



**Statement of the League of Women Voters of Delaware
Presented to the Access to Justice Commission
At a hearing in Georgetown, DE
December 1, 2015**

My name is Sandy Spence. I'm Advocacy Chair of the League of Women Voters of Delaware. Thank you for the opportunity to speak with you this evening. The League of Women Voters is a non-partisan political organization that encourages informed and active participation in government. We work to influence public policy through education and advocacy. One of the issues we address is social policy where we aim to promote social and economic justice and the health and safety of all Americans. We would like to emphasize a few areas of particular concern to us.

We urge immediate reform in pre-trial detention practices. After a legislative hearing in Dover in June, Department of Correction Commissioner Robert Coupe told me and two other League members that 25% of male prisoners in Delaware are in pre-trial detention and 40% of women prisoners are in pre-trial detention. Later he confirmed those numbers at a hearing of Delaware's Criminal Justice Council in Georgetown on October 22.

The representative from the Equal Justice Initiative at the Commission's November 13 hearing stated:

In Delaware, African American men, women, and children represent a disproportionately high number of individuals detained prior to trial, representing 56 percent of the pretrial detention population despite comprising only 22 percent of the state population. Though the state has initiated reforms in its bail process, the rate of pretrial detention rose from 2012 to 2014 by 20 percent even as violent crime fell in the same period. Of those detained prior to trial, over 65% are detained for more than 30 days and over 3% are detained for a year or longer.

We find these facts indefensible. As you know, pre-trial detention is supposed to be used only to ensure that the accused will not flee prior to trial or pose a danger to others. We question whether the number of defendants in pre-trial detention meet those criteria, especially the 40% women.

Not only is pre-trial detention an issue in its own right, but it leads to multiple additional issues affecting our criminal justice system, not to mention our state budget that must cover the average \$36,000 plus expense per year for each prisoner.

The length of time in pre-trial detention contributes significantly to our high rate of recidivism. As stated at your hearing on November 13 by Kate Parker West, "There are extreme impacts on recidivism even for 3 to 5 days of incarceration." This can be explained by such factors as the interruption of jobs, housing and family relationships.

As experts at your November 13 hearing suggested, it is time to reform Delaware's money bail system. At least part of the reason for the number of accused held in pre-trial detention can be explained by Delaware's money bail system. According to your own statistics, about 23 percent of those held in pre-trial detention are there because they cannot post bail while awaiting trial.¹

¹ *The News Journal*, "Del. chief justice targets prison racial disparities," January 15, 2015.

As you know, detention is only supposed to be used to ensure that the person will not flee prior to trial or pose a danger to other people.

In connection with a federal class action lawsuit challenging money bail as a violation of the Equal Protection Clause of the 14th Amendment in Clanton, Alabama,² the U.S. Department of Justice filed a brief saying that incarcerating individuals solely because of their inability to pay a cash bond violates the U.S. Constitution. It asserts that:

“As courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes poor public policy....

“Bail practices that are indifferent to an individual’s ability to pay are incompatible with our Constitution and contrary to our values,” said Attorney General Eric Holder. “By taking action in this case, the Justice Department is sending a clear message: that we will not accept criminal justice procedures that have discriminatory effects. We will not hesitate to fight institutionalized injustice wherever it is found. And we will never waver in our effort to ensure that all Americans – regardless of background or circumstance – receive the equal rights and protections to which they are entitled under the law.”³

The Bill of Rights in our own Delaware Constitution, indeed, states that:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted;.....”⁴

Surely, any bail that an indigent person can’t afford to pay is “excessive,” and therefore unconstitutional in Delaware. Would holding that person in pre-trial detention, then, not be “cruel”?

Your experts presented various practices that could work as well as or better than money bail to ensure that persons would not flee, and they gave examples where these procedures work, including in the District of Columbia. We urge you to work with the General Assembly to ensure reform of our money bail system.

