

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges federal, state, territorial and local
2 governments, in responding to budget constraints, to undertake a comprehensive review of their
3 pretrial detention, sentencing and correctional systems, to identify modifications that can be
4 made in those systems to improve their cost-effectiveness, in conformance with public safety
5 needs and constitutional requirements; and
6

7 FURTHER RESOLVED, That the American Bar Association urges these jurisdictions to
8 ensure the availability of alternatives to incarceration for use in appropriate cases before
9 considering construction of new or expanded public or private prisons or jails; and
10

11 FURTHER RESOLVED, That the American Bar Association adopts the “Blueprint for
12 Cost-Effective Pretrial Detention, Sentencing and Corrections Systems”, dated August 2002, and
13 commends to federal, state, territorial and local governments the provisions of the Blueprint as
14 minimum steps to eliminate unnecessary correctional expenditures, enhance cost-effectiveness,
15 and promote justice.

BLUEPRINT FOR COST-EFFECTIVE PRETRIAL DETENTION, SENTENCING, AND CORRECTIONS SYSTEMS

(August 2002)

Fiscal Accountability

1. Each state and the federal government should require the preparation of correctional/fiscal impact statements and their consideration by legislators and the governor or President before legislation is enacted that would increase the number of persons subject to a particular criminal sanction, or increase the potential sentence length for any criminal offense.
2. Each state and the federal government should make laws increasing the number of persons who will be incarcerated or the length of their incarceration subject to a sunset provision when the money to fund the projected increase in the prison or jail population is not appropriated.

Sentencing and Community Corrections

3. Each state and the federal government should adopt and implement a comprehensive community corrections act that provides the structure and funding for the sanctioning of nonviolent offenders within their communities.
4. Community corrections systems should be structured to avoid unnecessary supervision and incarceration, in part through the expanded use of means-based fines.
5. Each state and the federal government should review their sentencing laws, and sentencing or parole guidelines, to accomplish the following objectives: (a) to provide that a community-based sanction is the presumptively appropriate penalty for persons who do not present a substantial danger to the community; and (b) to ensure that the populations subject to the jurisdiction's prison, jail, or community-sanctioning systems do not exceed each system's rated capacity.
6. Each state and the federal government should review the length of sentences prescribed by law, and sentencing and parole guidelines, to ensure that they accurately reflect current funding priorities, as well as research findings that question the utility of long sentences, whether incarcerative or community-based, for certain kinds of crimes.
7. Each state and the federal government should repeal mandatory sentencing laws that unduly limit a judge's discretion to individualize sentences, so that the sentence in each case fairly reflects the gravity of the offense and the degree of culpability of the offender.
8. Each state and the federal government should review and revise sentencing laws and court procedures to provide for appropriate community-based responses to drug offenses, including treatment, in lieu of incarceration.

9. State and federal prosecutors should regularly examine their policies concerning charging, plea-bargaining, and sentence recommendations, in order to avoid overcharging, and to make greater use of community-based sanctions.

Sentence Modifications

10. Each state and the federal government should structure its sentencing system to permit a graduated response, when appropriate, to violations of the conditions of parole or other community release. The sentencing system should provide that a community-based sanction is the presumptively appropriate penalty for persons who do not present a substantial danger to the community.

11. Each state and the federal government should establish a mechanism to apply the above-described sentencing reforms retroactively, where appropriate, to currently incarcerated inmates.

12. Each state and the federal government should adopt and fully implement mechanisms for the expeditious consideration of early release for prisoners who are terminally ill or physically incapacitated, and each jurisdiction should assess the desirability of applying such mechanisms to elderly or other prisoners in specified circumstances.

Reentry and the Reduction of Recidivism

13. Each state and the federal government should adopt a comprehensive plan to reduce return rates to prison and jail, that includes the development of reentry plans, procedures, and services to facilitate released inmates' reintegration into the community, and relief from legal obstacles that impede reintegration.

