

A light blue line graph with a white grid background. The line starts at the bottom left and trends upwards to the top right, with several peaks and valleys. A large, semi-transparent arrow points from the bottom left towards the top right, following the general direction of the line graph.

Positive Trends

in State-Level Sentencing and Corrections Policy

By Judith A. Greene
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About FAMM and the Smart On Crime campaign

The Smart On Crime campaign is a project of Families Against Mandatory Minimums (FAMM). FAMM is a national non-partisan, non-profit organization founded in 1991 in response to inflexible and excessive penalties required by mandatory sentencing laws. FAMM promotes sentencing policies that give judges the discretion to distinguish between defendants and sentence them according to their role in the offense, seriousness of the offense and potential for rehabilitation. FAMM's 30,000 members include prisoners and their families, attorneys, judges, criminal justice experts and concerned citizens.

FAMM works with legislators, law enforcement, criminal justice experts, the media and citizens to provide public education and implement cost-effective criminal justice policies that increase judicial discretion while protecting public safety. FAMM provides support to policy makers concerned about the high fiscal and human costs of mandatory minimums sentencing and related policies, such as three-strikes laws, "truth in sentencing," disproportionately harsh sentences and parole disqualifiers.

About the author

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ERRATA: The following is a corrected table of contents.

A graphic featuring a stylized map of the United States in light blue, overlaid on a white grid. To the right of the map, the title "Positive Trends" is written in a large, bold, blue font. Below it, the subtitle "in State-Level Sentencing and Corrections Policy" is written in a smaller, bold, black font.

Positive Trends
***in State-Level Sentencing
and Corrections Policy***

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Introduction

Incarceration rates are at an all-time high, and state budgets are more constrained than during any period since the beginning of the United States prison-construction boom in the late 1970s and 1980s. One of the driving forces behind these problems are mandatory minimum sentencing laws passed by the U.S. Congress and many state legislatures that force judges to give lengthy, fixed prison terms to those convicted of specific crimes, especially those that are drug-related, without concern for mitigating factors such as the degree to which the accused may have been involved in the crime or the potential for rehabilitation. These laws contribute to the explosion in U.S. incarceration, with a disproportionate impact on low-income families and communities of color.

Now state-level policymakers are scrambling for information and ideas to help them better manage correctional resources. There is a great need for easily accessible, accurate information about sentencing policies and practices and cost-effective sentencing reforms. Families Against Mandatory Minimums (FAMM) is meeting that need through state-by-state briefing books and a website on state sentencing policy that provide “smart-on-crime” responses. These resources provide comprehensive sentencing and correctional policy information resource for public officials, policymakers, reform advocates, and members of the media.

A key component of our Smart on Crime briefing books and website are our state-by-state sentencing and correctional system profiles keyed to critical sentencing reform issues. The goals of our state sentencing and correctional system profiles are:

- To provide concise, up-to-date information about the policies and practices that drive state prison populations and correctional costs.

- To stimulate and facilitate exchange of policy-relevant information about sentencing and correctional policies across states.

- To gather and disseminate information about practical, successful reform strategies.

- To highlight progress toward gaining stronger control over correctional costs and more effective correctional outcomes.

FAMM’s Smart On Crime state-by-state profiles trace the state’s correctional policy history and describe the resulting sentencing and (where relevant) parole structures, identifying the factors and dynamics that underlay or influence prison population trends. Each state profile also characterizes the state’s level of commitment to crime prevention, alternatives to incarceration, community corrections, substance abuse treatment, and re-entry programs.

FAMM’s state profiles chronicle recent criminal justice policy developments that affect correctional reform efforts and analyze gains and set-backs in terms of prison population impacts and fiscal costs. Political leaders that champion positive change are recognized, and successful reform initiatives are celebrated. New proposals or initiatives for change in state sentencing policy are identified, and wherever possible, we provide information on draft legislation, fiscal notes, and/or legislative testimony. Our state profiles also identify the activist networks and grassroots organizations that are working to address the need for reform.

Despite the “tough on crime” environment, the cost of incarceration in a time of fiscal crisis is opening up opportunities for opponents of mandatory minimum sentencing—under the “smart-on-crime” banner—to challenge and rollback some of the worst state legislation. The recent win in Michigan, in which mandatory minimum sentencing laws were removed from the state’s books, was a significant example to the rest of the nation of what could be done in the presence of political will.

We hope this information is helpful to you. For more information on FAMM’s Smart On Crime campaign, please visit www.smartoncrime.org.

Positive Trends *in State-Level Sentencing and Corrections Policy*

EXECUTIVE SUMMARY

Families Against Mandatory Minimums (FAMM) commissioned this report detailing state sentencing and correctional reforms and emerging positive trends as part of FAMM's Smart on Crime initiative. Researched and written by Judith Greene of Justice Strategies, the report is timely: state budget crises have forced many state legislatures to reconsider their tough-on-crime policies of the past 25 years and pursue smart-on-crime policies that stop the cycle of crime, protect the public interest, and conserve dwindling state resources.

Key findings and positive trends

"Tough-on-crime" measures voted in the final quarter of the 20th century are now haunting state officials as they struggle to reduce state budgets to fit within falling revenue streams. As states entered a third straight year of fiscal misery, state policymakers struggled with a cumulative \$200 billion in revenue shortfalls. With the state budget crisis reaching epidemic proportions this year, the movement toward smarter, less costly sentencing and correctional policies and practices is gaining momentum. Since the state budget crisis erupted, governors in eleven states have decided to close entire prisons to save correctional costs. Some governors have simply ordered the early release of prisoners.

The report documents significant criminal justice policy changes in the states and emerging "smart-on-crime" trends.

Trend: State officials rethink costly policies and practices.

