AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 8-9, 2022

RESOLUTION

RESOLVED, That the American Bar Association adopts the ABA Ten Principles on Reducing Mass Incarceration, black letter and commentary, dated August 2022; and

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal legislative and other governmental bodies to adopt policies consistent with the ABA Ten Principles on Reducing Mass Incarceration.

ABA TEN PRINCIPLES TO REDUCE MASS INCARCERATION
AUGUST 2022

Introduction

Two million people are incarcerated in prisons and jails in the United States.[1] "The United States has less than 5 percent of the world's population, yet nearly 25 percent of its prisoners."[2] Over the last 40 years, the prison population has increased 500 percent.[3] "In Texas, for example, the state incarceration rate quadrupled, even controlling for population growth: In 1978, the state incarcerated 182 people for every 100,000 residents. By 2003, that figure was 710."[4]

"Mass incarceration has crushing consequences — racial, economic, social — and it doesn't make us safer."[5] Research consistently shows that higher incarceration rates are not associated with lower violent crimes rates."[6] One report found that "[o]f the 1.46 million state and federal prisoners, an estimated 39 percent (approximately 576,000 people) are incarcerated with little public safety rationale."[7] Moreover, "[t]he weak association between higher incarceration rates and lower crime rates applies almost entirely to property crime." Indeed, research suggests that incarceration often has the *opposite* effect, creating a cycle of crime, as high incarceration rates in communities correspond with *higher* crime rates.[8]

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[1] The Sentencing Project, *Criminal Justice Facts*, available at https://www.sentencingproject.org/criminal-justice-facts/.

[2] Brennan Center for Justice, *End Mass Incarceration*, available at https://www.brennancenter.org/issues/end-mass-incarceration; Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, Prison Policy Initiative (September 2021), available at https://www.prisonpolicy.org/global/2021.html.

[3] *Criminal Justice Facts*, *supra* n. 1.

[4] James Cullen, *The History of Mass Incarceration*, Brennan Center for Justice (July 20, 2018) available at https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration. As another example, from 1978 to 2016, Hawai'i's population increased by only 53%. During the same time period, however, Hawai'i's incarceration rate exploded by 670%, with the number of incarcerated people increasing from 727 to 5,602. HCR 85 Task Force, Creating Better Outcomes, Safer Communities: Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawai'i Legislature 2019 Regular Session, at 1 (Dec. 2018), available at https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf.

[5] *End Mass Incarceration*, *supra* n. 2.

[6] Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Institute for Justice, at 2 (July 2017) (citations omitted), available at https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf; see also Dr. James Austin, et. al*., How many Americans are unnecessarily incarcerated?,* Brennan Center for Justice, at 4-6 (2016), available at https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf. Note, this report examined individuals in prison, and not jails.

[7] *How many Americans are unnecessarily incarcerated?*, *supra* n. 6, at 2.

[8] *Id*. (describing a tipping point "after which future increases in incarceration lead to higher crime rates").

Incarceration does not simply hurt the individual jailed. It devastates families and destabilizes communities.[9] One of the most tragic aspects of mass incarceration is its disproportionate and devastating impact on people and communities of color across the United States. Over the last 50 years, the ill-fated War on Drugs, biased law enforcement, and overly harsh sentencing regimes have combined to ravage Black and brown neighborhoods and significantly increase the chances that individual Black, Latinx, and Native people will be ensnared by the criminal legal system. This is in stark contrast to their white counterparts. For instance, one out of every three Black men born in 2001 can expect to be incarcerated at some point in their lives, compared to one out of every 17 white men.[10] Similar disparities exist among women: one out of every 18 Black women born in 2001 can expect to face incarceration, compared to one in 111 white women born in the same year.[11] Black men and Latinx men are also 6 times and 2.5 times more likely to be incarcerated than white men, respectively. Further, Black people are stopped and arrested by the police at disproportionate rates,[12] leading to a greater chance of prosecution and, ultimately, imprisonment.

The American Bar Association has already adopted policies aimed at rectifying the racial disparities and reforming numerous aspects of the criminal legal system that contribute to mass incarceration, including policies related to sentencing, pretrial detention, and court fines and fees.[13] Despite widespread recognition of racial disparities in incarceration and numerous efforts to urge reform, disparities remain.[14] To reverse the tragedy of mass incarceration in the United States and address its devastating impact on communities of color, however, a unified approach is required. The criminal legal system is the sum of its many parts. Thus, these Principles articulate ten critical steps, which, in combination, would help to combat the drivers of mass incarceration and ultimately reduce the number of people in jails and prisons nationwide.

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[9] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, (Oct 13, 2001), available at https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

[10] Criminal Justice Facts, Sentencing Project, available at https://www.sentencingproject.org/criminal-justice-facts/. *Criminal Justice Facts*, *supra* n. 1.

[11] *Id*.

[12] Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, Prison Policy Initiative, (July 2020), available at https://www.prisonpolicy.org/blog/2020/07/27/disparities.

[13] *See, e.g.,* ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf.

[13] *See e.g.,* 2016AM111B; 2017MY112C (urging governments to "prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay"); Ten Guidelines on Court Fines and Fees, 2018AM114; 2004A112A (urging jurisdictions to repeal mandatory minimum sentences); 2004A112C (adopting the Kennedy Commission recommendations to establish a process for people in prison to request release for a variety of reasons "medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering.").

[14] Elizabeth Hinton, et. al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute for Justice (May 2018), available at https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

Moreover, in designing programs to satisfy these principles should prioritize identifying, monitoring, and eliminating racial disparities. Such an effort will require comprehensive and consistent data collection to monitor racial disparities across all aspects of the system, and ultimately, to inform solutions to this protracted and insidious problem.

It is imperative that jurisdictions across the country reverse the devastating trend of mass incarceration and, in so doing, focus these efforts on reducing disparities in incarceration. Federal, state, local, territorial, and tribal governments should immediately begin reducing the number of people they incarcerate.[15] Building on existing ABA policies, these Principles—organized roughly in the sequence of a typical criminal case—seek to provide guidance for jurisdictions on how to achieve these goals.

PRINCIPLE 1: Strictly and uniformly limit the use of pretrial detention to circumstances required for public safety where no conditions of pretrial release will suffice.

Commentary:

At any given time, over 500,000 people are incarcerated in pretrial detention in the United States, the vast majority of whom, by definition, have not been convicted of the crime for which they are held. Although reliable nationwide statistics on pretrial detention are hard to come by,[16] the Prison Policy Initiative estimates that, on average, over 440,000 individuals are being held in pretrial detention in state and local jails each day, and over 60,000 are held in federal pretrial detention.[17] Those numbers have grown exponentially over the last 40 years. The number of pretrial detainees held in local jails alone skyrocketed 433 percent between 1970 and 2015, from 82,922 people to 441,790.[18] And although there has been some reduction in pretrial detention during the pandemic, prosecution rates and pretrial detention rates appear to be returning to pre-pandemic levels.[19]

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[15] The number of people in prison and jails, or on probation, dropped from 2019-2020. According to the Prison Policy Initiative, however, "these drops were due to mainly to emergency responses to COVID-19, and correctional populations have already started rebounding toward pre-pandemic levels." Wendy Sawyer, *New data: The changes in prisons, jails, probation, and parole in the first year of the pandemic,"* Prison Policy Initiative (Jan. 11, 2022), available at https://www.prisonpolicy.org/blog/2022/01/11/bjs_update/.

[16] Until 2009, the State Court Processing Statistics provided data on the criminal justice processing of persons charged with felonies in 40 jurisdictions representative of the 75 largest counties. Available at https://bjs.ojp.gov/data-collection/state-court-processing-statistics-scps. A new National Pretrial Reporting Program is in development. *See* 87 Fed. Reg. 8607 (Feb. 15, 2022). *See also* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, The Prison Policy Institute (March 14, 2022), available at https://www.prisonpolicy.org/reports/pie2022.html (describing difficulties in aggregating data across numerous jurisdictions).

[17] *Mass Incarceration: The Whole Pie 2022*, *supra* n. 16.

[18] Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (April 2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf.

[19] *Compare Mass Incarceration: The Whole Pie 2022*, *supra* n. 16 (445,000 persons held pretrial in local jails and 64,000 in U.S. Marshals custody), *with* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Institute (Mar 24, 2020), available at https://www.prisonpolicy.org/factsheets/pie2020_allimages.pdf (470,000 persons held pretrial in local jails

Although much attention has been paid to the injustices of state monetary bail systems, it is the federal system where the highest rates of pretrial detention exist. As of 2010, 42% of defendants in state court were detained pretrial, compared to 64% of federal defendants.[20] Again, this is against the backdrop of the "presumption of innocence," which "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[21]

To make matters worse, the racial disparities in pretrial detention are stark. One study found that courts were 66 percent more likely to order pretrial detention if the defendant was Black than white.[22] Even controlling for criminal charges and criminal histories, Black defendants generally face higher bail amounts than white arrestees.[23] And pretrial detention can promote future criminal activity.[24] Even a brief stay in pretrial detention increases the likelihood that a defendant will reoffend.[25]

In short, the massive rise in pretrial detention has contributed to the rates at which Americans, particularly Black and brown Americans, are held behind bars—often with devastating consequences for already-disadvantaged communities. Although pretrial detention is certainly justified in some cases, longstanding ABA policy calls for minimizing its use.[26] Researchers and advocates have identified a range of strategies to identify ways to diminish pretrial detention while ensuring that defendants appear for court and protecting communities, including training programs for judges and bail commissioners on the fundamentals of bail, requirements that bail determinations be evidence-based, and oversight and accountability measures for bail determinations.[27]

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and 60,000 in U.S. Marshals custody). *See also* U.S. Marshals Service, *FY 2021 Annual Report*, at 43, available at https://www.usmarshals.gov/foia/annual-report-2021.pdf, (Figure 15 – Average Daily Prisoner Population, showing an increase in average daily prisoner population every year from FY2017 to FY2021).

[20] U.S. Department of Justice, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* (Nov. 2012), available at https://bjs.ojp.gov/content/pub/pdf/prmfdc0810.pdf

[21] *Estelle v. Williams*, 425 U. S. 501, 503 (1976).

[22] Stephen DeMuth, *Racial and Ethnic Differences in Pre-trial Release and Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 895 (2003).

[23] Cynthia E. Jones, *"Give us Free": Addressing Racial Disparities in Bail Determinations*, 16 Leg. & Pub. Policy 919, 942 (2013), available at https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1922&context=facsch_lawrev; Shawn D. Bushway & Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Mode*l, Nat'l Sci. Found., Working Paper No. SES0718955 (2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324.

[24] *See, e.g.*, Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017), available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3409&context=faculty_scholarship; Christopher T. Lowenkamp, et al., *The Hidden Costs of Pretrial Detention* (Nov. 2013), 3, 11, 22, available at https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf

[25] Leon Digard, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute for Justice. at 6 (April 2019), available at https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf.

[26] 2017AM112C, available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2017/2017-am-112c.pdf (urging jurisdictions to favor release of defendants upon their own recognizance).

[27] *Give Us Free, supra.* n. 23, at 956-57, 959-60.

The ABA has previously identified specific reforms to minimize pretrial detention. In 2018, the House of Delegates urged jurisdictions to adopt policies and procedures that:

1. favor release of defendants upon their own recognizance or unsecured bond;
2. require that a court determine that release on cash bail or secured bond is necessary to assure the defendant's appearance and no other conditions will suffice for that purpose before requiring such bail or bond;
3. prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay;
4. permit a court to order a defendant to be held without bail where public safety warrants pretrial detention and no conditions of pretrial release suffice, and require that the court state on the record the reasons for detention; and
5. bar the use of "bail schedules" that consider only the nature of the charged offense and require instead that courts make bail and release determinations based upon individualized, evidence-based assessments that use objective verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, disability, sexual orientation, or gender identification.[28]

By implementing these reforms, those with control over pretrial detention decisions—particularly legislators, prosecutors, and judges—can reduce rates of pretrial detention and make the pretrial process more equitable.