The money bail system and the excessive number of prisoners being held for lengthy periods in pre-trial detention lead to additional issues in our criminal justice system. For example:

Delaware’s prisons are overcrowded. There are three ways that experts determine the capacity of prisons:

1. “Rated capacity”, based on the number of beds assigned by a rating official to each facility. Delaware’s rated capacity is 5,649.
2. “Operational capacity”, based on the ability of the staff, programs, and services to accommodate a certain size population. Delaware’s operational capacity is 5,210.

² In the case of *Varden v. City of Clanton*, filed February 13, 2015, in the U.S. District Court for the Middle District of Alabama Northern Division.

³ <http://www.justice.gov/opa/pr/departement-justice-files-statement-interest-clanton-alabama-bond-case>

⁴ ARTICLE I. BILL OF RIGHTS, § 11.

3. "Design capacity, the original capacity that our facilities were designed to hold. Delaware's design capacity is 4,161.

But the number of prisoners held in these facilities as of December 31, 2014, was 6,730. This is 161.7% higher than the design capacity and 119.1% of the lowest, "rated" capacity.⁵

The overcrowded condition of our prisons leads to yet another issue with our system. That is that far too many of our prisoners are held in solitary confinement. We believe that solitary confinement, in most situations, is cruel and could even rise to the level of "torture." This is particularly true when applied to children and the mentally ill.

The situation in Delaware is so serious that the Community Legal Aid Society, Inc. (CLASI) and the American Civil Liberties Union (ACLU) with Pepper Hamilton LLP filed a lawsuit against the state in federal court in August. As reported on the CLASI website, approximately 300 prisoners are held in the Secure Housing Unit (SHU) of the correctional center in Smyrna, including 100 listed on DOC's mental health roster, more than 60 of whom have serious mental illnesses. Isolation under these conditions is known to make mental illness worse and cause paranoia, self-mutilation, and suicide attempts. The suit argues that this treatment of those with mental illnesses violates both the U.S. Constitution and the State of Delaware Constitution.⁶

"At the James T. Vaughn Correctional Center in Smyrna, people with mental illnesses have been warehoused in solitary confinement for years on end, living in 8'x11' cells for 23 to 24 hours a day. They are isolated from almost all contact with other human beings and receive virtually no meaningful mental health treatment," said Daniel Atkins, executive director of CLASI. "Someday, the vast majority of these inmates will be released back into the community. How are these individuals or the community at large served by such cruel and destructive policies and practices?" Atkins continued.⁷

The General Assembly began to address this issue on January 29, 2015, when HB 36 was introduced by Rep. James Johnson and Sen. Bryan Townsend. The synopsis of HB 36 stated that:

"This bill would place limits on the use of solitary confinement, a topic which is largely unaddressed in current Delaware law. A growing body of research shows that long-term solitary confinement may contribute to significant mental health issues and reentry problems. Of particular concern is the impact of the practice on juveniles and the mentally ill. Therefore, this Act would limit the amount of time that a person may be ordered into solitary confinement as part of their sentence to 4 weeks, rather than 3 months. Additionally, the bill would not allow the Department of Correction to use solitary confinement as a punishment for disciplinary violations for more than 15 consecutive days or 20 days out of any 60-day period. Finally, this legislation would prohibit the use of solitary confinement as a disciplinary tool for the mentally ill or juveniles."

In spite of the fact that even these proposed limits ignore evidence of the permanent psychological damage that solitary confinement has on human beings, this bill was tabled by the House Corrections Committee in January. We were led to believe this was because current prison facilities in the state

⁵ *Prisoners in 2014*, Table 8, page 12.

⁶ Amendment VIII to the U.S. Constitution prohibits cruel and unusual punishment and Article 11 of Delaware's Bill of Rights, states that "...in the construction of jails a proper regard shall be had to the health of prisoners."

⁷ <http://www.declasi.org/clasi-and-aclu-file-lawsuit-on-behalf-of-prisoners-with-mental-illnesses-in-solitary-confinement/>

would not accommodate all the prisoners who would need to be removed from so-called “restrictive housing.”