Policy reform advocates and grassroots activists are urging lawmakers and executive-branch administrators to consider a variety of "smart-on-crime" reforms, including:

- Eliminating mandatory minimum sentencing laws
- Revising sentencing laws and guidelines to return discretion to judges
- Rolling back harsh truth-in-sentencing laws and habitual offender statutes

- Diverting non-violent drug offenders to treatment instead of incarceration
- Increasing the "earned-time" credits available as positive incentives
- Revising parole standards for better-informed release decisions
- Responding more effectively to minor technical violations of probation and parole.

For example, Michigan legislators repealed almost all of the state's mandatory minimum drug statutes – long cited as among the toughest in the nation – replacing them with drug sentencing guidelines that give discretion back to Michigan judges. This sweeping reform of Michigan's tough mandatory minimum drug laws was accomplished with broad bipartisan support.

Ohio's policymakers used structured reforms at both the front-end and the back-end of the correctional system to stabilize the prison population and to reduce the number of prisoners by 4,000. In January 2002 corrections director Reginald Wilkerson shut down the Orient Correctional Institution, wringing as much as \$40 million out of the annual corrections budget. This year he has moved to close a second prison at Lima

Trend: Revised penalties for non-violent offenders and diversion for those with substance abuse problems.

States have rolled back mandatory minimums or restructured other harsh penalties enacted in preceding years to "get tough" on low-level or non-violent offenders, especially those convicted of drug offenses. Examples:

- 18 states have rolled back mandatory minimum sentences or restructured other harsh penalties. Most reforms have targeted low-level, non-violent offenders, especially those convicted of a drug offense.
- Texas legislators replaced prison sentences with mandatory treatment in first-offender felony drug possession cases involving less than one gram of narcotics, sparing taxpayers an estimated \$30 million over the next biennium as the prison population falls by

2,500 drug offenders.

- Washington legislators amended sentencing guidelines to give judges more discretion to divert non-violent drug offenders from prison to treatment, and to reduce prison sentences for drug trafficking. Part of the savings will increase funding for treatment by about \$8 million over the next biennium.
- Kansas legislators amended sentencing guidelines to divert non-violent offenders convicted of drug possession offenses from prison to mandatory drug treatment and eliminated mandatory enhancements for repeat drug offenders, allocating almost \$6 million to provide treatment for diverted offenders.
- Mississippi legislators amended the truth-in-sentencing law to restore parole for non-violent first offenders. By April 2003, 900 prisoners had been released, saving the state \$12 million in prison costs.

Trend: Smarter release and re-entry policies.

Fifteen states have eased prison population pressures with mechanisms to shorten time served in prison, increase the release rate and handle those who violate release conditions without returning them to prison. Examples:

- Texas policymakers introduced parole reforms in 2000. The parole board's approval rate for non-violent offenders rose, parole revocations fell sharply, and prison populations dropped by 7,698 from September 2000 to December 2001.
- Washington legislators enacted an increase in early-release eligibility for non-violent, non-sex offenders, increasing time credits off their sentences to one-half. The early releases will affect approximately 550 prisoners and save about \$40 million in two years.
- Colorado legislators provided a community-corrections alternative to returning parolees to prison for technical violations. They also eliminated "post-parole community supervision" – a mechanism that tacked an extra one-year period of supervision on revoked parolees after they served out their mandatory parole period in prison. The reforms are projected to save \$27 million by 2008.

- Kentucky policymakers adopted new risk-assessment guidelines to increase the chances of parole-eligible prisoners being granted release and approved a measure that allows non-violent prisoners to work off a portion of their sentences in community service projects.
- A number of states have closed entire prisons or reduced prison capacity by closing down housing units.

Future prospects for "smart-on-crime" reforms.

Public attitudes toward crime and corrections have been shifting for a decade or more. Substance abuse treatment is increasingly seen as the preferred response for offenders who commit low-level non-violent drug and property crimes to support their addictions. National opinion polls show that public support for mandatory minimum sentences and other "get tough" laws that tie judges' hands and impose harsh one-size-fits-all sentences is dwindling as support grows for restoring judges' discretion to fit the punishment to all the facts in a crime.

Nationally, lawmakers of every political stripe are embracing smart-on-crime sentencing and correctional reforms, a movement that is crossing traditional political lines. Families Against Mandatory Minimums (FAMM) and our colleagues have been instrumental in initiating and advocating for many of the sentencing and correctional reforms described in this report.

The state fiscal crisis is not likely to reach a quick resolution. However, there are many reasons to hope that once the states do regain financial stability, public officials will not rush to replace the new "smart-on-crime" solutions with sentencing and corrections policies that are costly in both human and fiscal terms.

Smart On Crime: Positive Trends in State-Level Sentencing and Corrections Policy was authored by Judith Greene of Justice Strategies and commissioned by Families Against Mandatory Minimums (FAMM). The report was funded by a grant from the Butler Foundation and Greenville Foundation. For a full copy of the report, visit www.famm.org, or contact FAMM (202) 822-6700.

As states enter

As states enter a third straight year of fiscal misery, state policymakers struggled with a cumulative \$200 billion in revenue shortfalls. “Tough-on-crime” measures enacted in the final quarter of the 20th century are now haunting state officials as they struggle to reduce state budgets to fit within falling revenue streams.

During the “get-tough” decades state revenues were more abundant and federal dollars were made available to states that stiffened their laws to prime the pump for new prison construction. The nation experienced an historic and unprecedented increase in its prison population. Legislators defined and enacted many new substantive criminal offenses, and they increased the penalties attached to those that were already codified. They enacted mandatory minimum prison terms that shifted sentencing discretion from the hands of judges into those of prosecutors.

Yet by 2002 the prison boom was sharply curtailed. The Bureau of Justice Statistics reports that nine states actually

experienced reductions in their prison populations during 2002: Alaska, Delaware, Hawaii, Illinois, Louisiana, Massachusetts, Montana, New Jersey and New York.

Since the state budget crisis erupted, governors in many states – California, Florida, Georgia, Illinois, Massachusetts, Michigan, Ohio, Pennsylvania, Utah and Virginia – have decided to close entire prisons to save correctional costs. Mississippi Gov. Ronnie Musgrove (D) ended a private prison contract with the Corrections Corporation of America (CCA) and placed the facility in mothballs.