14. Local, state, and federal governments should implement and fully fund programs within prisons and jails, and within community-based sanctioning programs, to provide educational opportunities, vocational and job training, mental health and substance abuse treatment, counseling, and other programs designed to reduce recidivism.

Pretrial Detention

15. Local governments, working in partnership with the state government, should adopt, expand, and refine pretrial services programs to reduce unnecessary detention, to save jail space for persons who need to be incarcerated.

Correctional Operations and Facilities

16. Local, state, and federal governments should adopt performance standards for prisons, jails, and community-sanctioning programs, to ensure that the effectiveness of correctional practices and programs can be assessed and improved.

17. Local, state, and federal governments should utilize information, management, and evaluation systems that regularly identify and rectify inefficiencies in judicial case management systems and correctional processes that unduly prolong incarceration in correctional facilities, that result in the inappropriate designation of offenders to high-security institutions, or otherwise increase costs.

18. Correctional officials in each local, state, and federal government should be granted and exercise the authority to designate a halfway house or other community residential facility as the site of an inmate's incarceration when such a placement comports with public safety.

19. Local, state, and federal correctional officials should establish linkages with universities, colleges, and community colleges through which research and service learning can be better utilized to reduce correctional costs.

20. The decision to close correctional facilities for budgetary reasons should be subject to the following requirements: (a) the selection of the facilities to be closed should be informed by and based on input from correctional officials regarding which facility (or facilities) it would be most advisable to close from a fiscal and correctional-management perspective; (b) the closing of a correctional facility should not result in the transfer of inmates to any facility already operating at or above its rated capacity; and (c) the selection of the facilities to be closed should take into account the desirability of permitting appropriate visitation by family members, in order to facilitate inmates' eventual reintegration into the community.

COMMENTARY

In recent years, this country has witnessed an unprecedented increase in its prison population: at midyear 2001, almost two million people were confined in prison or in jail. Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison and Jail Inmates at Midyear 2001*, at 1 (2002) [hereinafter *Inmates in 2001*]. The number of prison inmates was two and a half times the number incarcerated in 1986, *Inmates in 2001*, at 1; Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 1986*, at 1 (1987), and the jail population also more than doubled during this fifteen-year time span, climbing from 274,444 inmates to 631,240. *Inmates in 2001*, at 2 (2001); Bureau of Justice Statistics, U.S. Dep't of Justice, *Jail Inmates in 1987*, at 5 (1988). In 1985, 313 of every 100,000 residents in the United States were confined in prison or jail. Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison and Jail Inmates, 1995*, at 2 (1996). By 2001, the number incarcerated had increased to 690 per 100,000 residents, giving the United States the dubious distinction of having the highest incarceration rate in the world. *Inmates in 2001*, at 2; The Sentencing Project, *U.S. Surpasses Russia as World Leader in Rate of Incarceration 1* (2000). The impact of this "race to incarcerate" on racial and ethnic minorities has been disproportionately severe.

Shifts in sentencing policies, including augmented efforts to incarcerate drug offenders, the adoption of mandatory minimum sentencing laws, and increasingly lengthy sentences account for much of the dramatic increase in the number of people incarcerated. These policy shifts have come with a very large price tag. Between 1990 and 2000, for example, the states opened 351 additional correctional institutions for adults, adding over 528,000 beds to their prison systems. Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2000*, at 9 (2001). With the average cost of constructing a new prison bed reaching \$37,744 in 1999, states and the federal government spent over 1.5 billion dollars in 1999 adding over 34,000 prison beds to new and existing prisons. Camille Graham Camp & George M. Camp, *The Corrections Yearbook 2000 (Adult Corrections)* 73-74 (2000). In that same year, an additional 2.2 billion dollars worth of construction to add more prison beds was under way. *Id.* at 75. Above and beyond these construction costs, an average of \$21,140 was spent on each prisoner in 1999 for staff, food, medical care, and other operational costs. *Id.* at 88.