Instead, House Joint Resolution 5 was passed in June and was signed by the Governor on September 3. The synopsis of HJR 5 stated that:

“Delaware law is largely silent on the appropriate use of restrictive housing, or “solitary confinement,” and little information is publicly available regarding its use in corrections facilities. There is growing concern about the effects of solitary confinement on mental health and reentry. Therefore, this joint resolution authorizes the House Corrections Committee and the Department of Correction to commission an expert to study and make findings and recommendations concerning the use of restrictive housing in Delaware correctional facilities.”

We look forward to completion of that study, currently underway by experts from the American Correctional Association, which apparently will address both the facility issue as well as the effect on the mental health of inmates held in solitary confinement.

Your hearing addressed the need for reform of Delaware’s sentencing policies. We commend you especially for addressing these issues. While recognizing the need for budget limitations, the League supports:

- Provision of all necessary tools to facilitate sound decision-making by the judiciary;
- Employment of independent professional evaluators to assess the costs, benefits and long-range effects of current sentencing practices (as you have done in bringing in the experts who testified at your earlier hearings);
- Use of such evaluation results as guidelines for executive and legislative branches of state government in developing legislation and by the judiciary in exercising sentencing responsibilities;
- Use in the courts of a range of sentencing alternatives where such alternatives do not create a danger to society or jeopardize rehabilitation of the offender.
- Alternatives should include but not be limited to restitution, work service, work referral, and other programs of a constructive nature.
- Judicial discretion in making sentencing decisions rather than mandatory sentences imposed in statute. This has been one of our top priorities for several years. A copy of our Position Paper, attached, provides details of specifics on the basis for our position on this topic.

With regard to sentencing issues addressed at the November 13 hearing, we were particularly concerned about a statement by Natalie Woloshin who said that “sometimes defendants downstate get much worse sentences than [those] upstate.” In conversations with two officials involved in different parts of the criminal justice system, I had that statement confirmed with regard to two specific judges in Sussex County.

One explanation in response to Attorney Woloshin’s statement was that “sometimes judges don’t have a good idea of what their peers are doing....” Subsequently, it was noted that the Sentencing Accountability Commission established several years ago developed “presumptive sentences” for various crimes and that a senior judge would have a “talk” with judges whose sentences were found to be outside those guidelines. This practice should be re-instituted immediately, with particular attention to judges in Kent and Sussex Counties.

The urgent issue with regard to sentencing reform was made clear in David S. Swayze's summary of the 40 years of that reform initiated during the tenure of Governor Pierre DuPont. He stated that the early reforms were "motivated necessarily and almost entirely by the need to reduce the explosion in our incarcerated population in the '70's, and the lack of resources to house or manage that population." Some of the pressure for reform came from a lawsuit alleging that the "overcrowded issues violated both the 8th Amendment proscription against cruel and unusual punishment, and the obligation in Delaware statutory law to provide an adequate opportunity for rehabilitation."⁸

Most notable, for purposes of your Commission and the League's concerns, was Mr. Swayze's statement that it wasn't until 2004 that then-Secretary of Health & Social Services Tom Eichler published a 27-page report documenting the racial disparity in our prisons – 64% of inmates were African-American vs. 20% in the state's population at the time.⁹

How little all those efforts have changed things. For adults, blacks currently comprise 57 percent of sentenced inmates and 56 percent of detainees. The disparities are greatest among the 18-25 age group, where 70 percent of detainees and 65 percent of sentenced inmates are blacks, while Blacks currently comprise 22% of the state's population.¹⁰

Let me touch on a few additional League policy positions.

We are proud that Delaware initiated one of the first dozen Drug Courts in the nation in 1994 and expanded it to become the first statewide court in the nation in 1997. The League has supported expansion of drug courts and mental health courts for all nonviolent offenders and the appropriate science based health and mental health treatment of all offenders.