Wrestling with a \$38.2 billion budget deficit, California Gov. Gray Davis (D) temporarily closed the Northern California Women’s Facility, the smallest of the state’s three prisons for women, to save \$10 million. He also closed three small privately operated prerelease facilities. In other states such as New York, Texas and Nevada, correctional managers have “downsized” prison space by closing prison housing units or taking down bunks in units that had been previously double-celled.

The budget crisis has derailed prison construction plans in Oregon and delayed prison openings in California, Illinois, Indiana, Pennsylvania and Wisconsin. Pennsylvania will open one new prison later this year but will hold off opening another until next year. In Wisconsin state officials are leaving two newly constructed prisons empty until next year, while almost 2,300 of the state’s prisoners remain warehoused in private prisons operated by the Corrections Corporation of America (CCA) in Minnesota and Oklahoma. Georgia legislators have decided that they cannot afford to purchase an empty prison CCA built in their state on speculation that the beds would soon be in demand.

In a move to save \$11 million, Nebraska legislators voted to close the Lincoln Correctional Center in 2004. They enacted recommendations from Republican Gov. Mike Johanns’ “community corrections working group” to expand the use of alternatives to incarceration and enacted new probation and parole fees to fund community corrections program expansions. They removed certain restrictions on parole for prisoners with substance abuse problems and challenged the state’s parole board to screen and release 500 low-risk, non-violent offenders. To safeguard against prison overcrowding, they established an emergency release trigger for use if the prison population reaches 140 percent of design capacity.

Some governors have simply ordered the early release of

prisoners to reduce correctional costs. More than 200 Utah prisoners were released within nine months of their scheduled parole dates in 2001 to cut prison costs. Facing a budget shortfall last year, Montana’s correctional managers released more than 200 prisoners – three to five a day – over a period of five months to reduce the deficit by \$4.4 million.

The Arkansas Board of Correction invoked emergency powers to grant release to 521 prisoners in November 2002 to reduce prison crowding, and approved early release for another 860 this year. And before leaving office Frank Keating, Oklahoma’s tough-on-crime Republican governor, sent a letter to the parole board ordering sentence commutations for more than 1,000 prisoners serving sentences for non-violent crimes to save \$1.5 million in prison costs.

In December 2002 Kentucky Gov. Paul Patton (D) commuted the prison terms of 567 prisoners serving the lowest class of felony sentences, releasing them to harvest an immediate savings of \$1.3 million in the face of a \$6 million corrections budget deficit.

The state budget crisis also greatly increased fiscal pressures on local governments. Local jailers across Oregon ordered inmate releases, while the state courts shaved their workweek to just four days, causing district attorneys to postpone or drop prosecution of offenders charged with misdemeanors and other minor offenses.

TREND: State officials rethink costly policies and practices

To bring their budgets into balance, many policymakers are rethinking the costly criminal justice policies that have sent so many non-violent offenders to prison and are keeping them there so long. Policy reform advocates and grassroots activists are moving ambitious agendas in many states, urging lawmakers and executive-branch administrators to consider a variety of “smart-on-crime” reforms. Many state officials responded with strategic steps to rein in prison and jail population growth and yield significant budget savings:

- Revising sentencing laws and guidelines to return discretion to judges
- Eliminating mandatory minimum sentencing laws
- Rolling back harsh truth-in-sentencing laws and habitual-offender statutes
- Diverting non-violent drug offenders to treatment instead of incarceration
- Increasing the “earned-time” credits available to prisoners as positive incentives

- Revising parole standards for better-informed release decisions
- Responding more effectively to minor technical violations of probation and parole.

Landmark reforms in Michigan

Former Michigan Gov. John Engler set a prime example of strategic leadership before leaving office at the end of 2002 by approving reforms long advocated by Families Against Mandatory Minimums (FAMM).

FAMM won the solid support of Michigan's judges and prosecutors for ground-breaking legislation endorsed by the Republican leadership that controls both houses of the Michigan legislature. Legislators repealed almost all of the state's mandatory minimum drug statutes – long cited as among the toughest in the nation – replacing them with sentencing guidelines that give discretion back to Michigan judges.

Public Acts 665, 666 and 670 took effect on March 1, 2003. Before that, a Michigan offender convicted of sales, conspiracy to sell, or possession of drugs faced stiff statutorily-mandated penalties: mandatory minimum prison terms, imposed consecutively if multiple charges were involved, or, in very low-level cases, lifetime probation. These sentences were based solely on the weight of the drugs involved. An offender's prior record, role in the crime and other objective factors that judges normally assess as they make sentencing decisions under Michigan's sentencing guidelines system did not matter, because drug offenses were not included in the guidelines.

Because Michigan's judges' discretion in sentencing most drug offenders was sharply limited, many first-time offenders and low-level offenders whose crimes were driven by addiction received mandatory prison terms. Yet the "drug kingpins" for whom legislators had intended the long mandatory minimum prison terms were often able to use their role in the drug trade to provide information about others as bargaining chips to gain lower conviction charges and lower sentences.

FAMM's work to change these laws began in 1997, when the organization challenged what was then the harshest mandatory drug sentences in the country. Michigan's "650 Lifer Law" sent offenders convicted of delivering or intent to deliver 650 grams or more of heroin or cocaine to life in prison without parole. In 1988, FAMM was able to win reduction of the penalty for this crime from life without parole to 20 years to life. In addition, prisoners sentenced under the 650 Lifer Law became eligible for parole between 15 and 20 years, depending on the circumstances of the case.

Michigan's guideline system, established in 1998 for all serious crimes except drug offenses, works within an indeterminate sentencing structure. Where a prison term is warranted, the judge sets both a maximum and a minimum prison term, imposing a maximum term within the statutory cap for the crime and then choosing a minimum term, within a recommended guidelines range, that the offender will have to serve before becoming parole-eligible.