PRINCIPLE 2: Increase use of diversion programs and other alternatives to criminal prosecution, and limit use of criminal charges likely to result in incarceration to cases necessary to assure public safety.

Commentary:

Upon receipt of a case from law enforcement, the prosecutor must first decide whether to institute formal criminal charges against the individual. Appropriate screening of cases at this charging point can help avoid unnecessary detention and prosecutions. Prosecutors' offices "should establish standards and procedures for evaluating complaints to determine whether formal criminal proceedings should be instituted."[29] Prosecutors should consider not only whether sufficient evidence exists to sustain charges, but also "the extent or absence of harm,"[30] "the impact of the prosecution or non-prosecution on public welfare,"[31] "characteristics of the offender,"[32] "whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender,"[33] "the possible influence of any cultural, ethnic, socioeconomic

[28] 2017A112C, available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2017/2017-am-112c.pdf.
[29] ABA Criminal Justice Standards for the Prosecution Function, at Standard 3-4.2(b).
[30] *Id.* at Standard 3-4.4(a)(iii).
[31] *Id.* at Standard 3-4.4(a)(iv).
[32] *Id.* at Standard 3-4.4(a)(v).
[33] *Id.* at Standard 3-4.4(a)(vi).

or other improper biases,"[34] and "potential collateral impact on third parties,"[35] among other things.

For those cases in which criminal charges are appropriate, diversion is a key alternative to incarceration that prosecutors should consider. Used appropriately, diversion programs, which often require an individual to complete education, training and/or treatment in lieu of prosecution and incarceration, can help individuals to surmount underlying issues that place them at risk for ongoing criminal justice system involvement.[36] For this reason, ABA policy has long encouraged jurisdictions to create and use a wide scope of diversion programs for all types of offenders in the criminal and juvenile legal systems.[37]

Use of diversion should be expansive and include programs that range from course-based diversion to residential treatment programs to assist people with addiction and mental health issues,[38] to intensive programs that help people arrested for serious offenses.[39] Diversion programs should also be designed to assist individuals with disabilities[40] and ensure that they receive the necessary supports, rather than jail time.[41]

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[34] *Id.* at Standard 3-4.4(a)(x).
[35] *Id.* at Standard 3-4.4(a)(xii).
[36] Fair and Just Prosecution, *Issues: Diversion and Alternatives to Incarceration,* available at *https://fairandjustprosecution.org/issues/diversion-and-alternatives-to-incarceration/*
[37] *See, e.g.*, 2011MY107B (urging use of restorative justice alternatives for youth and teens).
[38] Recent studies estimate that 64% of jail inmates, 56% of state percent of state prisoners, and 45% of federal prisoners had a mental health problem. *See* KiDeuk Kim, et. al, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System*, Urban Institute (March 2015), available at https://www.urban.org/sites/default/files/publication/48981/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf.
[39] IACP/UC Center for Police Research and Policy, *Assessing the Impact of Law Enforcement Assisted Diversion (LEAD): A Review of Research,* i-vii, available at *https://www.theiacp.org/sites/default/files/IDD/Review%20of%20LEAD%20Evaluations.pdf*; Vera Institute of Justice, *What is Diversion* (June 21, 2016), available at https://www.vera.org/the-human-toll-of-jail/judging-without-jail/what-is-diversion; Center for Prison Reform, *Diversion Programs in America's Criminal Justice System* (Aug. 2015), available at https://centerforprisonreform.org/wp-content/uploads/2015/09/Jail-Diversion-Programs-in-America.pdf.
[40] A special report by the Bureau of Justice Statistics reported that "[a]bout 40% of females and 31% of males in prison and 49% of females and 39% of males in jail reported a disability." Jennifer Bronson, et. al., *Disability Among Prison and Jail Inmates*, 2011-12, Bureau of Justice Statistics (Dec 2015), available at https://bjs.ojp.gov/content/pub/pdf/dpji1112.pdf. "Prisoners were nearly 3 times more likely and jail inmates were more than 4 times more likely than the general population to report having at least one disability." In this report, the most common type of disability reported was cognitive disability. *See also*, Elliot Oberholtzer, *Police, courts, jails, and prisons all fail disabled people*, Prison Policy Initiative (Aug 23, 2017), available at https://www.prisonpolicy.org/blog/2017/08/23/disability/.
[41] For example, an individual with cognitive disabilities may not be able to successfully complete probation or regular diversion requirements without support in navigating sign-ups, schedules, reporting, etc. Similarly, an individual with a vision or hearing impairment may need access to different or additional explanations and reminder mechanisms, as well as accommodation to ensure ability to comply with various course or reporting requirements. Diversion programs should be prepared to meet the needs of individuals with disabilities. *See generally*, Jennifer Laszlo Mizrahi, et. al., *Disability and Criminal Justice Reform: Keys to Success*, RespectAbility (2016), available at https://www.respectability.org/wp-content/uploads/2017/05/Disability-and-Criminal-Justice-Reform-White-Paper.pdf.

Unfortunately, if misused, diversion programs can have the unintended and damaging effect of *increasing* the number of individuals under government supervision, which, in turn, can increase incarceration, which is precisely what these Principles seek to avoid.[42] Thus, to be clear, "diversion" programs should be considered only after a determination that probable cause exists and a criminal charge is warranted. Further, courts must ensure that participants' due process rights and right to counsel are protected, and that no participant is treated more harshly in diversion than a person who was not diverted.

Principle 3: Repeal mandatory minimum sentencing provisions.

Commentary:

Mandatory minimum sentences not only contribute to the mass incarceration problem in the United States; they are also inequitable and counterproductive. First, Black and Latinx defendants are more likely to receive mandatory minimum sentences than whites. Of federal prisoners subject to mandatory minimum sentences in 2015, 41.5 percent were Latinx, even though Latinx people make up only 17 percent of the overall U.S. population. Further, 28.9 percent of inmates subject to mandatory minimum sentences were Black, even though Black people represent only 13 percent of the U.S. population. Only 27.2 percent of those subject to mandatory minimum sentences were white.[43]

Second, mandatory minimum sentences afford prosecutors disproportionate power to coerce a plea bargain. The prosecutor can threaten to charge a crime with a long mandatory sentence, whether warranted or not, to coerce the defendant to plead guilty. Such charges tie the hands of judges who wish to tailor the punishment to the individual defendant's circumstances.[44] Mandatory minimum sentences thus act "like a sledgehammer rather than a scalpel."[45]

Third, mandatory minimum sentences, or the threat of them, do not improve public safety. Incarceration is intrinsically criminogenic.[46] Not surprisingly, mandatory sentencing laws have not reduced recidivism. Indeed, in increasing the level of incarceration—at an average annual cost of more than $37,000 per inmate—mandatory minimum sentencing diverts resources from other aspects of public safety and essential social services, including, for example, rehabilitative programs that can reduce recidivism.[47]

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[42] Melissa Labriola, et. al., *Prosecutor-Led Pretrial Diversion: Case Studies in Eleven Jurisdictions* 2 (April 2018), available at https://www.ojp.gov/pdffiles1/nij/grants/251664.pdf

[43] Leadership Conference, on Civil and Human Rights, *Fact Sheet: Sentencing and Mandatory Minimums, at 2* (2018) at p. 2.), available at http://civilrightsdocs.info/pdf/criminal-justice/Sentencing-Fact-Sheet.pdf.

[44] ABA policy urges against this practice. *See* 2017A10B (opposing imposition of a mandatory minimum sentence and urging jurisdictions to repeal laws requiring mandatory minimum sentences).

[45] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial,* 117 HARVARD LAW REVIEW 2463, 2487 (2004); Alison Siegler, *End Mandatory Minimums,* Brennan Center for Justice, *End Mandatory Minimums* (2021)

[46] Francis Cullen, Cheryl Lero Johnson, and Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science,* 91(3) Prison Journal 48S, 51S (2011).

[47] Pew Charitable Trust, *Low Return: Penalty increases enacted in 1980s and 1990s have not reduced drug use or recidivism* (2015).

The federal government has adopted partial reforms of mandatory sentencing. President Biden, during the 2020 campaign, called for the abolition of mandatory minimum sentences for nonviolent crimes, and, upon his election, the Justice Department promptly rescinded its policy of charging, in all cases, the offenses that would carry the most severe sentence.[48] The First Step Act of 2018 reduced mandatory minimum sentences for some drug traffickers with prior convictions, lowered the 20-year mandatory minimum to 15 years, and reduced the life-in-prison mandatory minimum to 25 years.[49] But long mandatory minimum sentences remain on the books.[50]

Many states, too, have undertaken reforms of mandatory minimum sentences. For example, Maryland enacted a law repealing mandatory minimum sentences for nonviolent drug offenses.[51] New Jersey accomplished the same thing by administrative directive.[52] Iowa passed legislation that allowed the parole board to release nonviolent drug offenders who served at least half their sentences.[53] And Oklahoma gave judges more discretion in the sentencing of nonviolent offenders.[54] As of 2014, more than 29 states had adopted reforms of mandatory minimum sentences.[55] However, no jurisdiction has abolished mandatory minimum sentences across the board.

Reforming mandatory fine requirements warrants equal attention. Some jurisdictions have mandatory minimum fines up to $750,000.[56] Mandatory minimum fines for driving while intoxicated are common. Illinois, for example, imposes minimum fines up to $5,000.[57] The ABA Ten Guidelines on Court Fines and Fees, adopted by the House of Delegates in 2018, urge jurisdictions to enable judges “to waive or reduce any fine” and

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[48] Ryan Reilly, *DOJ pulls Trump administration’s harsh charging and sentencing policy*, HuffPost (Jan 29, 2021), available at https://www.huffpost.com/entry/doj-biden-sentencing-charging-policy_n_601441aac5b63b0fb2808ce7601441aac5b63b0fb2808ce7.

[49] Congressional Research Service, *The First Step Act of 2018: An Overview,* at 8-9 (March 4, 2019), pp. 8-9.).

[50] *See* U.S. Sentencing Commission, *Report at a Glance: Mandatory Minimum Penalties in the Federal System*, available at https://www.ussc.gov/research/research-reports/report-glance-mandatory-minimum-penalties-federal-system.

[51] Ovetta Wiggins, *How Maryland came to repeal mandatory minimums for drug offenders,* WASHINGTON POST (June 1, 2016).), available at https://www.washingtonpost.com/local/md-politics/how-maryland-came-to-repeal-mandatory-minimums-for-drug-offenders/2016/06/01/4961c7c4-2124-11e6-8690-f14ca9de2972_story.html.

[52] Gurbir S. Grewal, Attorney General of New Jersey, *Attorney General Law Enforcement Directive No. 2021-4* (April 19, 2021); Nicholas Katzban, *NJ allows non-violent drug offenders to apply for new sentences*, NorthJersey.com (May 19, 2021), available at https://www.northjersey.com/story/news/new-jersey/2021/05/19/nj-allows-non-violent-drug-offenders-apply-new-sentences/5172441001/.

[53] Kathy Bolten, *Branstad signs bill allowing early release of hundreds of drug felons*, Des Moines Register (May 12, 2016), available at https://www.desmoinesregister.com/story/news/politics/2016/05/12/branstad-signs-bill-freeing-hundreds-drug-felons/84260820/.

[54] 22 OK Stat. §22-985 (2020).

[55] Ram Subramanian and Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Minimum Sentences*, at 8 Center on Sentencing and Corrections, at 8 (Feb 2014).

[56] Zach Ahmad, NYCLU, *How NY makes poor people pay to be prosecuted* , NYCLU (2021); Fines and Fees Justice Center, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States* (2020).

