

NEW YORK CITIZEN COUNCIL
of the
NATIONAL COUNCIL ON CRIME AND DELINQUENCY
44 East 23 Street, New York, N. Y.

POSITION STATEMENT ON THE PROPOSED NEW YORK PENAL LAW

Delivered by Cornelius W. Wickersham, Jr.
before the
Temporary Commission on Revision of the Penal Law and Criminal Code
New York City, November 24, 1964

The New York Citizen Council of the National Council on Crime and Delinquency welcomes this opportunity to present its views on the Proposed New York Penal Law.

The proposed law is undoubtedly the most ambitious undertaking in the history of the New York criminal law. It deserves the attention of all citizens interested in the proper protection of society from criminal activity. In a number of respects, particularly in the area of probation, the proposed law would provide important advances toward this objective. These deserve wholehearted support. However, there are some areas, such as the requirements for maximum and minimum terms, coupled with lack of proper definition of what is a dangerous offender, where the proposed law falls short and where amendment is necessary if real improvement is to be achieved. Before going into the details, we would like to provide the background for our approach.

NCCD is the only voluntary non-tax supported national service organization devoted entirely to developing and encouraging modern proved corrective and preventive methods so that the

public will be better protected and the cost of both crime and protection reduced. The New York Citizen Council is an integral part of NCCD working for adoption of such methods in New York. NCCD has been a prime mover in the slow but steady national trend toward reformation of potential criminals by better probation, better parole, better institutions, and more knowledgeable treatment in the courts. We believe that, as a consequence of this, the population of our prisons can be decreased and the building of additional fortress-type jails rendered unnecessary.

Society has a right to be better protected against crime than it is today. This means, first, that dangerous criminals must be kept out of circulation. It also means that offenders guilty of but a lesser degree of crime must not be put in jail, where they lose contact with law-abiding citizens for long periods of time. Rather, they need to be put under supervision and guidance that will train them to adjust to society and help them overcome the difficulties that led them into unlawful conduct in the first place.

We do not believe that every man will do right merely if told to and if given a slap on the wrist; we know that there are some incorrigibles whose reform society cannot achieve. But since over 98 per cent of all persons arrested eventually are released, we want to see them so conditioned, educated, and guided after release that they will merge properly in the body politic. It is for this reason that we have been in the forefront of organizations advocating the increased use of probation, suspended sentence, and fine.

NCCD believes that the rehabilitation of offenders should be emphasized more than it is today in our correctional system. Its goals are (1) more effective, efficient, and economical methods of dealing with offenders; and (2) greater protection of the public through prevention of further offenses by known offenders.

We have reviewed the proposed law in the light of these goals.

We believe that the deterrent effect of the criminal law, which is its most beneficent aspect, is served best by certainty of enforcement, not by long sentences. Sentences are much longer in the United States than in most European countries. Few men are sent to prison for more than five years in any western European country; only in cases of murder or extreme violence do the courts there pronounce a sentence of more than five years. (See appendix.)

Our organization believes that extremely long sentences serve no valid correctional purpose and should be imposed only where, for the protection of society, they remove from circulation those professional criminals and citizens whose liberty poses a threat to the safety of the public. Sentences longer than five years should be reserved for those from whom the public must be protected by long incarceration because of the violence of their crime and where the prospects of their becoming satisfactory members of society is poor. For all others, the disposition should be probation or short imprisonment.

In New York, both maximum and minimum terms of imprisonment are longer than in most of the other forty-nine states. National Prisoner Statistics for 1960 (the latest report) shows that, among the eleven states with more than 2,000 first releases, the next to the longest average time served before a release is in New York. The 1961 report of the State Commission of Correction shows that of the 2,504 new commitments to state prisons in that year, 1,004 or 40 per cent, had minimum terms of three years and over. Even more striking, 678 of the terms (28 per cent of all sentences) were for minimum terms of five years and over.

When a man is withdrawn from society by incarceration for a prolonged period of time, he loses contact with his family and with those persons in society who can help him adjust and give him a law-abiding career. In prison he makes new contacts among other persons who were unable to adjust to our society, whose power to help another convict to go straight is limited, to say the least, and whose friendship after release may lead to a life of crime. Furthermore, the long term of imprisonment removes an incentive to learn how to adjust to our society.

Most of the persons imprisoned are not of the dangerous type and do not require the maximum custody which our state provides for most of those committed to our prisons. What they require is discipline, education, and guidance to enable them to fit into the society to which they will almost certainly return. A maximum security prison fortress is not a desirable or suitable

place for learning how to live in a society which relies on each person's own self-discipline. Furthermore, the maximum security prisons are most expensive to build and very expensive to operate.