Statutory offenses are classified into six crime categories and nine crime classes. Individual offenders are scored for placement within a guidelines grid by application of 20 different offense variables and seven prior record variables. Under this system factors such as addiction, amenability to rehabilitation or family support may be considered in determining the appropriate sentence. When an offender faces sentencing on multiple charges, the sentences will usually be served concurrently. A judge who finds "substantial and compelling" reasons may depart from the recommended sentence.

The guidelines system did not pertain to drug offenses involving schedule 1 and 2 narcotics such as heroin or cocaine, however, because the law tied judges' hands with rigid mandatory minimum prison terms. The ability to depart from a mandatory minimum sentence was narrowly limited and could be easily challenged by prosecutors. And if a prosecutor chose to charge an offender for both "delivery" and "conspiracy to deliver" or for multiple quantities, the offender would face consecutive or "stacked" mandatory minimum sentences.

For example, if the offender was convicted on both charges and the amount of drugs fell between 225 and 650 grams, two mandatory 20-year minimums were required to run consecutively. The offender would not be eligible for parole until he or she served 40 years behind bars. The lowest level possession cases were subject to a term of lifetime probation.

The new 2002 laws eliminated most of Michigan's mandatory minimum drug laws and folded sentencing for drug offenders into the guidelines system. There drug weight remains important, but it is not the only factor to be considered in selecting a sentence. And judges may now depart under the normal guidelines rules. Drug weight thresholds were revised for the various drug offenses, and many offense and prior record variables were modified.

Under the guidelines system, prison terms for the most serious drug offenders (e.g., those with an extensive criminal history, or those that used a weapon) could actually increase, while a first-time offender convicted of an offense involving the same amount of drugs could receive far less than the mandatory minimum required

under the old laws. Sentences imposed for more than one sales charge no longer require that prison terms be served consecutively, and consecutive sentences were abolished for simple possession offenses altogether. For “the lowest-level” drug offenses, lifetime probation was replaced by the standard five-year probationary period imposed for all other serious crimes.

About 1,200 Michigan prisoners sentenced under the old mandatory minimum laws became eligible for earlier parole consideration. For example, prisoners sentenced under the statutes requiring 10- and 20-year mandatory minimum sentences are eligible for parole after completing 5- or 10 years, respectively, or after serving the minimum sentence imposed by the judge; whichever is less. Prisoners are eligible for early parole consideration for each sentence imposed. Under the new law, some individuals serving consecutive sentences are eligible for parole decades earlier. And almost 7,000 low-level drug offenders will be able to apply for discharge from lifetime probation once they serve the standard term of five years.

This sweeping reform of Michigan’s tough mandatory minimum drug laws was accomplished with broad bipartisan support. Sentencing reform advocates from FAMM worked with leaders from the Prosecuting Attorneys Association of Michigan to forge a legislative package that reflects the national trend toward “smart sentencing.” FAMM enlisted support from former Michigan Gov. William Milliken, a Republican who had originally signed the mandatory minimum drug bills into law. A wide spectrum of organizations joined the coalition spearheaded by FAMM to push the reform measures to enactment, including the Michigan Association of Drug Court Professionals, the Michigan Catholic Conference, Michigan’s Children, the NAACP’s Detroit Branch, the Citizen’s Alliance on Prisons and Public Spending, and a network of substance abuse treatment providers. The end result was an overwhelming majority of votes from both sides of the aisle.

The Michigan reforms will produce an estimated savings of \$41 million in 2003 alone. They should also help avoid costly construction of new prison beds.

Pragmatic reforms yield big savings in Ohio

In a neighboring state a series of pragmatic policy reforms made in the late 1990s sowed the seeds for huge correctional cost savings now being harvested. Reginald Wilkinson, Ohio’s corrections chief, believes that the nation’s “get-tough-on-crime” attitudes must end. He says that sentencing thousands of truly non-violent offenders to prison is not good justice and is cost-prohib-

itive. Wilkinson supported sentencing guidelines, introduced in 1996, to steer judges toward use of community corrections options for sentencing non-violent offenders, and he pressed for implementation of risk-based parole guidelines in 1998.

Ohio’s sentencing guidelines reform embraced “truth-in-sentencing” by abolishing parole and establishing a system of flat sentences. Prisoners are allowed a modest amount of “earned time” – one day per month – provided they are able to meet a prison program requirement. In the absence of parole, Ohio’s judges retain an extra margin of discretionary jurisdiction over the prison sentences they impose. They are able to grant a prisoner’s release from prison, typically within 18 months to two years of their sentence. In fiscal year 2002 judges released 1,659 prisoner petitioners.

The sentencing guidelines system prompted judges to use community penalties for low-level, non-violent offenders. Under the guidelines these offenders can get two bites at the community-program apple before becoming prison-bound. When the new system was introduced, community-based treatment and correctional programs received an infusion of new funding to expand their capacity. The guidelines worked to re-adjust the mix of prisoners, tilting the population toward repeat offenders and those convicted of violent crimes.

In 1998 the Ohio Adult Parole Authority adopted new parole guidelines that dramatically changed the handling of prisoners sentenced before the guidelines reform took effect. The new parole guidelines grid consists of 13 levels of offense severity and a criminal history/risk formula used to score the likelihood of recidivism at four levels of risk. At the intersection of the two scores, the grid provides a range of months for determining the amount of time a prisoner must serve before being released. Once in place, the guidelines intensified the population shifts begun under the sentencing reform, with low-level, non-violent prisoners gaining parole in record numbers.

For “new-law” prisoners (those sentenced under guidelines) the parole board retains discretion to impose “post-release control,” typically three years of post-prison supervision. Of the 25,866 prisoners released in fiscal year 2002, 8,810 were slated for post-release control supervision. The parole board can also order “transitional control” of a prisoner for up to 180 days of pre-parole release, typically to a halfway house. In fiscal year 2002, 1,304 prisoners were granted a transitional-control release.

