



The Smart on Crime Coalition

SMART ON CRIME

Recommendations
for the Administration
and Congress

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Administration and Congress

The Smart on Crime Coalition

The efforts of the Smart on Crime Coalition* are coordinated by the Constitution Project. The Constitution Project (TCP) brings together unlikely allies—experts and practitioners from across the political spectrum—in order to promote and safeguard America’s founding charter. TCP is working to reform the nation’s broken criminal justice system and to strengthen the rule of law through scholarship, consensus policy reforms, advocacy, and public education. More information about the Constitution Project is available at <http://constitutionproject.org/>.

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* Note that each participant only formally endorses the particular chapters in this list, and may not necessarily endorse the principles expressed in other chapters.

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Smart on Crime: Recommendations for the Administration and Congress provides the 112th Congress and the Administration with analysis of the problems plaguing our state and federal criminal justice systems and a series of recommendations to address these failures. It provides a comprehensive examination of the criminal justice system, from the creation of new criminal laws to ex-offenders' reentry into communities after serving their sentences. Our broad recommendations range from helping to restore and empower victims to identifying ways to protect the rights of the accused.

Americans depend on the criminal justice system to maintain our safety and security. We expect the system to effectively deter crime and punish offenders, and rehabilitate those who have served their sentences. We also demand that it treat victims and their families with compassion and provide justice and safety for all Americans. We insist that it be fair, reliable and accurate. Yet, too frequently, these laudable—but daunting—goals go unmet.

Central to our mission is offering recommendations that achieve these goals, while reflecting the economic realities and acknowledging the new priority of return on investment. Today, budget shortfalls and economic distress are plaguing states and placing greater burdens on the federal government. States are confronting budget crises that threaten all facets of the criminal justice system, including courts, prisons, police departments, prosecutors, and public defenders.

To effectively tackle these challenges, we must abandon heated rhetoric and explore policies based not on ideology, but on evidence. We must come together to forge a system that works for everyone. For this reason, *Smart on Crime* incorporates cost-effective, evidence-based solutions to address the worst problems in our system.

Unfortunately, since the initial publication of *Smart on Crime* in 2009, too little has been accomplished. We continue to see our criminal codes and sentences—and, therefore, the demand on law enforcement, prosecutors, and prisons—expand. At the same time, resources for indigent defense decline, forensic labs operate without enforceable standards, and scores of individuals are exonerated after serving years in prison, too often because our federal courts are not permitted to rectify errors. We release offenders without support systems, with significant restrictions that continue punishment rather than protect society, preventing them from effectively and safely reentering society. We fail to treat victims with respect and to implement principles of restorative justice designed to make victims whole.

Due to the undeniable human costs and the overwhelming fiscal costs, Americans of all political stripes, particularly professionals with experience in every aspect of the criminal justice system, recognize that the system is failing too many, costing too much, and helping too few. *Smart on Crime* embodies the most promising recommendations that have arisen out of this growing awareness of the crisis.

THE SMART ON CRIME COALITION

The Smart on Crime Coalition has re-convened to provide the 112th Congress and the Administration with a comprehensive view of the federal government's role in improving criminal justice systems. The Coalition is comprised of more than 40 organizations and individuals, who participated in developing policy recommendations across 16 broad issue areas.

These organizations and individuals represent the leading voices in criminal justice policy. Coalition members focus their efforts on such diverse and varied areas as combating unnecessary expansions of criminal law, advocating for improvements to investigatory and forensic science standards, ensuring that persons accused of crimes have an opportunity to receive a fair trial, helping persons who have served their sentences successfully reenter their communities, and protecting the rights and dignity of victims of crime.

The Coalition, with experts and advocates spanning the criminal justice system, is particularly troubled by the budget crises plaguing states and placing greater burdens on the federal government. To address this concern, the Coalition has expanded its membership since first convening in 2008, and has consulted a broad array of experts representing a diversity of philosophies and points of view. Our dedication to exploring all options means that *Smart on Crime* focuses on providing non-ideological, cost-effective, and evidence-based solutions to address the worst problems in our system.

For ease of reference, a list of participants and the chapters which they endorse follows the Executive Summary. Note that each participant only formally endorses the particular chapters in this list, and may not necessarily endorse the principles expressed in other chapters. The decision of a group not to sign on to a chapter does not necessarily indicate an opposition to the policies proposed; some participants were limited by issue area or by other factors.

MISSION AND SCOPE

Smart on Crime seeks to provide federal policymakers in both Congress and the Administration a comprehensive, systematic analysis of the current challenges facing state and federal criminal justice systems and recommendations to address those challenges. The main focus of *Smart on Crime* is the steps the federal government can take to improve federal criminal justice and support states seeking to improve their own systems.

While justice cannot be reduced to dollars and cents on a balance sheet, *Smart on Crime* endeavors to examine policy proposals that reflect the reality that resources at both the state and federal level are scarce. As a consequence, the recommendations in this

report seek to be cost-effective and, to the extent possible, contain costs in all facets of the system. Most importantly, these recommendations eschew ideology and focus on evidence-based approaches that aim to improve the system for all its participants.

Smart on Crime is organized into 16 chapters, each of which discusses a particular area of criminal justice policy. This report is premised on the idea that to successfully confront the crises in the criminal justice system, we must fully understand the nature of the problems, the context in which the problems arose and in which they continue to exist, and the manner in which recommendations will best address the problem. Thus, each chapter:

- **Identifies the issue**
- **Provides a history and summary of the problems**
- **Proposes specific recommendations**
- **Identifies the role of Congress, the Administration and the judiciary in implementing recommendations**
- **Identifies experts who can provide further analysis**
- **Refers readers to further resources that provide additional depth and research**
- **Provides primary policy contacts available for further inquiries**

The reader should feel free to contact any of the primary policy contacts listed in each chapter for more information.

PRINCIPLES OF REFORM

Embodied in *Smart on Crime* are five basic principles the Coalition considers foundational, which Congress, the Administration and the judiciary should always consider when contemplating improvement to the criminal justice system. These principles include:

Fair — The criminal justice system should provide access to all safeguards the U.S. Constitution, state and federal laws, and common sense afford. These include, but are not limited to, guaranteeing the presumption of innocence, providing effective representation, ensuring equal access to a fair day in court for all people charged with crimes, and eliminating policies that create improper disparities. Fairness also requires working towards a restorative justice system that treats victims with respect and compassion.

Accurate — Efforts to keep communities safe and secure must include safeguards to ensure that law enforcement policies and practices employed to investigate, charge, and prosecute individuals are appropriate and accurate.

Effective — The goal of the criminal justice system is to protect the public and punish blameworthy activity. Therefore, to ensure an effective system, policymakers should evaluate any proposed recommendation to determine that it increases public safety and regulates conduct that truly rises to a level that justifies its criminalization.

Proven — All strategies and practices that the criminal justice system employs should meet evidence-based or, when possible, scientific standards of effectiveness. This will improve law enforcement, investigation, prosecution, and punishment. It will also increase the public faith and trust in the system by minimizing mistakes and improving results.

Cost-Efficient — State and federal governments annually spend billions of dollars on the criminal justice system. In the current economic climate, the country literally cannot afford to maintain a status quo that fails too many. While justice cannot be reduced to dollars and cents on a balance sheet, any changes to the system must be considered with concern for cost efficiency.

THE SMART ON CRIME COALITION - 2011

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American Civil Liberties Union
American Psychological Association
Americans for Forfeiture Reform
Amnesty International
Brennan Center for Justice at New York
University School of Law
Campaign for Fair Sentencing of Youth
Campaign for Youth Justice
Center for Children's Law and Policy
Coalition for Juvenile Justice
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CHAPTER 3: FEDERAL INVESTIGATIONS

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CHAPTER 4: FEDERAL GRAND JURIES

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CHAPTER 5: FORENSIC SCIENCE

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CHAPTER 6: INNOCENCE ISSUES

Innocence Project

CHAPTER 7: INDIGENT DEFENSE

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CHAPTER 11: DEATH PENALTY

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The Raben Group

CHAPTER 12: FIXING MEDELLÍN: ENSURING CONSULAR ACCESS THROUGH COMPLIANCE WITH INTERNATIONAL LAW

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CHAPTER 13: PARDON POWER & EXECUTIVE CLEMENCY

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Prison Fellowship

CHAPTER 16: SYSTEM CHANGE

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Council on State Governments
Families Against Mandatory Minimums
Innocence Project
The Sentencing Project

CHAPTER 1: OVERCRIMINALIZATION

There are over 4,450 criminal offenses scattered through the federal criminal code, as well as untold numbers of federal regulatory criminal provisions. Congress routinely creates and amends federal criminal offenses, too often in response to a newsworthy problem for which a new federal law will provide no additional protection or safety.

Recommendation: Adopt rules and reporting requirements to stem overcriminalization and overfederalization. Congress should amend their rules to require every bill that would add or modify criminal offenses or penalties to be subject to automatic referral to the judiciary committee. Congress should also enact mandatory reporting legislation for all new or modified criminal offenses and penalties requiring the federal government to produce a standard, public report assessing the purported justification, costs, and benefits of all new or modified criminalization.

Recommendation: Enact default mens rea rules. Congress should enact legislation that specifically directs federal courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one and to apply any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense.

Recommendation: Codify the Common-Law Rule of Lenity. Congress should enact legislation codifying the common-law rule of lenity, which directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant.

Recommendation: Enact the Attorney-Client Privilege Protection Act and issue executive order to preserve its protections. Congress should pass legislation and the Administration should issue an executive order barring federal prosecutors and investigators in all federal agencies from pressuring companies to waive their attorney-client privilege, work product privilege, or employee' legal rights in return for cooperation credit, with certain exceptions.

CHAPTER 2: ASSET FORFEITURE

Asset forfeiture has become an important part of our legal framework, and it can be a powerful crime control weapon. Unfortunately, due to the steady erosion of procedural protections, forfeiture powers often skew law enforcement priorities in ways that threaten individual rights.

Recommendation: Curb the abuses of federal and state forfeiture powers. Congress should pass comprehensive legislation to curb abuses of federal and state forfeiture powers and fulfill the original intent of the bipartisan Civil Asset Forfeiture Reform Act and related state reforms. The Administration should issue an executive order or encourage agency rulemaking to limit or forbid the use of equitable sharing to circumvent state law.

Recommendation: Safeguard the rights of defendants and third parties with basic procedural reforms. Congress should pass comprehensive legislation to ensure fair procedures for the accused and third parties in criminal forfeiture proceedings, and to curtail the government’s use of criminal forfeiture as an end run around civil asset forfeiture reforms. This would include safeguarding the accused’s rights to a fair procedure for determining what is subject to criminal forfeiture, limiting the use of so-called personal “money judgments” in lieu of orders forfeiting specific property, and safeguarding the rights of third parties who have an interest in the property subject to forfeiture.

CHAPTER 3: FEDERAL INVESTIGATIONS

Public confidence in the criminal justice system requires the best possible evidence be available at trial and that the procedures and practices used to obtain that evidence are designed to provide the most accurate results possible. Enabling more reliable investigations will curb wrongful convictions and accurately identify the perpetrators of crime.

Recommendation: Support eyewitness identification reform measures. Congress should pass legislation requiring federal law enforcement agencies to adopt and implement eyewitness identification procedures shown by reliable, scientifically-supported evidence to minimize the likelihood of misidentification. Alternatively, the President should issue an executive order requiring the promulgation of federal standards for federal law enforcement agencies—grounded in best practices and scientifically-supported research—with respect to eyewitness identification procedures.

Recommendation: Support the mandatory recordation of custodial interrogations. Congress should pass legislation requiring federal law enforcement agencies to electronically record all custodial interrogations. Such legislation would allow the court to render inadmissible any unrecorded statement or confession. Alternatively, the President should issue an executive order to require the electronic recordation of all custodial interrogations.

Recommendation: Fund measures that support the states’ preservation of biological evidence. Congress should fully fund all measures it has previously authorized that would aid state and federal law enforcement in preserving biological evidence and increasing access to post-conviction DNA testing.

Recommendation: Regulate the use of incentivized testimony. Congress should pass legislation that would regulate the use of incentivized informants by adopting best practices and policies designed to address the issues of reliability related to incentivized testimony. Alternatively, the President should issue an executive order that outlines best practices and policies for use of incentivized information by federal prosecutors and investigators.

Recommendation: Permit crime scene comparisons to CODIS and IAFIS. Congress should pass legislation to enable federal judicial orders of comparisons of crime scene DNA and fingerprint

evidence to relevant databases: the Combined DNA Index System (CODIS) and Integrated Automated Fingerprint Identification System (IAFIS). Alternatively, the Executive Branch should clarify, through executive order or other policy guidance, that CODIS and IAFIS administrators should be responsive to judicial orders requesting such comparisons.

CHAPTER 4: FEDERAL GRAND JURIES

The federal grand jury was originally intended to serve both a screening and investigative function; however, modern grand jury procedures are incompatible with this screening function. The current allocation of power in federal grand juries is completely at odds with the constitutional responsibilities (not to mention considerable burdens) of grand jury service.

Recommendation: Enhance the role of federal grand jurors and address the institution's long-neglected shortcomings. Congress should pass comprehensive legislation to strengthen the grand jury's screening function, empower grand jurors, and protect the rights of witnesses, subjects, and targets of grand jury investigations. The Department of Justice's United States Attorney's Manual includes certain admonitions regarding the conduct of grand jury investigations; the Department and its personal should adhere to the manual's proscriptions.

CHAPTER 5: FORENSIC SCIENCE

In the landmark 2009 report, *Strengthening Forensic Science in the United States: A Path Forward*, the National Academy of Sciences made a number of recommendations to bring forensic science in line with validated life and physical sciences and ensure that forensic science is applied scientifically, consistently, and fairly in the legal system.

Recommendation: Coordinate federal agencies to create scientific forensic standards. Congress should direct the National Science Foundation to perform research to validate forensic techniques, and the National Institute for Standards and Technology to develop standards for forensic science methods and practice. If the task of overseeing accreditation of laboratories, certification of forensic practitioners, compliance, and enforcement is assigned to the Department of Justice, this function must be completely independent from the Department's law enforcement function.

CHAPTER 6: INNOCENCE ISSUES

Across the nation, 265 wrongfully convicted individuals have been exonerated through post-conviction DNA testing since 1989. Collectively, these men and women served more than 3,370 years in prison for crimes they did not commit. In 116 of the nation's first 255 DNA exonerations, the true perpetrators were identified in the process of settling claims of innocence; while free, many of them had gone on to commit additional serious crimes while the innocent languished behind bars.

Recommendation: Ensure effective administration of the Justice for All Act. Congress should reauthorize the Justice for All Act. The incentives and programs it created, which were originally enacted by a bipartisan Congress to facilitate the testing of DNA post-conviction—and thus, the discovery of the wrongly convicted and the real perpetrators, must continue to be enforced and funded. In addition, Congress should consider amending the Act to include language that will more easily allow for the disbursement of program funds.

Recommendation: Establish a federal commission that would address the causes and remedies of wrongful convictions. Congressional members should reintroduce the National Criminal Justice Commission Act, and ensure that innocence issues are included in the Commission’s work. Absent legislative action, the President should issue an executive order establishing a presidential innocence commission.

Recommendation: Exempt compensation to the wrongfully convicted from federal income tax. Congress should enact the legislation similar to the Wrongful Convictions Tax Relief Act of 2010, which would amend the Internal Revenue Code to clarify that wrongful conviction compensation packages are not subject to federal income tax.

CHAPTER 7: INDIGENT DEFENSE

Indigent defense services in the United States remain in a perpetual state of crisis. States are failing to meet their constitutional responsibilities to provide effective, independent counsel, while the federal government’s funding preferences create further resource imbalances between law enforcement and indigent defense systems.

Recommendation: Ensure adequate funding, staffing, and training for state indigent defense systems. Congress should address the funding disparity that cripples the provision of indigent defense, by fully funding existing programs like the John R. Justice Prosecutors and Defenders Act, encouraging states to use existing federal grants to support all components of the criminal justice system including indigent defense, and encouraging states to adopt civil infraction reform, which would relieve some of the current burden placed on indigent defenders. The Department of Justice could use current grant programs to increase indigent defense training and technical assistance for states.

Recommendation: Increase transparency in expenditure of federal taxpayer money by the states. Congress should reauthorize the Justice for All Act with the requirement that recipients of federal grant money for criminal justice indicate the recipient’s intended indigent defense expenditures and report back to the Bureau of Justice Assistance the recipient’s actual indigent defense expenditures. The Department of Justice should strengthen existing regulations to increase transparency in state spending of federal grants.

Recommendation: Establish accountability for violations of individual liberty by state and local government. Congress should provide the Department of Justice with the authority to bring suit against those states or local governments that fail to protect the individual liberty of persons within their jurisdictions by providing inadequate counsel or no counsel to indigent defendants.

Recommendation: Establish national standards for indigent defense services. Congress should adopt national standards, based on the American Bar Association's *The Ten Principles of a Public Defense Delivery System*, for adequate indigent defense. The Department of Justice should use these standards as the basis by which it evaluates states' indigent defense systems.

Recommendation: Increased independence of federal defender funding and policies. Congress should establish an independent, non-partisan federal program for federal defense that possesses funding and oversight responsibilities to reduce the conflict of interest that arises when a public defender is beholden to the opposing party (the state) or to the judge for funding. The Department of Justice should formalize the criminal defense functions of the Access to Justice Initiative as an Office of Public Counsel Services (OPCS) within the Department of Justice tasked with developing objectives, priorities and a long-term plan for federal support of state and local indigent defense systems.

CHAPTER 8: JUVENILE JUSTICE

The United States incarcerates more youth than any other country in the world. Every day in America there are over 80 thousand youth incarcerated in juvenile facilities and another 10 thousand youth who are held in adult jails and prisons. Unfortunately, far too many children are held in dangerous conditions where they can be pepper-sprayed, hog-tied, or sexually assaulted. These policies have the unintended consequence of increasing, not decreasing, crime. They are also extremely costly. The good news is that we know how to fix these problems. Our recommendations have a broad base of support from juvenile justice advocates, attorneys, and system stakeholders and spell out in greater detail what the problems are and how to solve them.

Recommendation: Restore the federal leadership role in juvenile justice policy. Congress should reauthorize the Juvenile Justice and Delinquency Prevention Act and ensure that states have the necessary guidance and resources to create and sustain cost-effective juvenile systems that both enhance public safety and treat court-involved youth age appropriately. In light of state budget crises, Congress should restore federal investments in state and local juvenile justice reform efforts. Furthermore, the President must appoint a competent Office of Juvenile Justice and Delinquency Prevention Administrator.

Recommendation: Prevent crime and divert youth from the justice system. Too many children end up in our justice system because of mental health problems or school-related problems, and these youth should be handled differently. Congress should pass the Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education (PROMISE) Act to implement and fund evidence-based practices to prevent delinquency and gang involvement. Additionally, the Office

of Juvenile Justice and Delinquency Prevention should help states and localities prevent and reduce the use of out of home placements, by supporting community-based alternatives to incarceration.

Recommendation: Prevent dangerous confinement conditions in the juvenile justice system.

Congress should work to improve conditions of confinement for youth in juvenile facilities. The Department of Justice should enact and enforce national standards protecting youth from sexual abuse.

Recommendation: Remove youth from the adult criminal justice system. Congress should extend Juvenile Justice and Delinquency Prevention Act protections to keep youth out of adult facilities. Congress should amend the Juvenile Justice and Delinquency Prevention Act to extend the jail removal and sight and sound protections of the Act to all youth, regardless of whether they are awaiting trial in juvenile or adult court. The Department of Justice must enact standards to protect youth from sexual abuse and help states remove youth from adult facilities.

End the practice of sentencing youth to life without parole. Congress should end the practice of sentencing youth tried and convicted in federal court to life without parole, and instead require review after ten years for any person incarcerated in federal prison for a crime committed when they were under the age of 18.

Recommendation: Help youth successfully reenter their communities. Congress should increase its focus on and funding for youth in the reauthorization of the Second Chance Act. Congress should also work to improve the education of incarcerated youth.

CHAPTER 9: FEDERAL SENTENCING

There is no doubt that our enormous prison populations are driven in large measure by our sentencing policies, which favor incarceration over community-based alternatives or rehabilitation. We spend enormous amounts of money keeping people in prison; money that in many cases would be better spent treating addiction or funding community-based programs to reduce recidivism. Moreover, our federal prison population is largely made up of non-violent and low-level offenders. While incarceration at modest levels has some impact on crime, we are now long past the point of diminishing returns in the cost-effectiveness of our vastly expanded prison system. Too many people are locked up and many for far too long without evidence that the length or sometimes even the very fact of incarceration makes our communities safer or otherwise serves any legitimate purpose of punishment.

Recommendation: Completely eliminate the crack cocaine sentencing disparity and make reform retroactive. Congress should pursue complete elimination of the crack cocaine sentencing disparity, which was reduced from 100:1 to 18:1 as the result of the Fair Sentencing Act of 2010. In addition, the Fair Sentencing Act must be strengthened by retroactive application of its provisions through executive, legislative or judicial branch action, so that those incarcerated pursuant to the previous sentencing scheme receive relief.

Recommendation: Improve and expand federal safety valves for mandatory minimum sentencing.

Congress should amend the current safety valve laws to allow judges to undertake a step-by-step inquiry into such things as the circumstances of the offense and the history and characteristics of the offender in order to provide appropriate sentences.

Recommendation: Create sunset provisions for new mandatory minimums. Congress should subject all new mandatory minimums to a five-year sunset provision or create a sunset commission that will offer recommendations to Congress ahead of reauthorization of mandatory minimum legislation.

Recommendation: Apply stacking provision only to true recidivists. Congress should pass legislation to ensure that individuals who carry a firearm while committing a violent crime or drug trafficking offense face the 25-year mandatory minimum for repeat offenses only if they have been previously convicted and served a sentence.

Recommendation: Expand federal statutory authority for deferred adjudication. Congress should enact a statute permitting individuals charged with certain federal crimes to avoid a conviction record by successfully completing a period of probation.

Recommendation: Expand alternatives to incarceration in federal sentencing guidelines. The United States Sentencing Commission should amend the Sentencing Guidelines to broadly expand the availability of alternatives to incarceration. In particular, the Commission should expand the use of alternative sentences for offenders whose crimes are associated with substance abuse or mental illness and who pose no substantial threat to the community.

Recommendation: Expand the Residential Drug Abuse Program to makes its sentence reduction opportunities available to a larger pool of deserving individuals. The Attorney General should issue a memorandum directing the Bureau of Prisons to administer the sentence reduction incentive consistent with federal law and to ensure that it be made available to all prisoners with detainers and that the planning be done far enough in advance to ensure that qualified prisoners receive the full benefit Congress intended to bestow.

Recommendation: Clarify and expand good time conduct credit calculations. Congress should pass legislation similar to the Prisoner Incentive Act, which would rewrite the good time statute to make clear that a prisoner serving a sentence of over one year may earn up to 54 days of good time credit per every year of his sentence. Congress should also pass legislation similar to the Literacy, Education, and Rehabilitation Act that would provide credit toward service of sentence for satisfactory participation in designated prison programs.

Recommendation: Permit sentence reductions for extraordinary and compelling circumstances. The Attorney General should signal his intention that the Sentencing Reform Act be used as Congress originally intended by providing a guidance memo laying out support for use of the power to reduce a sentence for extraordinary and compelling circumstances. Congress should also extend

and expand elderly prisoner home confinement release programs to address the rising cost of confining elderly prisoners who no longer pose public safety risks.

Recommendation: Add a federal public defender as ex-officio member of the United States Sentencing Commission. Congress should add a federal public defender to the Commission to improve the quality and accuracy of the Commission's work and the transparency and neutrality of the Commission's proceedings.

Recommendation: Reduce all drug guidelines indexed to mandatory minimums by two levels. The United States Sentencing Commission should reduce all drug guideline range triggers by two levels so that the corresponding mandatory minimum is at the top of the range for any given drug, not below it. This will ensure that the guideline ranges correspond with the mandatory minimums while providing additional flexibility to judges in cases where the mandatory minimum is not applicable.

CHAPTER 10: PRISONS

Critical reforms to our prison system are necessary. We must address the high incidence of sexual assault and rape in our nation's correctional facilities; return the rule of law to U.S. prisons and jails; end over-reliance on the use of solitary confinement and long-term isolation; reduce recidivism; and improve transparency in the world's largest prison system.

Recommendation: The Prison Rape Elimination Act should be fully implemented. Congress should fully fund the Prison Rape Elimination Act to realize the full benefits of the law, including grants to states and county to address prison rape, which have not been funded since 2006. Congress should also hold oversight hearings to ensure that the Department of Justice is meeting its obligations under the law. The Attorney General should ratify national standards to address sexual violence in detention and establish meaningful compliance monitoring of the standards.

Recommendation: Address conditions of confinement. Congress should pass the Prison Abuse Remedies Act to correct provisions in the Prison Litigation Reform Act that too severely restrict a prisoner's ability to address violations of his or her rights and thereby hold prison officials accountable for those violations. Congress should also reauthorize the Deaths in Custody Reporting Act and pass a strengthened Juvenile Justice and Delinquency Prevention Act. Congress should also pass the Private Prison Information Act, which would subject private prisons to the same Freedom of Information Act provisions as the Federal Bureau of Prisons. Finally, Congress should hold an oversight hearing on conditions at Bureau of Prisons facilities. Similarly, the Department of Justice Office of the Inspector General should exercise its authority to review and evaluate the Bureau of Prisons and the Department should zealously enforce the Civil Rights for Institutionalized Persons Act to investigate and bring suits against state and local institutions, including jails, prisons, and youth detention centers, that violate the law.

Recommendation: Reduce recidivism and increase effective rehabilitation. Congress and the

Administration should pursue policies that better prepare prisoners for reentry following the completion of their sentences at the federal and state level. These include a variety of policies, a few of which include drug treatment programs, alternatives to incarceration for non-violent offenders, access to educational programs and job training, and coordination between prison programs and communities.

Recommendation: Reduce the use of long-term isolation and build effective alternatives. Congress should introduce a bill limiting the use of long-term isolated confinement in Bureau of Prisons facilities. Additionally, the GAO should conduct a study of the effectiveness and availability of mental health care in the Bureau of Prisons generally and for prisoners confined to long-term isolated confinement, and the Bureau of Prisons should adopt policies and practices for its use of long-term isolation consistent with the standards established by the ABA's the ABA's Criminal Justice Standards on the Treatment of Prisoners.

CHAPTER 11: DEATH PENALTY

The death penalty, as currently applied, is in urgent need of reform. Capital defendants are too often not afforded adequate legal representation or a fair trial. Furthermore, alarming racial disparities exist in the application of the death penalty. The failure to provide even basic fairness in the systems leads to an incontrovertible truth: the death penalty is a "broken system." Despite these grave concerns, since the 1996 passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), federal courts have been severely constrained in their ability to vindicate the constitutional rights of individuals convicted of crimes in state and federal courts.

Recommendation: Reform habeas corpus to address damage caused by AEDPA. Congress should amend the federal *habeas* statute to address the damage AEDPA has wrought in federal *habeas corpus* over the past fifteen years. Congress should revise the statute of limitations, exhaustion requirements, and procedural default standards, as well as eliminate federal court deference to state court interpretations of constitutional and federal law and restrictions on successive *habeas* petitions.

Recommendation: Creating safeguards against racially biased capital prosecutions. Congress should seek to address the disproportionate application of the federal death penalty to defendants of color. Congress should commission an independent study of the federal death penalty system to examine racial disparities, prejudicial errors, adequacy of counsel, and other inequities in capital prosecutions, and make recommendations for legislative reform. The Department of Justice should also revise its policies and regulations to ensure greater consistency and fairness in the application of the federal death penalty.

Recommendation: Protecting the mentally ill from execution. Congress should exempt people with severe mental illness and/or developmental disabilities from capital prosecution. Even without legislative action, the Department of Justice should adopt a policy that exempts people with severe mental illness and/or developmental disabilities from capital prosecutions.

Recommendation: Provide adequate counsel in capital prosecutions. Congress should increase federal defender independence from the federal judiciary. Giving the judiciary control over defense functions creates a conflict of interest. Federal defenders would be able to operate more effectively and efficiently if the judiciary no longer appointed counsel or approved budgets for experts and other resources at any stage of a federal death penalty case, including post-conviction review.

CHAPTER 12: FIXING MEDELLÍN

In 2005, President Bush withdrew from the Vienna Convention on Consular Relations' Optional Protocol concerning the Compulsory Settlement of Disputes. Additionally, in 2008 the Supreme Court held that the Vienna Convention on Consular Relations was unenforceable against states absent implementing legislation. The effect was that foreign nationals who had improperly been denied access to their consulate upon their arrest in the U.S. had no remedy in court. Because rights and obligations under the Optional Protocol are entirely reciprocal, the decision to withdraw also stripped U.S. citizens abroad of a binding enforcement mechanism for their right to access their consulate when detained or arrested outside of the U.S.

Recommendation: The U.S. should rejoin the optional protocol. The President should rejoin the Optional Protocol. In the interim, the House and Senate Judiciary and Foreign Relations Committees should examine the impact of our withdrawal from the Optional Protocol on U.S. citizens living, working, and traveling abroad.