Reduced tax revenues associated with the economic downturn that began in 2000 have forced states to make difficult choices as they develop budget priorities. In this environment, lawmakers are having serious second thoughts about continuing to pay out such enormous sums to maintain their greatly expanded prison and jail systems, in light of competing demands from more popular programs such as education and health programs and services. These budgetary concerns were accentuated in the aftermath of September 11 by the new demands in connection with protecting Americans from the very real threat of global terrorism. In choosing where costs can be cut, correctional programs and services have proved an attractive and largely undefended target. See Ryan S. King and Marc Mauer, *State Sentencing and Corrections Policy in an Era of Fiscal Restraint*, The Sentencing Project, February 2002; Judith Greene and Vincent Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis*, Justice Policy Institute, February 2002.

Written against the backdrop of new fiscal pressures on correctional budgets, the attached Resolution and Blueprint reflect the American Bar Association's longstanding recognition that the nation's sentencing and corrections systems are in dire need of reform. We believe that these reform measures will yield substantial cost savings in sentencing and correctional expenditures. The Resolution and Blueprint also reflect the common-sense understanding that public safety may be compromised if the federal, state, and local governments fail to establish priorities in the use of highly expensive correctional resources to punish criminal offenses.

While the need for cost savings and efficiency is the catalyst for the Resolution and Blueprint, their specific provisions will also effectuate many of the justice-related goals for which the ABA has long advocated. If fiscal concerns have drawn attention to the need to reform criminal justice policies and practices in the interest of cost-reduction, the fairness and humanity of our criminal justice system is and must remain the primary goal of reform.

The centerpiece of the Resolution is a call for a comprehensive review by the federal, state, territorial, and local governments of their pretrial detention, sentencing, and correctional systems, to determine how those systems can be operated more efficiently and effectively. Specifically, each jurisdiction should determine what basic features of cost-effectiveness are absent from its system and should then initiate the necessary changes in laws, policies, procedures, and programs to rectify those deficiencies, consistent with public safety needs and constitutional requirements.

The initiation of this comprehensive review should be considered an urgent priority, one that can and should be completed in no more than a year. During and after the completion of this comprehensive review, each jurisdiction should consider whether community-based sanctions could be utilized to meet its penological and public-safety needs, before planning or constructing new or larger prisons or jails (or contracting for such construction with private correctional companies).

To provide further guidance to federal, state, territorial, and local governments in devising cost-effective detention, sentencing, and correctional systems, the ABA is disseminating a "Blueprint" that outlines a number of significant steps that governmental officials can and should take to not just control correctional costs, but also responsibly reduce them. Several of these prescribed steps reflect policies whose adoption the ABA has advocated for many years, including, in particular, the adoption of community corrections acts and the repeal of mandatory sentencing statutes. At the same time, the Blueprint fills in significant gaps in existing ABA policies and extends those policies in an effort to realize the goal of creating a coherent and comprehensive strategy for cutting costs in the interests of justice. While the recommendations in the Blueprint are for the most part self-explanatory, several points bear emphasizing. First, reducing what has clearly become an over-reliance in this country on incarceration will not realize its cost-

saving potential if community sanctioning systems and pretrial services programs are ineptly constructed or inadequately funded. The community corrections acts whose adoption the Blueprint recommends can, if well-drafted, avert these problems.

Second, and relatedly, jurisdictions should be wary of, and guard against, the potential “net-widening” effects of community sanctions, a problem addressed by recommendation #4 in the Blueprint. Just as the reflexive authorization and imposition of prison sentences is costly in economic and human terms, so is the reflexive authorization and imposition of community supervision on offenders who do not need or require it. The states and the federal government would therefore do well to consider the experience of Western European nations that have successfully utilized means-based fines to supplant incarceration and community supervision as the penalty of choice for most offenders. In the Netherlands, for example, fines are presumptively considered the most appropriate penalty, and when judges impose a different sanction, they must explain why they did not impose a fine. Michael Tonry, *Sentencing Matters* 124 (1996).