The combination of structured reforms at both the “front end” and the “back end” of the correctional system worked together to stabilize the correctional system and to reduce Ohio’s prison population by 4,000.

In January 2002 Wilkerson shut down the Orient Correctional Institution, wringing as much as \$40 million out of the annual corrections budget. This year he has moved to close a second prison at Lima.

Further reform of Ohio's parole policies is now being spurred by the Ohio Supreme Court. Prison population figures just began to swing upwards again when, in December 2002, the state's top court issued a landmark decision affecting 18,000 "old-law" prisoners sentenced before 1996. The court ruling rejected a parole board practice of scoring "old-law" prisoners under the risk-based guidelines based on offenses for which they were never convicted or in some cases were never even charged by prosecutors.

The board had been projecting some prisoners' release dates according to charges dropped pursuant to plea bargains, charges acquitted at trial or charges never filed – routinely disregarding decisions made in deliberations by prosecutors, judges and juries, and using unproven allegations to deny consideration for parole. As a result, many "old-law" prisoners were serving much longer time in prison than "new-law" prisoners sentenced for the same crimes under sentencing guidelines.

The Supreme Court determined that the practice of hiking the offense charge on the basis of unproven allegations rendered Ohio's statutory parole eligibility rules meaningless. The court held that the parole board could have a margin of discretion in determining whether to depart from the guidelines recommendation, taking account of all circumstances surrounding an offense – including crimes that did not result in conviction – to determine whether paroling an offender would further the interests of justice and be consistent with the welfare and security of society. But that discretion must now yield when it runs afoul of statutorily based parole eligibility standards and judicially sanctioned plea agreements.

This finding has obliged the board to switch to using the actual conviction charges to calculate a prisoner's risk score. Thousands of prisoners are slated to receive new parole hearings under these new rules.

TREND: Revised penalties for non-violent offenders and diversion for those with substance abuse problems

Many other state policymakers are restructuring the penalties facing those that commit non-violent offenses or whose criminal behavior stems from a substance abuse problem. In 2001 Iowa legislators took a modest step to

reduce prison population levels by downgrading burglary offenses involving breaking into cars and boats. They deflated penalties by creating a new class D felony, third-degree burglary, and a new aggravated misdemeanor, attempted third-degree burglary, for handling these property crimes. That same year Montana legislators enacted a measure that provides residential treatment as an alternative to prison for repeat drunk drivers. The diversion of these offenders is estimated to save about \$3 million a year.

Hawaii's legislators mandated treatment instead of incarceration in 2002. S.B. 1188 was modeled after Arizona's Proposition 200 and California's Proposition 36, placing first-time, non-violent offenders convicted for drug possession or use on probation with drug treatment instead of prison time. Mandated diversion to treatment also applies to probation and parole violators, if their first violation involves possession or use of drugs.

Texas responded to an increase in prison population this year with drug law reform. The state's spiraling prison population growth trend had suddenly shifted into reverse in September 2000 when new parole reforms were introduced. The parole board's approval rate for non-violent offenders began to rise, the rate of parole revocations fell sharply and the prison population dropped by 7,698 from September 2000 to the end of December 2001. The Texas Department of Criminal Justice was able to reduce its designated prison capacity by more than 1,000 beds in 2001 and hold thousands of empty prison beds on reserve.

In 2002 the prison population began to rise again. A broad-based alliance was formed by Texas-based civil liberties, civil rights and criminal justice reform groups: the Texas ACLU, the state NAACP, the League of United Latin American Citizens, the Texas Inmate Families Association and the Texas Criminal Justice Reform Coalition. Assisted by national organizations – the Justice Policy Institute; the NAACP National Voter Fund; and the National Council of La Raza – they raised a forceful call for action on new reforms to bring the prison population problem back under control.

Texas legislators, including many conservative, tough-on-crime Republicans, responded quickly. They voted to replace prison sentences with mandatory treatment in first-offender felony drug possession cases involving less than one gram of narcotics. Texas taxpayers will be spared an estimated \$30 million over the next biennium as the prison population falls by 2,500 drug offenders. Other legislation that could affect the Texas prison population included a bill that broadens the range of offenders who can qualify for a medically recommended release to intensive supervision. Another measure requires the parole board to give prompt re-hearings on an annual basis to

non-violent prisoners that have been denied parole.

Colorado legislators also reduced penalties for low-level drug offenders this year. The measure should save more than \$7.8 million by fiscal year 2008 by lowering the classification for possession of less than a gram of schedule I or II drugs to class 6 (the lowest felony class) for first offenders and downgrading such offenses from class 2 to class 4 for repeat offenders. At least \$2.2 million of the savings that result is supposed to be allocated to a dedicated community-based treatment fund.

Parole reforms long advocated by the Colorado Criminal Justice Reform Coalition were also enacted this year, and are projected to save \$27 million by fiscal year 2008. Legislators approved a bill that provides a community-corrections alternative to returning parolees to prison for technical violations. They also eliminated “post-parole community supervision” – a mechanism that tacked an extra one-year period of supervision on parolees who had been revoked from mandatory parole and already served out their mandatory parole period in prison.

Washington’s drug law reforms were signed into law by Gov. Gary Locke (D) in 2002 to divert non-violent drug offenders from prison to supervision under drug court judges, and to reduce prison sentences for drug trafficking under the state’s sentencing guidelines. Guided by corrections secretary Joseph Lehman and endorsed by the state’s leading prosecutors, the measures won bi-partisan support in the legislature after impact estimates showed they would save almost \$75 million in correctional costs and avert the need to build more than 2,000 new prison cells.

This year Washington’s legislators enacted an increase in early release eligibility for non-violent, non-sex offenders, increasing time credits off of their sentences from one-third to one-half, provided that they have no history of violence or sex crimes. The early releases will reduce the prison population by an estimated 550 prisoners to save about \$40 million over the next two years. Washington legislators also speeded up the guidelines changes approved in 2002 and scheduled to have taken effect in 2004 and increased funding for Washington’s drug courts. Under the guidelines reform judges will have more discretion in sentencing drug offenders.