It does concern us, nevertheless, that 80% of the State's prison population has issues related to substance abuse¹¹ and we understand only a relatively small number of offenders are served by the reputedly excellent programs that operate in some of our facilities.

A study by the California Department of Alcohol and Drug Programs estimates that for every \$1 spent on substance abuse treatment, \$7 is saved in criminal justice costs – making treatment a long-term, cost-effective approach toward reducing crime.¹²

Mental health treatment of offenders remains a major concern, as addressed in our discussion of those in solitary confinement, and within the general prison population where we understand as many as half of inmates experience personal/emotional needs.

⁸ Presentation of David S. Swayze, Esq. to The Committee on Fairness of the Access to Justice Commission, November 13, 2015.

⁹ A copy of Eichler's 27-page report can be found at <http://www.prisonpolicy.org/scans/RaceIncarceration.pdf>. It goes into considerable detail regarding the disparate treatment of blacks in Delaware's criminal justice system. According to Leland Ware, Louis L. Redding Professor of Law and Public Policy at the University of Delaware, in the report's Preface, "Delaware's criminal justice system treats Blacks differently and far less favorably than similarly situated Whites. The data shows that the racial disparities in the criminal justice system are increasing."

¹⁰ State Correction Commissioner Robert M. Coupe at a meeting of the state bar association, as reported in the *News Journal*, January 15, 2015.

¹¹ <http://www.doc.delaware.gov/treatmentServices.shtml>

¹² <http://www.doc.delaware.gov/treatmentServices.shtml>

The League also supports:

- Uniformity in operation of the Family Court system (including conditions of courthouses in Kent and Sussex Counties, as highlighted at the November 12 OMB budget hearing on the court system);
- Automatic expungement of certain juvenile records;
- Adequate staffing with Deputy Attorneys General and Public Defenders; and
- Adequate training for court staff, judges and police in handling domestic violence cases.

Finally, we must add one of our top priorities, which is **repeal of the death penalty**. Our position paper on this priority is attached. We urge the Court to take whatever action is within your authority to avoid use of this cruel sentence.

It is clear that many reforms are needed in Delaware's criminal justice system. We appreciate the work of the panel in studying "Access to Justice" in that system and urge you to act on the many excellent recommendations presented by your expert panels as well as members of the public who participate in these public hearings.

We pledge the League's support in advocating for needed reforms within the General Assembly and the Executive Branch.



MINIMUM MANDATORY SENTENCING POSITION PAPER

The League of Women Voters of Delaware Supports Abolition of Minimum Mandatory Sentencing and other Improvements in our Criminal Justice System

The top priority for the Justice portfolio of the League of Women Voters of Delaware is the abolition of minimum mandatory sentencing and support for the adjustment of drug sentencing laws to fit the seriousness of the crime. We believe that mandatory sentencing rules handcuff judges and fill prisons with too many nonviolent drug offenders. This sentence also has exacerbated the disparity in treatment of poor and minority defendants.

The LWVDE position is supported by a national position adopted by the 2012 Convention: **The LWVUS believes alternatives to imprisonment should be explored and utilized, taking into consideration the circumstances and nature of the crime. The LWVUS opposes mandatory minimum sentences for drug offenses.**

Even earlier, as part of an ongoing study of the state's criminal justice system initiated in 1977, LWV of Delaware, in 2003, adopted a position to **Support judicial discretion in making sentencing decisions rather than mandatory sentences imposed in statute.**

Since Congress created mandatory minimum sentences in the "War on Drugs" in the 1980s, our nation's prison population has grown to 2.3 million people behind bars -- more than any other country in the world, according to the International Centre for Prison Studies.

Delaware currently has 6,000 prisoners in Level V and 1,100 in Level IV, at a cost of \$36,232 per year as of the end of FY 2014. In addition, another 15,000 individuals are under the supervision of Probation and Parole officers.