Third, both unnecessary incarceration and unnecessarily long sentences waste taxpayers’ money and increase the risk of recidivism. Thus, as a general matter, community-based sanctions are the presumptively appropriate penalty for persons who do not present a substantial danger to the community, including non-dangerous persons under supervision in the community who violate the terms of their release. (Recommendations #5 and 13). (This is not to say, of course, that a term of incarceration will not be an entirely appropriate penalty for certain serious white-collar crimes, in order to serve the deterrent purposes of punishment.). In addition, decisions regarding the appropriate length of sentences should be informed by research indicating that criminal activity peaks when individuals are in their late teens and early twenties. (Recommendation #6) *See, e.g.*, Linda S. Beres & Thomas D. Griffith, “Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation,” 87 *Georgetown L.J.* 103, 135-37 (1998). Research has also shown that unnecessarily long terms of community supervision may result in additional processing and sanctioning costs in connection with relatively trivial violations.

Fourth, where a jurisdiction changes its laws so as to reduce the period of incarceration for certain offenses, fairness as well as fiscal good sense dictate that the benefits of such laws should be extended retroactively to currently incarcerated individuals. Furthermore, the added cost of caring for inmates who are elderly, seriously ill, or physically incapacitated represents a particularly heavy drain on correctional budgets, at the same time that the need for incapacitation has lessened. Accordingly, consideration should be given to early release in such cases, where resources are available in the community to provide adequate care. Other developments since the imposition of a sentence (such as family hardship) may warrant reducing the sentence originally imposed.

Fifth, the long-term costs associated with recidivism can be substantially reduced if jurisdictions implement policies and programs that will help offenders become and stay law-abiding. While incarcerated, as well as after release, offenders should be offered educational opportunities, vocational and job training, mental health and substance abuse treatment,

counseling, and other programs designed to reduce recidivism. Jurisdictions should also take steps to dismantle the legal barriers to full citizenship for those convicted of crime, and afford offenders who have been released from prison reasonable access to employment opportunities.

Sixth, the fiscal waste that permeates pretrial detention, sentencing, and correctional systems is aggravated by deficiencies in correctional and court procedures that unduly prolong incarceration and otherwise increase costs. For example, courts' case management systems can substantially increase or decrease the length of time persons who must be incarcerated in jail while awaiting trial are actually confined. In addition, poorly designed classification systems for prisoners can lead to inappropriate designation of prisoners to more expensive facilities than necessary or desirable. The seventeenth recommendation in the Blueprint therefore calls on jurisdictions to eliminate the inefficiencies in court and correctional processes that have proven so costly in the past.

Seventh, the responsibility for ensuring that sentencing and correctional systems operate cost-effectively, as well as justly, lies not just with legislatures and judges. Recommendation #9 recognizes that prosecutors will play a pivotal role in the effectuation of policies aimed at reducing incarceration costs by reducing prison and jail populations. In addition, correctional administrators can achieve substantial economies by adopting performance standards through which the effectiveness of correctional operations can be assessed and improved. (Recommendation #16). Correctional administrators can also cut costs by utilizing the research capabilities of neighboring colleges and universities, and by supplementing their staff resources through internship and other in-service learning programs. (Recommendation #19) Correctional administrators can furthermore ensure that the decision regarding what prisons, if any, to close in a particular jurisdiction is based on fiscal and correctional-management needs, although it may also be appropriate to consider the economic impact of a prison closing on the community in which it is located.

Finally, in considering the enactment of these reforms, policymakers should be encouraged by evidence that public attitudes toward crime and crime-related issues have undergone a significant transformation in the past few years. As noted in a very recent study by a well-known public opinion research organization, "support for long prison sentences as the primary tool in the fight against crime is waning, as most people reject a purely punitive approach to criminal justice. Instead, the public now endorses a balanced, multifaceted solution that focuses on prevention and rehabilitation in concert with other remedies." Peter D. Hart Research Associates, Inc., "The New Politics of Criminal Justice," January 2002 at 1. This evidence of a shift in public perspective on matters of crime and punishment provides a foundation and an opportunity for the kind of pragmatic leadership needed to effect changes in this country's sentencing and correctional systems – changes that are supported by considerations of justice and humanity, as well as by considerations of economy and public safety.