Recommendation: Pass legislation implementing Avena. Congress should pass legislation providing foreign nationals with judicial remedies for violations of their rights under the Vienna Convention on Consular Relations. The President should also require the Department of State and the Department of Justice to provide further education and support to state and local law enforcement about the right to consular access and compliance with this obligation going forward.

CHAPTER 13: PARDON POWER & EXECUTIVE CLEMENCY

With the rapid growth of the federal prison population and the expansion of legal barriers to reentry, the President's pardon power can and should play a central operational role in the federal criminal justice system. Despite its importance, during the past several administrations the pardon power has fallen into disuse, and the Justice Department has neglected its historical role as steward of the pardon power.

Recommendation: Make granting clemency a strategic priority for the White House. The Administration should develop a strategic plan for the use of the pardon power to advance the president's criminal justice agenda, both within the executive branch and outside of the executive branch, and with the public. It should identify the functions of clemency in the federal justice system, both to reduce prison sentences and to recognize and reward rehabilitation, and consider whether charges in the law may be in order to reduce the need for clemency. It should make public standards to guide those who wish to apply for clemency and those who are responsible for reviewing and making recommendations on clemency applications.

Recommendation: Make the process for administering the pardon power more independent, efficient, and accountable. The Administration should consider removing the pardon administrative process from the Justice Department and placing it in an independent board of appointees (possibly a panel of retired federal judges) that could operate with a degree of independence from federal prosecutors and give the president additional protection from political pressure. Alternatively, if the pardon advisory function remains in the Justice Department, those tasked with the performing this function should have a clear mandate to carry out the president's direction and sufficient resources to do so. A senior official in the White House Counsel's office should be assigned to advise the president on pardon matters and to review clemency recommendations on a regular basis. The president should have regularly-scheduled opportunities to review and act on clemency requests with his counsel.

CHAPTER 14: REENTRY

Reentry is critical to achieving the public safety and the rehabilitation goals of our criminal justice system. Many obstacles stand between the individual with a criminal record and successful reentry. Policies that create barriers to successfully reintegrating into one's community make it increasingly difficult for ex-offenders to become contributing members of their communities.

Recommendation: Reauthorize and fully fund the Second Chance Act.

Congress should reauthorize and appropriate sufficient funds for the Second Chance Act Reauthorization. The Second Change Act makes possible the development and testing of program models, the introduction of different approaches to successful reentry and the dissemination of information and research to guide states as they address the complex challenge of prisoner reentry.

Recommendation: Provide persons reentering communities the resources to encourage successful reintegration. Congress should pass legislation and the Administration should pursue executive action that encourages successful reintegration by balancing public safety with efforts to eliminate counterproductive stigmatization of persons who have served their sentences. This should include extending federal voting rights, removing unfair barriers to housing, and expanding employment opportunities for people released from prison. It should also include restoring welfare and food stamp benefits, and repealing or reducing the unintended impact of the financial aid ban for individuals with drug felony convictions. Congress and the Administration should also support expanding access to drug, alcohol and mental health treatment.

Recommendation: Expand and improve legal mechanisms for individuals to obtain relief from collateral consequences. Congress should enact an authority to permit individuals charged with certain federal crimes to avoid a conviction record by successfully completing a period of probation. This could achieve the goals of public safety and rehabilitation without unnecessarily and permanently stigmatizing individuals.

reinvesting the savings into alternatives to incarceration, such as community corrections and programs proven to reduce recidivism.

Recommendation: Evaluate and limit racial and ethnic disparities. Congress should pass legislation similar to the Justice Integrity Act to establish pilot programs to evaluate issues of racial and ethnic fairness in the practices of U.S. Attorney offices. Congress should mandate “Racial Impact Statements” for any proposed sentencing legislation to enable Congress to evaluate potential racial or ethnic disparities, and to consider alternative policies that could accomplish the goals of proposed sentencing legislation without causing racial disparity. Congress should also pass legislation similar to the Byrne/JAG Program Accountability Act to assess and limit racial and ethnic disparity in state, local and tribal systems that receive federal funding through the Byrne JAG Grant Program.

CHAPTER 1

OVERCRIMINALIZATION OF CONDUCT, OVERFEDERALIZATION OF CRIMINAL LAW, AND THE EXERCISE OF ENFORCEMENT DISCRETION

THE ISSUE

The American Bar Association's (ABA) Task Force on the Federalization of Crime observed in 1998, "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes."¹ As of 2007, there were more than 4,450 offenses that carried criminal penalties in the United States Code.² In addition, an estimated 10,000, and possibly as many as 300,000 federal regulations can be enforced criminally.³ Despite Supreme Court cases in the last 15 years cautioning against the federal assumption of plenary police power,⁴ Congress continues to introduce new criminal legislation. Recent studies demonstrate that from 2000 through 2007, Congress created 452 new federal crimes—that is, on average, one new crime a week for every week of every year.⁵

This over-federalization of criminal law is often a product of political considerations, wherein the response to a newsworthy problem is the introduction of federal legislation containing new criminal provisions or increased criminal penalties. So routine is this response that practitioners, academics, and even the Department of Justice (DOJ) have struggled to document the actual number of federal statutory offenses.⁶

The explosive growth of the federal criminal code in recent decades is noteworthy on its own, but it is only one part of the problem. Many of these new offenses do not punish conduct that is universally considered to be "criminal." This is because an increasing number of statutes lack an adequate criminal intent requirement to protect innocent people who act without intent to violate the law or knowledge that their conduct was illegal. For example, Abner Schoenwetter, a 64-year-old sea food importer with no criminal record, served six years in federal prison because he purchased a shipment of lobsters that were the wrong size and in the wrong packaging under Honduran treaty regulations.⁷ The absence of strong criminal intent requirements weakens protections for due process and civil liberties, especially where Congress criminalizes conduct involving regulatory violations

¹ AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 9 (1998) [hereinafter FEDERALIZATION OF CRIMINAL LAW].

² John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation L. Memo. No. 26, June 16, 2008, at 5.

³ FEDERALIZATION OF CRIMINAL LAW, *supra* note 2, at 9 n.11, app. C; See also John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

⁴ See, e.g., U.S. v. Lopez, 514 U.S. 549 (1995); U.S. v. Morrison, 529 U.S. 598 (2000).

⁵ Baker, *supra* note 3, at 2.

⁶ JOHN BAKER, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (Heritage Foundation June 16, 2008), available at: <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

⁷ *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (Sept. 28, 2010) (statement of Abner Schoenwetter), available at: <http://judiciary.house.gov/hearings/pdf/Schoenwetter100928.pdf>.

and highly technical prohibitions. Further, vague criminal laws, coupled with an expanding list of federal crimes, have led to abuses by the executive branch in the exercise of its prosecutorial discretion.

Enforcing this unwieldy criminal code has contributed to a backlogged judiciary, overflowing prisons, and the incarceration of innocent individuals who plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk.⁸ This enforcement scheme is inefficient, ineffective, and maintained at tremendous taxpayer expense.

HISTORY OF THE PROBLEM

The overcriminalization of conduct that is not inherently wrong⁹ and the overfederalization of criminal law enforcement are two faces of the same problem: the attractive but ineffective use of criminal sanctions as a solution for whatever current crisis faces the American public, be it a surge in gang crime or a breakdown on Wall Street. The new criminal offenses that result are frequently drafted in a vague and overly broad manner, without adequate criminal intent requirements, and enacted into law without any consideration of whether such criminalization is necessary and appropriate.

Overcriminalization occurs when federal policymakers enact criminal statutes lacking meaningful *mens rea* (criminal intent) requirements; federalize crimes traditionally reserved for state jurisdiction; adopt duplicative and overlapping statutes; expand criminal law into economic activity and regulatory and civil enforcement areas; impose vicarious liability with insufficient evidence of personal awareness or neglect; and create mandatory minimum sentences unrelated to the wrongfulness or harm of the underlying crime. These inevitably increase the size of the already massive federal criminal code.

Given the sheer number of criminal prohibitions, it is not surprising that only a small fraction of these offenses require “criminal intent.” Indeed, federal statutes provide for more than 100 types of *mens rea*.¹⁰ As a prominent casebook notes, “[e]ven those terms most frequently used in federal legislation—‘knowing’ and ‘willful’—do not have one

⁸ The Innocence Project, *When the Innocent Plead Guilty*, available at: http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php (last visited Jan. 25, 2010).

⁹ Crimes that are inherently wrong because of the intrinsic immoral nature of the act, such as rape or murder, are considered *malum in se*, or “wrong in itself.” These are acts that any reasonable person will know are wrong, regardless of whether or not that person knows they are illegal. In contrast, acts that are *malum prohibitum*, or “wrong due to being prohibited,” are those illegal acts that, on their face, would not immediately appear wrong to a reasonable person. For this latter category of crimes, reasonable notice of their illegality is necessary for effective compliance. See, e.g., *United States v. Bajakajian*, 524 U.S. 321 (1998).

¹⁰ JOHN S. BAKER, JR., *THE FEDERALIST SOC’Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 10* (2004) available at <http://fedsoc.server326.com/Publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf>.

invariable meaning. . . . Another layer of difficulty is attributable to the fact that Congress may impose one *mens rea* requirement upon certain elements of the offense and a different level of *mens rea*, or no *mens rea* at all, with respect to other elements.”¹¹ The erosion of *mens rea* is especially problematic in the white collar arena, where potential defendants often have little (or no) notice that the conduct in which they have engaged is unlawful, much less criminal.

Similarly, through the imposition of vicarious liability for the acts of others, defendants can be prosecuted, convicted and punished without any evidence of personal awareness or neglect. Under this theory, off-duty supervisors can be criminally punished for the accidental acts of their employees, even if they did not know of, approve of, or benefit from the conduct.¹² Corporate criminal liability employs the doctrine of *respondet superior*, which is identical to the standard used in civil tort law. This means that as long as an employee is acting within the scope of his or her employment (broadly defined), the corporation is deemed criminally liable for that employee’s actions, despite the corporation’s best efforts to deter such behavior. Regardless of compliance programs, employment manuals, or even strict instructions to the contrary, if an employee violates the law, then the corporation can be criminally punished.

Past attempts to reform these problems have been unsuccessful. In the 1970s and early 1980s, Congress produced several iterations of a comprehensive and cohesive federal criminal code.¹³ After hundreds of markups and passage through the Senate, the effort finally died due lack of support from major stakeholders.¹⁴ Throughout the 1990s, then Chief Justice William Rehnquist and the Judicial Conference advocated a five-point, limited basis for federal criminal jurisdiction in order to ease the burden on federal courts and return plenary police power to the states.¹⁵ The Judicial Conference advocated the exercise of federal criminal jurisdiction in the following cases: (i) offenses against the federal government or its inherent interests; (ii) criminal activity with substantial multi-state or international aspects; (iii) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; (iv) serious high level or widespread state or local government corruption; and (v) criminal cases raising highly sensitive local issues.¹⁶ In 1998, the ABA issued nearly identical recommendations for

¹¹ *Id.*

¹² See *United States v. Hanousek*, 176 F.3d 1116, 1120-23 (9th Cir. 1999) (upholding the conviction of an off-duty construction supervisor under the Clean Water Act when one of his employees accidentally ruptured an oil pipeline with a backhoe).

¹³ University of Buffalo Criminal Law Center, *Federal Criminal Code Reform: A Selected Bibliography*, available at: <http://wings.buffalo.edu/law/bclc/biblio.htm> (last visited Jan. 25, 2010).

¹⁴ Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future* 2 BUFF. L. REV. 45 (1998), available at: <http://wings.buffalo.edu/law/bclc/bclrarticles/2%281%29/Bclrgain.pdf>.

¹⁵ WILLIAM H. REHNQUIST, 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (Jan. 1, 1999). See also, *Rehnquist Blames Congress for Courts’ Increased Workload*, WASH. TIMES, A6 (Jan. 1, 1999).

¹⁶ *Id.* at 4-5. See also e.g., *Rehnquist Blames Congress for Courts’ Increased Workload*, WASH. TIMES, A6 (Jan. 1, 1999).

curbing the excessive costs of overcriminalization and overfederalization, and preventing the further diminishment of criminal enforcement.¹⁷

Despite these efforts, the dismal state of federal criminal law remains and the trend proceeds unabated. A prime example of overcriminalization is the honest services fraud statute,¹⁸ which is responsible for victimizing countless law-abiding individuals. Criticized by legal experts as vague and overbroad, it fails to define or limit the phrase “intangible right of honest services.” According to Justice Scalia, if “taken seriously and carried to its logical conclusion,” the statute makes it criminal for an elected official to vote for a bill because it will help secure the support of a particular constituency group in his re-election campaign; a mayor to use the prestige of his office to get a table at a restaurant without a reservation; or a public employee to call in sick to work in order to go to a baseball game.¹⁹

The failure of Congress to define criminal conduct in a clear and specific manner encourages prosecutors to charge criminally all sorts of conduct—from errors in judgment to behavior that is the slightest bit unsavory. Congress frequently relies on prosecutorial discretion to shape the contours of criminal offenses.²⁰ And, rather than limit the reach of prosecution to conduct truly belonging in the federal realm, these laws allow the federal government to directly encroach upon intra-state conduct and even criminalize behavior that state governments have deemed legal.

Another vague, poorly defined law that is subject to expansive application by prosecutors is the Foreign Corrupt Practices Act (FCPA).²¹ The law does not make clear what conduct is permissible and what is prohibited. To whom the law applies and the precise contours of the phrase “foreign official” are equally unclear.²² DOJ has had a free hand interpreting FCPA provisions, which have been virtually untested in the courts, since a criminal indictment would be a death sentence for corporations and going to trial is too risky and costly for most individual defendants. Thus, most FCPA investigations result in the settlement of allegations before there has been an opportunity to challenge a prosecutor’s interpretation of the statute’s application. Such risk and legal uncertainty is undoubtedly bad for business and decreases the competitiveness of American businesses abroad.

¹⁷ FEDERALIZATION OF CRIMINAL LAW, *supra* note 2, at 51.

¹⁸ 18 U.S.C. § 1346.

¹⁹ See *Sorich v. United States*, 129 U.S. S. Ct. 1308, 1300 (2009) (Scalia, J., dissenting from denial of certiorari).

²⁰ BRIAN WALSH AND TIFFANY JOSLYN, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (Heritage Foundation and National Association of Criminal Defense Lawyers, 2010), available at: <http://www.heritage.org/Research/Reports/2010/05/Without-Intent>.

²¹ The Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, *et seq.*

²² James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act* 62 Bus. Law. 1233 (2006 – 2007).

The most recent evidence of overcriminalization is found in the newly enacted 884-page Dodd-Frank Wall Street Reform & Consumer Protection Act.²³ This law contains more than two dozen new criminal offenses, prohibiting conduct ranging from public disclosure of certain broadly defined information, to margin lending, to failure to reasonably foresee the bad acts of others.²⁴ In addition to creating these new criminal offenses, virtually every provision of the Act includes regulatory criminalization wherein Congress hands over the power to define criminally punishable conduct to unelected agency bureaucrats.²⁵ Like many new crimes created by Congress in recent years, these new criminal provisions were not reviewed by the Judiciary Committee of either the House or Senate, despite the fact that those committees are granted express jurisdiction over new criminal laws. And unsurprisingly, most of the criminal laws that are contained in the financial reform legislation lack an adequate criminal intent requirement.²⁶ This financial services reform bill demonstrates that Congress continues to criminalize business and economic conduct without appropriate care and consideration.

Because businesses are automatically held liable for the criminal acts of their employees—regardless of how high up the wrongdoing went and who knew of it—the executive branch has tremendous leverage when it threatens to indict an entire business. Coupled with the erosion of *mens rea*, this makes cases involving honest services fraud, environmental regulatory offenses, and any law that requires only a “knowing” violation, easy to win. And, until recently, DOJ exercised unprecedented leverage through policies that included threatening a business with indictment unless it turned over “culpable” employees and refused to indemnify those employees’ legal costs.²⁷

Currently, there is a groundswell of unprecedented, bi-partisan support for stemming the tide of increasingly broad, vague, and unnecessary criminal laws. Both the business and legal communities share a concern about the vast amount of discretion that vague criminal laws give to the executive branch. For the past five years, a coalition of diverse groups that includes the ABA, the U.S. Chamber of Commerce, the American Civil Liberties Union (ACLU), the National Association of Criminal Defense Lawyers (NACDL), the Heritage Foundation, and the Association of Corporate Counsel (ACC), has pressured DOJ to limit its scope in investigating corporate crime.²⁸ Successful lobbying by this large and diverse coalition, has led DOJ to retract some of these policies.²⁹

²³ Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. 111-203 (2010).

²⁴ See National Association of Criminal Defense Lawyers, Dodd-Frank Wall Street Reform & Consumer Protection Act, <http://www.nacdl.org/public.nsf/whitecollar/HR4173> (last visited Jan. 20, 2010).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Brian W. Walsh & Stephanie A. Martz, *No Retreat Now: The Long Fight to protect the attorney-client relationship against aggressive prosecutors can only end with legislation*, LEGAL TIMES (Sept. 1, 2008), available at <http://www.law.com/jsp/nlj/legaltimes/PubArticleLT.jsp?id=1202424094454>.

²⁸ See Walsh & Martz, *supra* note 19.

²⁹ *Id.*

In the last two years, the overcriminalization coalition has expanded both in membership and scope. Washington Legal Foundation, the Federalist Society, the Cato Institute, Families Against Mandatory Minimums (FAMM), and the Constitution Project (TCP), among others, have joined the existing coalition to express support for positive reform.³⁰

Increased attention on the problem of overcriminalization helped spur two congressional hearings and a surge of attention to the topic by academics, legislators, and press. On July 22, 2009, under the bipartisan leadership of Reps. Bobby Scott (D-VA) and Louie Gohmert (R-TX), the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing to learn about the trend of overcriminalizing conduct and overfederalizing crime. The hearing received attention from national media and further ignited the overcriminalization reform movement.³¹

Shortly thereafter, two coalition organizations, NACDL and The Heritage Foundation, published a groundbreaking, non-partisan, joint report entitled: *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*.³² At the official release event, held on May 5, 2010 on Capitol Hill, Rep. Scott heralded the report as a “road map” for reform and Rep. Gohmert lamented the victimization of citizens by criminal laws lacking adequate intent requirements.³³

On September 28, 2010, the crime subcommittee held a second hearing to examine the problems through the lens of the *Without Intent* report and explored the report’s recommendations.³⁴ The coalition of organizations explicitly supporting this hearing included the ABA, ACLU, the Constitution Project, FAMM, The Heritage Foundation, Manhattan Institute, NACDL, and the National Federation of Independent Business (NFIB).

The explosive growth of federal criminal law in recent decades, the failure to guarantee adequate *mens rea* requirements, the proliferation of vague and overbroad criminal offenses, the expansion of vicarious criminal liability, and the increase in delegating Congress’s criminalization authority to unelected officials are all issues that Congress and the Obama administration need to address. Without reform, the federal criminal law is in

³⁰ Press release, National Association of Criminal Defense Lawyers, Diverse Coalition Urges Congress to Rein in Overcriminalization (Sept. 29, 2010), *available at*: <http://www.nacdl.org/public.nsf/NewsReleases/2010mn32?OpenDocument>.

³¹ See, e.g., Lesley Clark, Congress looks at laws that criminalize non-criminal behavior, MIAMI HERALD (Oct. 3, 2010), *available at*: <http://www.miamiherald.com/2010/10/03/1855997/congress-looks-at-laws-that-criminalize.html>.

³² WITHOUT INTENT, *supra* note 1.

³³ Heritage Foundation Symposium: Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law, Washington, DC: May 24, 2010. *Video available at*: <http://www.heritage.org/Events/2010/05/Without-Intent>.

³⁴ *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*. 111th Cong. (2010).

danger of becoming a broad template for abuse of government power. The current fragile state of the economy, growing deficit, and calls for a smaller, more efficient, and less intrusive government demand that we revisit and reform our federal criminal code and lawmaking process.

Further, recent history has witnessed an erosion of important attorney-client privilege protections. In recent years, many federal government agencies have adopted policies that erode the attorney-client privilege, the work product doctrine, and employee legal protections in the corporate context. Each of these policies—including DOJ’s 2006 “McNulty Memorandum,” the SEC’s 2001 “Seaboard Report,” the Environmental Protection Agency’s “Audit Policy,” and similar policies by other agencies—pressure companies and other organizations to waive their attorney-client privilege and work product protections as a condition of receiving full cooperation credit during investigations. These policies also contain separate provisions that weaken employees’ Sixth Amendment right to counsel, Fifth Amendment right against self-incrimination, and other fundamental legal rights by pressuring companies not to pay their employees’ legal fees during investigations, to fire them for not waiving their rights, and to take other punitive actions against them long before any guilt has been established.

After considering the concerns raised by the ABA, NACDL, former DOJ officials, congressional leaders, and others during the course of congressional hearings, the U.S. Sentencing Commission (USSC) and the Commodity Futures Trading Commission voted to reverse their privilege waiver policies in April 2006 and March 2007, respectively.³⁵ In addition, in August 2008, DOJ replaced the McNulty Memorandum with revised corporate charging guidelines that generally bar prosecutors from pressuring companies to waive their attorney-client privilege, work product, or employee legal rights in return for cooperation credit, with certain exceptions.³⁶ The SEC also issued a revised Enforcement Manual on January 13, 2010 that provides additional guidance for agency staff but does not formally change the SEC’s waiver policy outlined in the Seaboard Report.³⁷ Although the Manual generally directs agency staff not to request waiver of the privilege during most investigations, it also contains several significant exceptions and does not provide adequate protection for the privilege and employee legal rights. Comprehensive reform is needed to maintain attorney-client privilege in all federal agencies.

³⁵ Michael S. Greco, President of the American Bar Association, Statement re: U.S. Sentencing Commission Vote Rescinding 2004 Privilege Waiver Amendment (Apr. 6, 2006), *available at*: <http://www.abanow.org/2006/04/statement-re-u-s-sentencing-commission-vote-rescinding-2004-privilege-waiver-amendment/>; Douglas Koff and Jason Jurgens, *CFTC Yields More Conflicting Advice on Privilege Waivers*, 237 NEW YORK L.J. (Apr. 13, 2007), *available at*: http://www.cadwalader.com/assets/article/041307KoffJurgensNYLJ_.pdf.

³⁶ AMERICAN BAR ASSOCIATION, INDEPENDENCE OF THE LEGAL PROFESSION: ATTORNEY-CLIENT PRIVILEGE, WORK PRODUCT, AND EMPLOYEE LEGAL PROTECTIONS (Oct. 2010), *available at*: <http://www.abanet.org/poladv/priorities/privilegewaiver/>.

³⁷ Press release, Securities and Exchange Commission, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), *available at*: <http://www.sec.gov/news/press/2010/2010-6.htm>.

These problems transcend political affiliation or ideology; the need for reform is an increasingly commonly held view from those on both the right and the left. Congress and the administration should work toward stemming the growth of federal crimes, creating tighter *mens rea* requirements, and supporting more Congressional oversight of executive branch discretion. Otherwise, even more law-abiding individuals may find themselves facing unjust prosecution and punishment.

RECOMMENDATIONS

1. Resist Overcriminalization and Overfederalization

A. *Insufficient Oversight of New and Modified Criminal Offenses and Penalties*

While the House and Senate Judiciary Committees have jurisdiction over federal criminal law, congressional rules do not require bills containing criminal offenses to be referred to and reported out by the respective judiciary committee before floor consideration by the full chamber. Further, Congress is not required to assess the justification for, and cost of, new criminal offenses or penalties before legislative action or enactment.

B. *Amend Rules and Reporting Requirements to Stem Overcriminalization and Overfederalization*

Legislative

Congress should amend its rules to require that every bill that would add or modify criminal offenses or penalties is automatically referred to the House or Senate Judiciary Committee, as appropriate. This “sequential” referral requirement would give the Judiciary Committees exclusive control over a bill until they either report the bill out or the time limit for its consideration expires; only at that time could the bill move to another committee or to the full chamber. This reform will require changes to the rules of the House and Senate through the Rules Committees.

Because of their jurisdiction over federal criminal law, the House and Senate Judiciary Committees have special expertise in drafting criminal offenses and knowledge of federal law enforcement priorities and resources. Therefore, requiring Judiciary Committee oversight of bills containing criminal offenses or penalties would produce clearer, more specific criminal laws. It should also help protect against overcriminalization and foster a measured, prioritized approach to congressional criminal lawmaking.

Currently, there is no comprehensive process for Congress to determine whether new offenses or penalties are necessary and appropriate. Therefore, Congress should enact legislation mandating reporting for all new or modified criminal offenses and penalties.

Mandatory reporting would increase accountability by requiring the federal government to perform a basic analysis of the grounds and justification for all new and modified criminal offenses and penalties. Working together with the sequential referral reform, this mandatory reporting requirement would decrease overcriminalization and overfederalization.

Congress should pass legislation similar to the Federalization of Crimes Uniform Standards Act of 2001 (Manzullo bill)³⁸, requiring mandatory reporting by which the federal government produces a standard public report assessing the purported justification, costs, and benefits of all new or modified criminalization. This report should also include an assessment of whether the criminal offense or penalty is duplicative of state law; a comparison to similar offenses or penalties in existing federal, state, and local laws; and an analysis of any overlap between the conduct to be criminalized and conduct already criminalized by existing laws. The report should be available to the public before any major legislative action on a proposed bill. Federal agencies should also be subject to mandatory reporting prior to issuance of new guidance or rules.

2. Prevent the Further Erosion of *Mens Rea* Requirements

A. *The Omission of Mens Rea Terminology and Use of Blanket or Introductory Mens Rea Terms Jeopardizes Innocent Individuals*

Where Congress omits *mens rea* terminology from a statute defining a criminal offense, innocent individuals are at risk of unjust conviction.³⁹ Similarly, when Congress uses a *mens rea* term in a blanket or introductory manner, all parties—defendants, the government, and the courts—are forced to litigate the proper application of such term, again, placing innocent individuals at risk of unjust conviction.⁴⁰

B. *Congress Should Enact Default Mens Rea Rules*

Legislative

Congress should enact legislation specifically directing federal courts to grant a criminal defendant the benefit of the doubt when Congress has failed to adequately and clearly define the *mens rea* requirements for criminal offenses and penalties. This statutory

³⁸ Federalization of Crimes Uniform Standard Act of 2001, H.R. 1998, 107th Cong. (2001).

³⁹ WITHOUT INTENT, *supra* note 1, at 14-15 (explaining the danger of “strict liability” offenses, i.e. offenses that do not contain any *mens rea* terminology, and providing examples of such offenses contained in bills introduced in the 109th Congress).

⁴⁰ See *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 509 U.S. ____ (2009) (exploring the difficulties of interpretation caused by an introductory *mens rea* term in the one-sentence long federal aggravated identity theft statute and reversing the appellate court’s affirmance of a jury conviction on the grounds that the statute’s “knowingly” *mens rea* term applies to its “a means of identification of another person” clause).

enactment should be two-fold. First, Congress should direct federal courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one. This will address the problems that arise when Congress omits *mens rea* terminology. Second, Congress should direct federal courts to apply an introductory or blanket *mens rea* term in a criminal offense to each element of the offense. This reform will eliminate much of the uncertainty that exists in federal criminal law over the extent to which an offense's *mens rea* terminology applies to all of the offense's elements.

3. Increase Fairness in the Interpretation of Vague, Unclear, or Ambiguous Statutes

A. *Vague, Unclear, or Ambiguous Statutes Put Individuals at Risk of Unjust Prosecution and Punishment*

Vague, unclear, or ambiguous statutes violate the principle of due process because they fail to put individuals on notice of what conduct is criminal. Further, these statutes put federal courts in the position of legislating from the bench.

B. *Codify the Common-Law Rule of Lenity*

Legislative

Congress, through its Judiciary Committees, should enact legislation codifying the common-law rule of lenity. The rule of lenity directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant. Codification of this rule should reduce the risk of injustice stemming from criminal offenses that lack clarity or specificity. Further, giving the benefit of the doubt to the defendant is consistent with traditional rules presuming all defendants are innocent and placing the burden of proof of every element of a crime beyond a reasonable doubt on the government.

Explicitly codifying the rule of lenity into federal law would simply codify a long-standing principle upheld by the Supreme Court, and which the Court has called a fundamental rule of statutory construction.⁴¹ It would also help federal courts treat defendants uniformly, thereby restricting the instances in which federal courts are forced to legislate from the bench. This would protect Congress's lawmaking authority and advance separation of powers principles. Finally, this reform should encourage Congress to speak with more clarity and legislate more carefully.

⁴¹ See *United States v. Santos*, 553 U.S. 507, 514, 128 S. Ct. 2020, 2025 (2008) ("Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. . . . The venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.") (internal citations omitted).

