offender’s past criminal behavior in the sentencing decision.

In addition, the increased scrutiny of judicial and parole board practices led in turn to a veritable war over authority among the judiciary, the executive branch, and the legislature. It became increasingly common for lawmakers at both the federal and state levels to dictate the specific terms of sentencing, such as mandatory minimums, limiting the sentencing authorities to routinely applying formulaic rules. States began adopting “truth in sentencing” legislation, which supposedly was a move toward greater honesty in the sentencing process. No early release was allowed; the term the judge imposed approximated the actual term served. The motivation of good behavior credit in prison was removed from the equation.

Sentencing policy has become far more subject to changes in political climates and the vagaries of perceived public opinion. Political expediency has willfully ignored the findings of scores of researchers that question the public safety benefit of longer sentences. Arguably the most extreme form of “getting tough” was “three strikes” legislation, which sent third-time felons to prison for life. While 25 states enacted some version of these laws, the California system determined that any felony could be charged and counted as a third strike. During nearly 10 years of these laws, the third strike population grew from 254 (1994) to 7,234 (2003). As of September, 2003, 64.5% of second and third strikers were serving time for nonviolent offenses. There were 672 Californians serving life sentences for drug possession, and 354 for petty theft (Ehlers,

Table 2
Victimization, Reported Crime, and Imprisonment Rate
1984-2003

Year	NCVS Victimization*†			UCR**		Incarceration Rate**
	Violence	Theft	All Property	Violence	Property	
1984	46.2	307.1	399.2	539.9	4,498.5	188
1985	44.7	296.0	385.4	558.1	4,666.4	202
1986	41.9	284.0	372.7	620.1	4,881.8	217
1987	43.7	289.0	379.6	612.5	4,963.0	231
1988	44.2	286.7	378.4	640.6	5,054.0	247
1989	43.4	286.5	373.4	666.9	5,107.1	276
1990	44.0	263.8	348.9	729.6	5,073.1	297
1991	48.0	266.8	353.7	758.2	5,140.2	313
1992	47.8	248.2	325.3	757.7	4,903.7	332
1993	49.9	241.7	318.9	747.1	4,740.0	359
1994	51.8	235.1	310.2	713.6	4,660.2	389
1995	46.6	224.3	290.5	684.5	4,590.5	411
1996	42.0	205.7	266.4	636.6	4,451.0	427
1997	39.2	189.9	248.3	611.0	4,316.3	444
1998	36.6	168.1	217.4	567.6	4,052.5	461
1999	32.8	153.9	198.0	523.0	3,743.6	476
2000	27.9	137.7	178.1	506.5	3,618.3	478
2001	25.1	129.0	166.9	504.5	3,658.1	470
2002	23.1	122.3	159.0	494.4	3,630.6	476
2003	22.6	124.4	163.2	475.0	3,588.4	482
% Change	-51.1%	-59.5%	-59.1%	-12.0%	-20.2%	156.4%

* Rates are per 1,000 persons aged 12 and above or per 1,000 households.

** Rates are per 100,000 total population.

† Because of changes made to the victimization survey, data prior to 1992 are adjusted to make them comparable to data collected under the redesigned methodology.

Estimates for 1993 and beyond are based on collection year while earlier estimates are based on data year. Due to changes in the methods used, these data differ from earlier versions.

Sources:

Key Facts at a Glance: Incarceration rate, 1980-2003, U.S. Department of Justice, Bureau of Justice Statistics.

Key Facts at a Glance: Violent victimization rates by gender, 1973-2003, U.S. Department of Justice, Bureau of Justice Statistics.

Key Facts at a Glance: Property crime trends, 1973-2003, U.S. Department of Justice, Bureau of Justice Statistics.

Uniform Crime Reports: Crime in the United States, 2003, U.S. Department of Justice, Federal Bureau of Investigation.

Schiraldi, and Ziedenberg, 2004). Even at its worst, judicial discretion did not produce this kind of inequity. Significantly, three strikes legislation has demonstrated no value as a deterrent to violent crime.