REPORT

The Resolution responds to concerns that have recently arisen in many jurisdictions about the need to control the escalating costs of operating the nation's prisons and jails. Since the late 1980s, the costs associated with incarceration have skyrocketed, as the number of prisoners in the United States has ballooned to almost two million. At the same time, there has been a shift in public opinion about the utility and fairness of an exclusively punitive approach to crime, particularly insofar as it produces long mandatory prison terms for nonviolent offenders. In casting about for ways to cut costs, jurisdictions have implemented a variety of piecemeal measures, but they do not have available to them a comprehensive set of policies and implementing guidelines that will enable them to systematically reduce costs consistent with public safety needs and constitutional requirements. The Resolution and Blueprint are a timely effort to fill that need.

The Resolution calls upon jurisdictions to examine their pretrial detention, sentencing, and corrections systems to determine where they can be made more cost-effective, and to develop and utilize alternatives to incarceration in all appropriate cases before considering new or expanded prison facilities. It also endorses a "Blueprint for Cost-Effective Pretrial Detention, Sentencing, and Corrections Systems" that was developed by the American Bar Association Criminal Justice Section's Corrections and Sentencing Committee. The "Blueprint" was conceived as a means of providing federal, state, territorial and local governing bodies with a checklist for determining the most cost-effective way to structure and manage their corrections systems, consistent with existing ABA policies on detention, sentencing, corrections, and community sanctioning programs.

While the need for cost savings and efficiency is the catalyst for the Resolution and Blueprint, their specific provisions will also effectuate many of the justice-related goals for which the ABA has long advocated. If fiscal concerns have drawn attention to the need to reform criminal justice policies and practices in the interest of cost-reduction, the fairness and humanity of our criminal justice system is and must remain the primary goal of reform.

The financial crisis facing federal, state and local governments, and evidence of declining public support for a purely punitive approach to crime, presents a unique opportunity for the kind of pragmatic leadership needed to effect long overdue reforms in this country's sentencing and correctional systems – reforms that are supported by considerations of justice and humanity, as well as by considerations of economy and public safety. All that is missing is a coherent and comprehensive policy document that will provide guidance on how best to effectuate these reforms. The Blueprint answers this need, and presents a unique opportunity, at a critical point in time, for the Association to make an important contribution to correctional and sentencing reform in the United States.

All but three of the 20 Blueprint recommendations constitute significant extensions of ABA policy on sentencing and corrections, though they are consistent with and build upon that policy. The recommendations that reaffirm existing ABA policy are #3 on community corrections acts, #7 on mandatory sentencing laws, and #15 on pretrial services programs. However, the ABA's endorsement of community corrections acts dates from 1992, and the most

recent expression of its opposition to mandatory sentencing was in February 1993, just six months short of ten years ago. It would appear, therefore, that recommendation #15 is the only provision of the Blueprint that presents a substantial issue under Bylaw 45.2(a)(1), since the Criminal Justice Standards on Pretrial Detention were approved by the House just last February. But since the reduction of reliance on pretrial detention is a central and indispensable element of the reform plan presented in the Blueprint, we hope any objection under this bylaw can be waived to permit what seems a de minimis departure from applicable policy in order to permit presentation and enactment of the Blueprint as a comprehensive document.

Respectfully submitted,

Ronald C. Smith, Chairperson
Criminal Justice Section

August 2002

GENERAL INFORMATION FORM

1. Summary of Recommendation.

This recommendation urges that jurisdictions undertake comprehensive reviews to improve the cost-effectiveness of pre-trial detention, sentencing and correctional systems. It urges jurisdictions to consider alternatives to incarceration before constructing new prisons or jails or expanding existing ones. It recommends the implementation of policies described in the “Blueprint for Cost-effective Pretrial Detention, Sentencing and Corrections Systems.”