4. Reject and Repeal Mandatory Minimum Sentences

A. *Mandatory Minimum Sentences Result in Overcriminalization*

Mandatory minimum sentencing policies come with billions in direct costs. In 2008, American taxpayers spent over \$5.4 billion on federal prisons,⁴² a 925 percent increase since 1982.⁴³ This explosion in costs is driven, in part, by the expanded use of prison sentences for drug crimes and longer sentences required by mandatory minimums. The federal prison population has increased nearly five-fold since mandatory minimums were enacted in the mid-80s and mandatory guidelines became law.⁴⁴ About 75 percent of the increase was due to mandatory minimums and 25 percent due to guideline increases above mandatory minimums.⁴⁵

B. *Reject and Repeal Mandatory Minimum Sentences*

Legislative

Congress should reject proposals for new mandatory sentencing minimums and work to repeal existing mandatory sentencing minimums.⁴⁶

5. Preservation of the Attorney-Client Privilege in Federal Investigations and Proceedings

A. *The Attorney-Client Privilege is Under Federal Governmental Assault*

In recent years, many federal government agencies have adopted policies that erode the attorney-client privilege, the work product doctrine, and employee legal protections in the corporate context. Each of these policies—including DOJ’s 2006 “McNulty Memorandum,” the SEC’s 2001 “Seaboard Report,” the Environmental Protection Agency’s “Audit Policy,” and similar policies by other agencies—pressure companies and other organizations to waive their attorney-client privilege and work product protections as a condition of receiving full cooperation credit during investigations. These policies also contain separate provisions that weaken employees’ Sixth Amendment right to counsel, Fifth Amendment right against self-incrimination, and other fundamental legal rights by pressuring companies not to pay their employees’ legal fees during investigations, to fire them for not waiving their rights, and to take other punitive actions against them long before any guilt has been established.

⁴² U.S. DEP’T OF JUST., FY 2009 BUDGET AND PERFORMANCE SUMMARY, FEDERAL PRISON SYSTEM, available at http://www.usdoj.gov/jmd/2009summary/html/127_bop.htm.

⁴³ BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 (2006), at 3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf>.

⁴⁴ U.S. Bureau of Prisons, A Brief History of the Bureau of Prisons, <http://www.bop.gov/about/history.jsp>.

⁴⁵ U.S. SENT’G COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING (2004), at 54, available at http://www.ussc.gov/15_year/15year.htm

⁴⁶ See *Federal Sentencing Reform*, SMART ON CRIME (2011).

B. Enact Attorney-Client Privilege Protection Act or Issue Executive Order to Preserve Its Protections

Legislative

Congress should enact comprehensive legislation like the Attorney-Client Privilege Protection Act (ACPPA) to ensure that the basic reforms implemented by DOJ apply to all federal agencies. The Senate and House Judiciary Committees have held four separate hearings on this issue since early 2006. At each hearing, a broad range of concerned organizations and constituents testified in support of legislative reform.

In November 2007, the House overwhelmingly approved the ACPPA, sponsored by Reps. John Conyers (D-MI), Bobby Scott (D-VA), and Lamar Smith (R-TX).⁴⁷ The reforms in this bill were comprehensive, applying to *all* federal agencies. A Senate companion bill, sponsored by then-Senators Arlen Specter (R-PA), Joseph Biden (D-DE), and 12 others from both parties, was also introduced in the 110th Congress but failed to receive a vote.⁴⁸ On February 13, 2009, Senator Specter reintroduced similar legislation, and⁴⁹ on December 16, 2009, Rep. Scott subsequently reintroduced the House version of the bill.⁵⁰ Many of the bill's reforms were later adopted by the Justice Department (DOJ) in its revised corporate charging guidelines.⁵¹ The 112th Congress should reintroduce and pass the ACCPA.

However, Unlike the reforms in the House bill—sponsored by Representatives John Conyers (D-MI), Bobby Scott (D-VA), and Lamar Smith (R-TX)—which apply to *all* federal agencies, the DOJ policy was limited in scope.⁵² A Senate companion bill, S. 3217, sponsored by then-Senators Arlen Specter (D-PA, then R-PA), Joseph Biden (D-DE) and 12 others from both parties, was also introduced in the 110th Congress but failed to receive a vote. On February 13, 2009, Senator Specter reintroduced similar legislation, S. 445 in the 111th Congress. Representative Scott subsequently reintroduced the House version of the bill on December 16, 2009 as H.R. 4326.

Enactment of comprehensive legislation like the Attorney-Client Privilege Protection Act (ACPPA) is needed to ensure that the basic reforms implemented by DOJ apply to all federal agencies.

⁴⁷ Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007)

⁴⁸ Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008).

⁴⁹ Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. (2009).

⁵⁰ Attorney-Client Privilege Protection Act of 2009, H.R. 4326, 111th Cong. (2009).

⁵¹ American Bar Association, Protecting the Attorney-Client Privilege, the Work Product Doctrine, and Employee Legal Rights: Comprehensive Reform Still Critically Needed (Oct. 2010), *available at*: http://www.abanet.org/poladv/priorities/privilegewaiver/2010Oct_factsheet.pdf.

⁵² *Id.*

Executive

Absent Congressional action, the President should issue an executive order preserving the protections of the attorney-client privilege.

In August 2008, DOJ replaced the McNulty Memorandum, which limited attorney-client privilege, with revised corporate charging guidelines that generally bar prosecutors from pressuring companies to waive their attorney-client privilege, work product, or employee legal rights in return for cooperation credit, with certain exceptions. The President should issue an executive order applying DOJ's reforms to all federal agencies to clearly protect the sanctity of the privilege.

APPENDICES

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Further Resources

Overcriminalization

BRIAN W. WALSH & TIFFANY M. JOSLYN, THE HERITAGE FOUNDATION & NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE INTENT REQUIREMENT IN FEDERAL LAW 6* (2010), *available at* [http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/\\$FILE/WithoutIntentReport.pdf](http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/$FILE/WithoutIntentReport.pdf)

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American Bar Association, Resolution and report Regarding Attorney-Client Privilege and Work Product Doctrine (August 9, 2005), *available at*: <http://www.docstoc.com/docs/51019355/ABA-August-9-2005-Resolution-and-Report-Regarding-Attorney-Client-Privilege-and-Work-Product-Doctrine>.

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CHAPTER 2

ASSET FORFEITURE

THE ISSUE

Asset forfeiture has become an important part of our legal framework and it can be a powerful crime control weapon. But due to the steady erosion of procedural protections, forfeiture powers often skew law enforcement priorities in ways that threaten individual rights.

In particular, statutes that give law enforcement agencies a direct financial stake in forfeiture proceeds invite abuse. For law-abiding citizens, the consequences are severe: innocent property owners are harassed and deprived of their property without due process; law enforcement policies that explicitly or implicitly encourage racial profiling take root; and public confidence in law enforcement deteriorates. In the area of civil asset forfeiture, the most important reform to address the abuse of civil asset forfeiture is relatively simple: Congress should amend the federal equitable sharing laws¹ under which state police circumvent state forfeiture laws by turning over the forfeiture to federal law enforcement authorities in exchange for a percentage of the proceeds.

By contrast, the scope of *criminal* asset forfeiture laws has expanded in recent years, while procedural protections have eroded. Comprehensive reform of criminal asset forfeiture laws, which can impair the accused's ability to retain counsel as well as the rights of third parties, is long overdue. Paramount among the needed reforms are changes to the Federal Rules of Criminal Procedure that would safeguard the accused's right to a fair procedure for determining the amount of any criminal forfeiture and, in particular, provide a right to challenge *ex parte* restraining orders that are permitted under federal law.²

HISTORY OF THE PROBLEM

1. Civil Asset Forfeiture

In 2000, Congress unanimously enacted the Civil Asset Forfeiture Reform Act (CAFRA),³ the only major reform of our nation's forfeiture laws in over 200 years. CAFRA had strong bipartisan support, reflecting the public's concern that individual property rights were in danger from overzealous enforcement of forfeiture laws.⁴ The Act delivered several meaningful and overdue reforms. For example, it placed the burden of proof on the government by using a "preponderance of the evidence" standard in all civil forfeiture cases covered by the Act. It also abolished the cost bond, the fee that claimants were required to pay before they could proceed legally for return of their own property. Unfortunately, many

¹ See 21 U.S.C. § 881(e) (2006), 18 U.S.C. § 981(e)(2) (2006), and 19 U.S.C. § 1616a (2006).

² See 21 U.S.C. § 853(e) (2006).

³ Pub. L. No. 106-185, 114 Stat. 202-225 (2000).

⁴ See *U.S. v. James Good Real Property*, 510 U.S. 43 (1993) ("Individual freedom finds tangible expression in property rights").

of the law's important reforms have been undermined by statutory loopholes or judicial decisions.

Several states enacted similar reforms to address concerns regarding civil asset forfeiture laws.⁵ Indeed, some states enacted even broader reforms, in some cases requiring criminal conviction prior to any asset forfeiture. However, federal law has frustrated some of these reforms. For instance, under the federal equitable sharing law, if state police want to circumvent state forfeiture laws — for example, because the state law allocates forfeited assets to the state's education fund rather than the state police — they simply turn the forfeiture proceeding over to federal law enforcement authorities. Federal authorities keep 20% of the proceeds of the forfeiture and return roughly 80% to the state police. Federal legislation or regulation to halt this circumvention of state law and fiscal policy should garner strong bipartisan support, as it would serve to protect "states' rights," allowing states to enact their own reforms without federal interference.⁶

In addition to the issues described above, judicial opinions have thwarted efforts of those who would seek full relief from the wrongful seizure of assets. Specifically, remedies available to those persons whose assets were wrongly seized by asset forfeiture have been limited by judicial decisions, which have undermined the rights of prevailing parties to obtain attorney fees and damages from the government.⁷ Legislation addressing this issue could provide a useful tool to protect an individual's property rights.

2. Criminal Asset Forfeiture

CAFRA did not contain any reforms of the criminal forfeiture laws, due in part to the need to streamline the already complex negotiation process over civil forfeiture reforms. As a result, changes to the Federal Rules of Criminal Procedure and judicial decisions have greatly expanded the government's power to obtain criminal forfeitures. Many of these changes are at odds with the language and intent of the criminal forfeiture statutes enacted by Congress. In short, criminal forfeiture procedure has become less fair to defendants and third parties,

⁵ See *e.g.*, OR. CONST. ART. XV, § 10 (Oregon Property Protection Act of 2000); 2001 Mo. SB 5 (codified in MO. REV. STAT. §§ 513.605, 513.607, 513.647 and 513.653 (2010)); 2010 MINN. LAWS 391 (codified in scattered sections of MINN. STAT.).

⁶ See MARIAN R. WILLIAMS, ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, INST. FOR JUSTICE (2010), available at http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

⁷ See, *e.g.*, *United States v. Khan*, 497 F.3d 204 (2d Cir. 2007) (denying attorneys fees under CAFRA for representation of individuals whose property was not properly subject to forfeiture under federal law); *Foster v. United States*, 522 F.3d 1071 (9th Cir. 2008) (holding that CAFRA re-waiver of sovereign immunity for damage to goods detained by the government applies only to property seized solely for the purpose of forfeiture); *Adeleke v. United States*, 355 F.3d 144, 154 (2d Cir. 2004) (holding that sovereign immunity bars monetary rewards for property lost or destroyed by the government being held in anticipation of forfeiture); *Diaz v. United States*, 517 F.3d 608 (2d Cir. 2008) (claims for seized currency are similarly jurisdictionally barred by the principle of sovereign immunity).

while civil forfeiture has become fairer as a result of CAFRA. Not surprisingly, the government has decided to use criminal forfeiture instead of civil forfeiture whenever it is able to do so.

While Congress was drafting the civil forfeiture reform legislation, the Advisory Committee on Criminal Rules, promulgated Federal Rule of Criminal Procedure 32.2 on December 1, 2000.⁸ Rule 32.2 substantially curtailed the statutory right of a defendant to have the forfeiture issue decided by a jury, abolished the prior rule that the Federal Rules of Evidence apply at a forfeiture hearing, and abrogated the prior rule that the government must specifically allege what it seeks to forfeit in the indictment. It also fails to address an individual's right to challenge protective orders sought by the government in *ex parte* proceedings and substantially restricts the rights of third parties, often innocent of any crime, in criminal forfeiture proceedings.

In addition, the increased use of so-called personal "money judgments" in lieu of orders forfeiting specific property has created a completely separate, judicially-created schema apart from the policies that Congress has sought to implement.⁹ These money judgments allow the government to seek money beyond those assets that would otherwise be subject to forfeiture, increasing the threat that an individual could be unfairly deprived of property.

RECOMMENDATIONS

1. Civil Asset Forfeiture Reform

A. *Continued Abuse of Civil Asset Forfeiture*

Many of the Civil Asset Forfeiture Reform Act's important reforms have been undermined by statutory loopholes or judicial decisions.

⁸ FED. R. CRIM. P. 32.2.

⁹ See, e.g., Ginsburg at 801-802 (money judgment requires the defendant to pay the total amount derived from the criminal activity, "regardless of whether the specific dollars received from that activity are still in his possession"); *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000) (forfeiture order may include a money judgment for the amount of money involved in the money laundering offense, which acts as a lien against the defendant personally); *United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985) (because criminal forfeiture is in personam, it follows defendant; the money judgment is in the amount that came into his hands illegally; government not required to trace the money to any specific asset); *United States v. Amend*, 791 F.2d 1120, 1127 (4th Cir. 1986) (same); *United States v. Robilotto*, 828 F.2d 940, 949 (2d Cir. 1987) (following Conner and Ginsburg, court may enter money judgment for the amount of the illegal proceeds regardless of whether defendant retained the proceeds); *United States v. Voigt*, 89 F.3d 1050, 1084, 1088 (3d Cir. 1996) (government entitled to personal money judgment equal to the amount of money involved in the underlying offense); and *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (ordering entry of money judgment for the amount derived from a RICO offense).

B. *Curb the Abuses of Federal and State Forfeiture Powers and Fulfill the Original Intent of the Bipartisan Civil Asset Forfeiture Reform Act and Related State Reforms.*

Legislative

Congress should pass comprehensive legislation to curb abuses of federal and state forfeiture powers and fulfill the original intent of the bipartisan Civil Asset Forfeiture Reform Act and related state reforms. Amending the United States Code and Federal Rules of Civil Procedure as outlined below could provide meaningful solutions to curb abuse of civil asset forfeiture laws.

- Amend the federal equitable sharing law, 21 U.S.C. § 881(e), under which state police circumvent state forfeiture laws by turning over the forfeiture to federal law enforcement authorities in exchange for a percentage of the proceeds. Any amendment should restrict the Attorney General’s authority to transfer forfeited property in such a manner, particularly in cases in which the property was originally seized by state or local law enforcement and state law would otherwise prohibit or limit law enforcement’s retaining the property.
- Clarify CAFRA’s fee shifting provision, 28 U.S.C. § 2465(b)(1), which has been undermined by case law, to fully enforce the government’s obligation to pay attorney fees to prevailing claimants.
- Close loopholes – created by judicial decisions – in the statutory right to sue the government (i.e., waiver of sovereign immunity) for negligent or intentional damages to or loss of seized property in its custody by amending 28 U.S.C. § 2680(c).
- Explicitly waive sovereign immunity where the government forfeits property without proper notice to the owner or destroys, sells, or loses property without having forfeited it by amending Federal Rule of Civil Procedure 41(g).

In addition to these legislative solutions, Congress could prohibit or restrict the use of Department of Justice (DOJ) funds to forfeit property under the equitable sharing law.

Executive

Absent congressional action to amend federal civil asset forfeiture law, the President should issue an executive order or the Department of Justice should revise its regulations and policies to limit or forbid the use of equitable sharing designed to circumvent state law.

2. Criminal Asset Forfeiture Reform

A. *Criminal Forfeiture Rules are Unfair to Defendants and Third Parties*

The government increasingly relies on criminal forfeiture proceedings, which are less protective of property owners than civil forfeiture proceedings. Furthermore, court decisions have modified criminal forfeiture procedures in ways that unfairly tip the balance in favor of the government, in ways that circumvent and undermine the purposes of the Civil Asset Forfeiture Reform Act.

B. *Safeguard the Rights of Defendants and Third Parties with Basic Procedural Reforms*

Legislative

Congress should pass comprehensive legislation to ensure fair procedures for the accused and third parties in criminal forfeiture proceedings, and to curtail the government’s use of criminal forfeiture as an end run around civil asset forfeiture reforms. The reforms proposed below fall into three broad categories. The first category is comprised of three proposals that would help safeguard the accused’s rights to a fair procedure for determining what is subject to criminal forfeiture. The second category contains four proposals that would limit the use of so-called personal “money judgments” in lieu of orders forfeiting specific property. Such money judgments are a judicially-crafted remedy that was never authorized by Congress. The third category of proposed reforms is intended to safeguard the rights of third parties who have an interest in the property subject to forfeiture.

Amending the Federal Rules of Criminal Procedure and United States Code, as suggested below, could provide meaningful solutions to the issues identified above.

i. *Amend Rules 7 and 32.2 of the Federal Rules of Criminal Procedure*

Congress should safeguard the accused’s right to a fair procedure for determining the amount of any criminal forfeiture by: (i) requiring fair notice through a bill of particulars; (ii) providing the right to challenge ex parte restraining orders; and (iii) restricting the use of hearsay.

ii. *Amend Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 85*

Congress should amend these provisions to limit the use of money judgments in lieu of forfeiture of specific property by: (i) providing the right to a jury trial; (ii) limiting the use of joint and several liability; (iii) clarifying that the relation back principle does not apply to

substitute (i.e., “clean”) assets; and (iv) limiting the amount of money judgments to the defendant’s known current assets, unless the government proves that the defendant has concealed assets. Short of abolishing the money judgment, Congress needs to rein in the abuses that have arisen in connection with the use of money judgments.

iii. ***Amend Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 85***

Congress should seek to safeguard the rights of third parties with interests in the property the government seeks to forfeit by: (i) providing the right to a jury trial, (ii) allowing a third party with standing to contest the forfeiture on the merits; (iii) requiring a finding that the defendant has some forfeitable interest in the property before a preliminary order of forfeiture is entered; and (iv) treating both court-ordered child support obligations and claims for compensation by the defendant’s employees like secured interests, with priority over the government’s forfeiture claims.

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Further Resources

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CHAPTER 3

FEDERAL INVESTIGATIONS

THE ISSUE

In order to engender public confidence in the criminal justice system, it is imperative that the best possible evidence be available at trial, and that the procedures and practices used to obtain that evidence are designed to provide the most accurate results possible. A number of reforms could be employed on the federal level to enable more reliable investigations, curb wrongful convictions, and accurately identify the perpetrators of crime. The implementation of these reforms could be accomplished through legislation, executive order, or changes to agency policies and procedures.

The continuing improvement of existing federal investigatory procedure will not only serve to aid federal investigations, but will also provide a strong example to state and local jurisdictions which are also constantly seeking to improve their own criminal justice systems. It is therefore critical that federal practices provide both direction and resources to help ensure accuracy in the criminal justice system, from the investigative phase through post-conviction proceedings.

HISTORY OF THE PROBLEM

Since 1989, DNA exonerations have worked to reveal disturbing fissures in our criminal justice system. The nation's 265 DNA exonerations have exposed an array of factors that lead to wrongful convictions.¹ The leading contributing factors to the wrongful convictions in those 265 cases – including eyewitness misidentification, false confessions, and incentivized informant testimony, and invalid or improper forensic evidence² – are present not just in “DNA” cases, but also in cases where DNA evidence is not probative. This is an important point to recognize, as criminalists estimate that probative DNA evidence is available in less than 10% of all serious criminal cases.³ As such, the improvement of investigative techniques promises to prevent miscarriages of justice not just in the small percentage of cases where DNA testing would potentially identify errors, but in all criminal cases.⁴

¹ The Innocence Project, <http://www.innocenceproject.org/know/> (last visited Jan. 19, 2011).

² *Id.*

³ *Department of Justice Oversight: Funding Forensic Sciences – DNA and Beyond: Hearing Before the S. Subcomm. on Admin. Oversight and the Courts, 108th Cong. (2003)* (statement of Michael M. Baden, M.D., Director of the Medicological Investigations Unit of the New York State Police) (“In less than 10 percent of murders the criminal leaves DNA evidence behind. About 5 percent of a crime lab’s workload involves DNA analysis.”); Kelly M. Pyrek, editor of *FORENSIC NURSE MAG.* (Sept. 2005) (quoting a chair of a consortium of four major crime laboratory associations: requests for DNA analysis is “only 5 percent of what comes in the door.”); Cara Garretson, *Cybercrime Conference Highlights RFID Security*, Mar. 6, 2007 (quoting Jim Christy, Director of the Future Explorations unit of the Department of Defense’s Cyber Crime Center: “Only about 1 percent of criminal cases introduce DNA evidence -- contrary to what typically is portrayed on television crime dramas -- because most of the time it’s not relevant”).

⁴ Unvalidated and improperly applied forensic science also numbers among the documented factors of wrongful convictions, contributing to approximately half of the nation’s 265 DNA exonerations. See generally, *Forensic Science Reform*, SMART ON CRIME (2011).

Across the country, states have acknowledged the importance of reforming investigative practices to improve the quality of the justice system, particularly those relating to eyewitness evidence. Under Attorney General Janet Reno, the National Institute of Justice (NIJ) convened a criminal justice system-wide Technical Working Group for Eyewitness Evidence, which closely studied the issue and developed recommendations.⁵ Since then, ten more years of peer-reviewed scientific research and jurisdictional practice has made the value of eyewitness identification reform even clearer. Ohio,⁶ North Carolina,⁷ New Jersey⁸ and West Virginia⁹ have all implemented at least some eyewitness identification reforms, with Georgia,¹⁰ Maryland,¹¹ Vermont¹² and Wisconsin¹³ also taking statewide action on the issue. In addition, cities across the nation such as Dallas, Texas¹⁴ and Denver, Colorado,¹⁵ as well as small jurisdictions such as Northampton, Massachusetts,¹⁶ have adopted and implemented such reforms. During her tenure as Hennepin County Attorney, Senator Amy Klobuchar (D-MN) instituted the entire eyewitness reform package; she also has been a public advocate of eyewitness reform, writing favorably about the practice in a law review article.¹⁷

Additionally, many jurisdictions have taken strides to update their policies on eyewitness identification and the use of line-ups, especially in response to the formal adoption of Standards 42.2.11 and 42.2.12 by the Commission on Accreditation for Law Enforcement Agencies, Inc., which require accredited bodies to have written policies regarding their administration of identification procedures.¹⁸

Critical reforms have also been undertaken in the area of custodial interrogations. Eleven states and the District of Columbia have passed legislation requiring the recording of custodial

⁵ These recommendations are formalized in National Institute of Justice manuals. See U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>; U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT (2003), available at <http://www.ncjrs.gov/nij/eyewitness/188678.pdf>.

⁶ OHIO REV. CODE ANN. § 2933.83 (2010).

⁷ N.C. GEN. STAT. § 15A-284.52 (2009).

⁸ Memorandum from John J. Farmer, Jr., N.J. Attorney General, on Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001) available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

⁹ W. VA. CODE, § 62-1E-1, et seq. (West, Westlaw through 2010 2nd Extraordinary Sess.).

¹⁰ H.R. Res. 352, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

¹¹ MD. CODE ANN. PUB. SAFETY § 3-506 (2005).

¹² Vt. Act No. 154 of 2010 (Adj. Sess.) § 238e.

¹³ WIS. STAT. ANN. § 175.50 (West, Westlaw through 2009 Act 406).

¹⁴ Dallas Police Department General Order 304.01 *Eyewitness Identification*.

¹⁵ DENVER POLICE DEPARTMENT, OPERATIONS MANUAL, LINE-UP PROCEDURE, § 104.44, available at <http://www.denvergov.org/Portals/326/documents/104.pdf>.

¹⁶ NORTHAMPTON ADMINISTRATION & OPERATIONS MANUAL, EYEWITNESS IDENTIFICATION PROCEDURE ch. 0-408.

¹⁷ Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381 (2006).

¹⁸ Commission on Accreditation for Law Enforcement Agencies, 5th Edition Change Notices (2010), available at: <http://www.iacllea.org/visitors/professionaldevelopment/accreditation/5thEditionChangeNotices.pdf>.

interrogations in at least some crime categories statewide, and seven state supreme courts have taken action to accomplish the same.¹⁹ In addition, over 750 jurisdictions nationwide, including large metropolitan areas such as Atlanta, Boston, Denver, Las Vegas, Louisville and San Francisco, regularly record police interrogations.²⁰ The Effective Law Enforcement Through Transparent Interrogations Act of 2007,²¹ introduced by Representative Keith Ellison (D-MN), would have required the electronic recording of custodial interrogations in federal criminal cases. A similar bill was introduced in the House in September 2010 by Representative Hank Johnson (D-GA).²² Further, the Uniform Law Commission recently approved a uniform law on the Electronic Recordation of Custodial Interrogations in order to spur needed reform.²³

Additionally, the use of “incentivized” informant testimony is being steadily recognized as dangerously unreliable in its present form. The state of Illinois was the first to officially recognize this, passing legislation that would regulate the use of incentivized informants, and thus enhance jurors’ ability to properly assess the credibility of such evidence.²⁴ The California Commission on the Fair Administration of Justice and the New York State Bar Association Task Force on Wrongful Convictions have also publicly recognized the need to reform this area of evidence, such as by requiring the electronic recording of the informant’s statements and holding pre-plea and pre-trial reliability/corroboration hearings.²⁵

Recognizing that invalid or improper forensic evidence leads to false convictions, 32 states and the District of Columbia have created legislation that compels the automatic preservation of biological evidence upon conviction.²⁶ The preservation of evidence is critical to preserving the possibility of exoneration for the innocent; none of the nation’s 265 DNA exonerations would have

¹⁹ 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West, Westlaw through P.A. 96-1482 of the 2010 Reg. Sess.); ME. REV. STAT. ANN. tit. 25, § 2803-B (West, Westlaw through the 2009 2nd Reg. Sess. of the 124th Leg.); MD. CODE ANN., CRIM. PROC. § 2-402 (West, Westlaw through 2010 Reg. Sess. of Gen. Assem.); MO. ANN. STAT. § 590.700 (West, Westlaw through 2010 1st Extraordinary Sess. of the 95th Gen. Assem.); MONT. CODE ANN. § 46-4-401, et seq. (1999); NEB. REV. STAT. ANN. § 29-4501, et seq. (West, Westlaw through the 101st Leg. 2nd Reg. Sess. 2010); N.C. GEN. STAT. ANN. § 15A-211 (West, Westlaw through 2010 Sess.); OHIO REV. CODE ANN. § 2933.81 (West, Westlaw through 2010 File 58 of the 128th GA); OR. REV. STAT. ANN. § 133.400 (West, Westlaw through 2010 Spec. Sess.); WIS. STAT. ANN. § 972.115 (West, Westlaw through 2009 Act 406); D.C. Code § 5-116.01 (2005).

²⁰ H.R. 3027, 110th Cong. (2007), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-110hr3027ih/pdf/BILLS-110hr3027ih.pdf>.

²¹ H.R. 3027, 110th Cong. (2007).

²² H.R. 6245; 111th Cong. (2010).

²³ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT, *available at* <http://www.law.upenn.edu/bll/archives/ulc/erci/2010final.htm>.

²⁴ 725 ILL. COMP. STAT. ANN. 5/115-21 (West, Westlaw through P.A. 96-1482 of the 2010 Reg. Sess.)

²⁵ CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, REPORT AND RECOMMENDATIONS REGARDING INFORMANT TESTIMONY, *available at* <http://www.ccfaj.org/documents/reports/jailhouse/official/Official%20Report.pdf>; NEW YORK STATE BAR ASSOCIATION, TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT (2009), at 114-20, *available at* <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf>.

²⁶ Innocence Project, State Laws Requiring Preservation of Evidence, <http://www.innocenceproject.org/news/LawView4.php> (last visited Jan. 10, 2011)

been possible had the biological evidence not been available to test.²⁷ In the wake of a national series in the *Denver Post* on the failure to properly preserve evidence, Representative John Conyers (D-MI) and then-Senator Ken Salazar (D-CO) expressed interest in pushing this reform on the federal level.²⁸ Recognizing the need for federal direction to the states on proper evidence retention, the NIJ disbursed funds to the National Institute of Standards and Technology (NIST) to create a federal working group on the issue. In the summer of 2010, the NIST/NIJ Technical Working Group on Biological Evidence Preservation began its critical work towards identifying and recommending model legislation and best practices for the preservation of biological evidence.²⁹

These time-tested and scientifically supported reforms, bolstered by practitioner experience, should be implemented across the nation. Continued federal guidance through research, consensus, and practice will help states appreciate the value of these reforms. Prioritizing federal funding support for agencies adopting such reforms would promote the effectiveness of such guidance.

RECOMMENDATIONS

1. Eyewitness Identification Reform

A. *Eyewitness Misidentification is the Leading Factor of Wrongful Convictions*

Mistaken eyewitness identifications have contributed to approximately 75% of the 265 wrongful convictions in the United States overturned by post-conviction DNA evidence.³⁰ Inaccurate eyewitness identifications confound investigations from the earliest stages: critical time investigation is lost while police focus on building the case against a misidentified innocent person.

²⁷ Innocence Project, Preservation of Evidence (last visited Jan. 20, 2011), *available at*: http://www.innocenceproject.org/Content/Preservation_Of_Evidence.php.