[57] Ill. Stat. Ann. § 11-501.

note that "a full waiver of fines should be readily accessible to people for whom payment would cause substantial hardship."[58]

PRINCIPLE 4: Utilize alternatives to incarceration such as community supervision, condition such supervision with the fewest restrictions consistent with rehabilitation and public safety, and strictly limit carceral sentences for violations.

Commentary:

According to the Department of Justice, an estimated 3.9 million adults were under community supervision[59] at the end of 2020.[60] With appropriate standards, limitations, and resources, community supervision is an alternative to incarceration that can help solve the mass incarceration problem without compromising public safety. However, if overused or misused, community supervision programs can contribute to the mass incarceration these Principles seek to combat.

Community supervision often requires participants to abide by a lengthy set of conditions, or rules. These rules often include meeting regularly with a parole or probation officer, refraining from use of drugs and alcohol, completing regular or random drug or alcohol testing, performing community service, refraining from travel without permission, finding and maintaining regular employment, attending courses or counseling programs, payment of fines and fees, and not associating with individuals who have criminal records.[61] "It is estimated that people on probation regularly have to comply with an average of 10 to 20 or more conditions."[62] To be successful at promoting rehabilitation, these conditions should be specific to the individual[63] and crime charged, and should create the fewest restrictions possible consistent with the goals of the program and public safety.

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[58] Guideline 2, ABA Ten Guidelines on Court Fines and Fees, available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-ten-guidelines_.pdf?logActivity=true.

[59] The term "community supervision" describes the practice of allowing a person who has been convicted of a crime to serve their sentence in the community. A sentence that is imposed in lieu of imprisonment is called probation. Parole or supervised release is a term that follows a period of imprisonment. All three fall under the umbrella of community supervision.

[60] Danielle Kaeble, Probation and Parole in the United States, 2020, Bureau of Justice Statistics (Dec. 2021), available at https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf; By comparison, as of late 2020 the jail and prison populations were estimated at about 1.8 million people.

[61] Prison Fellowship, *Probation and Parole Requirements*, available at https://www.prisonfellowship.org/resources/training-resources/reentry-ministry/ministry-basics/probation-and-parole-requirements/.

[62] Alex Roth, et. al., *The Perils of Probation: How Supervision Contributes to Jail Populations*, Vera Institute of Justice (Oct 2021), at 6, available at https://www.vera.org/downloads/publications/the-perils-of-probation.pdf.

[63] Community supervision programs must consider the abilities of the individual under supervision and ensure that supervision requirements can be met. For example, an individual with cognitive disabilities may not be able to successfully complete probation requirements without support in navigating sign-ups, schedules, reporting, etc. Similarly, an individual with a vision or hearing impairment may need access to different or additional explanations and reminder mechanisms, as well as accommodation to ensure ability to comply with various reporting, testing or counseling requirements. Community supervision programs should be prepared to meet the needs of individuals with disabilities. *See Disability and Criminal Justice Reform: Keys to Success*, *supra* n. 41.

> At a minimum, agencies should adjust levels of supervision based on risk; requiring more intensive supervision requirements for higher-risk individuals is necessary, but not sufficient. Research shows that more intensive supervision, absent risk-reduction interventions, can make outcomes worse, as closer surveillance uncovers more misconduct but programming to facilitate behavior change is absent. An agency should define separate supervision pathways that are appropriate for people with different risk and need profiles.[64]

Probation and parole historically have been viewed as alternatives to incarceration. However, the prevalence of violations of probation and parole raises legitimate concerns that probation and parole may be contributing to, rather than reducing mass incarceration.[65] "[I]n the late 1970s, 16 percent of US state and federal prison admissions stemmed from violations of parole and some types of probation. This [percentage] climbed to a high of 36 percent in 2008, and, in 2018, the last year for which data is available, as 28 percent."[66] A huge number of these revocation admissions are the result of technical violations, e.g., failure to attend a required meeting or class or failure to pay a required supervision or testing fee.[67] Causes of technical violations often are related to poverty, not criminality. A recent report by Human Rights Watch found that individuals stopped reporting to supervision because they did not have money to pay the required fees.[68] The most common violation – failure to report – is often caused by a fear of reporting and having to acknowledge noncompliance with some other technical condition, such as payment of fees or class attendance.[69]

Reducing incarceration for probation and parole violations is also critical to reducing racial disparities in incarceration, as Black people are more likely to be under supervision, more likely to be given higher levels of supervision, more likely to be cited with technical violations and more likely to be sanctioned to incarceration for violations.[70] "Studies from different jurisdictions have shown Black people are anywhere from 18 to 66 percent more

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[64] Bureau of Justice Assistance, Department of Justice, *Community Supervision: Public Safety Risk Assessment Clearinghouse,* available at https://bja.ojp.gov/program/psrac/implementation/structured-decision-making/community-supervision.

[65] *Id*. at 1.

[66] Human Rights Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, at 1 (July 31, 2020) (citing Bureau of Justice Statistics data), available at https://www.hrw.org/sites/default/files/media_2020/07/us_supervision0720_web_1.pdf.

[67] For example, "[p]robation revocations accounted for more than half of North Carolina's new prison admissions in fiscal 2009, and more than three-quarters stemmed from technical violations." PEW Trusts, *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations* (July 16, 2019)(citing North Carolina Department of Safety reports), available at https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/07/to-safely-cut-incarceration-states-rethink-responses-to-supervision-violations.

[68] *Id.* at 153-162.

[69] *Perils of Probation, supra* n. 62, at 7 ("Failure to report, however, is often an indication of other, usually minor, noncompliance, as people who have fallen behind on paying fees or missed require program sessions may stop reporting to their probation officers because they are afraid of being incarcerated for those other issues."

[70] *Perils of Probation*, *supra* n. 62, at 8.

likely than white people to have their probation revoked and 4.3 times more likely to be admitted to prison for a probation revocation."[71]

To avoid unnecessary incarcerations and reduce racial disparities in sanctions, the ABA has urged jurisdictions to establish and implement graduated sanctions for violations of parole or probation.[72] Non-criminal violations of supervision conditions should result in imprisonment only when an individual engages in repeated violations and lesser sanctions have not been effective.[73] One way to effectuate this is through legislation defining when probation or parole violations can result in reincarceration. In Vermont, for example, a statute generally limits revocation and reincarceration unless "confinement is necessary to protect the community from further criminal activity by the probationer."[74] Other states explicitly provide for sanctions short of incarceration that may be imposed for violations, such as additional treatment or community service.[75] When used in this manner, increased use of community supervision can reduce the number of incarcerated prisoners while fostering rehabilitation and protecting public safety.

PRINCIPLE 5: Prohibit incarceration for failure to pay unless the individual has had an ability-to-pay hearing, and a judge has (a) entered a finding of willful refusal to pay fines that are within the individual's ability to pay, and (b) determined that incarceration is required to obtain compliance with financial obligations.

Commentary:

In *Bearden v. Georgia*, the U.S. Supreme Court ruled that courts may not incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing on the individual's ability to pay and making a finding that the failure to pay was "willful."[76] Unfortunately, more than half a century later, people are still incarcerated because they cannot pay court fines and fees.[77] Many of these individuals simply lack the financial means to pay the fine or fee.[78]

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[71] *Id.*

[72] 2007M103B (urging jurisdictions to "develop and implement meaningful graduated sanctions for violations of parole or probation as alternatives to incarceration").

[73] 2007M103B; *see also* ABA Justice Kennedy Commission, Report with Recommendations, at 32-33 (Aug 2004)(calling for the development of graduated sanctions and highly restricting the use of incarceration as a punishment for supervision violations).

[74] 28 V.S.A. §303 (2022), available at https://legislature.vermont.gov/statutes/section/28/005/00303.

[75] PEW, *To safely cut incarceration, states rethink supervision violations* (July 19, 2019), available at https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/07/to-safely-cut-incarceration-states-rethink-responses-to-supervision-violations (noting that a South Carolina effort to utilize administrative sanctions for supervision noncompliance led to significant reduction in reincarceration).

[76] *Bearden v. Georgia*, 461 U.S. 660, 667-69 (1983).

[77] Tony Messanger, *Can't pay the court? Go to jail. Debtors' prison lives on*., Washington Post (Jan. 7, 2022); Juliette Rihl, *How not paying court fines and costs can mean jail time*, PublicSource (Feb 27, 2020) (noting that in 2019, PA judges sent defendants to jail for not paying fines in roughly 3,600 cases); American Civil Liberties Union, *In For A Penny: The Rise Of America's New Debtors' Prisons* (2010), ACLU of Louisiana, *Louisiana Debtors' Prisons: An Appeal To Justice* (2015); ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People For Being Poor* (2014).

[78] *See id.*

In 2018, the ABA House of Delegates adopted the *Ten Guidelines on Court Fines and Fees*.[79] These Guidelines make clear that incarceration for failure to pay must be strictly limited to those who are provided an ability-to-pay hearing, with counsel, and whose failure to pay is found to be willful.[80] Moreover, the ability-to-pay standard should be "clear and consistent" and "require considerations of at least the following factors: receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness; health or mental health issues, financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person's ability to pay; and whether payment would result in manifest hardship to the person or dependents."[81]

PRINCIPLE 6: Adopt "second look" policies, requiring review of sentences of incarceration at designated times to determine if they remain appropriate.

Commentary:

Reducing mass incarceration requires taking a second look at long sentences. Although it is well documented that individuals "age out" of a propensity to commit criminal activity—known as the age-crime curve—large numbers of people remain in prison many years, even decades, past when there is any rational policy justification for keeping them behind bars.

"Over 200,000 people in U.S. prisons were serving life sentences in 2020—more people than were in prison with any sentence in 1970. Nearly half of the life-sentenced population is Black. Nearly one-third is age 55 or older."[82] "Many people serving long sentences, including for a violent crime, no longer pose a public safety risk when they have aged out of crime. Long sentences are of limited deterrent value and are costly, because of the higher cost of imprisoning the elderly."[83] At some point in the course of such sentences, the legitimate question arises whether they continue to serve the purpose for which they were imposed.

As 60 current and former prosecutors pointed out in a joint statement, "[a]lthough the role of incarceration is primarily to protect public safety, our criminal legal system currently has few mechanisms to ensure that only those who still pose a serious safety risk remain behind bars."[84] Jurisdictions should adopt such mechanisms. Lengthy sentences should be automatically reviewed and, where appropriate, reduced after the passage of sufficient

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[79] 2018AM114.
[80] *Id.* at Guidelines 3, 4 and 8.
[81] *Id.* at Guideline 7.
[82] Nazgol Ghandnoosh, *A Second Look at Injustice* (May 12, 2021), available at https://www.sentencingproject.org/publications/a-second-look-at-injustice/#:~:text=Legal%20experts%20recommend%20taking%20a,10%20years%20for%20youth%20crimes.
[83] *Id.*
[84] *Joint Statement on Sentencing Second Chances and Addressing Past Extreme Sentences* (April 2021), available at https://fairandjustprosecution.org/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf

time. The Model Penal Code recommends judicial review after 15 years for adult crimes, and 10 years for youth crimes.[85] Legislators in 25 states have introduced bills requiring prisoners to receive a second look after serving a certain period in prison. Consistent with that trend around the country, prisoners who have served more than 15 years of confinement should have the ability to have their sentence reviewed by a judge or panel of judges, who have the power to reduce that sentence after a "second look" at the incarcerated person, his or her record of rehabilitation, and any other relevant circumstances, including their age and health status.

PRINCIPLE 7: Expand and improve opportunities for incarcerated individuals to obtain credit against their sentences for positive behavior, as well as completion of educational, training, or rehabilitative programs.