Kansas’ sentencing commission called for sanctioning probation and parole violators within the state’s community corrections system rather than sending them to prison. State legislators mandated the change in 2000. They reduced the length of community supervision for offenders convicted of low-level offenses, cutting supervision time by half in many cases, and broadened

the target ranges for community corrections under the state’s sentencing guidelines. Implementation of the legislation resulted in immediate discharge of 574 prisoners and saves almost 800 prison beds for more serious offenders.

This year the Kansas sentencing commission won changes in the state’s sentencing guidelines that will divert eligible non-violent offenders convicted of drug possession offenses from prison sentences to mandatory drug treatment. They also eliminated a guidelines rule that required enhancing the offense severity classification level for second, third and subsequent possession convictions. A third conviction for possession will trigger a 20-month prison term. These reforms will produce a prison-bed savings of 194 beds in 2004, rising to 517 beds by 2013. Legislators allocated almost \$6 million to provide treatment for diverted offenders.

Missouri state senator Harold Caskey (D) won enactment this year of a multi-faceted reform measure intended to control the state’s burgeoning prison population level. It reduced penalties for low-level class D felonies by lowering the maximum sentence from five to four years. And Missouri judges will be required to give more consideration to sentence recommendations provided by 1997 voluntary sentencing guidelines.

Judges largely ignored the Missouri guidelines in the past, but now they will be notified of all available alternatives to incarceration in every case where the guidelines recommendation would allow a non-prison sanction. Caskey’s bill also creates a presumption that low-level offenders who complete a 120-day prison treatment program will be released on probation or parole. More than 1,300 prison beds are expected to be freed up as a result of these changes.

Many state legislators revisited the rigid mandatory sentencing measures enacted in preceding years to “get tough” on drugs and other non-violent crimes. While raising penalties in 2001 for methamphetamine to equal those for cocaine, Indiana legislators eliminated the state’s mandatory 20-year prison sentences for drug offenders arrested with three grams or more of cocaine, giving judges authority to sentence drug offenders who sell drugs to support their habit to treatment instead of prison. They also modified the “three-strikes” law to provide an exception in the case of habitual substance abusers, as well as in cases where the third offense is a misdemeanor charged as a felony because of prior convictions.

North Dakota lawmakers repealed a one-year mandatory minimum sentence for first-time drug offenders in 2001 and called for a study of other manda-

tory minimum laws. That same year Connecticut legislators gave judges some leeway to relax mandatory minimum sentencing laws for sale or possession of drugs for “good cause,” even within a “drug-free school zone.” And in Mississippi the legislature amended the sweeping truth-in-sentencing law enacted in 1994. Non-violent first offenders regained eligibility for parole after they serve one-quarter of their prison sentence. More than 2,000 of the state’s prisoners became parole-eligible in 2001. By April 2003, 900 had been released and the reform saved the state \$12 million in prison costs.

Louisiana’s legislators repealed mandatory minimum sentences for simple drug possession and many other non-violent offenses in 2001, and cut minimum sentences for drug trafficking in half. The possibility of parole, probation or suspension of sentence was restored for a wide range of non-violent crimes – from prostitution to burglary of a pharmacy. The bill allowed for already-sentenced prisoners to apply for an early release recommendation from a “risk-review panel.” If recommended, their case goes to the pardon board, and is then sent to the governor and the parole board for release consideration.

The Louisiana Department of Public Safety and Corrections is also implementing several initiatives to reduce the number of probation/parole violations. An intermediate sanction facility is being established to house technical violators for short periods of time rather than returning them to prison. A new risk assessment system being implemented will better identify probationers and parolees by their risk levels and divert an expected 800-1,000 violators from prison this year. Other administrative reforms and the creation of new treatment programs have significantly reduced the number of technical violators being returned – which, in turn, has stabilized prison population growth.

Delaware’s sentencing commission chair, Judge Richard Geblein, pressed legislators to do something this year about probation violators – the largest single group of prison admissions, now making up about a third of the prison population. S.B.50 was enacted to reduce the volume of probation violations by capping probation terms at one year, 18 months, or two years, depending on the offense. And Delaware legislators reduced the mandatory minimum prison terms for trafficking cocaine from three years to two and increased the weight amount that would trigger the penalty from five grams to 10.

New Mexico’s legislature repealed a mandatory sentence enhancement in 2002 that had been required if a prosecutor charged a defendant with a previous drug conviction as an habitual offender. The drug enhancement is now discretionary, allowing judges to determine whether

or not it would be appropriate in a particular case.

Maine’s legislators reduced the mandatory minimum sentence for murder from 25 to 20 years this year, and they authorized judges to suspend other mandatory prison sentences altogether if they are found to create a “substantial injustice” and if doing so would not diminish the gravity of the offense nor endanger public safety.

TREND: Smarter release and re-entry policies

Many states eased prison population pressures with mechanisms to increase the release rate and handle those who violate release conditions without returning them to prison.

Arkansas’ legislators moved in 2001 to reduce returns to prison of offenders who violate parole. Legislators relaxed restrictions on admissions to community corrections facilities so that parolees who are convicted of misdemeanors can avoid being sent back to prison.

Connecticut’s budget for fiscal year 2004 included a provision that increased the authority of Republican Gov. John Rowland (R) to send up to 2,000 prisoners to prisons in other states to help lessen the state’s prison population crunch. But key Democratic legislators at first refused to approve this measure unless provisions were included that might help to stem prison population growth – such as reforming mandatory minimum drug laws or improving parole policies and practices.

In midnight-hour budget negotiations the hoped-for reform measures failed to materialize, but the budget agreement did provide a commitment of \$7.5 million over the next two years to fund new community-based programs to provide drug treatment, remedial education and job training for those released from prison back to the state’s poorest districts.