New York's state prison facilities, with a capacity of 10,300, are presently filled to capacity, and the male prison population is expected to increase at the rate of 200 per year. State reformatory capacity is 6,300, with a population of 5,699 in December 1963, and a projected population of 7,200 by 1968. The designated capacity of the prisons for the City of New York in 1963 was 7,307, but the average daily population was 9,639, or over 30 per cent overcrowding. The State Department of Correction has an annual budget of 57 million dollars and maintains 22 institutions or facilities. The City of New York Department of Correction, with 11 facilities, has an annual budget of 22 million dollars.

In New York, state and local expenditures total at least 400 million dollars annually for the administration of criminal justice, and it is estimated that the cost of this function may well be the third largest expenditure of these governments, exceeded only by expenditures for education and public welfare.

Present laws fail to distinguish between really dangerous criminals and those who, from moral weakness, commit crime but do not threaten the safety of the public. A person who cheats, shoplifts, embezzles, or fails to obey any of the thousands of regulations our society can enforce only through the criminal process needs a type of treatment for his reform (or, if you wish

to put it another way, a proper deterrent against his future lapses from a required norm) far different from that required for the professional criminal living on the proceeds of the sale of dope, prostitution, or other organized crime, or the person so embittered against society that he will rape, assault, and murder without compunction. We believe that for the first group, our laws are too severe; for the latter group, they are not adequate.

With that as background, we turn now to certain specific provisions fo the Proposed New York Penal Law. This proposed law is devoted mainly to definitions of offense and general provisions relating to criminal responsibility and defenses. We are not commenting on those parts of the proposed law. Our concern is with the provisions on sentencing.

PROBATION AND DISCHARGE

Article 25 deals with probation and discharge, and in general follows the patterns and criteria which have worked elsewhere and should work in New York. We are confident that the Comm\$ssion which prepared the proposed new law recognizes that the implementation of these provisions will require an improved and expanded probation and parole service. We shall continue to support this as a major requirement for a properly balanced correction system.

We would suggest one additional provision to improve Article 25 namely, a provision for probation on "deferred judgment" in those cases in which the history of the defendant and the

crime he committed indicate that there is no pattern of criminality and that a criminal record would deter his rehabilitation. The procedure originated, we believe, in the Brooklyn federal court and is there used most successfully with offenders under twenty-one. It has also been used successfully in Maryland, Rhode Island, and Washington, and by some judges elsewhere. In Brooklyn, where it is called "deferred prosecution," probation is authorized usually for a year and the complaint is not filed unless the defendant shows he does not intend to adjust and to live a lawful life. If he gets in trouble with the law within a year, the earlier offense is prosecuted at the same time as the later offense. This procedure gives the man an incentive for going straight and resisting the temptation to partake in a new criminal enterprise.

SENTENCES: THE DEATH PENALTY AND LIFE TERMS

The Board of Trustees of NCCD has issued a statement on the death penalty in which it elaborates the reasons for opposition to capital punishment. It is also opposed to the life sentence particularly where it excludes parole or a long minimum term defers the possibility of parole for a long period. Such a life sentence has been described by a Minnesota warden as worse than a death penalty. We do not propose, however, to deal further with either of these matters at this time.

SENTENCES TO IMPRISONMENT: MINIMUM TERMS

Article 30 of the proposed statute, dealing with sentences of imprisonment, divides felonies into five categories: Class A crimes, which have a minimum term of 15 to 25 years before parole eligibility, and four classes for which a minimum

term not to exceed one-third of the maximum is authorized. Our organization is opposed to any minimum terms whatsoever; though, of course, we would not quarrel with a minimum term of one year for a major felony, since it would take about that much time anyhow for the prison and parole board to learn what it needs to about the prisoner and determine what to do about him. Our objection to minimum terms is based upon the fact that at the time of sentencing the judge is not able to determine the time in the future at which it would be best to release that particular person into society. We believe that the parole board, which has the opportunity of studying the prisoner as time passes, is in a better position than the court to fix the right time for his release. Furthermore, we believe that, in not fixing a long minimum, you offer the prisoner an additional incentive for trying to adjust. Thus, you hold out to him both the carrot and the stick.

We also have another very important objection to minimum terms. Differing minimum terms, fixed by judges with differing conceptions of seriousness of an offense, create sentence disparity which causes much dissatisfaction with the criminal law. While our state appellate judges have some power to correct sentencing disparity, they rarely exercise it except in cases of extreme abuse. Therefore, the statute should not fix a minimum term and the judge should not be authorized to impose one. We believe that the parole board should have full discretion to grant parole at the optimum time.