Commentary:

Early release mechanisms, when used appropriately, can help jurisdictions reduce incarceration by expediting the release of individuals who no longer present a significant risk of harm to the public because of their rehabilitative record. Most jurisdictions permit sentence reductions based on good behavior and/or completion of programming to reduce recidivism.[86] For example, a New York program provides a six-month credit for completion of a GED, associate degree, bachelor's degree, master's degree or doctoral degree.[87] A Nevada program pays firefighters $24/day while also allowing a sentencing reduction of up to 60 days.[88] For individuals incarcerated in the federal system, the First Step Act, passed in December of 2018, encourages providing time credits for recidivism reduction programs and productive activities as a way of reducing incarceration.[89]

These programs not only encourage compliance and use of anti-recidivism programs in prisons but also help prepare prisoners for release. They may also "provide stronger incentives for inmates to take advantage of programming and employment opportunities in prison and may improve prison discipline and safety."[90] A meta-analysis of correctional educational studies found that incarcerated individuals who participate in such programs "have 43 percent lower odds" of returning to prison than those who do not.[91]

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[85] *A Second Look at Injustice*, *supra* n. 82; Model Penal Code: Sentencing, § 305.6 Modification of Long-Term Prison Sentences (2017), available at https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

[86] The National Conference of State Legislatures, *Collected good time and earned time policies in December 2020*, available at https://www.ncsl.org/Portals/1/Documents/cj/Final-Sentence_Credit_50-State_Chart_2020.pdf As of that time, only Maine, Michigan, Minnesota, South Dakota and Wisconsin had no good time or earned time program.

[87] NY Stat. Art. 43, §803-B.

[88] Zachary Bright, *Amid brutal fire season, inmate firefighters see obstacles, wages described as 'a form of enslavement,'* The Nevada Independent (Sept 21, 2021).

[89] The First Step Act, 18 U.S.C. § 3632(d)(4)(A)(i).

[90] Michael O'Hear, *Let the Good Time Roll: Early Release for Good Behavior in Prison*, Wis. Law., 16, at 18 (March 2015).

[91] Lori M. Davis, et. al., *Evaluating Effectiveness of Correctional Education*, RAND (2013), at Summary xci.

However, in too many jurisdictions, such programs are severely restricted both in terms of who is eligible to pursue reductions and the total reductions available. Several jurisdictions exclude individuals with certain types of convictions or sentences from receiving time credit for program completion. For example, the federal good time credit program expanded through the 2018 First Step Act is not accessible to individuals convicted of some firearm, drug, or sex offenses, among many others.[92] Similarly, the maximum time reduction available under earned and good time policies is restricted in most states.[93] In Ohio, the total amount of time reduction available is only eight percent of the total sentence, and in Virginia and Florida it is fifteen percent.[94] To be effective and to ensure that such programs reduce, rather than propagate racial disparities in sentences, limitations on participation in merit-based early release mechanisms should be reduced or eliminated and the amount time reduction that can be earned should be increased.[95] Programs should also be available in all facilities and advertised prominently to all eligible individuals.

PRINCIPLE 8: Expand opportunities for incarcerated individuals to obtain early release under compassionate release or similar programs.

Commentary:

"From 1993 to 2013, the number of people 55 or older in the custodial state prison population increased 400%."[96] This population is increasing.[97] "Based on the aging of the current population and approximations of admissions, it is estimated that by 2023, adults who are 55 or older will constitute one-third of the people incarcerated in state and federal prisons."[98] This elderly prison population is also infirm. A study from 2008 found that "82 percent of inmates 65 and older have a chronic physical problem."[99]

Elderly and infirm prisoners cost more to care for in prison. Studies have found that it costs at least twice as much to care for elderly individuals than younger incarcerated individuals.[100] "A recent effort to assess the impact of age on healthcare costs nationally concluded that the average annual cost per prisoner was $5,482, but that for prisoners

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[92] U.S. Bureau of Prisons, *List of Disqualifying Offenses from First Step Act Programs*, available at https://www.bop.gov/resources/fsa/time_credits_disqualifying_offenses.jsp.

[93] Prison Fellowship, *Earned and good time policies: Comparing maximum reductions* (2018) (noting that Ohio has a maximum reduction of 8% of sentenced time), available at https://www.prisonfellowship.org/wp-content/uploads/2018/04/GoodTimeChartUS_Apr27_v7.pdf. Indeed. some states do not have good time credit programs, including Hawaii, Georgia, Utah and Minnesota. *See NCSL Chart, supra* n. 86.

[94] *Id.*

[95] In several states including California, Kansas, Nevada and Illinois, sentences can be reduced over 50% through completion of appropriate programs. *Earned and good time policies, supra* n. 93.

[96] Rebecca Silber, et. al., *Aging Out: Using Compassionate Release to Address the Growth of Aging and Infirm Prison Populations*, Vera Institute for Justice, at 2 (Dec 2017), available at https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations%E2%80%94Full-Report.pdf.

[97] *Id.* at 6.

[98] *Id*.

[99] Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States* (2012), at 73, available at (citing Anthony A. Sterns et al., The Growing Wave of Older Prisoners: A National Survey of Older Prisoner Health, Mental Health and Programming, Corrections Today, (October 2008)).

[100] *Id* at 75-77.

age 55 to 59, the amount was $11,000, and the figure steadily increased with age cohorts, reaching $40,000 for prisoners age 80 or over."[101]

At the same time, releasing elderly individuals from custody poses little risk to public safety. "Despite the many challenges of reentry, older inmates who are released to the community are far less likely to recidivate . . . than younger inmates."[102] For example, of 124 individuals released through a Mississippi medical furlough program, 86% of individuals did not reoffend within three years. Seventeen individuals (14%) returned to prison within three years – four individuals (3%) for new convictions and thirteen individuals (10%) for technical violations.[103]

Most jurisdictions also offer some mechanism for seeking early release from incarceration based on age, infirmity, or other compelling circumstances.[104] Often called compassionate release,[105] these mechanisms typically require application through the prison system, rather than the courts. A number of these compassionate release programs have been criticized for lacking clear standards and granting too few releases.[106] For example, Alabama released only 39 individuals under its medical release program between 2008 and March, 2016.[107]

Longstanding ABA policy supports expanding and expediting release programs for a variety of "medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or

[101] *Id.* at 75 (citation omitted).
[102] *Id.* at 81.
[103] *Aging Out, supra* n. 96 at 14-15.
[104] A 2008 review of state department of correction policies by USA Today found that 36 states had "some program allowing for the early release of dying or infirm prisoners." Marty Roney, *36 states release ill or dying inmates*, USA Today (Aug 13, 2008); *see also* Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, Families Against Mandatory Minimums (June 2018), available at https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf (noting that "49 states and the District of Columbia provide some means for prisoners to secure early release when circumstances such as imminent death or significant illness lessen the need for, or morality of, their imprisonment.").
[105] The mechanism is also sometimes called humanitarian release, medical and geriatric parole, medical furlough, suspension or reduction of sentence or clemency on medical grounds.
[106] For example, a 2013 Report by the Inspector General for the U.S. Justice Department found that the Federal Bureau of Prisons' compassionate release program lacked "clear standards on when compassionate release is warranted, resulting in ad hoc decision making." U.S. Dept of Justice Office of Inspector General, Evaluation and Inspections Division, *The Federal Bureau of Prisons' Compassionate Release Program* (April 2013), available at https://oig.justice.gov/reports/2013/e1306.pdf. The FAMM report on Compassionate Release in the states also noted that "despite the widespread existence of these programs, very few prisoners receive compassionate release." *Everywhere and Nowhere, supra* n. 104, at 8.
[107] *Aging Out*, *supra* n. 96, at 8; During COVID-19, more than 30,000 federal prisoners sought compassionate release, but the Bureau of Prisons approved less than 40. Keri Blakinger and Joseph Neff, *31,000 prisoners sought compassionate release during COVID-19. The Bureau of Prisons approved 36.*, The Marshall Project (June 11, 2021), available at https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36.

extraordinary suffering."[108] Accordingly, jurisdictions should consider expanding the use of early release mechanisms by eliminating unnecessary barriers or exceptions to eligibility and broadening the criteria for release.[109]

The application and review processes for compassionate release programs should be streamlined and more accessible.[110] For example, a number of jurisdictions require correctional facilities to nominate prisoners for release.[111] Instead, programs should permit not only incarcerated individuals, but also family members and attorneys to initiate the process.[112] Compassionate release programs also should ensure automatic consideration for geriatric release once a prisoner reaches a certain age and ensure automatic regular reconsideration for geriatric prisoners who remain incarcerated following initial review.[113]

PRINCIPLE 9: Evaluate the effectiveness of prosecutor offices based on their impact on public safety rather than conviction rates.

Commentary:
Core to the effectuation of each of these Principles is the prosecutor. Prosecutors are the gatekeepers to the criminal legal system. They have the power to charge (or not), to divert people from incarceration (or not), to recommend community supervision (or not), to plea bargain (or not), and to recommend a sentence.

Too many prosecutors "measure their success and effectiveness with a heavy focus on the number of convictions they obtain."[114] That perspective contributes to mass incarceration and divorces prosecutorial decision-making from public safety. "Rather than tallying up convictions, indictments and 'wins,' prosecutive leaders should ensure that they — and others who work for and with them — are improving public safety and community well-being, prioritizing community trust and transparency, and seeking just

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[108] 2004A112C; *see also* 1996A109 (urging compassionate release for terminally ill prisoners); 1996M113B (urging expedited handling of requests for medical release); and 2003M103B (urging evaluation and expansion of request for sentence reduction based on extraordinary and compelling circumstances).
[109] For example, many states "disqualify people sentenced under . . .'habitual offender' and 'truth -in-sentencing' laws, [as well as] those sentenced to life in prison." Andreea Matei, *States Could Save Lives by Expanding Compassionate Release during COVID-19 and Beyond*, Urban Institute (June 24, 2020). Eliminating such barriers would not only improve program effectiveness, but also reduce racial disparities, as Black prisoners are far more likely to be sentenced as habitual offenders and/or sentences to life imprisonment. See also *Aging Out*, supra n. 96 at 9 (citing statutory exclusions and limited eligibility as a "key obstacle that limits the reach of compassionate release policies").
[110] *Aging Out, supra* n. 96, at 10; 15-18.
[111] Arkansas, for example, requires corrections officials to initiate the release application. *Id.* at 10 (citing Arkansas SB 450 (2011), §75, amending Ark. Code §12-29-404).
[112] *Id.*
[113] *Id*. at 16.
[114] NAACP Legal Defense Fund, *Prosecutorial Success Based on Conviction Rates Distorts the Criminal Justice System*, at E1, available at https://www.votingforjustice.org/wp-content/uploads/2020/10/E_LDF_09282020_VFJToolkit_ProsecutorialSuccess-w_finished-endnotes-1-1.pdf.

results."[115] This principle should inform the "standards and procedures" that prosecutors' offices "should establish for evaluating complaints to determine whether formal criminal proceedings should be instituted."[116] It should underlie the prosecutor's individualized recommendation regarding pretrial detention.[117] It should be a key factor in the all-important decision to offer a plea and what plea to offer.[118] And it should be part of the "consistent policies" that prosecutors' offices should develop "for evaluating and making sentencing recommendations."[119]

Transparency in prosecutorial decision-making is critical to evaluate success under this approach. Publication of data from critical stages of the prosecution "serves to improve the working of prosecution offices and further the public's knowledge of how cases are prioritized, the extent to which disparities based on traits of a defendant or respondent exist and can be eliminated, whether outcomes of cases meet the goals of public safety, and how the pursuit of justice functions within that office."[120] To that end, prosecutors should collect data on all key recommendations and action points, including charging, pretrial release, plea offers and sentencing recommendations.[121] Such data should include both the prosecutor's recommendation and the court's decision.[122] Further, prosecutors should collect data regarding defendants' or respondents' race and gender and be able to review that data to identify any disparate treatment or impact, and take steps to rectify such practices.[123]

PRINCIPLE 10: Evaluate probation and parole officers based on effectiveness in assisting probationers and parolees achieve success, rather than on their revocation rates.