Targeting post-release services toward low-income neighborhoods in cities like New Haven, Hartford and Bridgeport is expected to reduce recidivism as well as reduce the technical parole violations that return so many parolees to the Connecticut prison system. Research conducted for the Council of State Governments indicates that elimination of just 25 percent of parolees’ technical violations would save upwards of \$9 million a year. But Rep. Michael Lawler (D-East Haven), Connecticut’s long-time champion of criminal justice reform, insists that sentencing and parole laws must be reformed in order for the investment in community programs to pay off by reducing prison costs. If these matters are not taken up in special session this fall, legislators

will raise them during the 2004 session.

Wisconsin Gov. Jim Doyle (D) established alternatives to revocation this year for offenders who violate the conditions of either probation or parole release. Such offenders can be housed at a regional holding facility, avoiding revocation to prison. Doyle is also creating earned-release programs that would parole non-violent prisoners who successfully complete substance abuse treatment at a drug abuse corrections center and young offenders who volunteer for a “boot camp” operated by the Department of Corrections.

Mississippi introduced earned release for prisoners in “trustee” status in 2001, giving an allowance of 10 days of freedom for each 30 days of work, education or participation in “special incentive” programs. That same year Virginia legislators established conditional release for elderly prisoners. Those over 65 who have served at least five years and those over 60 who have served at least 10 years may apply for release from prison.

Kentucky Gov. Paul Patton (D) released 567 prisoners in December 2002 – a move that sparked widespread controversy even though the released prisoners had an average of just 80 days left to serve on prison terms for non-violent drug or property offenses. Yet in January 2003 Gov. Patton ordered commutation releases for 328 more prisoners, and the parole board adopted new risk-assessment guidelines to increase the chances of parole-eligible prisoners being granted release. The parole grant rate, which had previously fallen between 30 and 35 percent, shot up to 47 percent. The higher grant rate eliminated the need for the commutation program and has stabilized the prison population.

Within a month the Kentucky legislature approved a measure to allow non-violent prisoners to work off a portion of their sentences. In exchange for half of their normal pay of 80 cents to \$2 a day, eligible prisoners now earn a day of freedom for each 40 hours of community service work performed. The Kentucky corrections agency expects to save more than \$5 million a year through this “earned-time” provision. Another \$2.6 million will be saved by granting Kentucky’s technical parole violators full credit for the time they served under supervision on the street before being revoked back to prison. The state also passed legislation that allows parolees to have their sentences reduced for the time they spend on parole without absconding or being violated. This law will also have a significant impact on reducing the amount of time prisoners will spend if they are returned to prison for a parole violation.

New Mexico’s legislators enacted S.B. 200 in 2001, authorizing early release of women prisoners to a re-

entry drug court program. Women convicted of non-violent, drug-related offenses and who are within 18 months of release or eligibility for parole may apply for early re-entry.

Arizona lawmakers gave the Department of Corrections authorization this year to release non-violent drug offenders 90 days early if they qualify for a new program of transition services, including job training and placement, mentoring, and help with treatment, housing, and other transitional needs. Treatment services are to be funded from money saved by early release.

Some early release measures recently enacted to reduce correctional costs have, unfortunately, never been fully implemented. Alabama passed legislation in 2001 to allow non-violent offenders sentenced to life terms under the state’s habitual offender law to seek a “risk review” that could lead to reconsideration of their sentences. The state’s prosecutors challenged the law, however, and it has never been implemented. In Louisiana a risk-review system enacted that same year to grant early parole relief for non-violent prisoners was expected to result in release of some 400 prisoners. Although 15,000 prisoners rushed to apply, by April 2003 just 16 of the applicants had worked their way through the complicated system and won prison release.

TREND: Structural reforms under consideration in many states may help stem correctional costs

In addition to the numerous reforms already adopted, policymakers in other states are taking action to revise or review sentencing policies and practices. Massachusetts lawmakers are considering a bill that would reduce mandatory minimum drug sentences by one-third. A bill to create a commission to review criminal sentencing is pending floor votes in both houses of the New Jersey legislature.

Arizona lawmakers have convened a special panel to address a severe prison overcrowding. Legislators are meeting weekly to consider proposals that include reducing the state’s strict truth-in-sentencing requirement, modifying mandatory minimum drug sentences and diverting drunk drivers from prison to community treatment and work-release programs. The committee is reviewing all low-level felonies for possible reclassification as misdemeanors.

North Carolina’s sentencing guidelines – introduced in 1994 – have kept prison population levels within prison capacity. The state’s incarceration rate fell

for five straight years, as the prison population was brought under strict controls that reduced the proportion of sentenced felons receiving prison terms from 44 percent to just 29 percent.

But the guidelines also boosted the length of prison terms for violent felons, retained mandatory minimums for major controlled substance offenses and required long prison terms for habitual offenders convicted of low-level felonies. Now the fiscal effect of these harsh provisions is being felt. North Carolina's sentencing commission has projected a need for 7,000 new prison beds over the next decade unless something is done to check population growth. The commission has offered state legislators a list of options to revamp the state's sentencing guidelines to reduce the length of recommended prison terms for many offenders.

Taken together, the options – which include reclassification of purely “statutory” rape, restructuring the prior record point system, reducing the recommended prison sentences for some habitual offenders and reducing the minimum sentences recommended for some offenders by three months – might have averted the need to construct more than 4,597 new prison beds. FAMM launched a multi-year campaign for sentencing reform in North Carolina, gathering significant support among lawmakers during the 2003 legislative session.

Unfortunately, North Carolina legislators failed to embrace the opportunity they were given this year, voting instead to purchase and activate three new prisons that had been privately financed and constructed, and to approve private financing and construction of three more new prisons. FAMM sentencing advocates are working to build support for policy options that could avoid continued prison expansion.

Georgia's sentencing commission released a proposal late last year for new felony sentencing guidelines that, if adopted by Georgia's judges, would slow the rate of prison population growth. But while he favors the product of their work, Gov. Sonny Perdue (R) disbanded the commission and transferred responsibility for considering implementation of the proposed guidelines to a task force within his office. Many Georgians expect that the reform proposal will languish unless legislators take up the cause of sentencing reform.