Under the proposed law, Class A offenses, murder and kidnapping, would be punishable by mandatory life terms (unless

the death penalty is imposed), but a sentence of life imprisonment could also be imposed for "persistent" felony offenders. We believe that placing the "persistent" felony offender in this category is not what the Commission really had in mind--namely, to subject dangerous offenders to long periods of incarceration for the protection of society. The proposed provision accepts the Baumes Law concept, which experience has shown is not successful. Many prisoners sentenced to life terms as fourth felony offenders under the present law are really petty offenders whose lifetime incarceration is not necessary for public protection. While a persistent shoplifter may be in need of treatment, seldom is he the kind of person that should be confined to a maximum security prison for thirty years or more. At the same time the Baumes Law system of sentencing does not reach the really dangerous person who has been convicted only once or twice or who may have "beaten the rap" previously. Multiple convictions may be a sign that a person is a dangerous offender; it shouldn't be the controlling criterion. We suggest, therefore, that the criterion be changed and that the words "dangerous offenders" be substituted for "persistent felony offenders."

Maximum terms provided for Class B, C, D, and E offenses would be as follows: B - 25 years, C - 15 years, D - 7 years, and E - 4 years. Unlike the mandatory life term sentence referred to above, these commitments have the preferred form--that is, the judge determines the maximum term within the limits set by the statute. But the very long maximums are much too harsh and

are not needed for public protection. A more rational approach to sentencing is provided by NCCD's Model Sentencing Act, which distinguishes among offenders according to their dangerousness.

Under the Model Sentencing Act, those offenders found to be a danger to society would be confined for long periods--up to thirty years; for all others--those who are not classified as dangerous--the maximum term would be five years. Conviction of a crime which threatened life or serious harm, or conviction of a type of crime involving continued criminal activity, would trigger an investigation of the offender. A finding of dangerousness could be made on the first conviction and thereby would serve as a better protection of the public than any multiple-conviction requirement.

In addition to the major amendments recommended above, there are other important changes which would make the proposed law more useful.

Under Section 30.40, conditional release under supervision would be granted on request of the prisoner under indeterminate sentence and would interrupt the service of the sentence. However, instead of serving only the remainder of his term under supervision, the man on conditional release would be under supervision for three years or for the unserved portion of the maximum, whichever is longer. The definite sentence prisoner would also be allowed conditional release; again, this release would interrupt service of the sentence and would entail supervision for two years. Unlike the indeterminate sentence prisoner, the

definite sentence prisoner would not be required to give his consent. The underlying purpose of these provisions is excellent, since they would provide an additional incentive to obey the laws to those prisoners whose strength of resistance to temptation is low. However, we do not believe that they should be so drawn as to permit lengthening the period served under supervision beyond the period of the sentence. In any event, if there is to be a fixed period, a two-year period should be the maximum, since experience shows that the benefits of parole can be obtained in that time, if at all, and a longer period merely increases cost and work load.

Article 35 provides for reformatory sentences for the young adult, defined in Section 35 as a person over sixteen and under twenty-one at the time the court imposes sentence upon him. The reformatory sentence has no minimum or maximum; if the young adult is not discharged by parole, the term is four years. It should also be noted that there is nothing mandatory about a reformatory sentence on the young adult. The court may choose to impose the regular sentence generally applicable.

From our point of view, this is an unsatisfactory provision. Our Model Sentencing Act has a separate article similar to the existing youthful offender law, providing for a non-criminal disposition. Under it, one being committed as a youthful offender may be committed for a term of three years or for a lesser term.

Not only is this a shorter term than is provided for in Article 35 of the New York proposal, but it also calls for a judge-fixed maximum. Without such a provision, the reformatory sentence may be even more punitive than the ordinary penal commitment. Further, in our opinion, the privilege of having a noncriminal disposition should be continued for only those who take advantage of it to lead lawful lives. Upon conviction of a subsequent offense, the court or parole board should be authorized to take the youthful offender disposition into consideration either in imposing sentence or in finding the defendant to be a dangerous offender.

CONCLUDING STATEMENT

The central problem in New York's penology is its savagery which results in a restricted parole system and large overpopulated institutions containing many long-term prisoners. The sentencing provisions of the proposed revision of the penal law do not greatly improve the situation.

We believe that acceptance of our recommendations would help to overcome criticism based on the disparity of sentences and will better protect society.

We recommend that the Proposed New York Penal Law be amended to make it a comprehensive and realistic method of detecting and separately classifying racketeers and dangerous offenders; i.e., those suffering from such severe personality disorders that they cannot be expected to live lawful lives if re-

leased. This would be a first step in separating them from those who are merely weak characters who can safely be treated with a shorter sentence or probation and then sent back to live in a self-supporting and lawful life.