²⁸ See Miles Moffiet, *Evidence: Case, Kin in Limbo*, DENVER POST, Sept. 24, 2007; Press Release, Office of Congresswoman Eddie Bernice Johnson, Congresswoman Eddie Bernice Johnson to hold panel discussions on wrongful incarcerations and DNA exonerations (July 17, 2008), *available at*: <http://gritsforbreakfast.blogspot.com/2008/07/conyers-in-dallas-for-panel-on-wrongful.html>.

²⁹ Interview with Rebecca Brown, Policy Advocate and Member of the NIST/NIJ Technical Working Group on Biological Evidence Preservation, Innocence Project in New York, N.Y. (Jan. 3, 2011).

³⁰ The Innocence Project, Eyewitness Misidentification, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Jan. 20, 2011).

B. *Support Eyewitness Identification Reform Measures*

Legislative

Congress should pass legislation requiring federal law enforcement agencies to adopt and implement eyewitness identification procedures shown by reliable, scientifically-supported evidence to minimize the likelihood of misidentification.³¹ These measures include:

- The requirement that the identification procedure be administered by a blind investigator (i.e., an individual who does not know who the suspect is);
- The issuance of instructions to the witness (i.e. a series of statements provided by the administrator of the identification procedure to the witness that deter the witness from feeling compelled to make a selection);
- The requirement that a lineup be properly composed (i.e. suspect photographs should be selected that do not bring unreasonable attention to him or her; non-suspect photographs and/or live lineup members (fillers) should be selected based on their resemblance to the description provided by the witness – as opposed to their resemblance to the police suspect);
- The requirement that immediately after the eyewitness makes an identification, the witness provides a statement, in her or his own words, that articulates the level of confidence she or he has in the identification made; and
- The requirement that an identification procedure be properly documented (i.e. electronically recorded; photographs of lineup members preserved).

Executive

The President should issue an executive order requiring the promulgation of federal standards for federal law enforcement agencies – grounded in best practices and scientifically-supported research – with respect to eyewitness identification procedures. The issuance of such an order would also provide much-needed guidance to state law enforcement agencies. Specifically, the executive order should require the adoption and implementation of those eyewitness identification procedures that have been shown by reliable, scientifically-supported evidence to minimize the likelihood of misidentification.

³¹ See Stephen Saloom, *Improving Eyewitness Identification Procedures* (Commission on Accreditation for Law Enforcement Agencies, Inc., October 2009), available at: <http://www.calea.org/calea-update-magazine/issue-101/improving-eyewitness-identification-procedures>.

2. Records of Custodial Interrogations

A. *False Confessions Contribute to Wrongful Convictions*

False confessions are a more frequent occurrence than one might think; approximately 25 % of the nation's 265 wrongful convictions overturned by DNA evidence involved some form of a false confession or admission.³²

B. *Support the Mandatory Recordation of Custodial Interrogations*

Legislative

Congress should pass legislation that would require federal law enforcement agencies to electronically record all custodial interrogations during the time in which a reasonable person in the subject's position would consider himself to be in custody. Such legislation should render any un-taped confession inadmissible in court.

Executive

The President's executive order, mentioned above, should require the electronic recordation of all custodial interrogations during the time in which a reasonable person in the subject's position would consider him- or herself to be in custody. This is the most reliable way to create an objective record of what transpired during the course of the interrogation process.

3. Preservation of Biological Evidence

A. *The Preservation of Biological Evidence is Integral to the Discovery of Wrongful Convictions*

Preserved evidence can help solve closed cases – and exonerate the innocent. Had the evidence been destroyed, tainted, contaminated, mislabeled, or otherwise corrupted, the innocence of the nation's 265 exonerated individuals would never have come to light.

B. *Fund Measures that Support States' Preservation of Biological Evidence*

Legislative

In 2004, Congress passed the Innocence Protection Act as part of the larger Justice for All Act (JFAA).³³ The JFAA included an incentive to states to enable proper post-conviction DNA testing

³² Innocence Project, Understand the Causes: False Confessions, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Jan. 10, 2011).

³³ Justice for All Act of 2004, Pub. L. No. 108-405 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

by providing grants to states with proper policies and practices for the preservation of biological evidence and post-conviction DNA testing. Specifically, JFAA Section 413 awarded funds if states could demonstrate that they had certain procedures for preserving biological evidence and providing access to post-conviction DNA testing. The funds could be awarded in four areas:

- DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;³⁴
- DNA Research and Development;³⁵
- DNA Identification of Missing Persons;³⁶ and
- Kirk Bloodsworth Post-Conviction DNA Testing Grant Program (Bloodsworth Program).³⁷

The Bloodsworth Program was the only grant program governed by the JFAA Section 413 innocence incentives that was actually funded in a manner consistent with JFAA intent. Currently, only 23 states meet Section 413 evidence preservation requirements. In order to encourage more states to comply, Congress should reauthorize the Section 413 requirement and appropriate the programs according to JFAA's original intent.

4. The Use of Incentivized Testimony

A. *The Use of Incentivized Testimony is a Demonstrated Cause of Wrongful Conviction*

A comprehensive study of the nation's first 200 exonerations proven through DNA testing concluded that 18% were wrongfully convicted, at least in part, on the basis of informant, jailhouse informant, or cooperating alleged co-perpetrator testimony.³⁸ Informant testimony is an undeniably valuable law enforcement tool, but it generally functions in service of only one side of the adversarial system and with little oversight.³⁹

³⁴ 42 U.S.C. 14136 (corresponds to the Justice for All Act of 2004, § 303).

³⁵ 42 U.S.C. 14136(b) (corresponds to the Justice for All Act of 2004, § 305).

³⁶ 42 U.S.C. 14136(d) (corresponds to the Justice for All Act of 2004, § 308).

³⁷ 42 U.S.C. 14136(e) (corresponds to the Justice for All Act of 2004, § 412).

³⁸ Innocence Project, *Understand the Causes: Informants / Snitches*, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited Jan. 10. 2011).

³⁹ *See generally*, ALEXANDRA NAPATOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (NYU Press 2009).

B. *Regulate the Use of Incentivized Testimony*

Legislative

Congress should pass legislation that includes provisions that regulate the use of incentivized informants by:

- Requiring pre-plea and pre-trial hearings that assess reliability and corroborate the content of informant testimony in all cases where informant testimony is intended for use at trial or in connection with a plea agreement;
- Requiring that accomplice testimony be corroborated by non-accomplice testimony and/or evidence — both in the grand jury and at trial — before it can be deemed legally sufficient to establish either probable cause or guilt beyond a reasonable doubt;
- Approving jury instructions that seek both to educate jurors about the long-established fallibility of informant testimony and the specific factors that may have influenced the testimony in the particular case at hand;
- Requiring that the FBI produce FD-209 forms (regarding contacts with informants) pursuant to discovery; and
- Establishing a uniform system of state and federal informant registries, through which law enforcement officers would maintain information about informants, as well as a national informant registry.

Executive

The President's executive order should regulate the use of incentivized informants by implementing the procedures listed above.

5. **Crime Scene Comparisons to CODIS and IAFIS**

A. *Crime Scene Comparisons can Exculpate the Innocent and Inculpate the Guilty*

In 119 of the nation's 265 DNA exonerations, the real perpetrator was subsequently identified, many times through the use of the Combined DNA Index System (CODIS).⁴⁰ In many

⁴⁰ Interview with Dr. Emily West, Research Director, Innocence Project in New York, N.Y. (Jan. 3, 2011). Among the first 255 exonerations, 94 real perpetrators have been identified (affecting 111 exonerees), among which nearly half were convicted of additional violent crimes. *Id.*

instances, the person subsequently identified as the real perpetrator committed additional crimes after committing the crime for which an innocent person was convicted.⁴¹

As a result, it would be in the interest of justice to compare specific crime scene evidence to CODIS or the Integrated Automated Fingerprint Identification System (IAFIS), the national DNA database system administered by the FBI. Sometimes prosecutors choose not to order such comparisons, and judges have refused to so order, believing that to do so would be beyond their judicial authority. As a result, the lack of a clear grant of authority entitling such comparisons can perpetuate the injustice of a wrongful conviction.⁴²

B. Compare Crime Scene Evidence to Federal Databases

Legislative

Congress should pass legislation to enable federal judges to order comparisons of crime scene DNA and fingerprint evidence to relevant databases.

Executive

The Executive Branch should clarify, through executive order or other policy guidance, that CODIS and IAFIS administrators should be responsive to judicial orders requesting comparisons of crime scene evidence to the CODIS and IAFIS databases.

⁴¹ The 44 real perpetrators who went on to commit additional violent crimes, including 61 sexual assaults, 21 murders and 9 other violent crimes. *Id.*

⁴² For example, Jeff Deskovic, an exoneree from New York, sought a comparison of crime scene evidence to the New York DNA database. It was only after a “hit” to the database that inculpated a convicted murderer that he was able to be exonerated. See Innocence Project, Know the Cases, Jeff Deskovic, http://www.innocenceproject.org/Content/Jeff_Deskovic.php (last visited Jan. 10, 2011).

APPENDICES

Experts

Barry Scheck, Co-Founder, Innocence Project
(<http://www.innocenceproject.org/about/Contact-Us.php>)

Peter Neufeld, Co-Founder, Innocence Project
(<http://www.innocenceproject.org/about/Contact-Us.php>)

Exonerees: many of the nation's 265 DNA exonerees will speak in support of and the need for these reforms (<http://www.ccfaj.org/m-JohnVanDeKamp.html>)

Eyewitness Identification

Chief Darrel Stephens (retired), Charlotte-Mecklenburg Police Department, North Carolina

Kenneth Patenaude, Detective Lieutenant, Northampton, Massachusetts

Gil Kerlikowske, former Police Chief of Seattle, Washington; current Director of the Office of National Drug Control Policy

Ret. Sgt. Paul Carroll, Chicago Police Department

Andrew Evans, Special Agent, Minnesota Bureau of Criminal Apprehension

Susan Gaertner, Former Ramsey County Attorney, Minnesota

Recording of Custodial Interrogations

Det. James Trainum (retired), Violent Crime Case Review Project, Violent Criminal Apprehension Program/ViCAP, Metropolitan Police Department/OSD

Preservation

Major Kevin Wittman (retired), Charlotte-Mecklenburg Police Department

Further Resources

AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* (2006).

ALEXANDRA NAPATOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (NYU Press 2009).

BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (New American Library 2000).

Justice for All Act of 2004, Pub. L. No. 108-405 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h5107enr.txt.pdf.
Innocence Project, www.innocenceproject.org (last visited Jan. 10, 2011).

U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999), *available at* <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, *EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT* (2003), *available at* <http://www.ncjrs.gov/nij/eyewitness/188678.pdf>.

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CHAPTER 4

FEDERAL GRAND JURY REFORM

THE ISSUE

In the words of William J. Campbell, a former federal chief judge in Chicago, “[t]he grand jury is the total captive of the prosecutor, who, if he is candid, will concede that he can indict anybody, at any time, for almost anything before any grand jury.”¹ This allocation of power is completely at odds with the constitutional responsibilities (not to mention considerable burdens) of grand jury service. Congress should work with the administration to empower federal grand jurors and address the institution’s long-neglected shortcomings. Most importantly, anyone facing the awesome power of a federal prosecutor armed with a federal grand jury should be allowed to have counsel.

HISTORY OF THE PROBLEM

While the federal grand jury was originally intended to serve both a screening and investigative function,² modern grand jury procedures are incompatible with the screening function. It is only before a grand jury that the government can compel someone to appear and face questioning without an attorney.³ The rules of evidence that govern trials do not apply to grand jury proceedings, opening the door to illegally seized evidence, coerced statements, and hearsay.⁴ The target of an investigation has no right to testify or present evidence, nor is the prosecutor required to present the grand jury with evidence that would exculpate the target.⁵ Many states have fixed these and other flaws without impairing the effectiveness of their grand jury systems, as evidenced by a report from National Association of Criminal Defense Lawyers (NACDL) examining the experience in Colorado and New York.⁶

Congressional attempts at federal grand jury reform date back to the late 1970s. From 1977-1987, Representative John Conyers (D-MI), among others, introduced various bills incorporating reforms to grand jury procedures.⁷ In 1998, Senator Dale Bumpers (D-AR) introduced the Grand Jury Due Process Act⁸, to provide a right to assistance of counsel in the grand jury room, and the more comprehensive Grand Jury Reform Act⁹. In July 1998, Senator Bumpers offered his right-to-counsel proposal as an amendment to an appropriations bill,¹⁰ but it was defeated 59-41.¹¹

¹ William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 180 (1973).

² *Id.* at 175.

³ John Weasley Hall, *A Fairer and More Democratic Federal Grand Jury System*, 20 FED. SENT’G REP. 334, 334 (June 2008).

⁴ *Id.*

⁵ *Id.*

⁶ National Association of Criminal Defense Lawyers, *Proposals of Commission to Reform the Grand Jury*, <http://www.nacdl.org/public.nsf/freeform/grandjuryreform?opendocument> (last visited Jan. 21, 2011).

⁷ *See id.* at note 27 (providing examples of various bills incorporating grand jury reforms).

⁸ S. 2030, 105th Cong. (1998).

⁹ S. 2289, 105th Cong. (1998).

¹⁰ S. Amdt. 3243 to S. 2260, 105th Cong. (1998).

¹¹ National Association of Criminal Defense Lawyers, *Federal Grand Jury Reform*, <http://www.nacdl.org/public.nsf/freeform/grandjury?opendocument>.

In 1999, in the wake of alleged grand jury abuses by Independent Counsel Kenneth Starr, Representative Bill Delahunt (D-MA), a former state prosecutor, announced his intention to introduce a bill mandating comprehensive changes in the way federal grand juries operate.¹² In 2000, the House Constitution Subcommittee held a hearing on grand jury reform, but Rep. Delahunt's grand jury bill was never introduced.¹³ Senator Arlen Specter, who had voted in favor of the 1998 Bumpers amendment, scheduled a Judiciary Committee hearing regarding the federal grand jury system for November 16, 2005, but other matters forced him to postpone.

The courts have largely abdicated any responsibility for policing the conduct of prosecutors within the grand jury room. Chapter 9-11 of the United States Attorneys' Manual (USAM), which contains the Department of Justice's (DOJ) policy on grand jury practice,¹⁴ does not contain guidance on filling this power vacuum. Further, the USAM is not enforceable at law, and fails to address the most glaring grand jury inequities. Where the USAM does speak to a particular issue—such as the naming of an unindicted coconspirator or a target's request to testify—the policy is generally consistent with the proposals outlined here.¹⁵ In these areas, DOJ's opposition, essentially an effort to avoid being bound by its own policies, is particularly unjustifiable.

As required by the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1999¹⁶, the Advisory Committee on Criminal Rules of the Judicial Conference Committee on Rules of Practice and Procedure (Judicial Conference) submitted a report¹⁷ evaluating whether an amendment to the Federal Rules of Criminal Procedure governing grand juries¹⁸ to permit the presence of counsel for a witness testifying before the grand jury in the grand jury room would further the interests of justice and law enforcement. In recommending against such an amendment, the Judicial Conference's five-page report relies extensively on a 1975 Judicial Conference report, which identified the three principal reasons for not allowing an attorney in the attorney room as concern that such practice would result in : “(i) loss of spontaneity in testimony; (ii) transformation of the grand jury into an adversary proceeding; and (iii) loss of secrecy, with a resultant chilling effect on witness cooperation, particularly in cases involving multiple representation.”¹⁹

¹² Sam Skolnik, *Grand Jury: Power Shift?*, LEGAL TIMES, Apr. 12, 1999, available at <http://truthinjustice.org/grandjury.htm>.

¹³ See *Constitutional Rights and the Grand Jury: Oversight Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, available at <http://judiciary.house.gov/legacy/constitution.htm>.

¹⁴ U.S. DEPT. OF JUST., U.S. ATTORNEYS' MANUAL, CRIMINAL DIVISION, GRAND JURY, § 9-11.000 (2002), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm#.

¹⁵ *Id.* at §9-11.130.

¹⁶ H.R. 4276, 105th Cong. (1998), § 622.

¹⁷ U.S. Judicial Conference Committee on Rules of Practice and Procedure, Meeting Minutes (Jan. 7-8, 1999), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/jan1999.pdf>.

¹⁸ FED. R. CRIM. P. 6, available at <http://www.law.cornell.edu/rules/frcrmp/Rule6.htm>.

¹⁹ U.S. Judicial Conference, *supra* note 17, at 14 (noting time frame provided by Congress was too short for comprehensive study and indicating reliance on past study).

RECOMMENDATIONS

1. A Fairer and More Democratic Federal Grand Jury System

A. *The Federal Grand Jury Process Fails to Respect the Constitutional Responsibilities and Burdens of Grand Jury Service and Fails to Protect Citizens and Businesses*

The federal grand jury today functions primarily as a tool of the federal prosecutor. Employing the power of compulsory process in a secret proceeding, the prosecutor investigates and determines, with virtually no check, who will be indicted and on what charges. The grand jury process is largely devoid of legal rules, allowing the prosecutor to exercise enormous power unrestrained by law or judicial supervision.

B. *Enhance the Role of Federal Grand Jurors and Address the Institution's Long-Neglected Shortcomings*

Legislative

Congress should pass comprehensive legislation to strengthen the grand jury's screening function; empower grand jurors; and protect the rights of witnesses, subjects, and targets of grand jury investigations. Congress should make the following changes to existing legislation:

- Amend Rule 6 of the Federal Rules of Criminal Procedure to allow a witness before the grand jury who has not received immunity to be accompanied by counsel in his or her appearance before the grand jury;²⁰
- Amend Rule 6 of the Federal Rules of Criminal Procedure to require that prosecutors present evidence in their possession that tends to exonerate the target or subject (other than prior inconsistent statements or *Giglio* material);²¹
- Prohibit prosecutors from presenting to the federal grand jury evidence they know to be constitutionally inadmissible at trial because of a court ruling on the matter by amending Rule 6 of the Federal Rules of Criminal Procedure;²²
- Amend Rule 6 of the Federal Rules of Criminal Procedure to provide a target or subject of a grand jury investigation the right to testify before the grand jury;²³

²⁰ FED. R. CRIM. P. 6(d), available at <http://www.law.cornell.edu/rules/frcrmp/>.

²¹ *Id.* at 6.

²² *Id.*

²³ *Id.*

- Provide witnesses the right to receive a transcript of their federal grand jury testimony by amending Rule 6 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500.²⁴
- Amend Rule 7 of the Federal Rules of Criminal Procedure to prohibit the practice of naming persons in an indictment as unindicted co-conspirators to a criminal conspiracy;²⁵
- Require that prosecutors give *Miranda* warnings to all non-immunized subjects or targets called before a federal grand jury by amending Rule 6 of the Federal Rules of Criminal Procedure;²⁶
- Require that all subpoenas for witnesses called before a federal grand jury are issued at least 72 hours before the date of appearance, not to include weekends and holidays, unless good cause is shown for an exemption by amending Rule 6 or 17 of the Federal Rules of Criminal Procedure;²⁷
- Amend Rule 6 of the Federal Rules of Criminal Procedure to: (i) give federal grand jurors meaningful jury instructions, on the record, regarding their duties and powers as grand jurors, and the charges they are to consider; (ii) record and make available to the accused all of the prosecutor’s instructions, recommendations, and commentary to grand jurors after an indictment and during pre-trial discovery; and (iii) grant the court discretion to dismiss an indictment, with or without prejudice, in the event of prosecutorial impropriety reflected in the transcript;²⁸ and
- Prohibit the practice of calling before the federal grand jury subjects or targets who have stated personally or through counsel that they intend to invoke the constitutional privilege against self-incrimination by amending Rule 6 of the Federal Rules of Criminal Procedure.²⁹

Executive

DOJ should amend the United States Attorney’s Manual (USAM). While the USAM States includes certain admonitions regarding the conduct of grand jury investigations,³⁰ the Executive has authority to strengthen the USAM’s language. Moreover, the existing guidelines do not adequately protect against grand jury abuse, in part because the manual is unenforceable.

²⁴ *Id.*; 18 U.S.C. §3500.

²⁵ *Id.* at 7.

²⁶ *Id.* at 6.

²⁷ *Id.* at 6, 17.

²⁸ *Id.* at 6.

²⁹ *Id.*

³⁰ See generally, U.S. ATTORNEYS’ MANUAL, *supra* note 14, at §§ 9-11.101-9-11.140, 9-11.160.

APPENDICES

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CHAPTER 5

FORENSIC SCIENCE

THE ISSUE

Unvalidated or improperly applied forensic science contributed to approximately half of the 265 wrongful convictions overturned by post-conviction DNA testing,¹ leading to serious questions about the reliability of forensic analyses that the police and legal system use to determine innocence or guilt. In the landmark 2009 report, *Strengthening Forensic Science in the United States: A Path Forward*, the National Academy of Sciences recommended additional research and development of forensic science based on their finding that the validity and reliability of certain non-DNA forensic techniques had not yet been proven.² To accomplish the NAS report's goals, researchers must conduct more rigorous studies of non-DNA forensic techniques³, Congress must implement national standards based on this research, and the Department of Justice (DOJ) must oversee the system to ensure compliance and enforcement.

HISTORY OF THE PROBLEM

At its best, forensic science can help identify the perpetrator of a crime and help prevent the innocent from being wrongfully convicted. At its worst, it is the second-greatest contributing factor to wrongful convictions.⁴ As a consequence, not only are innocent individuals imprisoned but dangerous criminals remain free, posing significant risks for public safety. Indeed, those identified as the true perpetrators by post-conviction DNA testing have, as a group, been convicted of at least 81 violent crimes committed while free because of faulty forensic techniques.⁵ All of these later crimes occurred while the innocent person was either imprisoned or identified as the prime suspect in the criminal investigation.⁶

¹ See The Innocence Project, <http://www.innocenceproject.org> (last visited Jan. 10, 2011).

² NAT'L RESEARCH COUNCIL, NAT'L ACADEMY OF SCIENCES, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* 42 (2009) (hereinafter NAS Report), at 8.

³ The NAS report discusses a selected number of forensic science disciplines in Ch. 5 of the report. Forensic science disciplines such as "DNA analysis, serology, forensic pathology, toxicology, chemical analysis, and digital and multimedia forensics – are built on solid bases of theory and research, many other techniques have been developed heuristically. That is, they are based on observation, experience, and reasoning without an underlying scientific theory, experiments designed to test the uncertainties and reliability of the method, or sufficient data that are collected and analyzed scientifically." (p. 128) Among the non-DNA forensic disciplines that fall under the "heuristic" category are: friction ridge analysis, pattern/impression evidence such as shoeprints and tire tracks, tool mark and firearms identification, analysis of hair evidence, analysis of fiber evidence, questioned document examination, forensic odontology, and bloodstain pattern analysis. Other forensic disciplines that require more fundamental research include analysis of paint and coatings evidence and the analysis of explosives evidence and fire debris.

⁴ See The Innocence Project, *Unvalidated or Improper Forensic Science*, <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (last visited Jan. 10, 2011).

⁵ Innocence Project internal statistics for first 254 DNA exonerations. On file with author. <http://www.innocenceproject.org/about/Contact-Us.php>.

⁶ *Id.*

In contrast to post-conviction DNA testing, which has been thoroughly studied and subjected to the rigors of scientific peer review, other forms of forensic science continue to have glaring and persistent deficiencies. Because DNA is only available in 5 to 10 percent of violent crimes,⁷ it is imperative that Congress and the Administration address these scientific shortfalls. With this in mind and pursuant to the Justice for All Act of 2004 (JFAA), Congress and President Bush directed the National Academy of Sciences (NAS) to examine the fundamental underpinnings of forensic scientific evidence and its application to the criminal justice system. In February 2009, the NAS issued the report, *Strengthening Forensic Science in the United States: A Path Forward*.⁸

In the report, the NAS concluded that there is an insufficient scientific foundation for many non-DNA forensic science disciplines, and recommended establishing limits for their use and measures of performance where they are lacking.⁹ The NAS also described the United States forensic system as fragmented and lacking a means through which to foster forensic science advancements.¹⁰ Consequently, there is wide variability in the practice of forensic methods, laboratory capacity, oversight, staffing, certification of forensic practitioners, and accreditation of crime laboratories.¹¹ The NAS report recommended a number of changes that would make forensic science as reliable as life and physical sciences, and ensure that forensic science is applied scientifically, consistently, and fairly in the legal system.¹² The primary recommendation of the NAS report is the creation of a National Institute of Forensic Science (NIFS).¹³ The NAS envisions NIFS as an independent, science-based federal agency with strong ties to the forensic science community, but not committed in any way to the current law enforcement system.¹⁴

While the National Institute of Justice (NIJ) has been the center of forensic science funding, it did not begin to support forensic science research at the levels required until after the release of the NAS report. Moreover, NIJ's research was based on the mistaken assumption that the forensic techniques in question were valid. Furthermore, a 2010 NAS report evaluating NIJ's research program found that the agency allows practitioners to drive research funding practices, further calling into question NIJ's research and conclusions.¹⁵

Recent Congressional hearings on forensic science have focused on identifying an oversight body to coordinate research, standardize forensic techniques, and apply a more scientific framework to the field.¹⁶ Members of Congress expressed skepticism about the notion of a NIFS.

⁷ GARDNER AND ANDERSON, CRIMINAL EVIDENCE: PRINCIPLES AND CASES, Seventh Addition (2010), at 271.

⁸ NAS Report, *supra* note 2.

⁹ NAS Report, *supra* note 2, at 7-8.

¹⁰ NAS Report, *supra* note 2, at 14.

¹¹ NAS Report, *supra* note 2, at 14-18.

¹² NAS Report, *supra* note 2, at 19-33.

¹³ NAS Report, *supra* note 2, at 19.

¹⁴ *Id.*

¹⁵ NATIONAL ACADEMY OF SCIENCES, STRENGTHENING THE NATIONAL INSTITUTE OF JUSTICE (2010).

¹⁶ *Strengthening Forensic Science in the United States: the Role of the National Institute of Standards and Technology: Hearing Before the Subcomm. on Technology and Innovation of the H. Comm. on Science and*

However, the responsibilities of NIFS can be implemented using existing federal agencies in roles that are in line with their missions to bring the foundation of non-DNA forensic sciences more closely in line with other scientific disciplines and make the U.S. a market leader in forensic science technology. To ensure impartial funding, development, implementation and oversight of forensic science, the National Science Foundation (NSF) should provide research funding, and the National Institute for Standards and Technology (NIST) should develop standards for forensic science methods and practice. Further, if the DOJ is to oversee accreditation of laboratories, certification of forensic practitioners, compliance, and enforcement, lawmakers must ensure transparency and complete independence from the Department's law enforcement function.

The Senate Judiciary, House Judiciary, and House Science & Technology Committees have demonstrated interest in reforming forensic science in the wake of the NAS report. The House Committee on Science & Technology's Subcommittee on Technology and Innovation held a hearing on March 10, 2009, less than one month after the release of the report, to discuss the role of NIST in addressing the NAS report's recommendations. The next week, on March 18, 2009, the Senate Judiciary Committee held a hearing inviting the report's co-chair, Judge Harry T. Edwards, to discuss its recommendations. On May 13, 2009, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing to gain a similar general understanding of the report. On September 9, 2009, the Senate Judiciary Committee then held a second hearing to examine the report's recommendations with a broad array of criminal justice stakeholders.

Further, The White House Office of Science and Technology Policy has chartered a Subcommittee on Forensic Science under the National Science and Technology Council, which convenes a group of federal agencies with an interest in forensic science. Its role is to deliberate on how immediate Executive Branch actions might address the NAS report's recommendations and lay the groundwork for Congressional legislation.

The U.S. has already demonstrated that it can lead in the field of forensic science. Under President Bush, the United States both funded and supported the use of forensic DNA technology. This investment made the U.S. the world leader in DNA technology, while also creating public and private sector jobs. One example is the success of Bode Technology, one of the world's largest forensic DNA analysis firms. In 2010, it sold more than 3.5 million units of a DNA collection device and achieved its greatest sales ever, even in a struggling economy.¹⁷ Because fingerprint and

Technology, 111th Cong. (2009); *The Need to Strengthen Forensic Science in the United States: The National Academy of Science's Report on a Path Forward: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009); *The National Research Council's Publication "Strengthening Forensic Science in the United States: A Path Forward": Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm on the Judiciary*, 111th Cong. (2009); *Strengthening Forensic Science in the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Congress (2009).

¹⁷*Bode Technology Surpasses Sales Mark of 3.5 Million Buccal DNA Collectors, Expands With New Global And Domestic Territories*, MARKET WATCH, Nov. 12, 2010, available at: http://www.marketwatch.com/story/bode-technology-surpasses-sales-mark-of-35-million-buccal-dna-collectors-expands-with-new-global-and-domestic-territories-2010-11-12?reflink=MW_news_stmp.

firearms toolmarks are collected for use in criminal cases as frequently as DNA,¹⁸ a forensic system supported by robust research could open more new market opportunities. Such an investment, especially at this early stage, could yield commercial benefits and help maintain the U.S. leadership position in forensic science technology.