Alabama's sentencing commission is working on a comprehensive structural reform of the state's sentencing laws and policies. This year the commission's preliminary recommendations were embraced by the legislature. The dollar threshold for “class C” felony theft and property offenses was hiked from \$250 to \$500, and the threshold for “class B” felonies was raised to \$2,500 to re-

flect current economic conditions in the state. These changes are expected to save upwards of 3,000 prison beds. Sentencing commissioners are also pressing for increased funding for drug treatment, community corrections, probation and parole.

New Mexico officials decided to retool the state's criminal justice coordinating council to serve as a sentencing commission. The commission will analyze any proposed changes in sentencing laws and produce impact estimates with prison population projections for policymakers' consideration. Gov. Bill Richardson (D) intends to keep his campaign promise to curb spiraling correctional costs. He declared a prison moratorium when he took office: “I intend to build no new prisons. I want to invest in education and economic development. We must find a correctional policy that is cost-effective.”

CONCLUSION: Future prospects for “smart-on-crime” reforms

With the state budget crisis reaching epidemic proportions this year, the movement toward smarter, less costly sentencing and correctional policies and practices is gaining momentum.

While it is clear that shrinking state revenues are spurring a remarkable new direction in state sentencing and corrections policies, these multifaceted reforms are not simply a reflection of the current state budget dilemma. A complex mix of critical factors are driving this new movement to “get smart” about our responses to the problem of crime.

Alongside a growing consensus that the expansionist policies of the late 20th century are fiscally unsustainable – that something has to give – there is a growing awareness that the huge investment in incarceration has yielded only very modest gains in crime control. The best estimates indicate that no more than one-quarter of the decline in crime rates since the early 1990s can be attributed to the policy of mass incarceration. Moreover, an increasing body of empirical evidence points up the greater crime control advantages to be won by investments in more effective strategies – from primary prevention programs focused on children, their families and their communities to public health responses to drug and alcohol addiction.

Public attitudes toward crime and corrections have been shifting for a decade or more. The war on drugs is now widely termed a failure, and substance abuse treatment is increasingly seen as the preferred response for offenders who commit low-level, non-violent drug and prop-

erty crimes to support their addictions. When voters in Arizona and California cast their ballots for diversion of low-level drug offenders to treatment, the political message echoed in statehouses across the nation.

National opinion polls show that public support for mandatory minimum sentences that tie judges' hands and impose harsh "one-size-fits-all" sentences is dwindling as support grows for restoring judges' discretion to fit the punishment to all the facts in a crime. Related mechanisms like truth in sentencing, and repeat offender provisions that quickly ratchet up sentences for offenders with underlying addictions and/or mental illness are increasingly seen as failed public policies that drive spiraling prison costs. Several state-level polls indicate a preference for cutting correctional budgets rather than reducing those for education, healthcare or other vital human services.

Public confidence in traditional law enforcement methods is being shaken by mounting evidence of wrongful convictions, coerced confessions and scandalous drug "task-force" campaigns based on fraudulent evidence from unreliable informants. And the disparate impact of the war on drugs within communities of color, having fueled much of the incarceration boom, is now intensifying attitudes against it.

With a large segment of African Americans males under criminal justice control, and an increasing lifetime risk of imprisonment facing black, Hispanic and Native American youths as a consequence of overly harsh mandatory minimum drug laws, the legitimacy of the criminal justice system is diminished in the eyes of those that suffer from the highest levels of crime victimization.

The September 11, 2001, attack on U.S. soil brought many sobering challenges to bear on law enforcement and other agencies that serve vital public security func-

tions at every level of government. It is not possible to predict the long-term impact of the "war on terror," but it is already evident that shifting priorities are moving resources away from drug enforcement to terrorism investigations. Local governments are mired in fiscal difficulties while law enforcement resources are stretched by increased responsibility for protecting vital public infrastructure. And while many police executives are reluctant to take up local enforcement of immigration laws, some are responding to federal demands for assistance in this area.

The gravity of these challenges adds weight to appeals for reassessment of law enforcement strategies, reprioritization of crime control objectives and reallocation of correctional resources away from the policies that have led to mass incarceration toward a more differentiated approach that provides an array of constructive responses to the problem of crime and reserves incarceration for those who commit serious criminal violence.

The state fiscal crisis is not likely to reach a quick resolution, but there are many reasons to hope that once the states regain financial stability, public officials will not rush to re-embrace the costly policies that have needlessly overloaded the prisons with low-level, non-violent offenders. The growing national trend toward sensible sentencing and correctional reforms by state policymakers of every political stripe, in every region of the country, is crossing traditional political alignments. The goal of creating a more just and effective system for responding to crime demands that we seize the opportunity afforded by the fiscal crisis to broaden and strengthen a consensus for reform that will hold beyond the budget deficits that plague us today.



About FAMM and the Smart On Crime campaign

The Smart On Crime campaign is a project of Families Against Mandatory Minimums (FAMM). FAMM is a national non-partisan, non-profit organization founded in 1991 in response to inflexible and excessive penalties required by mandatory sentencing laws. FAMM promotes sentencing policies that give judges the discretion to distinguish between defendants and sentence them according to their role in the offense, seriousness of the offense and potential for rehabilitation. FAMM's 30,000 members include prisoners and their families, attorneys, judges, criminal justice experts and concerned citizens.

FAMM works with legislators, law enforcement, criminal justice experts, the media and citizens to provide public education and implement cost-effective criminal justice policies that increase judicial discretion while protecting public safety. FAMM provides support to policy makers concerned about the high fiscal and human costs of mandatory minimums sentencing and related policies, such as three-strikes laws, "truth in sentencing," disproportionately harsh sentences, and parole disqualifiers.

For more information on the Smart On Crime campaign, please visit www.smartoncrime.org, or FAMM's website, www.famm.org.

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