Growth of the prison system

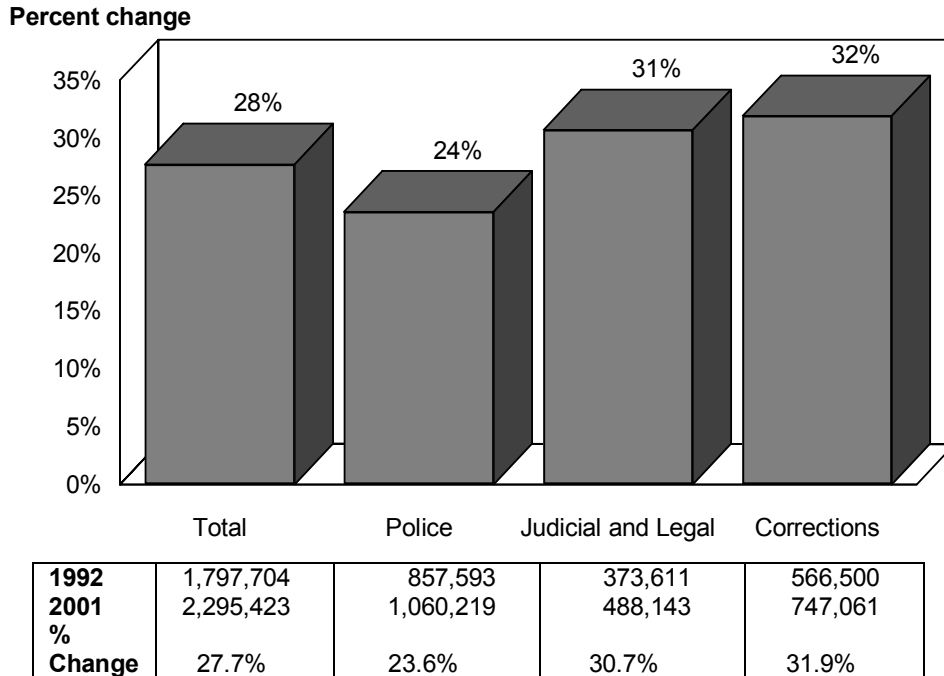
The effects of the get tough experiment are clear. The national rate of incarceration skyrocketed from 96 per 100,000 in 1970 to 297 per 100,000 in 1990. The result was a swelling of the prison population that has continued during the last fifteen years. In 2004, the rate of imprisonment in state and federal facilities was 486 per 100,000 (Bureau of Justice Statistics, 2005a). If we include jail terms of less than 12 months, the figure is over 700 per 100,000. As of 2003, the actual number of the incarcerated is almost 2.2 million, with a staggering total of 6.9 million Americans under some form of correctional control (Bureau of Justice Statistics, 2005b).

Our nation's reliance on prisons for behavior control is the highest in the world. The rate of imprisonment in the United States was 701 per 100,000 residents in 2003. In 60% of 205 countries, prison population rates were below 150 per 100,000 (Walmsley, 2003). In addition, the absolute numbers are astounding. Of the approximately nine million people imprisoned in the world, over two million of them reside in the United States.

Policies that relate to parolees have serious consequences for swelling prison populations. Of those inmates returning to prison, 40% are doing so because of a technical violation of the terms of their parole, such as failing a drug test, missing a meeting with the parole officer, or breaking a curfew. This is a grossly wasteful and ineffective practice (Jacobson, 2004).

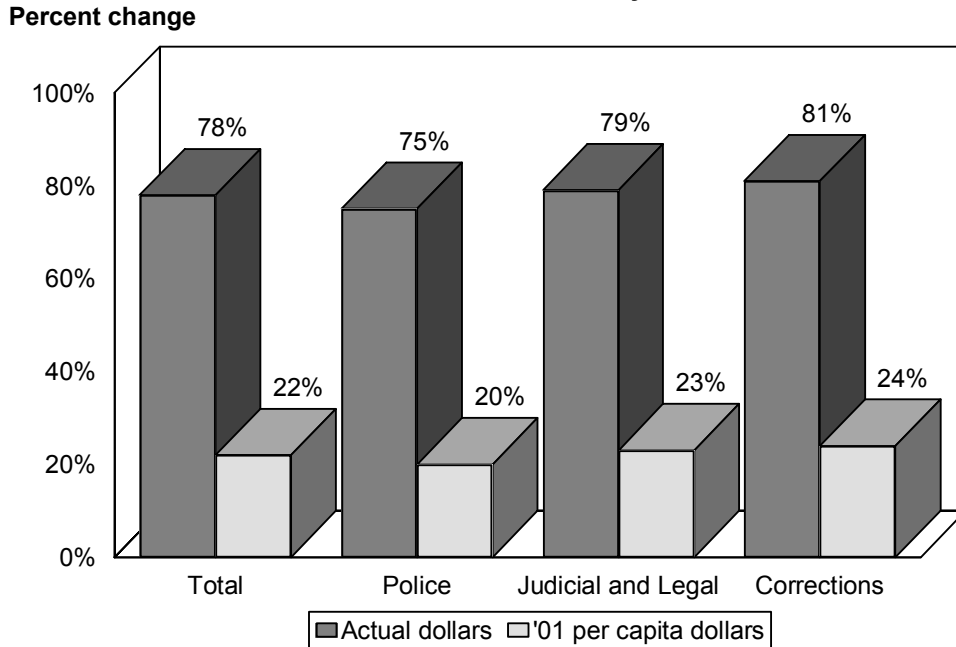
The facilities and personnel required to accomplish this phenomenal prison system expansion have grown accordingly. Over 40% of American prisons now in operation were built within the last 25 years (Travis and Lawrence, 2004). In the last quarter century, state prisons have grown in number from 592 in the late 1970s to 1,023 in 2000. In addition to these confinement-only state prisons, there are also 84 federal prisons, 264 private prisons, and 297 community-based state prisons. Between 1995 and 2000, 204 more prisons of all types were constructed (Bureau of Justice Statistics, 2003b).