Over the last few decades, the number of individuals on supervision have increased dramatically, while resources for probation and parole offices have not. As a result, probation and parole offices are often burdened by high caseloads and lack appropriate resources to assist individuals under supervision to address major causes of criminal system involvement, such as poverty, lack of housing, etc. Sadly, citing an individual for a violation and seeking incarceration as a punishment requires far fewer resources than

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[115] Fair and Just Prosecution, *Issues: Accountability, Transparency and Measuring Success*, at 1, available at https://fairandjustprosecution.org/issues/accountability-transparency-and-measuring-success/.

[116] ABA Criminal Justice Standards for the Prosecution Function, at Standard 3-4.2(b).

[117] *Id.* at Standard 3-5.2(b). "The prosecutor should favor pretrial release of [people wo have been charged], unless detention is *necessary* to protect individuals or the community or to ensure the return of the defendant for future proceedings." *Id.* at Standard 3-5.2(a).

[118] *See* ABA Criminal Justice Standards on Guilty Pleas, at Standard 14-1.1 ("as part of the plea process, appropriate consideration should be given to the views of the parties, the interests of the victims, and the interest of the public in the effective administration of justice").

[119] ABA Criminal Justice Standards on the Prosecution Function, at Standard 3-7.2(a).

[120] Report to ABA House of Delegates on 2021AM504, at 1, available at https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/504.pdf.

[121] 2021AM504, available at https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/504.pdf (urging all prosecutor offices to collect and publish all such data, subject to applicable confidentiality standards)

[122] *Id.*

[123] *Id.*

seeking appropriate services and can result in reducing the officer's caseload. To encourage the focus of supervision to remain on assisting the individual in obtaining the resources and skills necessary to be successful, probation and parole officers should be judged on their ability to assist individuals in completing supervision.[124]

[124] 2007M103B ("[T]he American Bar Association urges federal, state, territorial and local governments, to create standards for the performance of probation or parole officers that will consider, in addition to other appropriate factors, the number of individuals under an officer's supervision who successfully complete supervision."); see also Molly Davis, *Want to keep people on parole from going back to prison? Reward their supervisors*, AZ Central (June 13, 2021)(discussing a bill to financially incentivize probation service providers to lessen recidivism), available at https://www.azcentral.com/story/opinion/op-ed/2021/06/14/arizona-probation-programs-need-incentives-keep-out-prison/7550458002/.

REPORT

Introduction

Over the years, the ABA has adopted numerous policies aimed at reforming components of the criminal legal system in a manner that seeks to reduce reliance on incarceration.[1] These existing policies address numerous aspects of sentencing, as well as pretrial detention and court fines and fees.[2] Taken together, these policies implicitly acknowledge that mass incarceration damages individuals, families, communities, and society in myriad ways. But there has not been a concerted effort to place this collection of policies into the larger context of the need for system-wide reform since the Justice Kennedy Commission in 2004.[3] And there has never been such an effort specifically designed to address the need to end mass incarceration.

The ABA Working Group on Building Public Trust in the Justice System has canvassed existing ABA policies, supplemented them and compiled the whole into a set of Ten Principles, which, if employed together and consistently over time, would set the United States on a path toward ending mass incarceration. These Principles articulate critical steps, which, in combination, would bring about the sustained, collective, and creative reform necessary to make our criminal legal system more equitable and effective.

Background: The United States' Failed Experiment in Mass Incarceration

"The United States has less than 5 percent of the world's population, yet nearly 25 percent of its prisoners. Mass incarceration has crushing consequences — racial, economic, social — and it doesn't make us safer."[4] As the Brennan Center for Justice has explained,

> The prison population began to grow in the 1970s, when politicians from both parties used fear and thinly veiled racial rhetoric to push increasingly punitive policies. [President Richard] Nixon started this trend, declaring a "war on drugs" and justifying it with speeches about being "tough on crime." But the prison population truly exploded during President Ronald Reagan's administration. When [President] Reagan took office in **1980, the total prison population was 329,000**, and when he left office eight years later, the prison population had essentially **doubled, to 627,000**. This staggering rise in incarceration hit communities of color hardest: They were disproportionately incarcerated then and remain so today.

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[1] *See, e.g.*, 2017A112C (urging jurisdictions to favor release of defendants pretrial); 2018A114 at Guideline 3 (urging jurisdictions to prohibit incarceration for failure to pay a fine or fee); 2004A121A (urging jurisdictions to repeal mandatory minimum sentences and ensure that sentencing systems provide appropriate punishment without over-reliance on incarceration as a criminal sanction).

[2] *See id*.

[3] *See* ABA Justice Kennedy Commission Reports with Recommendations to the ABA House of Delegates (Aug. 2004), available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/justice-kennedy-commission-reports.pdf.

[4] James Cullen, *The History of Mass Incarceration*, Brennan Center for Justice (July 20, 2018), available at https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration.

Incarceration grew both at the federal and state level, but most of the growth was in the states, which house the vast majority of the nation's prisoners. The number of prisoners grew in every state — blue, red, urban, and rural. In Texas, for example, the state incarceration rate quadrupled: In 1978, the state incarcerated 182 people for every 100,000 residents. By 2003, that figure was 710.[5]

"Not only does the U.S. have the highest incarceration rate in the world; every single U.S. state incarcerates more people per capita than virtually any independent democracy on earth."[6] As of 2021, 664 of every 100,000 people in the United States was incarcerated.[7] "For four decades, the U.S. has been engaged in a globally unprecedented experiment to make every part of its criminal justice system more expansive and more punitive. As a result, incarceration has become the nation's default response to crime, with, for example, 70 percent of convictions resulting in confinement — far more than other developed nations with comparable crime rates."[8]

If each U.S. state were a country, thirty-four states would be the countries with the highest incarceration rates in the world. The top 34 highest incarcerating countries per 100,000 in population would be Louisiana (1,094), Mississippi (1,031), Oklahoma (993), Georgia (968), Arkansas (942), Alabama (938), Kentucky (930), Arizona (868), Wyoming (850), Texas (840), Tennessee (838), South Dakota (824), Florida (795), Montana, (789), Indiana (765), Idaho (761), Virginia (749), Missouri (735), New Mexico (733), West Virginia (731), Alaska (718), Nevada (713), Kansas (698), South Carolina (678), Wisconsin (663), Pennsylvania (659), Ohio (659), Delaware (631), North Carolina (617), Colorado (614), Nebraska (601), Michigan (500), North Dakota (583), and Iowa (582). Notably, two states, Louisiana and Mississippi, incarcerated more than 1% of their populations. And combined, these 34 states confined more than 0.5% of their people.

Even Massachusetts, which has the lowest incarceration rate of all U.S. states, has an incarceration rate more than double that of other founding NATO countries: United Kingdom

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[5] *Id.* As another example, from 1978 to 2016, Hawaii's population increased by only 53%. During the same time period, however, Hawaii's incarceration rate exploded by 670%, with the number of incarcerated people increasing from 727 to 5,602. HCR 85 Task Force, *Creating Better Outcomes, Safer Communities: Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawaii Legislature 2019 Regular Session*, at 1 (Dec. 2018), available at https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf.

[6] *See* Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, Prison Policy Initiative (September 2021), available at https://www.prisonpolicy.org/global/2021.html.

[7] The PPI numbers "include justice-involved youth held in juvenile residential facilities, people detained by the U.S. Marshals Service (many pre-trial), people detained for immigration offenses, sex offenders indefinitely detained or committed in "civil commitment centers" after completing a sentence, and those committed to psychiatric hospitals as a result of criminal charges or convictions." *Id.* According to the authors, these categories of people "are not typically included in the official statistics that aggregate data about prison and jails for the simple reason that these facilities are largely separate from the state and local systems of adult prisons and jails. That definitional distinction is relevant to the people who run prisons and jails but is irrelevant to the advocates and policymakers who must confront the overuse of confinement by all of the various parts of the justice systems in the United States." *Id.*

[8] *History of Mass Incarceration, supra* n. 4.

(129 persons incarcerated per 100,000), Portugal (111), Canada (104), France (93), Belgium (93), Italy (89), Luxembourg (86), Denmark (72), Netherlands (63), Norway (54), and Iceland (33).[9]

"The fiscal consequences of mass incarceration are immense. The United States spends about $270 billion annually on our criminal justice system, with the vast majority of those costs borne by taxpayers. Building and running prisons is an astonishingly expensive enterprise. Many states spend tens of thousands of dollars per year to incarcerate a single person — rivaling what it would cost to send them to an elite, private university."[10]

The societal damage of mass incarceration "extends far beyond the money spent by states and the federal government."[11] It "exacerbates poverty and inequality" not only through the direct effects of incarceration but also because "people who have interacted with the justice system — a disproportionate number of whom are racial and ethnic minorities — face discrimination in the hiring process, earn lower wages, have weaker social networks, and experience less upward economic mobility than those who are never incarcerated. And they aren't the only ones to shoulder these burdens: their families and communities suffer as well, and the effect reverberates across generations."[12]

For all these reasons, the United States should immediately begin reversing the devastating trend of mass incarceration. Federal, state, local, territorial, and tribal governments should immediately begin reducing the number of people they incarcerate per capita, with a goal of, at minimum, reducing their per capita incarceration to those comparable to international norms of other developed nations. To do so, federal, state, local, territorial, and tribal governments should adopt policies consistent with the ABA Ten Principles on Ending Mass Incarceration. The following sets forth the rationale supporting each of the ten principles:

Pretrial Detention (Principle 1):
The ABA has long advocated for strict limits on the use of pretrial detention. In February 2002, the House of Delegates approved the ABA Standards for Criminal Justice: Pretrial Release (the "Pretrial Release Standards"), with the accompanying commentary published in 2007.[13] The Pretrial Release Standards set forth principles for many facets of pretrial proceedings, from conditions of release to notice to victims.[14] Standard 10-1.1 provided in part:

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[9] *Id.* Treating U.S. states as countries, El Salvador, with an incarceration rate of 562 out of 100,000 people, would be ranked thirty-fifth. Only sixteen other countries, including Turkmenistan (552), Rwanda (515), Cuba (510), Thailand (445), Panama (420), Costa Rica (374), Uruguay (372), Brazil (357), Belarus (345), Turkey (335), Nicaragua (332), Russia (329), Cape Verde (296), Namibia (295), Eswatini (277), Trinidad and Tobago (276), have higher incarceration rates than the state with the lowest incarceration rate, Massachusetts (275).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007), available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf
[14] *Id.*

> The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings.

Standard 10-1.2, entitled "Release under least restrictive conditions; diversion and other alternative release options," set forth a recommended standard for determining whether an individual charged with a crime should be detained:

> In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person. Such conditions may include participation in drug treatment, diversion programs or other pre-adjudication alternatives. The court should have a wide array of programs or options available to promote pretrial release on conditions that ensure appearance and protect the safety of the community, victims and witnesses pending trial and should have the capacity to develop release options appropriate to the risks and special needs posed by defendants, if released to the community. When no conditions of release are sufficient to accomplish the aims of pretrial release, defendants may be detained through specific procedures.

These efforts dovetail with the ABA's bail reform efforts. In 2017, for example, Resolution 112C urged jurisdictions to "favor release of defendants upon their own recognizance or unsecured bond," and to release defendants before trial unless a court determines "that release on cash bail or secured bond is necessary to assure the defendant's appearance and no other conditions will suffice for that purpose."[15] It further urged that courts be prohibited from "imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay."[16]

Adopting a principle urging limited use of pretrial detention is therefore consistent with past ABA policy and a critical step in reducing reliance on incarceration.