Delaware's judicial selection process is regarded as a model: Delaware judges, in all courts in the state, are chosen through a merit selection process. A unique feature of our system is the requirement for partisan balance within the Delaware judiciary. These features suggest that Delaware's courts are among the best in the nation. Therefore, we should be able to trust in our judges' discretion to make reasonable decisions regarding the severity of sentences they impose.

A recent (March 2015) report from the Brennan Center for Justice suggests that "the idea that someone will choose not to commit a crime because of a specific penalty — is one justification often touted in support of harsh sentences....However, all such punitive policies have proved unlikely to deter, because potential offenders typically underestimate the risks of getting caught and the possible punishments. "

Furthermore, "more incarceration can increase crime. When defendants are sentenced to prison instead of pro-rehabilitation alternatives or longer instead of shorter terms, prison has detrimental effects. For example, incarceration strains relationships with families and communities and diminishes economic prospects, which in turn increases the likelihood of recidivism."

At the federal level, 2014 saw bipartisan legislative efforts to roll back America's punitive criminal justice policies. For example, Sens. Dick Durbin (D-Ill.) and Mike Lee (R-Utah) introduced the *Smarter Sentencing Act*, which received wide sponsorship in the Senate. It would reduce some mandatory minimum sentences and allow individuals sentenced under the old crack cocaine-powder cocaine laws to petition for a sentence reduction based on new provisions in the 2010 Fair Sentencing Act.

Criminal justice reform is an idea whose time has come! Let's keep Delaware in the forefront. Let's eliminate minimum mandatory sentences and adjust drug sentencing laws to fit the seriousness of the crime.



DEATH PENALTY POSITION PAPER

The League of Women Voters of Delaware supports Repeal of Delaware's Death Sentence

The League of Women Voters of Delaware supports repeal of the death penalty in Delaware based on a position adopted at the League of Women Voters of the United States convention in 2006: "The LWVUS supports the abolition of the death penalty."

Today the League of Women Voters of Delaware is one of the six original members of the Coalition to Repeal Delaware's Death Sentence and strongly supports repeal because it does not function as an appropriate punishment for the following reasons:

- 1) The death sentence may cause an **innocent person** to be executed by the state. An error cannot be corrected if the death penalty is carried out on an innocent person. Thus far, 142 persons in the United States, convicted of murder and sentenced to death, have been exonerated after new evidence showed them to be innocent.
- 2) The death penalty **does not serve the interests of family members of victims** since the necessary and lengthy appeals process postpones the realization of justice and so, can retard the healing process. On average the appeal process in a death penalty case lasts twelve years.
- 3) The death penalty is **extremely expensive**, due to the so-called precautions and extra measures taken to insure that only appropriate defendants receive the death penalty.
- 4) The death penalty is **not a deterrent**. States without the death penalty, such as Iowa, Wisconsin and Michigan have crime rates equal to or less than that of Delaware.
- 5) In practice, the death penalty is **unfair**. It targets the poor and other vulnerable people such as those who are mentally ill, intellectually disabled, brain-damaged, and members of an ethnic or racial minority group. (70% of the Delaware's death sentences involved cases where the victim was white although the majority of people murdered in Delaware are black.)
- 6) The nations with which the United States most identify—the nations of the European Union and Canada, for example—have abolished the death penalty and consider it a violation of human rights. (Delaware ranks third per capita in executions among states which allow death sentences.)
- 7) Reform has been tried and has not worked. In 1972, the U.S. Supreme Court declared unconstitutional the death penalty statutes of 40 states. The Court held that extensive jury discretion over death sentences resulted in arbitrary sentencing and therefore resulted in cruel and unusual punishment. However, resulting reforms have been shown to be ineffective to stave the arbitrary nature of the sentencing. As distrust of the system has grown, the death penalty is again infrequently applied and a host of arbitrary factors still strongly influence who lives and who dies.

The League of Women Voters of Delaware strongly urges the Delaware legislature to repeal Delaware's death penalty.