Table 3
**Percent Changes in the Number of
 Criminal Justice Employees
 1992-2001**



Source: *Criminal Justice Expenditure and Employment Extracts Program*, U.S. Department of Justice, Bureau of Justice Statistics.

Table 4
**Percent Changes in
Direct Government and Per Capita Expenditures*
for the Criminal Justice System**



* Per capita expenditures are calculated in 2001 constant dollars.

Sources:

CPI Inflation Calculator, U.S. Department of Labor, Bureau of Labor Statistics.

Criminal Justice Expenditure and Employment Extracts Program, U.S. Department of Justice, Bureau of Justice Statistics.

U.S. corrections spending

As one might expect, the growth of corrections has also fueled dramatic increases in government spending. According to the U.S. Department of Justice (2004), federal, state, and local governments spent more than \$167 billion in 2001 for criminal justice services. That is a 78% increase in total justice expenditures above the \$93 billion spent in 1992. It is an increase of 366% over the total justice expenditures of \$36 billion in 1982.

Total justice expenditures break down into several categories—police protection, judicial and legal expenses, and corrections. Between 1992 and 2001, expenditures increased in all of these areas. However, the largest increases were in corrections spending, which grew by 81% to a total of \$57 billion (Bureau of Justice Statistics, 2004). And although corrections spending increased at all levels—federal, state, and local—between 1992 and 2001, federal corrections expenditures increased the most at 96%, to over \$5 billion. At the state level, there was an 88% increase in corrections spending to more than \$38 billion. At the local level, corrections spending increased by 61% to \$16 billion (Bureau of Justice Statistics, 2004).

Between 1991 and 1999, 400,000 more government employees were hired in all sectors of the justice system. Correspondingly, during the same period, there was a \$50 billion increase in total government, justice expenditures (Bureau of Justice Statistics, 2003b). There is little reason to believe these trends will soon subside.

Table 5
Trends in State and Local Spending*
1993-2001

Spending category	1993	2001	% Change
Interest on debt	\$5.34	\$4.45	-17%
Education	\$28.20	\$29.68	5%
Health and hospitals	\$7.82	\$7.06	-10%
Public welfare	\$14.06	\$13.55	-4%
Justice	\$6.84	\$7.43	9%
Natural resources and parks	\$2.42	\$2.64	9%

*Spending figures reflect state and local spending per \$100 of total expenditure.

Source: *Justice Expenditure and Employment in the United States, 2001*, U.S. Department of Justice, Bureau of Justice Statistics.

Decrease in crime rates

Disagreement persists among observers both about why the prison population has expanded so dramatically, and about what effect that growth may have had on the incidence of crime.

From 1964 to 1974, following a period of stability, crime rates began to rise. For the 20 years following that, they rose and fell within a range of 20%, then began a decline that has continued to today (Zimring, 2005). However, prison expansion continued unabated well after rates of reported crime began their steady decline. The “tough” mentality retained its momentum even though the logical basis for it dissipated. Proponents of incarceration would like to simplistically conclude that there was less crime being committed because so many of the criminals were locked up.

Research has shown that, at best, incarceration rates have had a modest impact on crime commission. The curve in crime decline does not logically follow from that for prison expansion. There is a dynamic of diminishing returns at work, and there is no simple relationship between locking up more people and increasing public safety. In reality a complex of factors impact crime rates. According to Zimring (2005), some of the most important of these—demographic shifts, economic factors, and incarceration rates—were all operating at historically high levels during the 1990s.

Furthermore, in some striking instances, crime drops have coincided with a concerted effort to reduce the use of incarceration. According to Jacobson (2004), violent crime reported in New York City dropped 64% from 1993-2003. Although the exact reasons for the decrease are not known for certain, the increased use of prison is definitely not one of them. During this same time, New York actually reduced its reliance on prison terms for controlling behavior and increasing public safety. Jacobson cites San Diego as the city with the second-largest crime decline in the nation during the same period. Although using a different strategy than New York, San Diego also reduced its incarceration rates and crime rates simultaneously (Jacobson, 2004).

Who suffers and who benefits

Despite the best intentions of the proponents of reducing judicial discretion to rectify the problem of disparity in sentencing, that disparity stubbornly persists and in many jurisdictions has worsened significantly. Racial and ethnic minority groups have borne the negative brunt of laws and policies governing criminal behavior. These laws have had devastating effects on African American, Latino, and Asian communities.