Diversion From Prosecution (Principle 2):
Prosecutors in a limited number of jurisdictions across the country are implementing alternatives to prosecution and incarceration – sometimes known as diversion programs – for many offenses. Diversion programs generally aim to address underlying causes of criminality and provide individuals with a means of avoiding criminal legal system involvement. For example, more than half the inmates in state prisons qualify as having a substance abuse problem, and one-third of heroin addicts pass through the corrections

[15] 2017A112C, available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2017/2017-am-112c.pdf.
[16] *Id.*

system each year.[17] Imprisoning these individuals is not solving the drug problem—for the individuals or society at large—and has only exacerbated the problem of mass incarceration. Diversion into treatment programs is frequently the superior approach.[18] Successful completion of a diversion program generally results in no criminal prosecution.

Evidence shows that diversion programs can reduce recidivism and ease the burden on courts, correction systems, and prosecutors' offices.[19] "In addition to affording individuals an opportunity to address the behaviors that brought them to the attention of the justice system without the burden of a criminal conviction, diversion reduces the costs associated with formal court proceedings, reduces the burden on correctional institutions, lowers community corrections caseloads and frees up limited justice system resources and services for high-risk offenders."[20]

There are multiple models for diversion, including but not limited to, treatment, restorative justice, and probation.[21] Drug courts are the most common type of adult and juvenile diversion.[22] In addition, Law Enforcement Assisted Diversion (LEAD) "is a pre-booking diversion program that engages individuals who would otherwise be detained on low-level drug possession or sales charges, prostitution, or other charges related to behavioral health issues or extreme poverty."[23] Such programs are active in Washington, New Mexico, New York, Maryland, North Carolina, Oregon, West Virginia, and Maine, among others.[24] An evaluation of LEAD participation in Seattle showed significant results: "60% lower odds of arrest during the six months subsequent to evaluation entry; and both a 58% lower odds of arrest and 39% lowers odds of being charged with a felony over the longer term.[25]

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[17] Fair and Just Prosecution, *Harm Reduction Responses to Drug Use,* available at https://www.fairandjustprosecution.org/staging/wp-content/uploads/2019/08/FJP_Brief_HarmReduction.pdf.

[18] *See, e.g.*, Aleksandra E. Zgierska, et. al., *Pre-arrest diversion to addiction treatment by law enforcement: protocol for the community-level policing initiative to reduce addiction-related harm, including crim*e, Health and Justice, at 9 (2021), available at https://healthandjusticejournal.biomedcentral.com/articles/10.1186/s40352-021-00134-w.

[19] Leah Wong and Katie Rose Quandt, *Building exits off the highway to mass incarceration: Diversion programs explained*, Prison Policy Initiative (July 20, 2021), available at https://www.prisonpolicy.org/reports/diversion.html ("Anytime prosecutors can utilize diversion, they relieve the burden on the court system, correctional facilities, and probation offices in their jurisdiction, in addition to sparing individuals the collateral consequences of a criminal record).

[20] District of Columbia Statistical Analysis Center, *Brief: Diversion and Deflection in the District of Columbia* (Fall 2017), available at https://cjcc.dc.gov/sites/default/files/dc/sites/cjcc/page_content/attachments/DIVERSION%20AND%20DEFLECTION%20IN%20THE%20DISTRICT%20OF%20COLUMBIA.pdf

[21] Fair and Just Prosecution, *Promising Practices in Prosecutor-Led Diversion,* available at https://www.fairandjustprosecution.org/staging/wp-content/uploads/2017/09/FJPBrief.Diversion.9.26.pdf.

[22] *Brief: Diversion and Deflection in the District of Columbia*, *supra* n. 20.

[23] *Harm Reduction Responses to Drug Use*, *supra* n. 17.

[24] LEAD National Support Bureau, available at https://www.leadbureau.org/.

[25] Susan Collins, et. al., *Seattle's Law Enforcement Assisted Diversion (LEAD): Program effects on recidivism*, 64 Evaluation and Planning Program 49 (2017), available at https://www.sciencedirect.com/science/article/abs/pii/S014971891630266X?via%3Dihub.

A diversion program in Miami diverts individuals with serious mental disorders or concurrent mental and substance abuse problems.[26] Illinois has a diversion program for low-level drug-related offenses by individuals who do not have a prior felony or violent misdemeanor conviction. San Francisco uses neighborhood courts for certain nonviolent misdemeanor or felony cases.[27] This program uses restorative justice principles and voluntary adjudicators. "After reviewing the police report and hearing from the participant, adjudicators determine one or more 'directives' for the individual to complete to repair the harm caused. Directives can include community service, restitution, a letter of apology, or treatment, among other options."[28] The program had a 97 percent appearance rate and a 90 per cent successful conclusion rate.[29]

The ABA has long supported diversion. In 2004, acting on the recommendations of the Kennedy Commission on criminal justice reforms, the House urged jurisdictions to "[a]dopt diversion or deferred adjudication programs that, in appropriate cases, provide an offender with an opportunity to avoid a criminal conviction."[30] The Criminal Justice Section of the ABA is currently preparing new standards related to diversion programs, which are consistent with support for the increased use of diversion programs and avoidance of incarceration whenever possible.

Increased use of diversion is consistent with past ABA policy and a critical step toward ending mass incarceration.

Mandatory Minimums (Principle 3):
In 2017, nearly 22 percent of criminal convictions, representing 13,577 inmates, were for crimes with mandatory minimum sentences.[31] Of those, fewer than 4 in 10 received a sentence reduction because of cooperation or a statutory safety valve, leaving 13.7 percent of inmates subject to mandatory minimum sentences.[32] More than two-thirds of those sentences were for drug offenses.[33] Mandatory minimum sentencing provisions are also common under state law for drug, pornography, and firearms offenses.

The ABA has opposed mandatory minimum sentences for nearly 50 years. At the Mid-Year Meeting in 1974, the House passed a resolution opposing legislatively or administratively imposed mandatory minimum sentences or parole, including sentences for drug offenders.[34] In 2004, in response to the findings of the Justice Kennedy Commission, the House of

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[26] *Harm Reduction Responses to Drug Use*, *supra* n. 17.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] 2004A112A; *see also* Report of the ABA Justice Kennedy Commission to the House of Delegates (August 2004), available at https://static.prisonpolicy.org/scans/aba/kennedycommreport.pdf.
[31] United States Sentencing Commission, *Quick Facts* (2017) at 1; The Leadership Conference, *Fact Sheet on Sentencing and Mandatory Minimums* (2018).
[32] *Id.*
[33] *Id.*
[34] Report to Resolution 2017A10B (citing Proceedings of the 1974 Midyear meeting of the ABA House of Delegates, Report No. 1 of the Section of Criminal Justice, at 443-44), available at https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/opposing_minimum_sentencing_10b.authcheckdam.pdf.

Delegates urged jurisdictions to repeal mandatory minimum sentence statutes.[35] In 2010, the ABA testified before the U.S. Sentencing Commission that "[s]entencing by mandatory minimums is the antithesis of rational sentencing policy."[36] In 2017, the House urged jurisdictions to "repeal laws requiring minimum sentences" and "to refrain from enacting laws punishable by mandatory minimum sentences."[37] And in 2018, the House urged that all prosecuting authorities prohibit use of charges with mandatory minimums and recidivist enhancements to secure plea agreements.[38]

Eliminating mandatory minimum sentences, consistent with long-standing ABA policy, will reduce over-reliance on incarceration.

Community Supervision (Principle 4):
At the end of 2018, just under 4.4 million people were on probation or parole, more than twice the number incarcerated in state and federal prisons and local jails. That amounts to one in every 55 adults under justice system supervision.[39]

"Historically, probation and parole were intended to provide a less punitive, more constructive alternative to incarceration, but a growing body of evidence suggests that a frequent emphasis on surveillance and monitoring of people under supervision rather than on promoting their success, along with the resource demands of ever-larger caseloads, has transformed community supervision into a primary driver of incarceration."[40] Forty-five percent of incarcerations nationwide are because of violations of probation or parole.[41] Nearly one in four prisoners are incarcerated because of supervision violations, costing states more than $9.3 billion each year, of which $2.8 billion was for violations based on new offenses and $6.5 billion for technical supervision violations, such as missing a treatment appointment or failing to report to a probation officer on time, among other things.[42]

Community supervision should be a path to reintegrate former inmates into society, not a bus stop on the way back to prison. Jurisdictions should favor alternatives to incarceration for technical violations of the conditions of community supervision. Notably, the ABA has

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[35] 2004A112A.
[36] Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission (June 2, 2010).
[37] 2017A10B (opposing the imposition of mandatory minimum sentences).
[38] 2018M108C. The ABA also has opposed mandatory minimum fees. In ABA's Ten Guidelines on Fines and Fees, adopted by the House of Delegates in 2018 (2018A114), Guideline 2 provided that: Fines used as a form of punishment for criminal offenses or civil infractions should not result in substantial and undue hardship to individuals or their families. No law or rule should limit or prohibit a judge's ability to waive or reduce any fine, and a full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship.
[39] National Conference of State Legislatures, *Community Supervision* (Oct. 22, 2021), available at https://www.ncsl.org/research/civil-and-criminal-justice/community-supervision.aspx.
[40] Pew, *Policy Reforms Can Strengthen Community Supervision* (April 22, 2020), available at https://www.pewtrusts.org/en/research-and-analysis/reports/2020/04/policy-reforms-can-strengthen-community-supervision.
[41] The Council of State Governments Justice Center, *Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets* (June 18, 2019), available at https://csgjusticecenter.org/publications/confined-costly/.
[42] *Id.*

supported alternatives to incarceration for certain violations of community supervision. Indeed, as early as 1997, the House of Delegates urged implementation of such alternatives.[43] In 2007, the House urged the use of graduated sanctions for violations of parole or probation.[44]

Increased use of tailored and supportive community supervision can dramatically improve rehabilitation, reduce recidivism and, therefore, help end mass incarceration.

Strictly limit incarceration for failure to pay fines and fees (Principle 5):
Courts across the United States impose a variety of mandatory fines, fees, surcharges and assessments in connection with certain criminal and civil proceedings. Often these fees fund programs or services imposed when an individual is either released from custody pre-trial or sentenced in a criminal case.[45] These include fees for supervision, monitoring, drug testing, courses or required counseling or treatment, and even for expenses related to pretrial detention itself.[46] In many jurisdictions, when an individual cannot pay the fines and fees assessed, they can be incarcerated for failure to pay.[47]

Nobody should be incarcerated due to poverty. For this reason, ABA policy has long opposed incarceration for failure to pay unless the individual is shown to have the financial means to pay.[48] In 2018, the ABA House of Delegates adopted the *Ten Guidelines on Court Fines and*

[43] 1997M108 (urging jurisdictions to develop and implement alternatives to incarceration as sanctions for violations of probation and parole).
[44] 2007M103B (urging jurisdictions to "develop and implement meaningful graduated sanctions for violations of parole or probation as alternatives to incarceration").
[45] For example, Michigan requires judges to impose on people convicted of traffic and misdemeanor offenses a minimum state assessment *in addition to* any fines and costs. Hon. Elizabeth Hines, *View from the Michigan Bench*, National Center for State Courts 36, available at http://www.ncsc.org/~/media/Microsites/Files/Trends%202017/View-from-Michigan-Bench-Trends-2017.ashx. The minimum assessment in Michigan misdemeanor cases is $125. *Id*.
[46] For an illustrative catalog of fees imposed in just a single case, see Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, The Brennan Center of Justice, at 9 (2010), https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (snapshot of Case Financial Information sheet from a criminal case in the Court of Common Pleas of Cambria County, Pennsylvania. *See also* Human Rights Watch, *Profiting from Probation America's "Offender-Funded" Probation Industry,* at 27-31 (2014), https://www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry (discussing "pay only" probation arrangements). Other fees assessed do not relate to services provided. For example, most revenue collected from mandatory driver's license reinstatement fees in Arkansas goes to the Arkansas State Police. Ark. Code Ann. § 27-16-808. In California, California, a $4 fee is imposed for every criminal conviction, including traffic infractions, for Emergency Medical Air Transportation. Cal. Govt. Code § 76000.10(c)(1).
[47] The Brennan Center has identified the four most common "paths" to incarceration for failure to pay: (1) many courts may revoke or withhold probation or parole upon an individual's failure to pay; (2) some states authorize incarceration as a penalty for failure to pay, such as through civil contempt; (3) some courts force defendants to "choose" to serve prison time rather than paying a court-imposed debt; and (4) many states authorize law enforcement officials to arrest individuals for failure to pay and to hold them while they await an ability-to-pay hearing. See *Criminal Justice Debt, supra* n. 46, at 20-26.
[48] 2016A111B; 2017M112C (urging governments to "prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay").