¹⁸ PETERSON, ET AL., THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS, GRANT REPORT, NCJ 231977 (2010), *available at*: <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/29203>.

RECOMMENDATIONS

1. Nurturing Forensic Science To Increase Public Safety and Access to Justice

A. *Non-DNA Forensic Science Requires Additional Research and Support*

Non-DNA forensic science lacks the foundational research, reliability and the national standards that characterize DNA forensics. Researchers must conduct more rigorous studies of non-DNA forensic disciplines to increase their validity and reliability. This research must be used, in turn, to set national standards for how to handle forensic evidence, and establish appropriate enforcement and compliance measures to ensure that forensic sciences can be applied accurately, consistently, and fairly in our legal system.

B. *Coordinate Federal Agencies to Create a Scientific Forensic Solution*

Legislative

Congress should continue to focus on forensic science reform, starting with taking steps toward improving the accuracy of forensic science. As a starting point, Congress should assign responsibility for funding research to the NSF and should direct NIST to use the NSF research to set national standards for the use of forensic methods. Congress should also direct the DOJ to oversee accreditation of laboratories, certification of forensic practitioners, compliance, and enforcement. Funding to support development and marketing new technologies should be distributed through NIST as well.

Executive

The executive branch should direct the NSF to develop a research agenda for forensic science. Additionally, the executive branch should direct NIST to develop a model laboratory report and model terminology for testimony to help make forensic services uniform and transparent to the courts. NIST should also consider other opportunities to address the need for uniform forensics-related standards where a body of research is sufficient.

DOJ could also support transparency by reinforcing the Congressional intent of the Paul Coverdell Forensic Science Improvement Grant Program. To accomplish this goal, the Office of Justice Programs (OJP) should provide better guidance to applicants about naming a qualified independent external government entity to conduct investigations under the Coverdell program's forensic oversight requirements. Additionally, OJP should make it easier for forensic employees, criminal justice practitioners and members of the public to file allegations of forensic negligence or misconduct and make sure labs are referring allegations to their investigative entities; and investigations taking place subsequent to the filing of allegations should be monitored to confirm the thoroughness and independence of investigations.

Judicial

Few judges across the country, especially those at the trial level, are aware of the NAS report or its implications. As gatekeepers of scientific evidence, it is imperative that local, state and federal judges receive adequate training on the NAS report and judicial decisions on the admissibility and treatment of forensic evidence in criminal courts. To this end, federal funding must be made available to judicial organizations to coordinate and conduct such trainings.

APPENDICES

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Harry T. Edwards, Judge, U.S. Court of Appeals for the District of Columbia Circuit, Co-Chair, NAS Committee on Identifying the Needs of the Forensic Sciences Community (<http://www8.nationalacademies.org/cp/projectview.aspx?key=48741>)

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Further Resources

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CHAPTER 6

INNOCENCE ISSUES

THE ISSUE

Across the nation, 265 wrongfully convicted individuals have been exonerated through post-conviction DNA testing since 1989.¹ Collectively, these men and women served more than 3,370 years in prison for crimes they did not commit. In 119 of the nation's first 265 DNA exonerations, the true perpetrators were identified in the process of settling claims of innocence, many of who had gone on to commit additional serious crimes while the innocent languished behind bars.²

These exonerations have demonstrated with absolute certainty that mistaken convictions can and do happen, in states across the country. Without access to DNA testing and preserved evidence, however, none of these exonerations would have been possible. Indeed, it is beyond question that many more wrongful convictions will never be identified because DNA evidence was destroyed and/or the innocent were prevented from having DNA evidence tested after their wrongful conviction.

HISTORY OF THE PROBLEM

1. History of the Justice for All Act

Recognizing this need, Congress passed, with overwhelming bi-partisan support, the Justice for All Act (JFAA) in 2004.³ Title IV of the JFAA, the Innocence Protection Act (IPA), established a funding mechanism to settle claims of innocence through post-conviction DNA testing, and produced a set of innocence protections. The Act has long been championed by Senator Patrick Leahy (D-VT), and members on both sides of the aisle, in both the House and Senate, have taken strides to reauthorize and re-appropriate its provisions.

Specifically, the innocence protection provisions of the JFAA include: a requirement that recipients of Paul Coverdell Forensic Science Improvement Grants (Coverdell Program)⁴ – a source of financial support to crime labs – certify the presence of a governmental entity positioned to conduct independent, external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of forensic results; the creation of the Kirk Bloodsworth Post Conviction Review Grant Program (Bloodsworth Program),⁵ which provides funding for post-conviction DNA case review and testing; and a directive that recipients of DNA Training and Education for Law Enforcement, Correctional Personnel and Court Officers, DNA Identification of Missing Persons, and DNA Research and Development) (Section 413 Programs) create statewide

¹ Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/> (last visited Jan. 10, 2011).

² Among the first 255 exonerations, 94 real perpetrators have been identified (affecting 111 exonerees, among which nearly half were convicted of additional violent crimes. These 44 real perpetrators went on to commit 61 sexual assaults, 21 murders and nine other violent crimes. Interview with Dr. Emily West, Research Director, Innocence Project in New York, N.Y. (Jan. 3, 2011).

³ Justice for All Act, Pub. L. No 108-405 (codified in scattered sections of 42 U.S.C.).

⁴ 42 U.S.C. § 3797k(4).

⁵ 42 U.S.C. 14136(e).

schema for both access to post-conviction DNA testing and adequate preservation of biological evidence.⁶

The Bloodsworth Program, in particular, has aided agencies seeking to help free the wrongfully convicted. The program's administrator, the National Institute of Justice (NIJ) has encouraged state applicants to draft proposals that fund a range of entities involved in settling innocence claims, from law enforcement agencies to crime laboratories. Additionally, the Bloodsworth Program has fostered the cooperation of innocence projects and state agencies. For example, with the \$1,386,699 that Arizona was awarded for fiscal year 2008, the Arizona Justice Project, in conjunction with the Arizona Attorney General's Office, began the Post-Conviction DNA Testing Project.⁷ Together, they have canvassed the Arizona inmate population, reviewed cases, worked to locate evidence, and filed joint requests with courts to have evidence released for DNA testing. In addition to identifying the innocent, Arizona Attorney General Terry Goddard has noted that the "grant enables [his] office to support local prosecutors and ensure that those who have committed violent crimes are identified and behind bars."⁸ Similar joint efforts have followed in Connecticut, Louisiana, Minnesota, North Carolina, and Wisconsin.⁹

In a laudable move that will help the Bloodsworth program – and, indeed, all states and localities – realize the probative potential of preserved biological evidence, the NIJ recently funded a National Institute of Standards and Technology project to create a national working group with the goal of identifying best practices relating to proper evidence preservation. The group had its first meeting in August 2010, and hopes to promulgate its recommendations and guidance to states by early fall 2012.¹⁰

2. Causes of Wrongful Convictions

It is not enough, however, to ensure that those wrongfully convicted men and women who remain in prison have the tools with which to prove their innocence. These compelling cases of wrongful convictions demand a conscientious review of what went wrong in these cases leading fact-finders to believe beyond a reasonable doubt that an innocent person was guilty of every element of these serious crimes. Those exonerated by DNA testing are not, after all, the only people who have been wrongfully convicted in recent decades. For every case that involves DNA evidence, there are

⁶ 42 U.S.C. § 14136 note.

⁷ Sandra Day O'Connor College of Law, *Arizona receives federal DNA grant*, COLLEGE OF LAW NEWS (Oct. 21, 2008), available at: <http://community.law.asu.edu/news/19167/Arizona-receives-federal-DNA-grant.htm%20%28last%20visited%20Jan.%202010,%202011%29>.

⁸ Press release, Justice Project, *Arizona Receives Federal DNA Grant* (October 9, 2008), available at: http://www.azag.gov/press_releases/oct/2008/Justice%20Project%20Release.pdf.

⁹ *Strengthening Our Criminal Justice System: Extending the Innocence Protection Act, Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2009) (statement of Keith Findley, Professor of Law, University of Wisconsin), available at: http://judiciary.senate.gov/hearings/testimony.cfm?id=4162&wit_id=8302.

¹⁰ Interview with Rebecca Brown, Policy Advocate and Member of the NIST/NIJ Technical Working Group on Biological Evidence Preservation, Innocence Project in New York, N.Y. (Jan. 3, 2011).

many that do not. Reviewing the cases of those for whom DNA has proven innocence helps to pinpoint weaknesses in the justice system that, if addressed, can reduce the number of wrongful convictions. Learning from wrongful convictions does not just protect the innocent; it also enhances the accuracy and efficacy of our criminal investigations. Every time an innocent person is wrongfully suspected, arrested, prosecuted, or convicted, the justice system's focus is distracted from the real perpetrators of these serious crimes, and public safety is put at risk.

In response to the proliferation of wrongful convictions across the country, many states have formed statewide commissions to identify and remedy the causes of wrongful conviction.¹¹ These efforts have proven incredibly valuable in those states, but because these causes transcend state borders, a more uniform and comprehensive approach to learning from wrongful convictions would be of tremendous value to the nation as a whole.

Last year, Senators Jim Webb (D-VA), Lindsey Graham (R-SC), and Orrin Hatch (R-U), along with Representatives William Delahunt (D-MA), Darrell Issa (R-CA), Marcia Fudge (D-OH), Tom Rooney (R-FL), and House Crime Subcommittee Chairman, Robert Scott (D-VA), introduced the National Criminal Justice Commission Act of 2010 (S. 714 111th Cong. (2010); H.R. 5143, 111th Cong. (2010)), which would create a commission to study and recommend reform of the broader criminal justice system.¹² The bill passed in the House in July with a voice vote and awaited passage in the Senate.¹³ Integral to such an examination of criminal justice reform is an analysis of wrongful convictions and their causes, as they reflect deeper concerns with the system as a whole. Indeed, a federal inquiry into the causes of wrongful convictions will strengthen the capacity of the criminal justice system to make guilt/innocence determinations more accurate, promising in turn to provide guidance to states in their efforts to bolster their respective fact-finding endeavors.

3. Compensation for the Wrongfully Convicted

Just as it is important to learn from and seek to prevent wrongful convictions, it is also imperative that those men and women who suffered wrongful conviction and imprisonment be fully compensated for that harm. Twenty-seven states and Washington D.C. provide a statutory scheme by which to compensate the exonerated.¹⁴ Such compensation is critical to the ability of the wrongfully convicted to rebuild their lives in earnest. These men and women face a myriad of significant challenges to successfully returning to the community from which they were wrongfully removed. Upon their release from prison, these individuals deserve, at a minimum, the removal of avoidable financial roadblocks in their efforts to begin their lives anew.

In an effort to ensure that wrongful conviction recoveries are not unfairly taxed as income, Representative John Larson (D-CT) and Senator Charles Schumer (D-NY) introduced the Wrongful

¹¹ See, Innocence Project, *Innocence Commissions in the U.S.*, http://www.innocenceproject.org/Content/Innocence_Commissions_in_the_US.php (last visited Jan 20, 2011).

¹² S. 714, 111th Cong. (2010); H.R. 5143, 111th Cong. (2010).

¹³ *H.R. 5143: National Criminal Justice Commission Act of 2010*, NEW YORK TIMES, <http://politics.nytimes.com/congress/bills/111/hr5143>.

¹⁴ Innocence Project, *State Compensation Laws*, <http://www.innocenceproject.org/news/LawView1.php> (last visited Jan. 10, 2011).

Conviction Tax Relief Act of 2010 (H.R. 4743, 111th Cong. (2010)).¹⁵ The bill would have clarified federal tax law so that compensation awards received are not subject to federal income tax. The legislation would have also provided the wrongfully convicted with an income tax credit on payroll taxes paid over the same earnings.

The unique horrors suffered by the 265 men and women who have spent an average of 13.2 years behind bars for crimes they did not commit compel action. Otherwise, their lost years – and the relationships, professional development and life experiences that they lost with them – will have been in vain.

RECOMMENDATIONS

1. The Justice for All Act

A. *The Justice for All Act is Not Being Enforced to its Full Potential.*

The JFAA, legislation passed by a bi-partisan Congress, represents a significant step towards uncovering and preventing wrongful convictions. The incentives and programs it created to make testing post-conviction DNA – and thus the discovery of the wrongly convicted and the real perpetrator – possible, must continue to be enforced and funded.

B. *Ensure Effective Administration of the Justice for All Act.*

Legislative

Congress, through its Judiciary Committees, should ensure the reauthorization of all four programs governed by the Section 413 innocence protection requirements, through FY 2014. These Section 413 programs were written to ensure that states and localities receiving federal funding possess schema for biological evidence retention and post-conviction DNA testing. In doing so, Judiciary Committee members should consider the Department of Justice’s proposal to amend the JFAA’s language to more easily allow for the disbursement of program funds.

As a result of its stated difficulty in administering the Bloodsworth Program in years past, the Department of Justice sought the following provisional language to loosen Section 413 grant requirements and assure the disbursement of unspent, unobligated funds, as well as those funds for the remaining fiscal years in the funding cycle:¹⁶

¹⁵ H.R. 4743, 111th Cong. (2010).

¹⁶ *Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs? Hearing Before the S. Comm. on the Judiciary, . 110th Cong., 2d Sess., 27 (2008) (testimony of Dr. John Morgan).*

\$5,000,000 shall be for the purposes described in the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program (Public Law 108-405, section 412): Provided, that unobligated funds appropriated in FY 2006 and FY 2007 for grants as authorized under sections 412 and 413 of the foregoing Public Law are hereby made available, instead, for the purposes herein before specified....¹⁷

The Department of Justice represented that this provisional language freed them from the constraints of the JFAA's authorizing language, and would ultimately allow for the disbursement of funds associated with this grant program.¹⁸ This language should also apply to the other Section 413 Programs when reauthorized, so that states have a strong incentive to comply with the innocence protections sought in the JFAA.

The Appropriations Committees should continue to fund these critical programs at current levels, through either the current or proposed disbursement language discussed above.

Finally, Congress, through the work of the Judiciary Committees, should maintain the present statutory forensic oversight requirements for the Coverdell Program. These oversight requirements are central to ensuring that the states are equipped to discover errors in forensic examinations – errors that may lead to wrongful convictions.

Executive

The Department of Justice, through the Office of Justice Programs (OJP), is well-positioned to ensure vigorous enforcement of the JFAA. OJP should loosen current procedural and administrative burdens on potential Bloodsworth Program applicants (e.g. certification from the Chief Legal Officer) to achieve even distribution of post-conviction DNA testing monies across deserving applicant states and localities in need.

Additionally, OJP should more rigorously enforce the forensic oversight requirements of the Coverdell Program by verifying the existence of the appropriate forensic oversight entity and process upon an applicant's application for such funds. OJP should also track state and local responses to allegations of negligence or misconduct in forensic analyses in a way that ensures that such responses are in line with the program's purpose, and that allow it to take appropriate measures if such responses are not.

¹⁷ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161.

¹⁸ *Id.*

2. Addressing Innocence through a Federal Commission

A. *Wrongful Convictions are an Issue Nationwide; They do not Stop at State Borders*

Each DNA exoneration should be looked upon as an opportunity to identify both the criminal justice system's shortcomings, and the remedial steps that can be taken to prevent other wrongful convictions. The federal government is particularly well-positioned to help analyze the nation's exonerations and to promulgate suggestions for state reforms.

B. *Establish a Federal Commission to Address Causes and Remedies of Wrongful Convictions*

Legislative

Congressional members should reintroduce and work to pass the National Criminal Justice Commission Act,¹⁹ a legislative proposal which would create a commission to study and recommend reform of the broader criminal justice system, and ensure that innocence issues are included in the commission's work.

In the alternative, Congress should pass legislation that would establish an independent, federal innocence commission. Appropriate appointments are critical. Whether established through legislative action or executive order, as suggested below, such a commission should have independent investigative powers, and be comprised of key players from throughout the criminal justice system, including: prosecutors, judges, law enforcement officials, defense attorneys, forensic scientists, crime lab representatives, victim advocates, the wrongfully convicted, and Innocence Project representatives.

This commission should be charged with examining post-conviction DNA exoneration cases to establish the causes of wrongful conviction in each case. The commission should also be responsible for recommending reforms to the federal criminal justice system, and creating a template of such legislative and administrative reforms that could then be adopted by the individual states. Key features of an effective commission include access to first-rate investigative resources, political independence, and subpoena power.

Executive

The President should issue an Executive Order establishing a presidential innocence commission with the same foci as discussed above.

¹⁹ S. 714, 111th Cong. (2010); H.R. 5143, 111th Cong. (2010); *See System Change*, in SMART ON CRIME (2011).

3. Wrongful Conviction Tax Relief

A. *It is Unclear Whether Wrongful Conviction Recoveries are Subject to Federal Taxation*

When an innocent person is convicted of a crime, that person is robbed of his or her freedom, family, and livelihood to be put through the unique horror of prison. The difficulty of reentering society is profound. To make matters worse, all compensation packages are, in theory, currently subject to federal taxation.

B. *Exempt Compensation to the Wrongfully Convicted from Federal Income Tax*

Legislative

Congress should work to pass a reintroduced version of Wrongful Convictions Tax Relief Act of 2010, which would amend the Internal Revenue Code to clarify that wrongful conviction compensation packages are not subject to federal income tax.²⁰

²⁰ H.R. 4743, 111th Cong. (2010).

APPENDICES

Experts

Barry Scheck, Co-Founder, Innocence Project
(<http://www.innocenceproject.org/about/Contact-Us.php>)

Peter Neufeld, Co-Founder, Innocence Project
(<http://www.innocenceproject.org/about/Contact-Us.php>)

Exonerees: many of the nation's 265 DNA exonerees will speak in support of and the need for these reforms (<http://www.innocenceproject.org/know/>)

Innocence Commissions

Hon. John K. Van de Kamp, Chair, California Commission on the Fair Administration of Justice (<http://www.ccfaj.org/m-JohnVanDeKamp.html>)

Senator Stewart J. Greenleaf, Pennsylvania Republican Senate Judiciary Chair and Sponsor of legislation establishing an Advisory Committee on Wrongful Conviction in Pennsylvania (http://www.legis.state.pa.us/cfdocs/legis/home/member_information/senate_bio.cfm?id=173)

Beverly Lake, Jr., former Chief Justice of the North Carolina Supreme Court and creator of the North Carolina Actual Innocence Commission
(<http://www.shanahanlawgroup.com/Bio/ILake.asp>)

Further Resources

BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (New American Library 2000).

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *FINAL REPORT (2008)*, available at <http://ccfaj.org/documents/CCFAJFinalReport.pdf>.

NEW YORK STATE BAR ASSOCIATION, *TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT (2009)*, available at: <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf>.

Innocence Project, www.innocenceproject.org (last visited Jan 10, 2011).

Justice for All Act, Pub.L. No 108-405, *available at*: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h5107enr.txt.pdf.

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CHAPTER 7

INDIGENT DEFENSE: ENSURING THE CONSTITUTIONAL RIGHT TO COUNSEL

THE ISSUE

In the landmark case *Gideon v. Wainwright*, the Supreme Court acknowledged the “obvious truth” that “lawyers in criminal courts are necessities, not luxuries” given that “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.”¹ Yet, almost fifty years later, the promise of *Gideon* remains unfulfilled. According to *Justice Denied*, a 2009 report of the Constitution Project’s National Right to Counsel Committee, public defense systems—which handle the vast majority of representation for defendants in criminal cases—fail to provide adequate representation for those the government accuses of crimes.² Public defenders’ offices are understaffed, underfunded, undertrained, and overworked, and they often lack the oversight necessary to ensure constitutionally adequate representation for indigent defendants. As experts from the Cato Institute observed, “the great majority of defender systems are understaffed and underfunded; they cannot provide their clients with even the basic services that a non-indigent defendant would consider essential for a minimally tolerable defense.”³

When the government accuses, convicts, and incarcerates its citizens without providing them adequate counsel, it disrupts the basic structure of our adversarial system, endangering both its people’s constitutional rights and the rule of law. The inevitable consequence of a dysfunctional system is the conviction and incarceration of innocent people. Wrongful convictions not only unjustly deprive people of their liberty, but also risk public safety by allowing the real perpetrators to remain free. Moreover, without proper representation, many non-violent offenders are sentenced to inappropriately lengthy prison terms, unnecessarily driving up taxpayer costs.

The Administration and the members of the 112th Congress have an important opportunity to address the current crisis in indigent defense, and to realize the promise of the constitutional right to counsel. Reforms should be adopted to strengthen public defender training; increase transparency in federal grants to state criminal justice systems; create accountability for inadequate provision of representation to state indigent defendants; and increase independence for federal defenders. Each of these reforms is both constitutionally required and long overdue.

HISTORY OF THE PROBLEM

1. The Constitutional Right to Counsel

The Constitution affords people charged with crimes due process, the presumption of innocence, and equal access to a fair day in court. The Founders understood the danger of a

¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

² CONSTITUTION PROJECT, NATIONAL RIGHT TO COUNSEL COMMITTEE, *JUSTICE DENIED*, 49-101 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>.

³ Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, CATO INST., 7 (Sept. 2010). available at <http://www.cato.org/pubs/pas/pa666.pdf>.

powerful government exercising arbitrary control over the freedom of the People through mechanisms of the justice system and criminal law. For this reason, the Sixth Amendment guarantees, among other fundamental rights, that “[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence [*sic*].” Although the Sixth Amendment’s right to counsel provision was originally interpreted to apply only in federal prosecutions, in the twentieth century the Supreme Court interpreted the due process clause of the Fourteenth Amendment to also apply the Sixth Amendment right to counsel in state prosecutions.

In the 1932 case *Powell v. Alabama*, the Supreme Court held that defendants in capital cases, even at the state level, were entitled to due process, including the right to counsel.⁴ Justice Sutherland wrote in his majority opinion that the right to counsel is among the “immutable principles of justice which inhere in the very idea of free government...”⁵ In 1963, the Supreme Court issued the landmark decision *Gideon v. Wainwright*, holding that states are required to provide representation for defendants who cannot afford private counsel in felony cases. Since then, the right to counsel has been consistently extended to any case that may result in a person’s potential loss of liberty.⁶

In addition to a basic right to counsel, a defendant in a criminal case has a right to “effective assistance of counsel” under the Supreme Court’s decision in *Strickland v. Washington*.⁷ In practice, courts have set a very low standard for effective assistance of counsel,⁸ and it is difficult for defendants to meet the Supreme Court’s demand that they affirmatively prove that their attorney’s errors were “so serious” that her or his performance fell below an “objective standard of reasonableness.” Under the *Strickland* standard, defendants are also required to affirmatively prove that the result of the proceeding would have been different with more effective counsel.⁹ These nearly insurmountable standards have undermined the right to effective counsel necessary for our adversarial system of justice to operate properly.

2. Indigent Defense Systems

The method by which a government provides indigent defense services varies by jurisdiction. At the federal level, public defenders are provided in two ways: federal public

⁴ *Powell v. Alabama*, 287 U.S. 45 (1932)

⁵ *Id.* at 68 (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

⁶ *Gideon* established the right to counsel for felony trials. Subsequent cases extend that right. See *Douglas v. California*, 372 U.S. 353 (1963) (direct appeals); *Miranda v. Arizona*, 384 U.S. 436 (1966) (custodial interrogation); *In Re Gault*, 387 U.S. 1 (1967) (juvenile proceedings resulting in confinement); *Coleman v. Alabama*, 399 U.S. 1 (1970) (critical stages of preliminary hearings); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanors involving possible imprisonment); *Shelton v. Alabama*, 535 U.S. 654 (2002) (misdemeanors involving a suspended sentence).

⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁸ See, e.g., *US v. Cronin*, 466 U.S. 648, 666-67 (1984), holding that ineffective assistance of counsel cannot be inferred by surrounding circumstances but rather must be demonstrated affirmatively “only by pointing to specific errors made by trial counsel.”

⁹ JUSTICE DENIED, *supra* note 2, at 39- 43.

defender organizations and community defender organizations.¹⁰ In the first system, a federal defender is appointed to a four-year term by the court of appeals for the district in which he or she serves, and the staff in his or her office are federal employees. In a community defender system, non-profit entities incorporated under state law operate with grants from the federal judiciary and are supervised by a board of directors or a local legal services organization. Funding for federal indigent defense is authorized by the Criminal Justice Act of 1964.¹¹

At the state level, indigent defense is usually provided in one of three ways.¹² First, many populous jurisdictions have a local office of the public defender staffed by government employees which handles almost all indigent defense in the jurisdiction. Second, some jurisdictions contract with private firms or individual attorneys to represent indigent defendants or a particular class of indigent defendants for a fixed fee. Third, many jurisdictions use an “assigned counsel” model in which the court assigns attorneys to indigent defendants on a case-by-case basis. Funding is provided by the state, the county, and, sometimes, by federal grant programs administered by the Bureau of Justice Assistance within the Department of Justice (DOJ).¹³

3. The Executive and Indigent Defense

The executive branch has a special responsibility to enforce the federal mandate announced in *Gideon v. Wainwright* and is uniquely situated to pursue indigent defense reform. Not only are federal defenders employees of the executive branch, but DOJ also directly assists state and local indigent defense systems with federal grant funding. Within DOJ, the Office of Justice Programs administers the Edward Byrne Memorial Justice Assistance Grant program (Byrne JAG). This program is the largest single federal grant program for funding of state law enforcement, court, prosecution, indigent defense, and related programs. While Byrne JAG grants can be used by states to fund indigent defense services, the formulation used for awarding grants has been criticized because it neither (i) conditions federal funding on the establishment of statewide public defense systems, nor (ii) requires any percentage of the federal grant go toward indigent defense programs.¹⁴

¹⁰ See United States Courts, The Defender Services Program, <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx> (last visited Dec. 10, 2010).

¹¹ 18 U.S.C. § 3006A.

¹² JUSTICE DENIED, *supra* note 2, at 53-57.

¹³ *Id.* at 53-60.

¹⁴ See e.g., *Hearing before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations*, 111th Cong. (2010) (statement of Virginia E. Sloan, President, The Constitution Project), available at <http://www.constitutionproject.org/pdf/389.pdf>; National Legal Aid and Defender Association, *Make Our Justice System Fair and Our Communities Safer by Supporting Quality Public Defense Systems* (2008), available at <http://www.nlada.org/DMS/Documents/1232143408.49/NLADA%20DOJ%20Transition%202-pager.pdf>.

4. Congress and Indigent Defense

In 1964, Congress passed the Criminal Justice Act (CJA), “[t]o promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in the criminal cases in the courts of the United States.”¹⁵ The Act established a system, administered by the federal judiciary, for the appointment and compensation of counsel to represent indigent defendants charged with federal crimes. In 1970, the CJA was amended to authorize districts with large numbers of indigent defendants to establish federal defender organizations as counterparts to federal prosecutors in U.S. Attorneys’ offices.¹⁶

The Innocence Protection Act (IPA) sponsored by Senator Patrick Leahy (D-VT) in the Senate, and Representatives Ray LaHood (R-IL) and Bill Delahunt (D-MA) in the House, and with support from Representative James Sensenbrenner (R-WI) and Senator Orrin Hatch (R-UT), was passed by Congress as part of the Justice for All Act of 2004 (JFAA).¹⁷ The IPA was intended to help reduce the risk of wrongful convictions and executions in capital cases, and the JFAA was also intended to improve access to forensic evidence in criminal trials. The IPA includes a provision authorizing grants to states to improve their appointment of qualified defense counsel in capital cases, and conditions those grants on states adopting minimum standards for defense counsel and prosecutors in capital cases.¹⁸ Grants for such a purpose must be matched by equal-sized grants to prosecutors to enhance their ability to effectively prosecute state capital cases and vice versa. In September 2010, Senator Leahy introduced a reauthorization of the JFAA that would also extend provisions of the IPA.¹⁹ Though the legislation never came before the Judiciary Committee for markup, according to his staff, Senator Leahy intends to reintroduce the JFAA reauthorization in early 2011.

Finally, the John R. Justice Prosecutors and Defenders Incentive Act of 2008 (J.R. Justice Act) authorizes a program for student loan repayment for prosecutors and public defenders.²⁰ This piece of legislation, which passed both chambers with overwhelming bipartisan support, increases the incentive for the best and the brightest young lawyers to enter public services as public defenders and prosecutors.

5. Resources Available to Indigent Defense Attorneys

In our adversarial legal system, the truth is expected to emerge from the clash of two well-prepared, opposing sides, each of which has the ability to present its arguments, evidence, and witnesses with full knowledge of the rules of engagement. However, especially at the state and

¹⁵ 18 U.S.C. § 3006A.

¹⁶ Pub. L. No. 91-447, Sec. 1(b), 84 Stat. 916 (1970) (codified in 18 U.S.C. § 3006A(g)).

¹⁷ Innocence Protection Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18, 42 U.S.C.).

¹⁸ 42 U.S.C. § 14163.

¹⁹ S. 3842, 111th Cong. (2010).