In 2002, African American males aged 25 to 29 faced the largest arrest rates compared to any other racial or age group at 10,376 per 100,000 residents of that age group. Compared to arrest rates for whites of similar ages, 1,229 per 100,000 residents, African American males aged 25 to 29 were over 8 times more likely to be arrested. The arrest rate for African American males of all ages was 3,437 per 100,000 residents. This rate was more than seven times the arrest rate for whites, 450 per 100,000 same-age residents; and almost three times the rate for Latinos, 1,176 per 100,000 same-age residents. (Bureau of Justice Statistics, 2003a).

Beyond these disproportionate arrest rates, there is gross disparity in the number of minorities being locked up and how long they stay there. Comparing felony sentence length by race, African Americans, on average, were sentenced to prison for 66 months for felony incarceration—a full year longer than the average white prison sentence of 54 months (Bureau of Justice Statistics, 2005b). In the U.S. general population, white Americans outnumber African Americans by more than six to one (US Census, 2000). However, in 2000 there were 134,000 more African Americans in prison than whites (Bureau of Justice Statistics, 2003c).

Changes in drug laws have created the greatest increases in the numbers of incarcerated. Many of these laws are based on factors that are already racialized. For example, the federal drug laws mandate the same 5-year sentence for 5 grams of crack cocaine, largely used by African Americans, as they do for 500 grams of powder cocaine, largely used by whites. It must be stressed that these two substances are chemically identical.

In addition, although women make up a small percentage of those incarcerated, the rate of incarceration for women is rising faster than that for men and has done so for over 10 years (Amnesty International, 1998). Approximately 2/3 of women in prison are there because of nonviolent property or drug offenses, the majority have a history of victimization, mental illness, and substance abuse—conditions that call for treatment, not incarceration. The majority of these women have children younger than 18 who themselves are at risk for later offending.

On the other hand, prison expansion has created a host of jobs and careers, many of them very lucrative. Prison design and construction, operation, and supply, and peripheral support and tax benefits, have generated enormous financial interests. Once considered an unwanted presence, prisons are now an economic boon, especially to rural communities with depressed economies.

The economic situation has given rise to the “single interest” lobbies of prison guards unions in many states and the private prison industry. There is an inherent conflict between the economic labor interests of the prison industry and the needs of the society to balance its expenditures and promote a healthy people.

NCCD Positions on the Reform of Sentencing

Position 1: _____

Make offenders and not offenses the subject of sentencing.

United States Supreme Court Justice Anthony Kennedy stated that, “Our case law system is built on the idea that individuals in any era can strive to vindicate personal rights and that, by their effort, our law emerges stronger than before” (Kennedy, 2003).

Legal reforms since the 1980s have emphasized the idea of equality of sentences—that people who commit similar crimes receive similar sentences. But similarity has proven extremely difficult to define. Equal sentences can be unjust when they are substantively inappropriate, and far too often the sentences required under determinate and mandatory sentencing schemes “fit” neither the crime nor the circumstances of the offender, not to mention the needs of the victim. A more creative process of sanctioning is needed, one that takes into account what the offender needs to avoid future crime, which is the best guarantor of public safety.

Determinate and mandatory sentencing legislation resulted in its own form of injustice: unmitigated punitiveness disproportionately experienced by minorities and women. It also did little to address the discretion inherent in law enforcement practices, investigation, and prosecution. Tying the hands of judges shifted the ability to determine sentencing outcomes to prosecutors. Whether to prosecute, what charges to bring against an individual, and what kinds of pressure to exert to arrive at a plea bargain all rest with the prosecutor.

Sentencing based only on offense leads to arbitrary and unjust sentences. There is much to gain from reinserting a concern for individual circumstances into the sentencing process. This can be accomplished even within a set of advisory sentencing guidelines. Supreme Court Justice Stephen Breyer, one of the original authors of the Federal Sentencing Guidelines, called for simplification of the Guidelines, stating that the fine crime-category distinctions written into the Guidelines presented a false precision (Breyer, 1998).

Position 2: _____

Adopt objective criteria designed to make discretion visible and to promote the accountability of government officials at every stage of the sentencing process.

Accountability rests on the transparency of decision making. Judges must state on the record their reasoning, and their decisions must be subject to review on appeal. That transparency must extend to each area of the justice system. We advocate the development of structured systems of discretion for all decisions that affect the sentencing process, from arrest to parole release.

There is sufficient experience with structured sentencing systems, such as the one adopted in Minnesota, to acknowledge that, well-designed and implemented, they can remain true to their goals and spirit. Every state should promulgate guidelines to govern decisions on prosecution, pretrial release, sentencing, release from prison or jail, and community supervision.

Finally, we emphasize that no approach to sentencing reform is more important than the need to depoliticize the process. Almost every counter-productive sentencing law in the last 30 years has been a product of political salesmanship rather than sound correctional policy analysis. Sentencing guidelines should be administered by an independent commission rather than by the legislature.