2. Approved by Submitting Entity.

The Criminal Justice Section Council approved this recommendation at its April 20, 2002, meeting.

3. Similar Recommendations Submitted Previously.

This is the first time this recommendation has been submitted to the House of Delegates. See the list of relevant related ABA policies below.

4. Relevant Existing ABA Policies and Effect on These Policies.

The “Blueprint” expands and supplements a number of existing ABA policies and standards relating to detention, sentencing and corrections. Seventeen of the 20 Blueprint recommendations constitute significant extensions of existing ABA policy. In two of the three cases in which a Blueprint provision reaffirms existing ABA policy, that policy was adopted ten years ago. (See report accompanying the Recommendation.) The one Blueprint provision that reaffirms recently adopted ABA policy is a central and indispensable element of the reform plan presented in the Blueprint. The use of a “Blueprint” format permits the presentation of a comprehensive set of policy recommendations, and enhances the likelihood that the document as a whole will prove a useful tool for policymakers.

Existing ABA Policies reaffirmed in the Blueprint:

Policy approved Midyear Meeting 1992, Report 101D. (Recommendation #3)

American Bar Association Standards for Criminal Justice – Sentencing Standard 18-2.6 (1993). (Recommendation #7)

American Bar Association Standards for Criminal Justice – Pretrial Release Standards 10 - 1.6, 10 -1.10 (2002) (Recommendation #15)

Other ABA policies related to and consistent with the Blueprint recommendations are set forth below. The ways in which these recommendations expand upon existing ABA

policies is explained in the attached “Summary of Policy Implications of the Blueprint for Cost-Effective Pretrial-Detention, Sentencing, and Corrections Systems.”

American Bar Association Standards for Criminal Justice – Pretrial Release Standards (2002)

Policy approved Midyear Meeting 2000, Report 102B

Policy approved Annual Meeting 1999, Report 113C.

Policy approved Midyear Meeting 1997, Report 108.

Policy approved Midyear Meeting 1996, Report 113B.

Policy approved Annual Meeting 1996, Report 109.

American Bar Association Standards for Criminal Justice – Sentencing Standards (1993)

American Bar Association Standards for Criminal Justice – Prosecution Function Standards (1992)

Policy approved Midyear Meeting 1992, Report 101C, 110D.

Policy approved Midyear Meeting 1990, Reports 115A, 115C.

American Bar Association Standards for Criminal Justice – Legal Status of Prisoners (1981)

Policy approved Annual Meeting 1976, Report 3 of the Commission on Correctional Facilities and Services.

5. Urgency Requiring Action at this Meeting.

The recommendation is needed to provide an immediate and comprehensive response to the legal and policy issues raised by the escalating costs of operating the nation’s prisons and jails. Many jurisdictions are considering how to reduce costs consistent with the justice-related goals for which the ABA has long advocated, and approval of the recommendation will permit the ABA to provide an integrated set of policy recommendations in this regard.

6. Status of Congressional Legislation (If applicable).

No known congressional legislation is pending at this time.

7. Cost to the Association.

The recommendation's adoption would not result in direct costs to the Association. The only potential costs would be those that might be attributable to lobbying to have the recommendation adopted or implemented at the state and federal levels. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to advocate for Association policies.

8. Disclosure of Interest (If Applicable).

No known conflict of interest exists.

9. Referrals.

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the August 2002 House of Delegates agenda, it is being circulated to the following:

Standing Committees:

Legal Aid and Indigent Defendants
Substance Abuse

Sections, Divisions and Forums:

Government and Public Sector Lawyers Division
Individual Rights and Responsibilities
General Practice, Solo and Small Firm Section
Judicial Division
 National Conference of Federal Trial Judges
 National Conference of State Trial Judges
Litigation
State and Local Government Law
Young Lawyers Division

Affiliated Organizations:

The Federal Bar Association
National Association of Attorneys General
National Association of Criminal Defense Lawyers, Inc.
National District Attorneys Association
National Legal Aid and Defenders Association
Council of State Governments

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