²⁰ John R. Justice Prosecutors and Defenders Incentive Act of 2008, Pub. L. No. 110-315, §§ 951-52, 122 Stat. 3078 (codified as amended in scattered sections of U.S.C.).

local level, the resources available to the district attorney or prosecutor often far exceed those available to the defender, creating a favorable situation for government power and a dangerous situation for individual liberty. For example, defenders, who most often depend on the very government they are opposing in court for their salary, frequently lack the time or funding to pay for necessary expert witnesses.²¹

Additionally, inadequate funding leads to insufficient staffing of defenders' offices. As a result, many public defenders have caseloads so large that they risk violating the oaths they took as members of the bar to provide adequate attention to each client, and also violate, by a large margin, the American Bar Association's (ABA's) guidelines for attorney caseloads.²² In fact, the Bureau of Justice Statistics reports that in 2007, 73% of county-based public defender offices exceeded the maximum caseload per attorney.²³ Similarly, state public defender offices had a median 67% of the attorneys necessary to comply with caseload limits.²⁴ The Cato Institute reported that "[i]n one highly publicized case, the Atlanta public defender demoted a staff attorney because she had filed a motion asking the local judges to appoint her to no more than six cases per day" (emphasis added).²⁵

The federal government exacerbates already existing resource imbalances between the prosecution and defense by furnishing funding to the states for prosecution and law enforcement functions, as well as for training and technical assistance for prosecutors and law enforcement agencies, while providing almost no analogous support for state-based public defense services. The administration proposed \$3.4 billion in federal funding for state, local, and tribal law enforcement assistance programs in fiscal year (FY) 2011, a \$722.5 million increase from FY 2010.²⁶ Of that \$3.4 billion in federal funding, a total of \$1.3 million would be specifically directed to indigent defense programs.²⁷ An additional \$2.5 million would fund the hiring of personnel for the Access to Justice Initiative, a DOJ program launched in March 2010 whose mission is to improve the availability and quality of indigent defense.²⁸ This means that under the President's FY 2011 budget, less than 0.1% of federal funding for state law enforcement programs would be specifically directed to indigent defense services.

²¹ JUSTICE DENIED, *supra* note 2, at 95-97.

²² AMERICAN BAR ASSOCIATION, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

²³ BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CENSUS OF PUBLIC DEFENDER OFFICES, 2007: COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES 8 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf>.

²⁴ For FY2011, the Department of Justice requested \$2.5 million and 10 positions for the Access to Justice Initiative.

²⁵ BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CENSUS OF PUBLIC DEFENDER OFFICES, 2007: STATE PUBLIC DEFENDER PROGRAMS 13 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf>.

²⁶ SCHULHOFER, *supra* note 3, at 8.

²⁷ U.S. DEPT. OF JUSTICE, FY 2011 BUDGET REQUEST: ASSIST STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT (2010), available at <http://www.justice.gov/jmd/2011factsheets/pdf/law-enforcement.pdf>.

²⁸ *Id.* at 3.

²⁹ U.S. Dept. of Justice, FY 2011 BUDGET REQUEST: RESTORE CONFIDENCE IN OUR MARKETS, PROTECT THE FEDERAL FISC, AND DEFEND THE INTERESTS OF THE UNITED STATES 5 (2010), available at <http://www.justice.gov/jmd/2011factsheets/pdf/defend-interests-unitedstates.pdf>.

There are many examples of this imbalance. For instance, state prosecutors receive millions of dollars each year in direct federal funding through Byrne JAG, while public defense attorneys receive virtually no federal funding. Although indigent defense is currently a permitted expenditure of Byrne JAG funds, states may be unaware of this because it is not explicit in the statute.²⁹ States consistently spend either none or only a miniscule portion of the grant money for public defense programs, directing a vastly greater share to law enforcement and prosecutorial programs. In 2009, of the \$1.2 billion in federal funding to states, only \$3.2 million was spent on indigent defense, while prosecutors and courts received over \$171 million and law enforcement received more than \$521 million.³⁰ The disparity is staggering.

Likewise, prosecutors often have ready access to federally funded crime labs, while too often public defense attorneys are denied access or provided inadequate funding for essential testing. Similarly, state prosecutors have access to excellent training resources through the federally funded Ernest F. Hollings National Advocacy Center on the campus of the University of South Carolina,³¹ while the federal government provides no funding for public defense professionals (and funding for state prosecutors in this training program has currently been removed for FY2011). These resource imbalances make it extremely difficult for publicly funded defense counsel to assess the reliability of the prosecution's evidence and to validate their own evidence. The end result is that juries and judges are deprived of critical information necessary to ensuring accurate verdicts and fair sentences.

6. Transparency, Oversight and Accountability in Indigent Defense

Transparency regarding government support of public defenders is necessary for the effective representation of indigent defendants. Without transparency in the manner in which federal, state, and local governments allocate funds and resources for indigent defense, it is nearly impossible to accurately assess the disparity in spending between indigent defense and prosecutors and law enforcement, fix deficiencies in systems, or hold anyone accountable for infringing upon the constitutional rights of indigent defendants. As Erica Hashimoto, associate professor of law at the University of Georgia Law observed, "we have no idea how many defendants are represented by the indigent defense systems in the country, how many misdemeanor defendants have a right to counsel, or how what percentage of defendants who are entitled to court-appointed representation go unrepresented."³²

²⁹ 42 U.S.C. § 3751.

³⁰ National Criminal Justice Association, *Byrne JAG Funding: A Snapshot from the States*, http://www.ncja.org/NCJA/Policies_and_Practices/Byrne_JAG_Data_Collection/NCJA/Navigation/PoliciesPractices/Byrne_JAG_Data_Collection.aspx?hkey=8bd3d63b-a641-4009-a9a1-bb977cc00e31 (last visited January 14, 2011).

³¹ See generally Hollings National Advocacy Center, <http://www.ndaa.org/nac.html> (last visited January 14, 2011).

³² Erica Hashimoto, *Assessing the Indigent Defense System*, AM. CONST. SOCIETY 9 (2010), available at <http://www.acslaw.org/node/16836>.

The current system does not provide the requisite transparency. The Bureau of Justice Statistics collects indigent defense data, but only for felony cases and only in very large jurisdictions. There is little data available for either misdemeanor representation or felony representation in smaller districts. Moreover, when the Bureau of Justice Assistance accepts grant applications from state and local criminal justice entities, it does not require reporting on indigent defense. Thus, the data necessary to evaluate indigent defense in a specific district simply does not exist.

Even if this data were available and violations of the constitutional right to counsel were detectable, it would be very difficult to hold state governments accountable should they abrogate the constitutional right to counsel. DOJ currently does not have the authority to hold state and local governments accountable for failing to meet their constitutional obligations, even if these jurisdictions use DOJ funding for their criminal justice systems. As a result, the responsibility for monitoring local governments and identifying constitutional violations falls to the defendants themselves—the very individuals who lack adequate legal counsel and access to knowledge of the law.

RECOMMENDATIONS

1. Funding, Staffing and Training

A. *Public Defense Systems Lack Adequate Funding*

Inadequate funding, insufficient staffing, and unequal training opportunities are consistent challenges for public defense systems in all jurisdictions. Especially at the state and local level, the resources available to the district attorney or prosecutor often far exceed those available to the defender, creating a favorable situation for government power and a dangerous situation for individual liberty. With states facing budget shortfalls and the federal government under pressure to reduce the deficit, the already-underfunded indigent defense programs that protect the life, liberty, and property of Americans are particularly vulnerable.

B. Congress and the Administration Should Ensure Adequate Funding, Staffing, and Training

Legislative

i. Provide Funding for John R. Justice Prosecutors and Defenders Act

Congress should fully fund the John R. Justice Act, which authorizes student loan repayment assistance for prosecutors and public defenders.³³ This program improves public safety by assisting prosecutor and defender offices in their ability to hire and retain high-quality lawyers.³⁴ The law authorizes up to \$10,000 per year in education debt assistance for prosecutors and defenders who agree to maintain that employment for three years.³⁵ Unfortunately, the current FY 2010 appropriation of \$10 million, \$5 million of which goes to prosecutors, limits the program's impact on indigent defense systems.

Congress could make it financially feasible for young attorneys to serve in indigent defense systems by supporting a national fellowship program to cultivate and train the next generation of defenders. The fellowship could combine loan forgiveness with federal funding for hiring entry-level attorneys. This program could be modeled on Public Defender Corps, a project of Equal Justice Works and the Southern Public Defender Training Center that is currently funded by a grant from the Bureau of Justice Assistance.³⁶ Public Defender Corps is a three-year fellowship program for bright young attorneys dedicated to providing excellent representation to indigent clients. The program matches these attorneys with public defender offices and sponsors their work for three years. Congress should support and provide resources to expand such efforts.

ii. Dedicate Indigent Defense Funding in Federal Grant Programs

Congress should provide sufficient financial support to states, local governments, and territories for the provision of indigent defense services comparable to federal support for prosecution. To this end, Congress should allow for exceptions to the required equal allocation between prosecutors and defenders for federal grants for capital case training. This would enable states to use the grants to create parity between prosecution and indigent defense resources.³⁷ Additionally, Congress should permit states to use grants under this program to hire counsel for capital defendants.

³³ 42 U.S.C. § 3797cc-21. In 2007 the Congressional Budget Office estimated that the John R. Justice loan repayment assistance program, if fully funded, would cost \$83 million over the 2008 – 2012 period. CONGRESSIONAL BUDGET OFFICE, H.R. 4127: HIGHER EDUCATION AMENDMENTS OF 2007, *available at*: <http://www.cbo.gov/ftpdocs/88xx/doc8899/hr4137.pdf>.

³⁴ 42 U.S.C. § 3797cc-21.

³⁵ *Id.* at § 3797cc-21(d)(3).

³⁶ See Equal Justice Works, Public Defender Corps, <http://www.equaljusticeworks.org/programs/public-defender-corps/general>.

³⁷ See 42 U.S.C. § 14163 *et seq.*

Although indigent defense is currently a permitted expenditure of Byrne JAG funds, states may be unaware of this because it is not explicit in the statute.³⁸ Congress should amend the Byrne JAG authorizing legislation, adding indigent defense to the list of seven specific program categories identified in the statute. This will clarify for DOJ and state personnel that support for indigent defense services is one of the central purposes of the Byrne JAG programs.³⁹ Furthermore, either Congress, through legislation, or the DOJ, through its rulemaking authority,⁴⁰ can require that each state include at least one representative of the state's indigent defense systems as a member of its State Administering Agency (SAA), which distributes the funds. This will ensure, at a minimum, that the needs and interests of indigent defendants are considered during the SAA's deliberation process, and will highlight to the indigent defense community its right to seek Byrne JAG funding.

iii. ***Reduce Overcriminalization through Civil Infraction Reform***

To relieve the overwhelming caseloads of public defenders, states should re-classify certain non-violent crimes as civil infractions for which civil fines would be imposed rather than prison sentences. This would reduce the number of cases that public defenders must handle at a single time. To aid in states' civil infraction reform efforts, Congress should provide funding for states to establish criminal justice coordinating committees to consider reclassification of certain non-violent crimes to civil infractions, thereby alleviating some of the burden currently placed on indigent defense systems.⁴¹

iv. ***Create an Independent National Center for Public Defense Services***

Congress should adopt the recommendation of the ABA that the federal government establish and fund a National Center for Public Defense Services to serve as an independent, national oversight authority that would strengthen state public defense services by conducting and hosting public defense training programs, and administering federal funds for state public defense programs. For the past thirty years, the ABA has supported the establishment of an independent

³⁸ 42 U.S.C. § 3751.

³⁹ Violence Against Women and Department of Justice Reauthorization Act of 2005 §1111, Pub. L. 109-162, merged the Byrne Grant program with the Law Enforcement Block Grant program to create the Edward Byrne Memorial Justice Assistance Grant Program, 42 U.S.C. § 3751 *et. seq.* Previously, the authorizing legislation for these grant programs (Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C § 3711) listed indigent defense as an authorized use of grant funds. However, the streamlined language of the 2005 reauthorization did not explicitly list indigent defense and instead stated that a Byrne JAG grant "may be use for any purpose for which a grant was authorized to be used" in the previous legislation. 42 U.S.C. § 3751(a)(2). Thus, Byrne JAG funds are authorized for indigent defense expenditures, but this is not explicit in the DOJ grant solicitation given to states, which includes only the streamlined language from the 2005 reauthorization.

⁴⁰ The Department of Justice can amend 28 C.F.R. § 33.12(a) to achieve this result.

⁴¹ For more information on the potential benefits of civil infraction reform, see COMMITTEE FOR PUBLIC COUNSEL SERVICES OF THE COMMONWEALTH OF MASSACHUSETTS, 2009 REPORT TO THE LEGISLATURE, *available at* http://www.publiccounsel.net/report_to_the_legislature.html.

federal Center for Defense Services to serve this function.⁴² The concept was also endorsed in the 2009 report *Justice Denied* issued by the National Right to Counsel Committee. DOJ's Access to Justice Initiative, launched in March 2010, is an important first step. Under Professor Laurence Tribe's leadership it has brought needed attention to public defense reforms. However, as discussed above, it is critical that public defenders have the independence that a National Center for Public Defense Services would provide, especially given the potential for serious conflict of interest inherent in indigent defense work.

Executive

Each year, the Bureau of Justice Assistance within DOJ is allocated a certain amount of discretionary funds. In past administrations, a portion of these funds have been used to provide federal technical assistance and training for state, local, and territorial public defense systems, and the attorneys who participate in them.⁴³ The Bureau of Justice Assistance should use a portion of its discretionary funding for these functions, as it did under Attorney General Janet Reno.

2. Transparency, Oversight and Accountability in Indigent Defense

A. *The Current System Suffers from a Lack of Transparency, Oversight and Accountability*

Currently, there is no mechanism for the collection, analysis, and dissemination of nationwide indigent defense data. In addition, despite statutory and regulatory reporting requirements,⁴⁴ many states do not fully account for the manner in which they spend federal grant money for criminal justice initiatives.⁴⁵ Without such data, decision-makers are left to form policy based on anecdotal information, speculation, intuition, presumption, and even bias. Furthermore, the federal government lacks a sufficiently strong mechanism for holding state and local governments accountable for violations of the Sixth Amendment right to effective assistance of counsel.

⁴² AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, RECOMMENDATION FOR ESTABLISHMENT OF A CENTER FOR DEFENSE SERVICES (1979), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/121.pdf>; AMERICAN BAR ASSOCIATION, *supra* note 22, at 41.

⁴³ *See*, Bureau of Justice Assistance, National Training and Technical Assistance Center, *available at* <http://www.bjatrain.org> (last visited Jan. 18, 2011).

⁴⁴ *See* 28 C.F.R. § 33.41(b) (requiring states receiving Byrne Justice Assistance Grant money to “designate which statutory purpose the program or project is intended to achieve, identify the state agency or unit of local government that will implement the program or project, and provide the estimated funding level for the program or project including the amount and source of cash matching funds.”); *see also* 42 U.S.C. § 3752.

⁴⁵ The Constitution Project has requested information on state spending of Byrne Justice Assistance Grant money from both State Administering Agencies (SAAs) as well as the Department of Justice, but has never received the requested information. In a July 27, 2010 letter responding to a Freedom of Information Act (FOIA) request submitted by the Constitution Project, the Department of Justice FOIA office indicated that the Department does not keep separate account of the manner in which states spend grant money.

B. *Transparency, Oversight, and Accountability will Protect Taxpayer Money and Individual Liberty*

Legislative

i. *Increase Transparency in Expenditure of Taxpayer Money by the States*

Congress should reauthorize the Justice for All Act with the requirement that recipients of federal grant money for criminal justice indicate the recipient’s intended indigent defense expenditures and report the recipient’s actual indigent defense expenditures to the Bureau of Justice Assistance.

ii. *Establish Accountability for Violations of Individual Liberty by State and Local Government*

Congress should provide DOJ with a cause of action to bring suit against those state or local governments that fail to protect the individual liberty of persons within their jurisdictions by providing inadequate counsel or no counsel to indigent defendants. DOJ’s authority to sue is currently limited to cases demonstrating a “pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”⁴⁶ By extending this authority beyond juvenile justice to include all criminal justice systems, Congress would empower DOJ to rectify states’ systemic violations of the Sixth Amendment. Congress could also authorize DOJ to “deputize” private litigants to file federal suits on behalf of the United States, thereby ensuring that enforcement actions against non-compliant states could be sought without overburdening the Department.⁴⁷

iii. *Fund Research to Determine Whether Unequal Access to Counsel Contributes to Racial Disparities*

Congress should coordinate and fund a study to determine whether failure by states to provide constitutionally adequate public defense systems contributes to racial disparities within the criminal justice system. Because of the dearth of data on indigent defense, it is almost impossible to measure the impact of inadequate public defense systems on racial disparities in the criminal justice system. This study should be conducted by an entity that is independent of government, such as a university or impartial research foundation.

⁴⁶ 42 U.S.C. § 14141.

⁴⁷ For discussion of a private litigation strategies see Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, AM. CONST. SOCIETY 9 (2010), available at <http://www.acslaw.org/files/Primus%20-%20Litigation%20Strategies.pdf>.

*Executive***i. *Require Transparency in Federal Grants***

Because there is so little public data on indigent defense, it is extremely difficult to identify quantitatively measurable deficiencies in specific jurisdictions, and to hold accountable those responsible for violations of the right to counsel. The collection, analysis, and public presentation of this data would provide the transparency necessary for proper oversight. Therefore, DOJ should annually collect and publish data pertaining to: state-by-state indigent defense expenditures and funding sources; caseloads by provider and case types; methods of providing counsel; number of persons under the age of 18 tried in adult courts; indigency rates and criteria; race and ethnicity demographics of defendants and victims; and staffing of public defense agencies.

Additionally, DOJ should strengthen its regulations related to reporting requirements for state grant recipients and, if necessary, Congress should empower the DOJ to withhold a portion of a state's formula grant for failure to meet reporting requirements. Finally, if granted by Congress, the DOJ should use its authority to pursue causes of action against states violating the Sixth Amendment to engage those states in negotiations to help them improve their indigent defense systems, and, if necessary, hold accountable with litigation those jurisdictions that continue to deprive people of the right to counsel.

ii. *Establish National Standards for Indigent Defense Services*

The ABA provides objective guidelines for the provision of indigent defense services. This document, titled *The Ten Principles of a Public Defense Delivery System*, should form the basis for national standards for adequate indigent defense promulgated by DOJ.⁴⁸ This document should also inform standards by which the federal government evaluates all state indigent defense systems, including standards for the awarding of grants and for state opt-in applications under Chapter 154 of Title 28.⁴⁹

⁴⁸ AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

⁴⁹ As part of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), Chapter 154 mandates greater restrictions on federal habeas corpus review of state capital cases if a state establishes a mechanism for appointing competent counsel to indigent capital defendants for state post-conviction review. A 2005 amendment to the statute moved the authority to certify that a state is eligible from the federal courts to the Attorney General of the United States, subject to review by the Court of Appeals for the District of Columbia Circuit. The Bush Administration issued a final rule that provided no standards for competent counsel; it was never implemented due to an injunction. The Department of Justice recently issued a notice removing this rule and is currently in the process of developing a new rule.

iii. ***File Amicus Briefs to Support Individual Liberty against State Governments***

DOJ should support current private litigation efforts by filing *amicus* briefs in support of cases that seek redress from states and localities that provide constitutionally inadequate indigent defense representation.⁵⁰ The Attorney General should also continue to speak to criminal justice stakeholders, through speeches, op-eds, and briefings, about the need for indigent defense reform, with special focus on prosecutors and law enforcement.

3. **Independence of Indigent Defense Attorneys**

A. ***Public Defenders Currently Lack Independence, Hampering Performance***

By design, public defense is necessarily provided by the same government that is accusing a defendant in a criminal case. As a result, conflicts of interest can easily arise in indigent defense systems. This is especially true in jurisdictions where politicians or judges appoint public defenders, pushing a defender's economic interest in a different—and sometimes opposite—direction from the interests of his or her client. Attorneys representing indigent defendants but beholden to the prosecuting party or the judiciary for funding or employment may focus not on their client's best interest, but rather on reducing backlogs of cases at the court, appearing “tough” on crime, or just keeping their jobs.⁵¹

B. ***Providing Independence for Public Defenders in both Funding and Decision-making will Reduce Central Government Control and Improve Representation***

Legislative

Congress should establish an independent, non-partisan federal agency for federal defense that possesses funding and oversight responsibilities. This will reduce the conflict of interest that arises when a public defender is beholden to the opposing party (the state) or to the judge for funding. When a defender's budget is dependent on the approval of judges, elected local boards, or others to whom she may be politically or professionally accountable, she will often come under pressure to shape defense strategies not according to the interests of her clients, but rather according to the political interests of those who control her budget.⁵² Achieving systemic improvements may require an autonomous and permanent office with greater resources and authority at its disposal. For the past thirty years, the ABA has supported the establishment of an

⁵⁰ See, e.g., *Duncan v. State* 784 N.W.2d 51 (Mich., 2010). This case is currently before the Michigan Supreme Court, with the plaintiffs arguing that systemic deficiencies in Michigan's public defense system deprive indigent defendants of their Sixth Amendment rights to counsel.

⁵¹ SCHULHOFER, *supra* note 3 at 2.

⁵² For specific examples of the political pressure facing public defenders, see JUSTICE DENIED, *supra* note 2, at 80-84.

independent federal Center for Defense Services to serve this function. In addition, the concept was endorsed in the 2009 report issued by the National Right to Counsel Committee.⁵³

Alternatively, Congress could make local federal defender organizations, or the Administrative Office of U.S. Courts (for those districts without federal defender organizations), responsible for the appointments and payment of private, appointed counsel to represent indigent defendants in federal criminal cases. If the judiciary remains responsible for appointing counsel, Congress should require federal courts to accept (absent good cause to the contrary) recommendations for counsel made by federal public defenders, federal defender community organizations, the Capital Habeas Unit, or the Administrative Office. These organizations, each of which has a role in providing federal indigent defense services, are better positioned to offer independent, expert recommendations for the appointment of counsel, as compared with judges, who are meant to be the impartial arbiters between prosecutors and defense attorneys.

Executive

The Access to Justice Initiative, which was established within DOJ in March 2010, represents a positive first step in the creation of an independent federal voice for indigent defense. It has already served as an important voice within DOJ by advocating reforms to federal policies related to indigent defense. The creation of the initiative marks an important first step in the federal government's acceptance of responsibility for addressing the national indigent defense crisis. In addition, the initiative's efforts have resulted in states taking notice and seeking to engage the Department regarding ways to improve indigent defense at the state level. The Access to Justice Initiative should be maintained and strengthened.

If Congress chooses not to pursue an independent federal defender agency (see legislative recommendation above), an alternative approach is to formalize the criminal defense functions of the Access to Justice Initiative as an Office of Public Counsel Services (OPCS) within DOJ.⁵⁴ The OPCS would be a congressionally created office headed by an assistant attorney general, who is appointed by the president, confirmed by the Senate, and reports directly to the Attorney General. The OPCS would develop objectives, priorities, and a long-term plan for federal support of state and local indigent defense systems. The office would have primary authority for the implementation of federal indigent defense policy and strategies necessary to carry out that policy.

⁵³ *Id.*, at 200.

⁵⁴ See ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 42; AMERICAN BAR ASSOCIATION, *supra* note 22, at 41.

APPENDICES

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CHAPTER 8

JUVENILE JUSTICE

THE ISSUE

The juvenile justice system in the United States is in urgent need of reform. Nationwide each year, police make 2.1 million juvenile arrests;¹ 1.7 million cases are referred to juvenile courts;² and over 200,000 youth are prosecuted in the adult criminal justice system.³ The United States incarcerates more youth than any other country in the world such that on any given night, approximately 81,000 youth are confined in juvenile facilities,⁴ and 10,000 children are held in adult jails and prisons.⁵ Wherever they are held, incarcerated youth are particularly vulnerable to victimization and abuse.⁶ The United States is also alone in imposing the sentence of life without parole for crimes committed as children. Recent estimates find that 2,589 people are currently serving a juvenile life without parole sentence.⁷

Over the past 20 years, however, scientific research has vastly increased our understanding of how to best approach juvenile delinquency and system reform. Promising reforms are being implemented in many jurisdictions, and there is an increasingly clear path for moving from counterproductive, dangerous, and wasteful practices toward more effective and just approaches to addressing adolescent crime. Leaders in the Executive and Legislative branches have the opportunity and the obligation to help establish a meaningful system of justice for all of our youth, and should begin by focusing on (i) restoring the federal leadership role in juvenile justice policy, (ii) preventing crime and diverting youth from the justice system, (iii) keeping court-involved youth safe, (iv) removing youth from the adult criminal justice system, and (v) helping youth return to their communities.

¹ CHARLES PUZZANCHERA, U.S. DEPT. OF JUST., OFFICE OF JUV. JUST. AND DELINQ. PREVENTION, JUVENILE ARRESTS, 2008, (2009), available at <http://www.ncjrs.gov/pdffiles1/ojdp/228479.pdf>.

² CRYSTAL KNOLL & MELISSA SICKMUND, U.S. DEPT. OF JUST., OFFICE OF JUV. JUST. AND DELINQ. PREVENTION, DELINQUENCY CASES IN JUVENILE COURT, 2007 (2010), available at <http://ncjrs.gov/pdffiles1/ojdp/230168.pdf>.

³ J. Woolard, *Juveniles within adult correctional settings: legal pathways and developmental considerations*, 4 INT'L J. OF FORENSIC MENTAL HEALTH. 18 (2005); COALITION FOR JUVENILE JUSTICE, CHILDHOOD ON TRIAL: THE FAILURE OF TRYING AND SENTENCING YOUTH IN ADULT CRIMINAL COURT (2005).

⁴ MELISSA SICKMUND, JUVENILES IN RESIDENTIAL PLACEMENT, 1997-20008, U.S. DEPT. OF JUST., OFFICE OF JUV. JUST. AND DELINQ. PREVENTION (2010), available at <http://www.ncjrs.gov/pdffiles1/ojdp/229379.pdf>.

⁵ TODD D. MINTON, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., JAIL INMATES AT MIDYEAR 2009 (2010); HEATHER C. WEST U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., PRISON INMATES AT MIDYEAR 2009 (2010).

⁶ Campaign for Youth Justice, *Jailing Juveniles*, <http://www.campaignforyouthjustice.org/key-research/national-reports.html#jailingjuveniles> (last visited Jan. 17, 2011). See also A.J. BECK ET. AL., U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09 (2010).

⁷ Human Rights Watch, *State distribution of youth offenders serving juvenile life without parole*, <http://www.hrw.org/en/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole> (last visited Jan. 17, 2011).

HISTORY OF THE PROBLEM

Greater federal assistance is needed for key juvenile justice programs. Since FY2002, the operational budget for Office of Juvenile Justice and Delinquency Prevention (OJJDP) has plummeted 90%. In that time period, funding for the Juvenile Justice and Delinquency Prevention Act (JJDP) Title II State Formula Grants Program has declined 16%; Title V funding for incentive grants to local delinquency prevention programs has declined 34%, with between 53% and 97% of the limited dollars appropriated for the Title V program earmarked for non-JJDP programs.⁸ Title II funds provide essential support for state and local agencies to develop and strengthen juvenile justice systems to reduce youth offending, meet vital standards for care and custody of juvenile offenders, and ensure community safety. Equally importantly, Title V Incentive Grants for Local Delinquency Prevention Programs are the only federal funding source dedicated solely to the prevention of youth crime and violence. These small grants fund a range of innovative and effective programs, from home visitation by nurses and preschool-parent training programs, to youth development initiatives involving the use of mentoring, after-school activities, tutoring, truancy prevention, and dropout reduction strategies. Research has shown that every dollar spent on such evidence-based programs can yield up to \$13 in cost savings.⁹ Furthermore, each child prevented from engaging in repeat criminal offenses can save the community \$2.6 to \$4.4 million.¹⁰

Current juvenile justice practices too often ignore children's age and amenability to rehabilitation, increase crime, endanger young people, damage their future prospects, waste billions of taxpayer dollars, and violate our deepest held principles about equal justice under the law. Our justice system is riddled with racial and ethnic disparities, a lack of mental health and drug treatment services, and disproportionate sanctions for minor and nonviolent adolescent misbehavior.

1. Overincarceration and Non-treatment of Vulnerable Youth

Misguided policies that purport to be “tough on crime” increase incarceration rates, disproportionately impact poor youth and youth of color, exacerbate the problem of gang-related crime, funnel a disproportionate number of youth who have a cognizable mental health and/or substance abuse disorder into the justice system, and often make our communities vulnerable to crime. Research from top scholars in a variety of fields including economics, educational psychology, and public health reveals that public dollars spent on effective prevention and education programs are far more effective at reducing crime than broadening prosecutorial powers

⁸ COALITION FOR JUVENILE JUSTICE, UNLOCKING THE FUTURE OF JUVENILE JUSTICE: A POLICY AGENDA FOR THE 111TH CONGRESS (2009), available at http://www.juvjustice.org/media/resources/public/resource_240.pdf.

⁹ ANNIE E. CASEY FOUNDATION, JUVENILE DETENTION ALTERNATIVES INITIATIVE, DETENTION REFORM BRIEF 1: DETENTION REFORM: A COST-SAVING APPROACH (2007), available at http://www.aecf.org/upload/PublicationFiles/jdai_facts1.pdf.