Position 3: _____

In the sentence of the court, account for: 1) the offender's current risk to public safety, 2) offender rehabilitation and treatment needs, 3) the gravity of the offense, and 4) the relative costs-benefits of each available sanction.

A sanction should take into account the safety risk that an offender represents to society. The risk to the public is commonly assumed to be violent behavior, but must also include the risk of violations of the public trust, such as high-level corporate theft. There are reliable (although not perfect) methods and tools for assessing an individual's threat to public safety. To avoid the

criminalizing effects of incarceration, offenders who represent a limited risk to society ordinarily need not be incarcerated, or certainly not for long periods. Further, the sanctions imposed on all offenders ought to be designed to reduce the offender's risk of reoffending.

Sentencing systems that focus only on punishment fail to emphasize adequately the opportunities correctional agencies have to reduce an offender's risk to society through ameliorative programs. Unremitting emphasis on punishment also leads to practices that institutionalize inequalities based on race and income, since these inequities are created in earlier stages in the justice system (Petersilia and Turner, 1985). Thus, concern about the circumstances of the offender should decide the actual sentence without exceeding the sentence that is deserved.

Corrections systems currently release tens of thousands of prisoners onto the streets each year. These individuals have to deal with a host of problems, including substance abuse, illiteracy, mental illness, and poorly treated or exacerbated infectious diseases, leaving them completely unprepared for life on the outside and leaving the public at risk. Some prisoners are even released directly from the debilitating conditions of extreme solitary confinement, perhaps having been there for many years, to the nation's streets, with no preparation whatsoever. The state of Texas releases 1,200 to 1,300 such prisoners every year (USA Today, June 9, 2005). Time in prison should be used to treat and educate those that are ready to change. Programs that enhance chances of crime-free living must be at the disposal of sentencing authorities.

It goes without saying that some crimes are so serious that a sentence requiring incarceration is called for to protect citizens and to demonstrate public intolerance. However, retribution has become legitimate in a system that was originally designed deliberately to protect the guilty from a public thirst for revenge.

Finally, we need to promote long-range thinking about correctional policy. Unrestricted growth in prisons and jails diverts resources from government services such as health and education, which may be ultimately much more effective in controlling crime. Cost-benefit analysis needs to guide our thinking about sanctions, in which we evaluate the long-term, cumulative effects of the choices we make in sentencing individual offenders.

Position 4: _____

Direct sentences to serve a number of goals, including rehabilitation and treatment.

A multiplicity of goals should guide our thinking about appropriate sanctions. One size does not fit all. Rehabilitation as a goal rests on the underlying assumption that change is possible, that criminal behavior is “treatable.” Indeed, there are many promising, evidence-based rehabilitation programs that focus on recovery from drug and alcohol addiction, education, vocational skills, and life skills.

Clearly there is merit to the other goals of sentencing—incapacitation, retribution, and deterrence. But determining which of these goals should be foremost in individual cases must take into account the severity of the offense, the threat to public safety, the damage caused by the offense, and the individual’s acknowledgment of wrongdoing.

The problem with multiple goals is, of course, the tendency toward erratic, piecemeal sentencing policy. The failure to clearly articulate complex philosophical guides to control sentencing policy has played a major role in the current chaos in corrections. In place of chaos, an integrated sentencing philosophy is needed, one that makes a coherent order out of our various ideals regarding punishment without discarding an appropriate emphasis on problem solving, one that attempts to raise the standards of behavior of prisoners as well as staff in prison and beyond its walls.

Position 5: _____

Expand and use less expensive and more effective forms of criminal penalties; encourage innovation.

Sanctioning policy in America has only barely begun to realize the potential of community-based approaches—often referred to as “intermediate sanctions.” Because sentencing has overemphasized the prison, there has been a failure to fully utilize existing alternative, non-prison sanctions (Morris and Tonry, 1991). Alternative options range from financial penalties to intensive supervision. The restorative justice model stresses offender responsibility and effective restitution. This concept allows for the possibility for an individual to redeem himself or herself.

Alternative options must be carefully designed, funded, and implemented. They must also be continually evaluated to allow for appropriate adjustments and improvements. Competent training of staff is essential. The dollars now devoted to incarcerating low-level offenders must be reallocated to a community-based corrections system to support intermediate sanctions. Intermediate sanctions must be implemented in ways that directly cut into the rising prison population, and programmatic and organizational incentives must accompany the expanded reliance upon these approaches.

We are long overdue for making better and more widespread use of two decades of creativity in graduated sanctions, restorative justice, and diversion for less violent offenders and for infractions of probation and parole. A brief listing of intermediate sanctions illustrates the vast potential of this approach to sentencing: fines, intensive supervision, specialized courts for drug offenders and mentally ill offenders, day centers, work programs, short-term incarceration, home detention, community service—these are all potentially useful strategies, if used appropriately. Further, there is room for the development of new and creative alternatives to incarceration such as those that utilize an individual's skills and work experience.