Application of our recommendations would have important implications for the institutional structure. Today most of the prisoners are in maximum security institutions, even though less than 10 per cent of them are dangerous. Only these dangerous offenders should be in the maximum security institutions that are typical today in New York State. For almost all nondangerous offenders, the best institutions for reform or truly correctional purposes are the open or minimum security type. Segregating the dangerous from the nondangerous prisoners would, furthermore, reduce the influence of the vicious criminals on those who are merely weak characters. Since minimum-security prisons cost considerably less to operate than maximum-security fortresses, we would save tax money; and since segregating nondangerous offenders in minimum-security institutions would help to prepare those released from them to return to a normal law abiding life, we would at the same time be improving the correctional aspect of our penal system.

APPENDIX

SENTENCING PRACTISE IN SELECTED EUROPEAN COUNTRIES

Sweden: (population: approximately 7,000,000)

The Swedish Penal Code provides for two types of prison sentences: those with hard labor with a minimum of two months and a maximum of ten years or for life; and those of simple imprisonment, with a minimum of one month and a maximum of two years.

Of a total of 3,274 imprisonment with hard labor sentences in 1956, the length of the sentences were: 1,048 for less than 6 months; 1,484 for 6 months to less than 1 year; 615 from 1 year to less than 2 years; and 127 from 2 to 10 years. No life sentence was imposed.

Of a total of 4,010 simple imprisonment sentences, 3,805 were for less than 3 months, 205 from 3 months to 2 years.

Preventive detention is used for mentally defective offenders and habitual recidivists, with periods from 1 to 12 years for the former group, and from 5 to 15 years for the latter. There were only 85 such sentences in 1956 in Sweden of which only 19 were for more than two years.

Denmark (population approximately 4,400,000)

The Danish Penal Code provides for two types of prison sentences: simple detention, with a minimum of seven days and a maximum of two years; and imprisonment from thirty days to sixteen years or for life.

There were 496 simple detention sentences in 1954 and all were for 60 days or less.

Of a total of 3,244 imprisonment sentences, the length of the sentences were: 2,842 from 30 days to 1 year; 360 from more than 1 year to 3 years; 31 from more than 3 years to 6 years; 9 from more than 6 years to 16 years; and 2 for life.

Preventive detention from 4 to 20 years or longer can be applied to professional or habitual criminals. The average duration has been 7 years, however, and it is used in no more than one or two cases a year.

Western Germany (population approximately 48,500,000)

Under the German Penal Code the principal penalties are penal servitude for 1 to 15 years or for life, and imprisonment from one day to 5 years.

Of a total of 3,120 penal servitude sentences in 1955, the length of the sentences were: 1,547 from 1 to 2 years; 1,267 from more than 2 years to 5 years; 239 from more than 5 years to 15 years; and 67 for life.

Of a total of 157,058 imprisonment sentences, the length of the sentences were: 106,336 for 3 months or less; 37,065 for more than 3 months to 9 months; 13,619 for more than 9 months to 5 years; and 38 for more than 5 years.

The Netherlands (population approximately 11,000,000)

In the Netherlands there is a prevalence of short prison sentences, those of less than six months amounting to about

70 per cent of all prison sentences. Of a total of 11,257 prison sentences in 1955 the length of the sentences were: 3,766 for less than one month; 2,427 from 1 month to less than 3 months; 1,705 from 3 months to less than 6 months; 2,192 from 6 months to less than 1 year; 698 for one year; 406 for more than 1 year to less than 3 years; 62 for more than 3 years; and one for life.

Italy (population approximately 47,000,000)

According to the Italian Penal Code, the principal penalties for felonies (delitti) are imprisonment for a minimum of two weeks and a maximum of thirty years, and fines. Of a total of 85,604 prison sentences in 1953, the length of the sentences were: 15,127 for 1 month or less; 18,203 from 1 to 3 months; 22,953 from 3 to 6 months; 14,722 from 6 to 12 months; 7,389 from 1 to 2 years; 2,854 from 2 to 3 years; 1,882 from 3 to 5 years; 1,197 from 5 to 10 years; 604 from 10 to 15 years; and 664 from 15 to 30 years.

Austria (population approximately 7,000,000)

In Austria, in 1954, short sentences of up to three months were about 50 per cent of the total sentences of imprisonment imposed for the more serious offenses (Verbrechen), and sentences of up to 6 months about 75 per cent, whereas sentences of more than five years were about 1 per cent.

Of a total of 15,883 prison sentences for the more serious offenses in 1954, the length of the sentences were: 1,583 for 1 month or less; 6,220 from 1 to 3 months; 4,342 from 3 to 6 months; 2,183 from 6 to 12 months; 1,459 from 1 to 5 years; and 96 for more than five years. The total number of prison sentences seems rather high, but about 40 per cent of these sentences were suspended