¹⁰ Mark A. Cohen & Alex R. Piquero, *New Evidence on the Monetary Value of Saving a High Risk Youth*, (Vanderbilt Law and Economics Research Paper No. 08-07, 2007), available at <http://ssrn.com/abstract=1077214>.

or stiffening criminal penalties for young people.¹¹ Public opinion polls similarly reveal that taxpayers overwhelmingly favor paying for prevention, education, and rehabilitation programs over prosecution and incarceration of youthful offenders.¹²

Far too many youth in the juvenile justice system are in desperate need of mental health treatment. Recent studies indicate that up to 70% of youth in the juvenile justice system may have a diagnosable mental health disorder, and 60% may also meet the criteria for a substance use disorder, and 27% may experience disorders so severe that their ability to function is significantly impaired.¹³ Moreover, according to recent data released by OJJDP, 44% of youth in custody say they were under the influence of alcohol or drugs during the commission of their offense.¹⁴ These youth should be provided treatment and alternatives to incarceration.

Academic success plays a crucial role in preventing delinquent behavior and promoting positive outcomes for youth and safer communities. Youth who drop out or are pushed out of school find themselves with fewer opportunities for gainful employment and are more likely than youth who remain in school to commit delinquent acts. Nearly 10% of young male high school dropouts were institutionalized on a given day in 2006-2007 compared to only 3% of high school graduates and less than .1% of college graduates.¹⁵ In addition, out-of-school suspension and expulsion are being overused and disproportionately affect youth of color and students with disabilities. According to the Dignity in Schools campaign, each year more than three million students are suspended and over 100,000 are expelled nationally.¹⁶ More than 5.2 million young people between the ages of 18 and 24 (17%) do not have a high school diploma. Approximately 4.4 million young people within the same age span are neither in school, working, nor have a degree

¹¹ In recent years, a range of organizations have commissioned or conducted related research and reached similar conclusions, including the American Psychological Association, the Washington State Institute for Public Policy, the Social Development Research Group of Seattle, Washington, and the Office of Juvenile Justice and Delinquency Prevention. For more information, see

[http://chhi.podconsulting.com/assets/documents/publications/NO MORE CHILDREN LEFT BEHIND.pdf](http://chhi.podconsulting.com/assets/documents/publications/NO_MORE_CHILDREN_LEFT_BEHIND.pdf)

¹² ALEX PIQUERO & LAURENCE STEINBERG, *MODELS FOR CHANGE, SYSTEMS REFORM IN JUVENILE JUSTICE, REHABILITATION VERSUS INCARCERATION OF JUVENILE OFFENDERS: PUBLIC PREFERENCES IN FOUR MODELS FOR CHANGE STATES (2007)*, available at <http://www.modelsforchange.net/publications/186>; CENTER ON CHILDREN'S LAW AND POLICY, *POTENTIAL FOR CHANGE: PUBLIC ATTITUDES AND POLICY PREFERENCES FOR JUVENILE JUSTICE SYSTEMS REFORM, MODELS FOR CHANGE, SYSTEMS REFORM IN JUVENILE JUSTICE (2007)*, available at <http://www.modelsforchange.net/publications/121>.

¹³ JOSEPH CONCOZZA, J. ET AL, *ADDRESSING THE MENTAL HEALTH NEEDS OF YOUTH IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM IN SYSTEM OF CARE COMMUNITIES: AN OVERVIEW AND SUMMARY OF KEY ISSUES (2010)*, available at http://www.tapartnership.org/docs/jjResource_overview.pdf.

¹⁴ ANDREA J. SEDLAK, & C. BRUCE, U.S. DEPT. OF JUST., OFFICE OF JUV. JUST. AND DELINQ. PREVENTION, *YOUTH'S CHARACTERISTICS AND BACKGROUNDS (2010)*.

¹⁵ ANDREW SUM ET. AL, *THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL: JOBLESSNESS AND JAILING FOR HIGH SCHOOL DROPOUTS AND THE HIGH COST FOR TAXPAYERS (2009)*, available at http://www.clms.neu.edu/publication/documents/The_Consequences_of_Dropping_Out_of_High_School.pdf.

¹⁶ National Center for Education Statistics, *Contexts of Elementary and Secondary Education*, <http://nces.ed.gov/programs/coe/2009/section4/indicator28.asp> (last visited Jan. 17, 2011).

beyond high school.¹⁷ Individually, each of these young people are at risk of long-term unemployment, living in poverty, and engaging in criminal activity. Collectively, these disconnected youth represent a generation of lost potential. African-American students (nearly three times as likely to be suspended and 3.5 times as likely to be expelled as white students) and Latino students (1.5 times as likely to be suspended and twice as likely to be expelled as white students) bear a disproportionate burden of these punishments when compared to their white peers,¹⁸ while students with disabilities also experience disciplinary removal from the classroom at rates that are disproportionate to their overall representation in the K-12 population.¹⁹

Lesbian, gay, bisexual, or transgender (LGBT) youth encounter the juvenile justice system at a disproportionately high rate, creating a need for greater sensitivity toward the issues faced by LGBT youth in the system. Recent research shows that up to 13% of youth in juvenile detention identify as (LGBT).²⁰ In their homes, schools, and communities, LGBT youth face challenges related to their sexual orientation and/or gender identity that can increase their risk of coming into contact with the juvenile justice system. A recent study in *Pediatrics* found that adolescents who self-identified as LGBT were about 50 percent more likely to be stopped by the police than other teenagers. In particular, girls who labeled themselves as lesbian or bisexual reported about twice as many arrests and convictions as other girls who had engaged in similar behavior.²¹

2. Dangerous Conditions in the Juvenile Justice System

Far too often, incarcerated youth endure abusive conditions. In a recent study by the Bureau of Justice Statistics (BJS), a shocking one in eight youth in juvenile facilities reported experiencing sexual abuse at their current facility in the past year alone.²² An earlier BJS survey, which focused solely sexual violence reports filed with prison officials, confirmed that young inmates are also more likely to be victimized when in adult facilities.²³ Reports of widespread abuses in juvenile institutions in California,²⁴ Indiana,²⁵ Mississippi,²⁶ Ohio,²⁷ Texas,²⁸ and other

¹⁷ PHILLIP LOVELL & JACQUE MINOW, FIRST FOCUS, RECLAIMING OUR NATION'S YOUTH (2009), available at <http://www.firstfocus.net/sites/default/files/r.2009-8.6.lovell.pdf>

¹⁸ US Department of Education Office of Civil Rights, 2006 Data Collection, http://ocrdata.ed.gov/Projections_2006.aspx (last visited Jan. 20, 2011).

¹⁹ American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63(9) AM. PSYCHOL., 852-862, available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>

²⁰ THE EQUITY PROJECT, LEGAL SERVICES FOR CHILDREN, NATIONAL JUVENILE DEFENDER CENTER, & NATIONAL CENTER FOR LESBIAN RIGHTS, *HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS* (2009), available at http://www.equityproject.org/pdfs/hidden_injustice.pdf.

²¹ Kathryn E.W. Himmelstein & Hannah Bruckner, *Criminal Justice and School Sanctions against Nonheterosexual Youth: A National Longitudinal Study*, PEDIATRICS (2011), available at <http://pediatrics.aappublications.org/cgi/reprint/peds.2009-2306v1>.

²² A.J. BECK ET. AL., *supra* note 6.

²³ A.J. BECK & P.M. HARRISON, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., *SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES*, 2005 (2006).

²⁴ In California, authorities failed to provide adequate medical and mental health treatment and facility staff regularly used pepper spray on youth. Michael Rothfeld, *Juvenile Prison System Needs Reform Lawyers Say*, Los

states demonstrate the importance of using federal laws to ensure the safety of children in custody. Abuses have included frequent use of pepper spray, sexual assaults by staff, hog-tying, and shackling youth. Youth who commit crimes must be held accountable, but no court disposition, regardless of the offense, should ever include abuse, mental health deterioration, or death in prison. Currently, there are no national standards in federal rule or law regulating conditions of confinement in facilities in the juvenile justice system, and there is little or no federal monitoring or oversight to hold these facilities accountable for how they care for and supervise youth.²⁹

In the original JJDP, Congress recognized that status offenses (truancy, curfew violations, runaways, disobeying parents) are non-delinquent and non-criminal and, therefore, detention was

ANGELES TIMES, Feb., 18, 2008 available at <http://www.latimes.com/news/local/la-me-youth18feb18,0,5845357.story>; Ralph Boyd, *Investigative Findings Letter*, U.S. DEPT. OF JUSTICE, CIV. RTS. DIVISION, April 9, 2003, available at http://www.justice.gov/crt/about/spl/documents/la_county_juvenile_findlet.pdf.

²⁵ In Indiana, staff sexually assaulted youth in one facility, and failed to protect youth from violence in several juvenile facilities. Wan Kim, *Investigative Findings Letter*, U.S. DEPT. OF JUSTICE, CIV. RTS. DIVISION, Aug. 6, 2007, available at http://www.justice.gov/crt/about/spl/documents/marion_findlet_5-9-07.pdf; *Justice Department Reaches Settlement Regarding Conditions at Two Indiana Juvenile Justice Facilities*, U.S. DEPT. OF JUSTICE, Feb. 8, 2006, available at http://www.usdoj.gov/opa/pr/2006/February/06_crt_066.html; Bradley Schlozman, *Investigative Findings Letter*, U.S. DEPT. OF JUSTICE, CIV. RTS. DIVISION, Sept., 9, 2005, available at http://www.justice.gov/crt/about/spl/documents/split_indiana_logansport_juv_findlet_9-9-05.pdf.

²⁶ In Mississippi, staff in state facilities hog-tied youth, put them in shackles, and stripped youth and put them in dark rooms for 12 hours a day for up to one month at a time. Adam Nossiter, *Lawsuit Filed Over Treatment of Girls at State Reform School in Mississippi*, N.Y. TIMES, July 12, 2007, available at <http://www.nytimes.com/2007/07/12/us/12prison.html>; *Mississippi Center Accused of Abuse*, USA TODAY, July 12, 2007, available at http://www.usatoday.com/news/nation/2007-07-12-mississippi_N.htm (July 12, 2007).

²⁷ In Ohio, girls in a state facility were sexually assaulted by male staff. *Ohio Settles Suit Over Juvenile Jails*, CNN, April 4, 2008; *Investigative Findings Letter*, U.S. DEPT. OF JUSTICE, CIV. RTS. DIVISION, May 9, 2007, available at http://www.justice.gov/crt/about/spl/documents/marion_findlet_5-9-07.pdf.

²⁸ In Texas, youth filed hundreds of complaints over physical and sexual abuse and repeated use of pepper spray by staff in juvenile facilities. Doug Swanson, *Officials Indicted in Abuse at TYC*, THE DALLAS MORNING NEWS, April 10, 2007, available at

<http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/041107dntextyc.be59c6b.html>;

Emily Ramshaw, *Complaints Pour In to TYC Abuse Inquiry*, DALLAS MORNING NEWS, March 13, 2007, available at

[http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-](http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-tyc_13tex.ART.State.Edition1.44911b8.html)

[tyc_13tex.ART.State.Edition1.44911b8.html](http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-tyc_13tex.ART.State.Edition1.44911b8.html); Becka, Holly, et al., *Young Inmates Endured 'Deplorable Conditions'*, Dallas Morning News, Oct. 3, 2007, available at

<http://webcache.googleusercontent.com/search?q=cache:SVNMM3EVCHEJ:www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/100307dntextyc.35bdf47.html+Young+Inmates+Endured+%E2%80%98Deplorable+Conditions%E2%80%99,+Dallas+Morning+News,+Oct.+3,+2007&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a>.

²⁹ Beginning in 1995, OJJDP funded the Council of Juvenile Correctional Administrators (CJCA) to develop national performance-based standards (now called the PbS program) and more than 100 outcome measures reported twice a year to monitor conditions of confinement and the practices and services in juvenile institutions. For more information, go to <http://cjca.net/initiatives/performance-based-standards-pbs>. While more than 200 facilities voluntarily participate with the program, participation is not mandatory, so there is no federal oversight or enforcement for the remaining – more than 2,000 – juvenile detention and correctional facilities that do not participate with the program. See NATIONAL EVALUATION AND TECHNICAL ASSISTANCE CENTER, FACT SHEET ON JUVENILE FACILITIES (January 2010). Available at http://www.neglected-delinquent.org/nd/docs/factSheet_facilities.pdf.

not appropriate. Rather than resolve the factors that lead to a status offense, detention often aggravates them because children held in secure facilities are often exposed to abusive conditions and youth with more serious delinquency histories.³⁰ The Deinstitutionalization of Status Offenders (DSO) provision was designed to ensure that status offenders receive the services they need through the appropriate human services agency rather than the justice system.³¹ However, the valid court order (VCO) exception allows status offenders to be locked up for their second and subsequent status offenses, i.e., for violating a court order not to commit another status offense. Girls are disproportionately affected as they are 170% more likely than boys to be arrested for status offenses and to receive more severe punishment.³² Many states no longer allow the incarceration of status offenders under the VCO exception.

Further, the Prison Litigation Reform Act (PLRA)³³ has kept countless juveniles from protecting their constitutional rights in courts. PLRA was enacted to curb frivolous lawsuits brought by adult prisoners; however, the law applies to all inmates, regardless of age or status. Whether housed in a juvenile facility or with adults, detained youth are among the most vulnerable to constitutional violations, but they rarely file lawsuits.³⁴ Youth generally lack the literacy skills, knowledge of the court system, and access to legal materials that would be needed to bring about litigation.³⁵ Moreover, youth under age 18 cannot file lawsuits on their own under federal law. As youth are not similarly situated to adults, the PLRA provisions should not apply to them. Rather than benefiting the public, the PLRA's application to youth actually reduces public safety by allowing serious abuses to occur without the availability of judicial recourse. Youth are sent to the juvenile justice system for rehabilitation, and these systems should be held accountable for improving youths' lives, and ensuring that they do not cause more harm.

The Sex Offender Registration and Notification Act (SORNA)³⁶ is also inappropriate to address the needs of incarcerated youth. SORNA, as currently applied to youth, is contraindicated by research that shows that youth who commit sex-based offenses are more amenable to

³⁰ BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION; THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES at 9 (2006), available at http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf.

³¹ S. REP. NO. 93-1011, at 5287-88 (1974).

³² SUSANNA ZAWACKI, GIRLS INVOLVEMENT IN PENNSYLVANIA'S JUVENILE JUSTICE SYSTEM, PENN. JUV. JUST. STAT. BULL. (2005) at 1.

³³ 18 U.S.C. §3626(e)(2).

³⁴ As of 1998, there were fewer than a dozen reported opinions directly involving challenges to conditions in juvenile detention centers, and around two dozen cases with unreported opinions or settlements. Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. Rev. 675, 681-98 (1998). This figure contrasts strongly with the much larger number of reported and unreported opinions arising from challenges to adult prison conditions. The authors of this report are generally familiar with institutional litigation and can confirm that this large disparity persists.

³⁵ See *Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995) (holding that juvenile detainees had no constitutional right to a law library because, in light of their limited capacity, they "would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds"); accord, *Shookoff v. Adams*, 750 F.Supp. 288 (M.D.Tenn. 1990), *aff'd in pertinent part, reversed in part on other grounds sub nom.* *John L. v. Adams*, 969 F.2d 228 (6th Cir. 1992).

³⁶ 42 U.S.C. §16913.

treatment and have significantly lower recidivism rates than adults. SORNA also fails to recognize that if a youth is being adjudicated within the juvenile court, the youth's offense is not serious enough to warrant criminal prosecution. SORNA has great potential to disrupt families and communities across the nation because public registration and notification does not just stigmatize the youth; it stigmatizes the entire family, including the parents and other children in the home. Finally, SORNA has a chilling effect on the identification and proper treatment of youth who exhibit inappropriate sexual behavior. Instead of seeking appropriate treatment for their child, parents may be inclined to hide their child's problem when they learn that their child may be required to register for life as a sex offender.

3. Youth Tried and Incarcerated in the Adult Criminal Justice System

An estimated 200,000 youth are tried, sentenced, or incarcerated in the adult criminal justice system every year across the United States.³⁷ Trying youth as adults is bad for public safety and for youth. Youth incarcerated in the adult system are more likely to reoffend than similarly situated youth who are retained in the juvenile system, and these offenses tend to be more violent. According to the Centers for Disease Control and Prevention, youth who are transferred from the juvenile court system to the adult criminal system are approximately 34% more likely than youth retained in the juvenile court system to be re-arrested for violent or other crime.³⁸

Youth are at greater risk of sexual abuse and suicide when housed in adult jails and prisons. The National Prison Rape Elimination Commission found that "more than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse."³⁹ Youth are also often placed in isolation and locked down 23 hours a day in small cells with no natural light, conditions which cause anxiety and paranoia, exacerbate existing mental disorders, and heighten the risk of suicide. In fact, youth housed in adult jails are 36 times more likely to commit suicide than are youth housed in juvenile detention facilities.⁴⁰

The most youth tried in the adult system are charged with non-violent offenses,⁴¹ and yet still suffer the lifelong consequences from an adult criminal conviction. Youth are often denied employment and educational opportunities,⁴² which makes transitioning to adulthood difficult. If

³⁷ J. Woolard, *Juveniles within adult correctional settings: legal pathways and developmental considerations*, 4 (1) INT'L J. OF FORENSIC MENTAL HEALTH. 18 (2005); COALITION FOR JUVENILE JUSTICE, CHILDHOOD ON TRIAL, *supra* note 3.

³⁸ CENTERS FOR DISEASE CONTROL AND PREVENTION, EFFECTS ON VIOLENCE OF LAWS AND POLICIES FACILITATING THE TRANSFER OF YOUTH FROM THE JUVENILE TO THE ADULT JUSTICE SYSTEM: A REPORT ON RECOMMENDATIONS OF THE TASK FORCE ON COMMUNITY PREVENTIVE SERVICES (2007), available at <http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf>.

³⁹ NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT (2009) at 18, available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

⁴⁰ Campaign for Youth Justice, *Jailing Juveniles*, *supra* note 6.

⁴¹ Campaign for Youth Justice, *The Consequences Aren't Minor: the Impact of Trying Youth as Adults and Strategies for Reform* (2007), available at http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/JPI014-Consequences_exec.pdf.

⁴² *Id.*

sentenced to an adult prison, approximately 80 percent of youth convicted as adults will be released from prison before their 21st birthday, and 95 percent will be released before their 25th birthday.⁴³ At the other extreme, however, some young people will spend the rest of their lifetimes behind bars. Human Rights Watch reported in 2009 that an estimated 2,589 people were serving life without parole for crimes they committed while under age 18.⁴⁴

4. Youth Reentry

Approximately 100,000 young people under age 18 leave secure juvenile facilities and return to their communities each year.⁴⁵ Youth are often discharged from care back to families struggling with domestic violence, drug and alcohol abuse, and unresolved mental health disabilities. Many youth are placed back into neighborhoods with few youth support programs, high crime rates, poverty, and poor performing schools. Public safety is compromised when youth leaving out-of-home placement are not afforded necessary supportive services upon reentering their communities and are therefore at great risk to recidivate into delinquency.

Reentry services and aftercare for youth exiting juvenile justice facilities reduce recidivism and support their successful reintegration back into families and communities. By fostering improved family relationships, reintegration into school, and mastery of independent life skills, reentry services help youth build resiliency and positive development to divert them from harm and delinquent behaviors. In order to reduce recidivism, we must establish a national policy agenda which supports reentry services to connect youth with meaningful opportunities for self-sufficiency and community integration that is grounded in evidence-based practices and stresses cooperation among existing federal and state agencies, local stakeholders, juvenile justice experts, and reform advocates.

Youth coming out of secure placement face serious barriers to education. Attendance at school is a strong protective factor against delinquency; youth who are engaged in school are much less likely to commit crime in the short-term and also in the long-term. Yet, more than half of youth in secure placements have not completed the eighth grade and two-thirds of those leaving formal custody do not return to school.⁴⁶ Emphasis on returning to school upon exit from out-of-home placement should be a high priority for any reentry initiative because of the strong connection between school engagement and delinquency. Despite the strong association between school truancy, dropouts, and delinquency, reenrollment in school for youth exiting detention is sometimes challenging. Some schools place obstacles to reenrollment for formerly incarcerated youth because these youth are considered difficult to manage. In the absence of federal policy

⁴³ RICHARD E. REDDING, U.S. DEPT. OF JUST., OFFICE OF JUV. JUST. AND DELINQ. PREVENTION, *JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY?* (2008), available at: <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

⁴⁴ *Human Rights Watch, State distribution of youth offenders serving juvenile life without parole*, supra note 7.

⁴⁵ H. Snyder, *An Empirical Analysis of the Youth Reentry Population* 2(1) *YOUTH VIOLENCE AND JUV. JUST.* 39-55 (2004).

⁴⁶ C. ROY-STEVENS, U.S. DEPT. OF JUST., OFFICE OF JUV. JUST. AND DELINQ. PREVENTION, *OVERCOMING BARRIERS TO SCHOOL REENTRY* (2004).

disallowing it, states have enacted laws that create clear obstacles for youth attempting to re-enroll in high school upon reentry.

As discussed above, youth in the justice system often have serious health and mental health needs. Prior to their incarceration many youth have access to health services through Medicaid or the State Children's Health Insurance Program (SCHIP), but youth are terminated from these services upon entering a secure detention or correctional facility. These youth are forced to reapply for benefits upon their release, a process which may take up to 90 days to complete.⁴⁷ This delay seriously threatens successful reintegration to the community, and often results in long delays in obtaining vital treatment, medication, and services at a time when they are most needed. Gaps in services significantly increase the risk of reoffending and recommitment to an institution.⁴⁸

RECOMMENDATIONS

1. Restore the Federal Leadership Role in Juvenile Justice Policy

A. *Federal Abdication of Responsibility for Juvenile Justice*

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is the federal agency responsible for juvenile justice and delinquency prevention issues, and is tasked with assisting state and local governments in addressing juvenile delinquency. Over the past decade, OJJDP suffered a drastic depletion of funding and support, and the agency's commitment to the most important issues confronting youth steadily waned.⁴⁹ Making matters worse, the Juvenile Justice and Delinquency Prevention Act (JJDPA) is long overdue for reauthorization.

B. *Meeting Federal Juvenile Justice Obligations*

Legislative

Congress should reauthorize the Juvenile Justice and Delinquency Prevention Act (JDDP). Congress should use the reauthorization of the JJDPA as an opportunity to restore the federal government's leadership role on these issues, and ensure that states have the necessary guidance and resources to create and sustain cost-effective juvenile systems that both enhance public safety and treat court-involved youth age appropriately. Congress should pass a JJDPA reauthorization bill

⁴⁷ C. Brown, *Jailing the Mentally Ill*, 44(4) ST. GOV'T NEWS 28 (2001); S. EIKEN & S. GALANTOWICZ, U.S. DEPT. OF HUMAN SERVICES, CENTERS FOR MEDICAID AND MEDICARE SERVICES, DISABLED AND ELDERLY HEALTH PROGRAM DIVISION, IMPROVING MEDICAID ACCESS FOR PEOPLE EXPERIENCING CHRONIC HOMELESSNESS: STATE EXAMPLE (2004).

⁴⁸ BAZELON CENTER FOR MENTAL HEALTH LAW, CREATING NEW OPTIONS: TRAINING FOR CORRECTIONS ADMINISTRATORS AND STAFF ON ACCESS TO FEDERAL BENEFITS FOR PEOPLE WITH MENTAL ILLNESS LEAVING JAIL OR PRISON (2007), *available at*: <http://www.bazelon.org/LinkClick.aspx?fileticket=b7UagW8enCw%3D&tabid=104>.

⁴⁹ For more information, see *Hearing on the Department of Justice, Office of Justice Programs Oversight Before the H. Comm on the Judiciary Subcomm. on Crime Terrorism and Homeland Security*, 100th Cong. (2008) (statement of Shay Bilchik, former OJJDP Administrator), *available at* <http://judiciary.house.gov/hearings/pdf/Bilchik080918.pdf>.

that will:

- Extend the *jail removal* and *sight and sound separation* core protections to all youth under the age of 18 held pre-trial, whether charged in juvenile or adult court;
- Modify the definition of “adult inmate,” and thereby codify current state flexibility for housing youth convicted in adult court in juvenile facilities rather than adult prisons;
- Strengthen the *Disproportionate Minority Contact* (DMC) core protection by requiring states to take concrete steps to reduce racial and ethnic disparities in the juvenile justice system. The JJDP’s currently requirement that states “address” DMC with the juvenile justice system is vague and lacks clear guidance on how to reduce racial and ethnic disparities. By strengthening the DMC core protection, Congress would allow states to: (i) establish coordinating bodies to oversee efforts to reduce disparities; (ii) identify key decision points in the system and the criteria by which decisions are made; (iii) create systems to collect local data at every point of contact youth have with the juvenile justice system (disaggregated by descriptors such as race, ethnicity and offense) to identify where disparities exist and the causes of those disparities; (iv) develop and implement plans to address disparities that include measurable objectives for change; (v) publicly report findings; and (vi) evaluate progress toward reducing disparities.
- Strengthen the *Deinstitutionalization of Status Offenders* (DSO) core protection, which prohibits the locked detention of status offenders, by removing the Valid Court Order (VCO) and Interstate Compact exceptions;
- Provide safe and humane conditions of confinement for youth in state and local custody by restricting the use of JJDP funds for dangerous practices, thereby encouraging states to adopt best practices for confinement;
- Provide a research-based continuum of mental health and substance abuse services to meet unmet needs of court-involved youth and their families, including diversion and reentry services;
- Assist states in complying with JJDP, and establish Incentive Grants to encourage states to adopt evidence-based or promising best practices that improve outcomes for youth and their communities. For states out of compliance with any of the core requirements, Congress should require that JJDP funds that would have been withheld for non-compliance be used as improvement grants to bring states into compliance;
- Enhance the partnership between states and OJJDP by expanding training, technical assistance, research, and evaluations. Enhance the partnership between OJJDP and Congress by encouraging transparency, timeliness, public notice, and communication;

- Incentivize juvenile justice systems to ensure that all policies, practices, and programs recognize the unique needs of girls by: (i) adding an accountability mechanism for states to meet the needs of female offenders; (ii) ensuring expertise about girls on state advisory groups by increasing research and information dissemination; and (iii) providing direct funding to gender-specific prevention and treatment programs under Title V Delinquency Prevention grants.

Congress should also restore and increase funding for JJDPA. Successful support of state efforts to reduce juvenile delinquency and protect youth in the system requires adequate federal assistance. Federal appropriations for key federal juvenile justice programs have suffered in the last decade. Congress should restore federal investments in state and local juvenile justice reform efforts to their FY 2002 levels, adjusted for inflation, and increase these investments over the next five years.

Executive

The Administration must move quickly to appoint an experienced and competent OJJDP Administrator. The OJJDP has been without permanent leadership since 2008. Strong, new leadership will provide the voice and commitment necessary to move important system reforms forward.

The Administration should also encourage Congress to fully fund the OJJDP. The Administration must request and advocate for sufficient appropriations for OJJDP and the juvenile justice programs it administers. The Administration's budget should restore juvenile justice funding to their FY 2002 levels, adjusted for inflation, and increase these investments over the next five years.

The time is ripe for OJJDP, as a national leader with access to and command of national resources, to restore and increase funding for research driven reforms. With increased funding, OJJDP could focus on identifying, developing and promoting what works to reduce delinquency and to advance youth, family and community success. OJJDP should continue to support Blueprints for Violence Prevention and other research to evaluate the evidence base for other promising programs; support increased research to find new evidence-based programs that work; and discontinue federal funding for programs that are ineffective, such as boot camps and Scared Straight programs.

The Department of Justice (DOJ) should strengthen partnerships between OJJDP and the states. The partnership between states and OJJDP should be strengthened by expanding training, technical assistance, research, and evaluation. Further, there should be greater transparency and accountability by making state plans and reports on compliance with the core protections publicly available on the OJJDP website. The OJJDP Administrator should be required to investigate and make a public report available when a state is out of compliance with any of the core protections.

OJJDP should increase family and youth involvement in policy decisions. Consistent with its 2011 Program Plan, OJJDP should continue to maintain an intentional focus on increasing family

and youth involvement in all its program planning and grant making activities. At a minimum, these activities should include focus groups to hear the concerns of families, information and resources online to assist families understand and navigate the justice system, and funding of parent resource, support, and training centers to provide direct services to families.

DOJ should also strengthen OJJDP reporting requirements. Few states and localities are able to achieve meaningful changes in their juvenile justice systems without adequate data, particularly data disaggregated by race and ethnicity, so communities are able to develop culturally and linguistically appropriate services for youth and their families. OJJDP should further its existing efforts by solidifying the requirement that states report disaggregated race and ethnicity data to OJJDP through policy guidance or regulations. Data on youth prosecuted in the adult criminal justice system via judicial, statutory, or prosecutorial waiver mechanisms, and age of jurisdiction laws are also lacking. The Administration has made progress on collecting this information at the federal level by funding the Survey of Juveniles Charged in Criminal Courts through the Bureau of Justice Statistics. The Administration should further its efforts by assisting states in collecting these data at the state and local levels to track and evaluate the impact of prosecuting youth as adults. Finally, there must be better data collection on the consequences of school discipline (e.g., in- and out-of school suspensions, expulsions, instances of corporal punishment, referrals to disciplinary alternative schools and court referrals). The Administration should require that measures of school discipline and climate are used in assessments of school success as part of the Elementary and Secondary Education Act. Signs of poor school climate, high disciplinary rates and subgroup disparities in particular, should trigger required assistance and support from local, state and federal educational agencies.