Position 6: _____

Reserve prison sentences for three types of offenders:
a) first-time felons that have committed a violent or serious crime, b) repeat felons whose new crimes involve a substantial threat to public safety, and c) felons whose crimes involve substantial violations of the public trust.

The correctional goals of incapacitation and punishment are more appropriate for this group of individuals than they are for those who committed less serious crimes and have less serious criminal records. Restricting imprisonment for the most serious offenders is the most reasoned application of this sanction.

Position 7: _____

Sentence repeat felony offenders or those convicted of very violent or other serious crimes to maximum terms that allow the possibility of parole.

Long sentences are, of course, justified in some cases. The availability of parole for long-term prisoners is beneficial for two reasons. First, it allows authorities to take into account the natural reductions in risk that can occur during a lengthy prison stay, if for no other reason than advancing age. Second, it encourages participation in ameliorative institutional programs and improves behavior in prison.

Position 8: _____

Devise a plan for reentry at the time of sentencing.

In recognition of the reality that the vast majority of people in prison return to their communities, the sentencing process should include a plan for reentry. By fully implementing best practices in rehabilitation, health services, job training, and proactive pre-release services, we can work to increase the success of reentering prisoners, society's acceptance of them, and enhanced public safety.

There are currently many structural barriers to successful reintegration such as prohibitions against student loans and public housing. These barriers should be removed. Returning inmates, having done their time, should have their legal rights restored. This must include the right to vote.

Position 9: _____

Reestablish and reinvigorate parole and the pardon processes.

To quote U.S. Supreme Court Justice Anthony Kennedy—"A people confident in its laws should not be ashamed of mercy." A return to a robust and well-implemented system of parole would revive a motivation for improved standards of behavior in prisons and jails. In combination with graduated sanctions

for parole violations, this could reduce overcrowding and underfunctioning in prisons in meaningful ways. In addition, a mechanism for responding to sentence reductions and consideration of pardons would contribute to an approach that is “smart on crime.”

Position 10: _____

In general, impose short and determinate prison sentences for nonviolent felons.

The vast majority of offenders in the United States serve less than two years in prison. To most Americans, this may sound like very short punishment, indeed. Yet the time served in U.S. prisons is longer than in nearly every other democracy in the world.

We have sustained a national fallacy that our punishments are too lenient, despite a large and impressive body of literature showing no consistent relationship between the amount of imprisonment and crime or evidence that punishment is effective in reducing crime. On the contrary, the longer the prison term, the more difficult it is for an individual to then integrate into society—a society in which he or she may never have felt included—and the greater the financial burden on the state.

In fact, virtually any sentencing purpose can be achieved with shorter sentences than those we now impose. General deterrence would be unaffected if average time served were reduced (Blumstein et al., 1983). The symbolic message of punishment is also satisfactorily demonstrated by short, determinate sentences—there is little difference in punitive value between a six-month term, and, say, a twelve-month term (von Hirsch, 1985). There is compelling evidence, in the case of New York City, that the certainty of a prison sentence has far more deterrent effect than a long sentence (Jacobson, 2004).

Community protection is not endangered by releasing offenders a few months earlier (Austin, 1986; National Council on Crime and Delinquency, 1991). Even life without parole, designed to incapacitate, can in nearly all instances be replaced by terms lasting 10 or 20 years, since this takes the offender out of the typically criminally active ages (Gottfredson and Hirschi, 1990).

Position 11: _____

Repeal mandatory minimum sentences and three strikes laws.

U.S. Supreme Court Justice Anthony Kennedy identified mandatory minimums as a singularly unjust idea and called for their abolition in his address to the American Bar Association in August, 2003. In practice these sentences have resulted in ineffective, punitive, and lengthy sentences and have clearly proven themselves to be counterproductive to the goal of public safety.

According to Supreme Court Justice Stephen Breyer, mandatory minimums make adjustments impossible (even with relevant factors) or drive them “underground,” increase prosecutorial power, do not accomplish their goals, and skew the entire set of punishments. He stated that these laws “...do not involve any careful consideration of the effect they might have on the Sentencing Guidelines as a whole. Indeed, it seems to me that one of the best arguments against...[mandatory minimums]...is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish” (Breyer, 1998).

There is no credible evidence that the “selective incapacitation” idea behind three strikes laws has reduced violent crime. The contrary seems to be true in California, the state with the most stringent version of three strikes. Between 1993 and 2002, San Francisco had the highest reduction in violent crime than any other county in the state, yet used three strikes less frequently (Ehlers, Schiraldi, and Ziedenberg, 2004). Also according to Ehlers and associates, since their inception, California three strikes laws have added \$6.1 billion to corrections costs and 164,000 incarceration years for nonviolent offenders.

Position 12: _____

Abolish the death penalty.