Fees.[49] These Guidelines make clear that incarceration for failure to pay must be strictly limited to those who are provided an ability-to-pay hearing, with counsel, and whose failure to pay is found to be willful.[50] Ensuring that no one is incarceration simply for being poor will not only help solve mass incarceration, but also effectuate core principles of equal justice.

"Second Look" Sentencing (Principle 6):
In recent years, federal and state governments have begun to institute reforms that lessen the term of imprisonment for many offenses and to focus more on rehabilitation as opposed to punishment and incapacitation. Most of these reforms, however, are not retroactive. Therefore, many inmates continue to serve exceptionally long sentences that no longer comport with our collective understanding of appropriate sentencing. As of May 2019, more than half of federal prisoners were 36 years old or older, past the ages with the highest risk of recidivism.[51] Further, 19.2% of federal prisoners were more than 50 years old, an age at which the risk of recidivism sharply declines. [52] Yet there are few mechanisms by which these prisoners can reduce their sentences and achieve release.

"Second look" sentencing allows prisoners to petition the courts or administrative agencies for resentencing after a specified period of incarceration. The court can then make an individualized determination whether the original sentence was still appropriate and necessary to protect the public, based on the inmate's rehabilitation and behavior. "If the progression of the individual is such that the original sentence would be a waste of resources, is unnecessary to protect the public, and unjust or harmful for the person, the court may resentence the individual to a shorter prison term or time served."[53]

The Model Penal Code recommends a second look at sentencing after 15 years of incarceration, with reconsideration every 10 years thereafter.[54] The National Association of Criminal Defense Lawyers has proposed model legislation allowing a prisoner to petition for resentencing after 10 years of incarceration.[55] Twenty-five states have considered or are consideration legislation to institute second look sentencing. The District of Columbia has enacted legislation allowing individuals sentenced for a crime committed when they were under 25 to petition the court for resentencing after they have served 15 years. The judge may reduce the sentence if the inmate does not pose a danger to public safety and the interests of justice warrant resentencing.[56]

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[49] 2018A114.
[50] *Id.* at Guidelines 3, 4 and 8.
[51] Bureau of Prisons, *Inmate Age* (2019), available at https://www.bop.gov/about/statistics/statistics_inmate_age.jsp
[52] *Id.*
[53] Families for Justice Reform, *A Second Chance Starts with a Second Look: The Case for Reconsideration of Lengthy Prison Sentences,* available at https://famm.org/wp-content/uploads/Second-Look-White-Paper.pdf.
[54] American Law Institute, *Model Penal Code § 305.6 (2008).*
[55] NACDL, *Model Second Look Legislation,* available at https://www.nacdl.org/getattachment/4b6c1a49-f5e9-4db8-974b-a90110a6c429/nacdl-model-second-look-legislation.pdf.
[56] Leah Sakala and Leigh Courtney, *The New DC Second Look Amendment Act Is a Step in the Right Direction, and Community Supports for Young Adults Can Build on This Progress.* Urban Institute (Dec. 17, 2020), available at https://greaterdc.urban.org/blog/new-dc-second-look-amendment-act-step-right-

The ABA has long supported second look sentencing. The Criminal Justice Standards on Sentencing provide that "[t]he rules of procedure should authorize a sentencing court, at any time during the period that the court has retained jurisdiction over a sentenced offender, to modify the requirements or conditions of a sanction to fit the present circumstances of the offender." In 2003, the House of Delegates urged jurisdictions to entertain prisoners' requests for modification of their sentences.[57] And in 2004, the House adopted the Kennedy Commission recommendations to establish standards and a process for people in prison to request reduction of their sentences.[58]

For all these reasons, every jurisdiction should have a process for the routine review and reconsideration of extended terms of incarceration, which, in turn, can help end mass incarceration.

Early Release Programs (Principles 7 & 8):
Most jurisdictions permit sentence reductions based on good behavior and/or completion of programming to reduce recidivism.[59] These programs not only encourage compliance and program use in prisons but also can help to prepare prisoners for successful reentry. Examples of such programs include:

- A New York program provides a six-month credit for completion of a GED, associate degree, bachelor's degree, master's degree or doctoral degree.[60]
- A Nevada program pays firefighters $24/day while also allowing a sentencing reduction of up to 60 days.[61]
- Colorado, Florida, Indiana, Kentucky and several other states award time credits for vocational training.[62]
- A number of states including Nevada, New Hampshire and Ohio award time credit for completion of mental health or substance abuse programs.[63]

The federal government recently endorsed expanded use of time reduction programs. The First Step Act, passed in December of 2018, encourages providing time credits for

direction-and-community-supports-young-adults-can. DC had previously enacted a similar statute for offender who committed their crimes when under the age of 18. *Id.*

[57] 2003M103B (urging jurisdictions to "develop criteria relating to the consideration of prisoner requests for reduction or modification of sentence based on extraordinary and compelling circumstances arising after sentencing, to ensure their timely and effective operation").

[58] 2004A112C (urging jurisdictions to "establish standards and provide an accessible process by which prisoners may request a reduction of sentence in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering; and to ensure that there are procedures in place to assist prisoners who are unable to advocate for themselves.").

[59] The National Conference of State Legislatures *Collected good time and earned time policies in December 2020*, available at https://www.ncsl.org/Portals/1/Documents/cj/Final-Sentence_Credit_50-State_Chart_2020.pdf. As of that time, only Maine, Michigan, Minnesota, South Dakota and Wisconsin had no good time or earned time program.

[60] NY Stat. Art. 43, §803-B.

[61] Zachary Bright, *Amid brutal fire season, inmate firefighters see obstacles, wages described as 'a form of enslavement,'* The Nevada Independent (Sept 21, 2021).

[62] NCSL Charts, *supra* n. 59.

[63] *Id.*

recidivism reduction programs and productive activities as a way of reducing incarceration.[64] The First Step Act allows incarcerated individuals to "earn 10 days of time credits for every 30 days of successful [program] participation.[65]

However, such programs vary greatly across jurisdictions and are often severely limited both in terms of who is eligible and the total time that a sentence can be reduced. In addition, most jurisdictions do not allow individuals convicted of certain offenses to pursue good time credits. For example, the federal good time credit program expanded through the 2018 First Step Act is not accessible to individuals convicted of some firearm, drug, or sex offenses, among many others. An independent review of the program concluded that "less than half of federal inmates are eligible" for the program and that current eligibility criteria is not connected to collective recidivism risk.[66]

The total time reductions that can be accrued through good time credit programs similarly vary widely by state and often within states based on the offense of conviction.[67] A 2018 analysis by Prison Fellowship calculated the maximum time reduction available under each state's earned and good time policies.[68] According to the study, in states with programs, the percentage reduction available varied from 8% in Ohio to 83% in California.[69]

Similarly, most jurisdictions also offer some mechanism for seeking early release from incarceration based on age, infirmity, or other compelling circumstances.[70] Often called compassionate release,[71] these mechanisms typically require application through the prison

[64] The First Step Act, 18 U.S.C. § 3632(d)(4)(A)(i).
[65] *Id.*
[66] Report of the Independent Review Committee Pursuant to the Requirements of Title I Section 107(g) of the First Step Act of 2018, at 2 (Dec 2020), available at https://firststepact-irc.org/report-of-the-independent-review-committee-report-pursuant-to-the-requirements-of-title-i-section-107g-of-the-first-step-act-fsa-of-2018-p-l-115-391/. Nevertheless, the Department of Justice has proposed expanding the offenses that would exclude individuals from participation in the ETC program. *See* The Attorney General's First Step Act Section 3634 Annual Report, at 13-16 (Dec 2020), available at https://www.bop.gov/inmates/fsa/docs/20201221_fsa_section_3634_report.pdf.
[67] NCSL Charts, *supra* n. 59.
[68] Prison Fellowship, *Earned and good time policies: Comparing maximum reductions* available (2018), available at https://www.prisonfellowship.org/wp-content/uploads/2018/04/GoodTimeChartUS_Apr27_v7.pdf.
[69] *Id.* Some states do not have good time credit programs, including Hawaii, Georgia, Utah and Minnesota. NCSL Charts, *supra* n. 59.
[70] A 2008 review of state department of correction policies by USA Today found that 36 states had "some program allowing for the early release of dying or inform prisoners." Marty Roney, *36 states release ill or dying inmates*, USA Today (Aug 13, 2008); see also Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, Families Against Mandatory Minimums (June 2018), available at https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf (noting that "49 states and the District of Columbia provide some means for prisoners to secure early release when circumstances such as imminent death or significant illness lessen the need for, or morality of, their imprisonment.").
[71] The mechanism is also sometimes called humanitarian release, medical and geriatric parole, medical furlough, suspension or reduction of sentence or clemency on medical grounds.

system, rather than the courts. But like other early release programs, compassionate release programs are often criticized for lacking clear standards and granting too few releases.[72]

The ABA has long supported programs for early release from incarceration, when appropriate. For example, the ABA has urged that jurisdictions establish mechanisms, with sufficient resources and clear procedures, criteria and timelines, for compassionate release for elderly and infirm prisoners, as well as early release based on extraordinary and compelling circumstances.[73] At the 1996 Mid-year meeting, the House adopted a resolution urging each jurisdiction to review its procedures relating to medical release of terminally ill inmates to ensure that they are accessible, integrated into regular processes, and "provide for expedited handling of requests for medical release."[74] And at the 1996 Annual Meeting, the House supported compassionate release for terminally ill prisoners.[75] Finally, in 2004, the House adopted the Kennedy Commission recommendations to establish a process for people in prison to request release for a variety of reasons "medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering."[76]

Early release mechanisms, when used appropriately, can help jurisdictions reduce incarceration by expediting the release of individuals who no longer present a significant risk of recidivism. All individuals expected to return to our communities deserve an opportunity to expedite that return if they can demonstrate such diminished risk. To this end, jurisdictions should consider expanding use of early release mechanisms by eliminating barriers or exceptions to eligibility and expanding program criteria.

Additionally, consistent with past ABA policy, early release programs should be systematized.[77] Incarcerated individuals should be made aware of these programs and how

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[72] For example, a 2013 Report by the Inspector General for the U.S. Justice Department found that the Federal Bureau of Prisons' compassionate release program found that the program lacked "clear standards on when compassionate release is warranted, resulting in ad hoc decision making." U.S. Dept of Justice Office of Inspector General, Evaluation and Inspections Division, *The Federal Bureau of Prisons' Compassionate Release Program* (April 2013), available at https://oig.justice.gov/reports/2013/e1306.pdf. The FAMM report on *Compassionate Release in the States*, *supra n. 70*, also noted that "despite the widespread existence of these programs, very few prisoners receive compassionate release.").