The most extreme expression of the goals of punishment and retribution in America’s criminal justice system is, of course, the death penalty. Twelve states, plus the District of Columbia, prohibit the death penalty; 38 states and federal military and civil law allow it. As a nation, the U.S. is increasingly isolated in the world for its legalization of the death penalty; a majority of nations worldwide have abolished it. Over 80% of the world’s executions occur

in the U.S., China, Iran, and Viet Nam (Amnesty International, 2005). Between 1990 and 2004, the U.S. executed 19 individuals who were children at the time of their crimes, more than any of the seven other nations that permit such executions. Moreover, allowing the death penalty is grounds for exclusion from the European Union.

Regardless of the severity of a person's crime, and regardless of the understandable urge for revenge that many crimes might evoke, the decision to take the life of an individual in payment for those crimes treads into the domain of moral and religious belief. In so doing, it consigns us to irresolvable controversy. We take the position that the death penalty is a violation of human rights and is morally indefensible. The keen observer, Sister Helen Prejean, articulated the following question about the death penalty, "You could say, 'They deserve to die,' but the key moral question is, 'Do we deserve to kill them?'" (Prejean, 1993). However, beyond one's position on the morality of the death penalty, no reasonable person could defend the unfair application of the death penalty.

The American system has proven itself flawed to an undeniable and intolerable degree. The death penalty is imposed on the poor and on African Americans and Latinos in gross disproportion, and is imposed disproportionately often in cases involving a white victim. Inadequate legal counsel leaves defendants vulnerable to many injustices. More than 100 individuals have been exonerated from death row—not pardoned for a crime committed, but found to be innocent of any crime. In some cases, if it had not been for the interest and actions of friends, relatives, or journalism students, those blameless individuals would have been executed. We must ask ourselves then, how many innocents have we already executed? It logically follows that we must stop this. The simple and correct solution is to abolish the death penalty.

There is no credible evidence that the death penalty deters violent crime more effectively than life imprisonment. In cases that would call for capital punishment under the current scheme, life without the possibility of parole protects the public safety, punishes the convicted party, and offers a resolution to the families of victims. Wrongful conviction and unjust application of the death penalty are persistent, unacceptable flaws in our current system. Life without parole would allow the possibility for an individual to continue to attempt to vindicate himself or herself.

Position 13: _____

Scrutinize and monitor all sentencing propositions and implementation to prevent an unjust impact on women.

Although more men than women serve time in prison, the proportion of women sentenced to prison has been steadily increasing, largely as a result of mandatory minimums, three strikes, and drug laws (Mauer, Potler, and Wolf, 1999). We must build in assurances that, like men, women are only imprisoned to ensure public safety. Sentencing policies should take into account the underlying causes of offending by women, which are fundamentally different than those of men.

Instead of gender-blind policies, we advocate gender responsiveness. That is, policies must reflect an awareness of the true societal differences between women and men. Societal expectations of how women “should” behave impact punishment for women who break the law. Women have different motivations than men do for drug use, property theft, and violence. They are more likely than men to use drugs to self medicate for depression and other mental health issues. Women have patterns of victimization and poverty that are different than those of men; they are often economically and emotionally dependent on men that are involved in crime (Raeder, 1993). They are more likely to be unemployed or underemployed (Morash, Bynum, and Koons, 1998). Of particular importance is that women more often live with their young children and have other significant family obligations and relationships.

Position 14: _____

Adopt sentencing legislation only after completing a fiscal impact statement on the likely effects of proposed legislation on prisons, jails, probation, parole, court resources and dockets, and public safety.

Every form of correctional strategy has a price tag, but more severe sentencing seems to have flourished without regard to fiscal considerations. Budget crises are creating an urgent need to stop these practices. In the era of prison expansion, resources dedicated to corrections have taken ever larger bites out of state and federal budgets. Politicians must account for the fiscal consequences of the policies they champion that drain vital state services such as education, housing, transportation, and medical care.

Position 15: _____

Establish national standards for the conditions of confinement.

All prisons must meet at least a minimum standard for safety and security of prisoners and staff. Staff should be well trained and fairly compensated. There should be a grievance procedure that is clear and expedient and that protects prisoners from retribution. Federal laws, such as the Prison Litigation Reform Act of 1995, have made it more difficult to use the courts to ensure minimally humane conditions of confinement. These restrictions need to be reversed.

Position 16: _____

Scrutinize and monitor all sentencing propositions and implementations to prevent an unjust impact on minority communities.

As previously stated, the expanded use of prison has brought with it an extremely disparate impact on minorities. Mandatory sentencing has diverted the discretion that judges once had to police and prosecutors. Racial biases on the part of police, prosecutors, judges, parole boards, intended or not, contribute cumulatively to a prison population grossly out of proportion to the general population and self-reported crime statistics. Additionally, many policies now in place are inherently biased against the poor and minorities. Indeed the rate of incarceration for African American men (4, 914 per 100,000) is nearly 6.8 times the rate for white men (717), and that of Latino (1,717) men is 2.4 times the rate for white men (Bureau of Justice Statistics, 2005a). The extremely high overall rate of U.S. incarceration is significantly boosted by these unconscionable minority imprisonment rates (U.S. Department of Justice, 1997).

The Sentencing Project has studied this issue carefully and recommends a series of changes that would ameliorate this discrepancy. These cultural competency measures include ensuring more competent and better continuity of defense, explanations for defendants of legal procedures and their meaning, the elimination of jumpsuits and chains in court, improved communication between a defendant and his or her counsel, and improved behavior standards for court personnel (The Sentencing Project, 2003).

Position 17: _____

Retain juvenile offenders in a separate juvenile justice system specifically designed to meet the needs of young people.

A separate justice system exists for juveniles because they are deemed less at fault for their actions, more deserving of second chances, more amenable to treatment, more susceptible to labeling, and more at risk developmentally for normal maturation. Youth sent to adult facilities have higher rates of suicide and sexual assault in prison. Recidivism rates for youth sent to the adult system are higher than those for comparable youth kept in the juvenile system. The current trend in transferring children to the adult system undermines all of these concerns, and studies have found transfer decisions to be arbitrary and racially discriminatory in their application. Poor and minority youth are arrested, locked up, and transferred at far greater rates than their more affluent and white counterparts (Poe-Yamagata and Jones, 2000).

Position 18: _____

Address victims' interests apart from the sentencing decision.

The repetitive, knee-jerk call for draconian penalties is too often a caricature of the victim's true interests. In fact, it allows the system to focus its "pro-victim" efforts on merely adding to the arsenal of punitive techniques rather than truly considering what victims need. The criminal justice system must increase its efforts to help the victims of crimes. The National Center for Victims of Crime advocates two separate and "parallel paths" to justice—one for offenders and another for victims (National Center for Victims of Crime, 2005).

The focus on severe punishments for offenders distracts everyone from the task of helping victims, and it turns victims into pawns of narrow political interests without really addressing their concerns. While the public declaration of the offender's culpability for the crime is an important first step in the victim's healing process, it is only a beginning. A meaningful policy that respects the needs of victims does not merely use the victim's suffering to increase the

offender's suffering; rather, it must involve positive steps to help the victim recover after the sentencing process is concluded. Community-based organizations have formed to provide healing support for victims, counseling, and financial assistance for medical costs and lost wages. The government could play a role in supporting these organizations to give real help to victims.

For these reasons, victims' interests should be handled separately from sentencing. The interests of victims and offenders alike can often be served by individualized sentences that provide for restitution, reconciliation, or both. Legislation should specify the latitude necessary to humanize the sentencing process by taking into account circumstances of the offender and the victim.

Position 19: _____

Conduct rigorous research to evaluate the effects of various sanctions on offenders, the corrections system, and crime reduction.

Although we have learned a great deal about the effects of sentencing policy in recent years, much more needs to be known. First, we must learn more about the long-term crime prevention effectiveness of sanctions. Current research increasingly indicates that "get-tough" policies are unwise. Also, sanctions aimed at ameliorating specific offender disabilities while controlling specific aspects of criminal involvement are sound and effective choices. Second, we need to obtain better and more consistent ways of estimating the impact of sanction choices on the correctional system and the community. This will enable better long-term planning for sentencing and penal systems. Third, we need to stimulate our imaginations about correctional options by studying effective approaches used in other countries.

We must have better data collection at facilities, and research must control for legally relevant factors. By now we should understand that, no matter how well crafted, our system is one that tends toward disparity in practice. It needs constant monitoring and readjustment. Solid data should be the basis for such adjustments.

Position 20:

Periodically review sentencing statutes and practices to assure compliance with the spirit of legislation and relevant court decisions.

Self evaluation should be built into the system. Time and experience have proven that no matter how well intentioned or well crafted policies are, they are subject to the forces of politics and human interpretation. It is presumably inevitable that distortion of the intentions of policies may occur, and only by regularly reviewing those policies and practices can we hope to maintain a loyal adherence to the true meaning of reforms of the sentencing system.

Conclusion

Recent decisions of the United States Supreme Court have raised critical issues about the fundamental fairness of criminal sentencing systems, both federal and state. Since the 1990s, prison populations and the resulting correctional budgets have continued to grow at unprecedented rates, despite declining rates of crime. Legislation has been enacted in almost every state that ignores the evidence of research and purports to “get tough” on crime. Mandatory minimum sentences, three strikes laws, truth in sentencing laws, and the like have eroded the integrity of the justice system and failed to deter crime or enhance public safety. It is incumbent upon us to look with an intelligent and critical eye to our justice policies and the goals they intend to accomplish. The above-outlined positions of NCCD are closely aligned with those set forth by the Kennedy Commission of the American Bar Association as it answered Justice Kennedy’s challenge to revisit and analyze current practices.

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