[73] 2003M103B. The Resolution urged jurisdictions to: (1) evaluate their existing laws, as well as their practices and procedures, relating to the consideration of prisoner requests for reduction or modification of sentence based on extraordinary and compelling circumstances arising after sentencing, to ensure their timely and effective operation; (2) develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community. (Rehabilitation alone shall not be considered an extraordinary and compelling circumstance.); and (3) develop and implement procedures to assist prisoners who by reason of mental or physical disability are unable on their own to advocate for, or seek review of adverse decisions on, requests for sentence reduction.

[74] 1996M113B.

[75] 1996A109.

[76] 2004A112C.

[77] For example, eligibility for the federal good time credit program could be expanded and simplified. *See* Emily Tiry and Julie Samuels, *Three ways to increase the impact of the First Step Act's earned time credits*, Urban Wire (Apr 30, 2021), available at https://www.urban.org/urban-wire/three-ways-increase-impact-first-step-acts-earned-time-credits. *See also*, Families Against Mandatory Minimums, *Summary: First Step Act,*

they operate. Program materials should be accessible. Applications, where required, should be simple and easy to use. Any criteria for evaluation should be clear, easy to understand and applied in an equitable fashion. And the timeline for decision making should be defined and expeditious.

Prosecutorial Effectiveness Measures (Principle 9):
"Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official."[78] The ABA Criminal Justice Standards on the Prosecution Function encourage prosecutors making these decisions to set standards and polices for their office that are designed to ensure fairness and equity in the criminal legal system**.** Standard 3-1.2(b), for example, instructs that "the primary duty of the prosecutor is to seek justice within the bounds of the law" and "to serve[] the public interest and . . . act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances."[79]

The temptation is strong for many prosecutors to "measure their success and effectiveness with a heavy focus on the number of convictions they obtain."[80] Prosecutors must withstand that temptation. Such an approach contributes to mass incarceration and divorces prosecutorial decision-making from public safety. "Rather than tallying up convictions, indictments and 'wins,' prosecutive leaders should ensure that they — and others who work for and with them — are improving public safety and community well-being, prioritizing community trust and transparency, and seeking just results."[81] This principle should inform the "standards and procedures" that prosecutors' offices "should establish for evaluating complaints to determine whether formal criminal proceedings should be instituted."[82] It should underlie the prosecutor's individualized recommendation regarding pretrial detention.[83] It should be a key factor in the all-important decision to offer a plea and what plea to offer.[84] And it should be part of the "consistent policies" that

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S. 756 (115th Congress, 2018), available at https://famm.org/wp-content/uploads/FAMM-FIRST-STEP-Act-Summary-Senate-version.pdf ("Any person who will return to our communities from prison someday should get time credit incentives for doing the hard work of rehabilitation.").

[78] Angela Davis, *The American Prosecutor: Power, Discretion and Misconduct*, at 25 Criminal Justice Magazine (Spring 2008), available at https://digitalcommons.wcl.american.edu/facsch_lawrev/1396/.

[79] ABA Criminal Justice Standards on the Prosecution Function, Standard § 3-1.2

[80] NAACP Legal Defense Fund, *Prosecutorial Success Based on Conviction Rates Distorts the Criminal Justice System*, at E1, available at https://www.votingforjustice.org/wp-content/uploads/2020/10/E_LDF_09282020_VFJToolkit_ProsecutorialSuccess-w_finished-endnotes-1-1.pdf.

[81] Fair and Just Prosecution, *Issues: Accountability, Transparency and Measuring,* at 1, available at https://fairandjustprosecution.org/issues/accountability-transparency-and-measuring-success/.

[82] ABA Criminal Justice Standards for the Prosecution Function, at Standard 3-4.2(b).

[83] *Id.* at Standard 3-5.2(b). "The prosecutor should favor pretrial release of [people wo have been charged], unless detention is *necessary* to protect individuals or the community or to ensure the return of the defendant for future proceedings." *Id.* at Standard 3-5.2(a).

[84] *See* ABA Criminal Justice Standards on Guilty Pleas, at Standard 14-1.1 ("as part of the plea process, appropriate consideration should be given to the views of the parties, the interests of the victims, and the interest of the public in the effective administration of justice").

prosecutors' offices should develop "for evaluating and making sentencing recommendations."[85]

Transparency is critical to evaluate success under this approach. ABA policy also provides that prosecutors should collect data on all critical decision points and release that data in the aggregate, consistent with confidentiality, to allow the public to accurately assess whether prosecutorial decisions are serving the interests of the community.[86] A number of jurisdictions, including Manhattan, already collect and publish this data.[87] Others, like Connecticut, have recently passed legislation requiring its collection and publication.[88]

Publication of data from critical stages of the prosecution "improve[s] the working of prosecution offices and further the public's knowledge of how cases are prioritized, the extent to which disparities based on traits of a defendant or respondent exist and can be eliminated, whether outcomes of cases meet the goals of public safety, and how the pursuit of justice functions within that office."[89] To that end, prosecutors should collect data on such key decisions as charging, pretrial release, plea offers and sentencing recommendations.[90] Further, prosecutors should collect data regarding the race and gender of individuals subject to the criminal justice system, review that data to identify any disparate treatment or impact and seek to rectify it.[91]

Given the critical role that prosecutors play in the criminal legal system, reducing incarceration rates is likely impossible without their support. By evaluating prosecutorial decisions based on the impact on public safety and ensuring transparency with regard to prosecutorial practices and policies, prosecutors can play a key role in ensuring fairness and balance in the American criminal legal system.

Probation and Parole Effectiveness Measures (Principle 10):
To encourage the focus of supervision to remain on assisting the individual in obtaining the resources and skills necessary to avoid future criminal system involvement, probation and parole officers should be judged on their ability to assist individuals in completing

[85] ABA Criminal Justice Standards on the Prosecution Function, at Standard 3-7.2(a).
[86] 2021A504 (urging the creation and use of public prosecutorial dashboards).
[87] See Manhattan District Attorney's Data Dashboard, available at https://data.manhattanda.org/#!/arrests; see also Measures for Justice, *National Prosecutorial Dashboards: Lessons Learned, Themes and Categories for Consideration*, available at https://measuresforjustice.org/services/national-prosecutorial-dashboards.
[88] Connecticut Public Act 19-59: An Act Increasing Fairness and Transparency in the Criminal Justice System (2019), available at https://legiscan.com/CT/text/SB00880/id/2037836/Connecticut-2019-SB00880-Chaptered.pdf.
[89] Report to ABA House of Delegates on 2021AM504, at 1, available at https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/504.pdf.
[90] 2021AM504, available at https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/504.pdf(urging all prosecutor offices to collect and publish all such data, subject to applicable confidentiality standards)
[91] *Id.*

supervision.[92] It is easy for a probation and parole officer to seek a violation for failure to comply and doing so can benefit the officer and office by reducing often excessive caseloads.[93] Moreover, when burdened by excessive caseloads, it may be difficult for probation and parole officers to perform their more time-consuming duties, including providing the necessary supports and referrals for services, such as housing and employment, that will help individuals under supervision succeed.[94] Finally, probation and parole officers may fear negative repercussions if an individual under supervision seriously reoffends, leading them to more strictly punish any violation.[95] To counteract these current incentives, it is critical that probation and parole offices have positive incentives to assist individuals under supervision in achieving success.

CONCLUSION

No criminal justice reform effort, standing alone, will be effective at reversing America's over-reliance on incarceration, which has resulted in far too many individuals spending far too much time behind bars. A unified approach is required. The ABA Ten Principles to Reduce Mass Incarceration brings together long-standing ABA policies to provide an easy-to-access roadmap toward sustainable, transformative change.

Respectfully submitted,

Robert Weiner, Chair
Working Group on Building Public Trust in the American Justice System

August 2022

[92] 2007M103B ("[T]he American Bar Association urges federal, state, territorial and local governments, to create standards for the performance of probation or parole officers that will consider, in addition to other appropriate factors, the number of individuals under an officer's supervision who successfully complete supervision."); see also Molly Davis, *Want to keep people on parole from going back to prison? Reward their supervisors*, AZ Central (June 13, 2021)(discussing a bill to financially incentivize probation service providers to lessen recidivism), available at https://www.azcentral.com/story/opinion/op-ed/2021/06/14/arizona-probation-programs-need-incentives-keep-out-prison/7550458002/.

[93] Human Rights Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, at 56 (July 31, 2020("[E]nforcement is less time consuming than finding the right set of services for a particular person."), available at https://www.hrw.org/sites/default/files/media_2020/07/us_supervision0720_web_1.pdf.

[94] *Id.* (noting that most people interviewed including supervision experts report that supervision officers provided little support).

[95] *Id.* at 55-56.

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GENERAL INFORMATION FORM

Submitting Entity: Working Group on Building Public Trust in the American Justice System

Submitted By: Robert Weiner, Chair

1. Summary of the Resolution(s).

   The ABA Working Group on Building Public Trust in the Justice System has canvassed existing ABA policies, supplemented them and compiled the whole into a set of Ten Principles, which, if employed together and consistently over time, would set the United States on a path toward ending mass incarceration.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

   This Resolution Advances the Rule of Law (Goal 4) by setting the United States on a path toward ending mass incarceration. A unified approach is required if we hope to reverse the tragedy of mass incarceration in this country. These Principles articulate critical steps, which, in combination, would bring about the sustained, collective, and creative reform necessary to make our criminal legal system more equitable and effective.

3. Approval by Submitting Entity.

   This Resolution was passed by the Working Group on Building Public Trust in the American Justice System on May 3, 2022.

4. Has this or a similar resolution been submitted to the House or Board previously?

   No.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   The relevant policies are referenced throughout the Report. Key policies relevant to this Resolution are:

   ABA Standards for Criminal Justice: Pretrial Release
   ABA Ten Guidelines on Fines and Fees
   2003A103B
   2004A121C
   2017A112C
   2021A503

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

   N/A

7. Status of Legislation. (If applicable)

   There is no pending legislation, state or federal.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   This policy will enable the ABA and relevant ABA committees to provide guidance to courts, legislatures, and advocates on the ground on the best means of ensuring the ending of mass incarceration.

9. Cost to the Association. (Both direct and indirect costs)

   It is not anticipated that this resolution will result in any direct or indirect costs to the Association.

10. Disclosure of Interest. (If applicable)

    None

11. Referrals.

    Criminal Justice Section
    Section of Civil Rights and Social Justice
    Young Lawyers Division
    Judicial Division
    Section of Litigation
    Government & Public Sector Lawyers Division
    Section of State and Local Government Law
    Standing Committee on Legal Aid and Indigent Defense

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.)

    Mark Pickett (Staff Counsel). Ph: 919-499-8280, Email: mark.pickett@americanbar.org
    Jason Vail (Staff Counsel), Ph: 312-988-5755, Email: jason.vail@americanbar.org

13. Name and Contact Information. (Who will present the Resolution with Report to the

House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.

Robert Weiner (Chair), Ph: 202-431-0696, Email: robertnweiner@aol.com.

EXECUTIVE SUMMARY

1. Summary of the Resolution.

   This Resolution adopts the ABA Ten Principles on Reducing Mass Incarceration and urges federal, state, local, territorial, and tribal legislative, and other governmental bodies to promulgate law and policy consistent with, and otherwise to adhere to the Principles.

2. Summary of the issue that the resolution addresses.

   The ABA Working Group on Building Public Trust in the Justice System has canvassed existing ABA policies, supplemented them and compiled the whole into a set of Ten Principles, which, if employed together and consistently over time, would set the United States on a path toward ending mass incarceration.

3. Please explain how the proposed policy position will address the issue.

   A unified approach is required if we hope to reverse the tragedy of mass incarceration in this country. These Principles articulate critical steps, which, in combination, would bring about the sustained, collective, and creative reform necessary to make our criminal legal system more equitable and effective.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

   To date, no minority views or opposition has been identified.