The Administration should increase involvement of the Federal Coordinating Council on Juvenile Justice Commissioners. The Federal Coordinating Council on Juvenile Justice and Delinquency Prevention (the Council) plays an important role in ensuring that all federal agencies effectively serve youth at risk of entering the system, youth in the system and youth transitioning back into their community. As members of this Council, the agency directors should personally attend these meetings to assess the effectiveness of current programming, and determine where systems and agency practices can be improved. The Council should regularly hold “listening sessions” to hear directly from current or formerly court-involved youth and their families. Further, the Council should be expanded to include two new positions for family members and youth who have been directly affected by the justice system.

2. Prevent Crime and Divert Youth from the Justice System

A. Overincarceration and Non-treatment of Vulnerable Youth

Misguided policies that purport to be “tough on crime” increase incarceration rates, disproportionately impact poor youth and youth of color, exacerbate gang-related crime, funnel a disproportionate number of youth who have a cognizable mental health and/or substance abuse

disorder into the justice system, and often make our communities vulnerable to crime. Research from top scholars in a variety of fields including economics, educational psychology, and public health reveals that public dollars spent on effective prevention and education programs are far more effective at reducing crime than broadening prosecutorial powers or stiffening criminal penalties for young people.⁵⁰

B. Reduce Youth Crime and Incarceration

Legislative

In addition to reauthorizing and adequately funding the JJDPA, as discussed above, Congress should take the following steps to reduce the number of children in the justice system.

Congress should pass the Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education (PROMISE) Act⁵¹ to implement and fund evidence-based practices to prevent delinquency and gang involvement. Under the Act, local communities form PROMISE councils with representatives from schools, social services, health and mental health providers, community-based and faith-based organizations, court services, and law enforcement. Each council assesses the community's needs and strengths, evaluates current funding priorities – including local jail and prison expenditures – and then develops a comprehensive plan for implementing evidence-based and promising prevention and intervention strategies.

Congress should create incentives, such as grants administered by the Department of Justice, and requirements that would meet the needs of particularly vulnerable youth, including youth with disabilities and LGBT youth involved in the justice system. Juvenile justice agencies are ill-equipped to manage the mental health and substance abuse needs of youth effectively. Congress should work to address the barriers to service identified by juvenile justice agencies, including: insufficient resources, inadequate administrative capacity, lack of appropriate staffing, and lack of training for staff.⁵² Also, Congress should pass federal protections against discrimination in juvenile justice systems based on actual or perceived sexual orientation or gender identity.

Congress should also create incentives for states to reduce the inappropriate detention of youth with mental health disabilities. Congress should encourage states to : (i) identify vulnerable youth through consistent use of screening and assessments; (ii) divert youth with mental health disorders from detention and incarceration into home- and community-based treatment; (iii) make

⁵⁰ In recent years, a range of organizations have commissioned or conducted related research and reached similar conclusions, including the American Psychological Association, the Washington State Institute for Public Policy, the Social Development Research Group of Seattle, Washington, and the Office of Juvenile Justice and Delinquency Prevention. For more information, see

<http://chhi.podconsulting.com/assets/documents/publications/NO MORE CHILDREN LEFT BEHIND.pdf>

⁵¹ H.R. 1064, 111th Cong. (2009); S.435, 111th Cong. (2009).

⁵² Federal Advisory Committee on Juvenile Justice, *Annual Report* (2006), available at <http://www.ncjrs.gov/pdffiles1/ojdp/218367.pdf>

training and technical assistance available for law enforcement officers, judges, probation officers, and other decision makers; and (iv) require individualized discharge plans to link youth to appropriate aftercare services, including mental health and substance abuse services and supports for the youth and his/her family.

Congress should pass the RAISE UP Act (Reengaging Americans in Serious Education by Uniting Programs)⁵³, which challenges every high school dropout to attain a high school diploma, a postsecondary credential, and a family supporting career – and provides them with the support to succeed.

Executive

OJJDP should do more to support community-based alternatives to incarceration. OJJDP has a vital role to play in helping states and localities prevent and reduce the use of out of home placements. For example, the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI)⁵⁴, which is aimed at reducing pre-adjudication detention through a variety of tools and principles, such as objective risk assessment tools, has been replicated in more than 100 jurisdictions across the country. OJJDP has begun to partner with the Annie E. Casey Foundation to replicate JDAI in additional jurisdictions and should continue to use its discretionary budget to support efforts to reduce the use of incarceration and other residential facilities.

The Administration should grant technical assistance to improve school safety and reduce exclusionary disciplinary practices through. To this end, the Administration should provide schools with training and technical assistance on the use of alternatives to suspension and expulsion, family and tutoring supports, social and emotional learning, positive youth development programming, bullying prevention, threat assessment, positive behavior supports, and restorative justice practices.

OJJDP, in coordination with the Substance Abuse and Mental Health Services Administration, should conduct a major study regarding the prevalence of mental health and substance abuse disorders among juvenile justice populations served by all states and territories. Additionally, OJJDP should increase training and technical assistance related to mental health and substance abuse, including best practices for law enforcement and probation officers, detention/corrections and community corrections personnel, and court services personnel.

The Administration should promote LGBT cultural competence in Safe Schools/Healthy Students (SS/HS)⁵⁵, a program widely recognized as a model for achieving effective collaboration

⁵³ H.R. 3982, 111th Cong. (2009).

⁵⁴ See Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx> (last visited Jan. 17, 2011).

⁵⁵ Substance Abuse and Mental Health Services, Safe Schools/ Healthy Students, <http://www.sshs.samhsa.gov/> (last visited Jan. 17, 2011).

across public education, local mental health, and the juvenile justice system. SS/HS evaluations should reflect efforts to meet the needs of LGBT students, including decreasing the rate of arrest and referral to the juvenile court of LGBT youth.

3. Keep Court-Involved Youth Safe

A. *Dangerous Conditions in the Juvenile Justice System.*

The JJDPAs and other relevant legislation do not address abusive conditions and practices, as well as other age-inappropriate settings in juvenile facilities. To address the recent and well-documented abuses in juvenile facilities nationwide, juvenile justice facility staff need to be trained on effective behavior-management techniques to respond to dangerous or threatening situations. Additionally, PLRA keeps countless uses from addressing these conditions and other constitutional violations in court.

B. *Ensure Safe Conditions for Youth*

Legislative

Congress should remove the VCO and Interstate Compact exceptions from the DSO provision of the JJDPAs. This will ensure that status offenders are served in more appropriate settings, and will allow the juvenile justice system to focus on youth charged with delinquent offenses.

Congress should work to improve conditions of confinement for youth in juvenile facilities. Congress should restrict the use of federal funds for the most dangerous practices such as hog-tying, fixed restraints, psychotropic medications, and pepper spray, which create an unreasonable risk of physical injury, pain, or psychological harm. Congress should also fund training and technical assistance to help jurisdictions reduce unnecessary use of isolation and restraint, require increased collection of data on isolation and restraint, and allow states to use JJDPAs funds to develop independent monitoring bodies (e.g., creating ombudsmen programs, creating family monitoring panels, or partnering with Protection and Advocacy organizations) and to institute programs to reduce unnecessary isolation and restraint.

Congress should pass the Family Justice Act⁵⁶. The Family Justice Act of 2010 would provide grants to non-profits to establish monitoring panels that involve youth, families, and other community members in developing better policies and practices to protect youth, support their rehabilitation and reduce recidivism. This would increase both oversight of and family engagement with juvenile justice systems.

⁵⁶ H.R. 6361, 111th Cong. (2010).

Congress should also ensure that Prison Rape Elimination Act of 2003 (PREA)⁵⁷ implementation addresses the needs of detained youth. PREA was passed in recognition of the serious crisis of rampant sexual abuse in corrections and detention facilities nationwide. Youth are especially vulnerable to this abuse, but the bulk of attention and resources devoted to PREA have focused on adult prisons and jails. PREA appropriations have never reached the levels approved by Congress when the law passed. As a result of limited funding, the state grant program – a key component in the statute – has been defunct since FY2006, and focused on state prison systems. Congress should provide sufficient appropriations to implement PREA, including funds dedicated to reducing the sexual abuse of youth in all types of facilities and in community corrections.

Congress should amend the PLRA to define ‘prisoner’ as an adult, and exclude youth from the law’s application. Also, Congress should amend Title I of the Adam Walsh Child Protection and Safety Act of 2006 – the Sex Offender Registration and Notification Act (SORNA)⁵⁸ – to exclude youth adjudicated for certain sex-based offenses within the juvenile court from mandatory registration on a public offender registration.

Executive

DOJ should enact and enforce national standards protecting youth from sexual abuse. In accordance with PREA, which required the Attorney General to ratify binding national standards addressing sexual abuse in detention within one year from receiving the June 2009 recommended standards from the bipartisan National Prison Rape Elimination Commission (NPREC), the Attorney General should ratify binding standards. The standards enacted by the Attorney General should ensure that:

- Responsible, professional adults trained in adolescent behavior and development provide continuous, direct supervision of youth, and do not rely on video surveillance;
- The Adult and Lockup Standards prohibits holding youth in adult facilities to protect youth from sexual abuse and dangers associated with isolation;
- Youth are protected from harmful cross-gender interactions, recognizing that a large percentage of sexual abuse of young people in facilities is perpetrated by staff members of the opposite sex. The standards should prohibit one-on-one cross-gender supervision and provide additional guidance on how these prohibitions apply to transgender residents;
- Specific guidance is available on how to use individual safety plans to keep vulnerable youth safe without resorting to blanket policies for certain groups, such as LGBT youth;

⁵⁷ 45 U.S.C. §15601.

⁵⁸ 42 U.S.C. §16913.

- The Juvenile Standards do not treat voluntary consensual sexual activity as sexual abuse, even if facilities prohibit voluntary consensual sexual activity among residents by rule. Conflating abuse and voluntary consensual sexual activity often leads to overly harsh responses that misuse limited resources and have a disproportionately negative impact on certain groups, such as LGBT youth;
- The Juvenile Standards include a clear statement of the dangers associated with isolation in order to reinforce a facility’s responsibility to keep children safe without resorting to that practice. Additionally, youth who engage in sexual abuse should not be subjected to prolonged disciplinary isolation as punishment for that behavior;
- Employees, volunteers, and contractors working in all facilities that house youth receive training on adolescent development, the prevalence of trauma and abuse, mandatory reporting requirements, and the agency’s zero tolerance policy on sexual abuse of incarcerated persons;
- The caretaking relationship between medical and mental health professionals and youth is preserved, by eliminating inquiries into prior offending behavior and obtaining informed consent before sharing sensitive information;
- Medical and mental health programs engage in quality assurance activities, including monitoring with the standards;
- Access to prophylactic HIV treatment and emergency contraception and pregnancy-related services is available;
- Limited English Proficient (LEP) children not only understand sexual misconduct policies and reporting procedures, but are also able to communicate with staff during other important phases, including investigation, medical and mental health care, and other supportive services; and
- Agencies only hire, retain, and promote staff members who are qualified by experience, education, and background to protect children by considering information from civil protection orders and annual criminal background checks.

The Attorney General should move quickly to ratify the standards after addressing the unique concerns and development needs of youth in juvenile and adult facilities. DOJ must ensure that agencies comply with these standards, including by providing the needed training and technical assistance.

OJJDP should work to improve the conditions of incarceration for youth. In recognition of its national role in ensuring that incarcerated youth are held in safe conditions, OJJDP recently

initiated a new Center on Youth in Custody. This new entity should have an advisory board that includes youth and family voices. This new entity should also make best practices and standards available nationwide, and help states to provide necessary training for facility staff to adopt best practices in programming, behavior management, and security while eliminating dangerous practices and unnecessary isolation. In conjunction with this new effort, OJJDP should also encourage states to establish community advisory boards or other independent monitoring structures to monitor conditions in juvenile facilities and support their improvement.

DOJ should encourage states to keep youth off public sex offender registries. In the absence of Congressional action on SORNA, the Attorney General should refrain from promulgating policies or promoting practices that unnecessarily stigmatize youth. The Attorney General should maintain a policy that allows states to exercise discretion in establishing or maintaining a separate juvenile registry that is accessible to the relevant authorities but not the general public, and allow for the courts or designated agency to determine whether community notification is required.

4. Remove Youth from the Adult Criminal Justice System

A. Youth Tried, Sentenced, and/or Incarcerated as Adults

An estimated 200,000 youth are tried, sentenced, or incarcerated in the adult criminal justice system every year across the United States.⁵⁹ Trying youth as adults is bad for public safety and for youth. Youth incarcerated in the adult system are more likely to reoffend, are at greater risk of sexual abuse and suicide, and more likely suffer lifelong employment and education consequences than similarly situated youth who are retained in the juvenile system.

B. Treat Youth as Youth

Legislative

Congress should extend JJDP A protections to keep youth out of adult facilities and extend the jail removal and sight and sound protections of the Act to all youth, regardless of whether they are awaiting trial in juvenile or adult court. In the limited exceptions allowed under the JJDP A where youth can be held in adult facilities, they should have no sight or sound contact with adult inmates. Congress should also revise the definition of “adult inmate” to codify the recent guidance issued by OJJDP by excluding youth who, at the time of the offense, are under the age of 18 and are below the maximum age for youth held at a juvenile facility under state law.

Congress should raise the age of juvenile court jurisdiction. In accordance with the recommendations of the Federal Advisory Council on Juvenile Justice and Coordinating Council, Congress should both encourage states to set the age of adulthood to 18 at the time of the

⁵⁹ J. Woolard, *Juveniles within adult correctional settings: legal pathways and developmental considerations*, *supra* note 3; COALITION FOR JUVENILE JUSTICE, *CHILDHOOD ON TRIAL*, *supra* note 3.

commission of the crime and to provide financial incentives for states to do so. Further, Congress should encourage states to raise the extended age of juvenile court jurisdiction to at least the age of 21.

Congress should end the practice of sentencing youth tried and convicted in federal court to life without parole, and instead require review after ten years for any person incarcerated in federal prison for a crime committed when they were under the age of 18. Just this past year, in *Graham v. Florida*⁶⁰ the United States Supreme Court reiterated that youth are fundamentally different than adults by declaring it unconstitutional to sentence youth to life without parole for a non-homicide crime. Although we know that young people have a greater capacity to be rehabilitated, the United States alone continues to sentence youth to die in prison.

Executive

In accordance with PREA, the Attorney General must enact standards to protect youth from sexual abuse. In light of the overwhelming evidence that youth cannot be kept safe in adult facilities and the research demonstrating that keeping youth in adult facilities is harmful to the youth and to public safety, these PREA standards should be modified to require removal of youth from adult jails and prisons altogether. This change would be consistent with existing laws and policies used by the Federal Bureau of Prisons that prohibit the placement of youth in adult jails and prisons in federal custody.

DOJ should help states remove youth from adult facilities. Roughly one in four incarcerated youth are held in adult jails or prisons instead of juvenile facilities. Several jurisdictions including Virginia, Colorado, and Multnomah County, Oregon have recently changed their state laws to allow youth tried in the adult system to be housed in juvenile facilities. OJJDP should fund a demonstration program to help these jurisdictions remove youth from adult jails and prisons.

5. Reentry of Youth into their Communities

A. Lack of Reentry and Treatment Assistance for Youth

Approximately 100,000 young people under age 18 leave secure juvenile facilities and return to their communities each year.⁶¹ Youth are often discharged from care back to families struggling with domestic violence, drug and alcohol abuse, and unresolved mental health disabilities. Many youth are placed back into neighborhoods with few youth support programs, high crime rates, poverty, and poor performing schools. Public safety is compromised when youth leaving out-of-home placement are not afforded necessary supportive services, including access to education and physical and mental health care, upon reentering their communities and are therefore at great risk to recidivate into delinquency.

⁶⁰ *Graham v. Florida*, 130 S. Ct. 2011.

⁶¹ H. Snyder, *supra* note 44 at 39-55.

B. Provide Support for Youth After Incarceration

Legislative

Congress should increase its focus on youth in the reauthorization of the Second Chance Act by increasing funding dedicated to youth.⁶² Federal commitment to improving reentry is evident in the passage of the Second Chance Act in 2008, which authorized \$165 million in federal spending on reentry, including competitive grants to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family services, mentoring, victims support, and other services that help reduce recidivism. While the Second Chance Act is a vehicle for improved reentry programs and services, its focus on young people must be strengthened.

Congress should work to improve the education of incarcerated youth. Congress should use the Elementary and Secondary Education Act of 1965 (ESEA)⁶³ reauthorization as an opportunity to begin addressing some of the education barriers that returning youth face. Specifically, Congress should support the inclusion of incentives for jurisdictions to appropriately handle the educational needs of these vulnerable youth.⁶⁴

Congress should suspend and/or restore Medicaid and other health benefits for incarcerated youth. Congress should end the practice of terminating Medicaid, and State Children's Health Insurance Program (SCHIP) coverage for youth who enter secure detention or correctional facilities. Instead, the law should be amended to only suspend coverage so that it can be immediately reinstated upon exit from the facility.

Executive

The Administration should ask Congress to increase funding for youth reentry by requesting that funding be specifically allocated for youth under the Second Chance Act. In addition, all youth-serving federal agencies, including the U.S. Departments of Labor, Education, and Health and Human Services, should work together to educate states and localities on the availability of federal funds that support youth reentry.

DOJ should increase federal coordination on youth reentry. The Attorney General should oversee and coordinate youth reentry issues with other reentry programming administered by

⁶² For more information, see The Sentencing Project and National Network for Youth, Memo to Senate and House Judiciary Committee Staff from Robert F. Kennedy Juvenile Justice Collaborative, http://www.ceanational.org/phorum/file.php?9,file=126,filename=Juv.Second_Chance_Act.doc. (last visited Jan. 20, 2011).

⁶³ 20 U.S.C. § 6301 et. seq.

⁶⁴ For more information on the educational barriers that youth face upon exit from secure placement, see J. Feerman et al, The School to Prison Pipeline...and Back: Obstacles and Remedies for the Re-enrollment of Adjudicated Youth, 54 N.Y.L. SCH. L. REV. 1115 (2009).

other federal agencies through DOJ's new Inter-agency Reentry Working Group, announced by Attorney General Holder in July 2010. The Inter-agency Reentry Working Group also should coordinate its work on youth reentry with DOJ's Federal Coordinating Council on Juvenile Justice and Delinquency Prevention Subcommittees on Youth Reentry and Education.

The Administration should promote a continuum of education for delinquent youth. The Administration should incentivize state departments of education to focus on vulnerable school populations to ensure youth experience no interruptions in their education during out-of-home placement, and are assisted with reenrollment in school upon exit from placement. The Administration should also call for the inclusion of an individualized education assessment as a part of each youth's reentry planning.

The Administration should actively educate states and support efforts to suspend, rather than terminate, Medicaid or other health coverage for incarcerated youth.

APPENDICES

Experts

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(<http://www.fightcrime.org/state/usa/staff-list>).

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Neelum Arya, Research and Policy Director, Campaign for Youth Justice
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Dana Shoenberg , Deputy Director, Center for Children's Law and Policy
(<http://www.cclp.org/Shoenberg.php>)

Tracy Velazquez, Executive Director, Justice Policy Institute
(<http://www.justicepolicy.org/content-hmID=1810&smID=1544.htm#TV>)

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CHAPTER 9

FEDERAL SENTENCING

THE ISSUE

Sentencing policies enacted over the past 30 years have turned the United States from the land of the free into the home of the incarcerated. One in every 31 Americans is either in prison or jail, on probation or on parole, according to the Pew Center on the States, and there are 2.3 million people in prison.¹ That number represents 25 percent of the world's prison population and yet the United States is home to just five percent of the world's population.² This mass incarceration comes with an extraordinarily high price for both state budgets as well as for families. Financially, prison budgets have become the fastest growing segment of state budgets, outpacing investments in education and transportation.³ Socially, families are being torn apart as more and more parents are behind bars. And, morally, communities are becoming fractured by a criminal justice system that fails to treat all people alike.

While the high costs to society of incarceration might be tolerable were more effective and less expensive alternatives to reducing crime not available--but they are. Thirty years of academic research and real-world experience have demonstrated that incarceration is valuable for removing the most dangerous, violent individuals from our streets, but counterproductive to efforts to rehabilitate those who commit less serious offenses before they re-enter society. Community corrections, treatment and rehabilitation, and other alternatives to prison have proven to be far more effective at reducing recidivism rates and at less cost to taxpayers.⁴

Criminal justice reformers from across the ideological spectrum are working together to promote smarter sentencing solutions. Blue states, like New York, and red states, such as South Carolina, have led the way by either repealing or significantly reforming their costly and ineffective mandatory minimum sentencing regimes.⁵ In 2010, Congress showed that bipartisan sentencing reform is possible at the federal level, too. An overwhelming majority approved legislation to

¹ PEW PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008. (Pew Center on the States February 2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

² Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at: <http://www.nytimes.com/2008/04/23/us/23prison.html>.

³ National Association of State Budget Officers, *Expenditure Reports 2005 – 2009*, available at: <http://nasbo.org/Publications/StateExpenditureReport/StateExpenditureReportArchives/tabid/107/Default.aspx> (last visited Jan. 24, 2011).

⁴ See, e.g., Joan Persilia, *A Crime Control Rationale for Community Corrections* 74 PRISON J. 479 – 496, available at: <http://tpj.sagepub.com/content/75/4/479.abstract>.

⁵ Press release, Families Against Mandatory Minimums, *Historic Agreement to Reform Rockefeller Drug Laws* (Mar. 27, 2009), available at: <http://www.famm.org/NewsandInformation/PressReleases/HistoricAgreementtoReformRockefellerDrugLaws.aspx>; *Prisons Full, Coffers Empty*, ECONOMIST (July 22, 2010), available at: <http://www.economist.com/node/16636019> (last visited Jan. 24, 2011).

repeal a mandatory minimum for the first time since the Nixon Administration.⁶ It also reduced the infamous 100:1 disparity between crack and powder cocaine sentences.

The new Congress and administration should continue to work together to improve our federal sentencing system in ways that protect the public, reduce crime rates, and save taxpayers money. Specifically, Congress should repeal all mandatory minimums or, in the alternative, expand the federal safety valve, which authorizes judges to avoid imposing a mandatory minimum in certain circumstances. Moreover, Congress and the administration should expand alternatives to incarceration in the federal sentencing guidelines. Finally, Congress should act to expand the Residential Drug Abuse Program (RDAP), provide more good time credit for model prisoners, and expand the release program for elderly inmates.

HISTORY OF THE PROBLEM

There are two types of federal sentencing laws addressed in this chapter: (1) mandatory minimum sentencing laws, enacted by Congress, and (2) 18 U.S.C. § 3553(a). A mandatory minimum sentence is a required minimum term of imprisonment. When it applies, a judge is forced to impose it, even if the circumstances of the offense or the culpability of the defendant warrant a lower sentence. In cases where mandatory minimums do not apply, judges are directed by the sentencing statute, 18 U.S.C. § 3553(a), to impose a sentence “sufficient but no greater than necessary” to comply with the enumerated purposes of sentencing. Judges are directed to consult the advisory sentencing guidelines (promulgated by the U.S. Sentencing Commission) as well as undertake a step-by-step inquiry into such things as the circumstances of the offense and the history and characteristics of the offender. The resulting sentence is more likely to be a better fit than the one-size fits all mandatory sentence.

Mandatory minimums were created as part of a larger effort to create more uniform sentencing. Mandatory minimums first appeared only a few years after Congress created the U.S. Sentencing Commission (USSC) in 1984.⁷ This expert body wrote and implemented the Federal Sentencing Guidelines (Sentencing Guidelines), with the mandate that equally blameworthy offenders get similar sentences.⁸ At the same time, the guidelines also gave courts some flexibility to tailor sentences to fit individuals or special circumstances.⁹ The discretion exercised by judges was not extinguished, but simply transferred to prosecutors. Prosecutors now have control over sentencing through their charging decisions.

⁶ Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT’G REP. 55 - 2008) available at: http://www.famm.org/Repository/Files/11.FSR.21.1_55-68%5B1%5D.pdf.

⁷ Pub. L. No. 98-473, 98 Stat. 2017 (codified as amended at 28 U.S.C. § 991 (2007)).

⁸ See 28 U.S.C. § 991(b)(1)(B) (2007); See also Pub. L. No. 98-473, 98 Stat. 2019 (codified as amended at 28 U.S.C. § 994 (2007)) (describing the Commission’s duties and powers).

⁹ See, e.g., U.S.S.G. § 5K2.0 (2008) (describing when a sentence may be increased or decreased based on factors “not adequately taken into consideration by the Sentencing Commission in formulating the guidelines”).

In the mid-1980s, Congress responded to concerns about crime by adopting mandatory minimums of five or more years for a variety of drug and gun offenses.¹⁰ These were expanded in following years to apply to a growing number of offenses, including gun offenses, sex crimes, identity fraud, and some crimes of violence.¹¹ In 1988, they were expanded to include conspirators.¹² Sentence triggers were simple, for example, drug type and weight or presence of a gun. Some judges found they could not impose appropriate sentences in many cases because such simplistic factors did not account for culpability and distorted the criminal sentencing process.¹³ But, their hands were tied by these mandatory minimums. One size fits all penalties have extracted a heavy economic and social price without providing results.

Mandatory minimum sentencing policies come with billions in direct costs. In 2008, American taxpayers spent over \$5.4 billion on federal prisons,¹⁴ a 925 percent increase since 1982.¹⁵ This explosion in costs is driven, in part, by the expanded use of prison sentences for drug crimes and longer sentences required by mandatory minimums. The federal prison population has increased nearly five-fold since mandatory minimums were enacted in the mid-80s and mandatory guidelines became law.¹⁶ The major cause is the increase in sentence length for drug trafficking from 23 months¹⁷ before mandatory minimums to 83.2 months in 2008.¹⁸ About 75 percent of the increase was due to mandatory minimums and 25 percent due to guideline increases above mandatory minimums.¹⁹ Despite more than 50 years of experimenting with mandatory minimums, however, backers can point to no conclusive studies that demonstrate any positive impact of

¹⁰ Gill, *supra* note 6, at 59.

¹¹ *Id.*

¹² *Id.*

¹³ For example, the policy body of the federal judiciary expressed its view in testimony by Judge Vincent Broderick on mandatory minimums in 1993 before the Crime subcommittee of the House Judiciary Committee “I warrant that there is no single issue affecting the work of the federal courts with respect to which there is such unanimity: most federal judges . . . whatever their background, believe – and this is predicated on their experience – that mandatory minimums are the major obstacle to the development of a fair, rational, honest and proportional federal criminal justice sentencing system.” *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. of the Judiciary*, 103rd Cong. 104 (1993) (statement of the Honorable Vincent L. Broderick, Chair of the Conference Committee on Criminal Law of the Judicial Conference of the United States), available at <http://www.archive.org/stream/federalmandatory00unit#page/n0/mode/2up>

¹⁴ U.S. DEP’T OF JUST., FY 2009 BUDGET AND PERFORMANCE SUMMARY, FEDERAL PRISON SYSTEM, available at http://www.usdoj.gov/jmd/2009summary/html/127_bop.htm.

¹⁵ BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 (2006), at 3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf>.

¹⁶ U.S. Bureau of Prisons, A Brief History of the Bureau of Prisons, <http://www.bop.gov/about/history.jsp>.

¹⁷ U.S. SENT’G COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING (2004), at 48, available at http://www.ussc.gov/15_year/15year.htm [hereinafter FIFTEEN YEAR REVIEW]; U.S. SENT’G COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL GUIDELINES AND POLICY STATEMENTS (1987), at 69-70.

¹⁸ U.S. SENT’G COMMISSION, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2008), at Table 14, available at <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm>

¹⁹ FIFTEEN YEAR REVIEW, *supra* note 19, at 54.

federal mandatory minimum sentences on the rate at which drugs are being manufactured, imported, and trafficked throughout the country.²⁰

Furthermore, mandatory minimums aren't always appropriate. Because courts cannot tailor these sentences to fit the individual, many people get punishments that are too harsh for the crimes they committed. For example, drug mandatory minimums are based on only the type and weight of the drug, which prevents courts from considering other important facts, such as whether the offender is nonviolent or a drug addict, played a minor role in the crime, or is not dangerous to the community. Additionally, many mandatory minimum-bearing statutes overlap with state criminal code provisions, effectively federalizing these crimes. This federalization of crime is inconsistent with the long-standing principle that law enforcement and crime prevention are largely state functions.

For the first time in our nation's history, more than one in 100 adults are imprisoned.²¹ The United States now imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan.²² Approximately one-quarter of all persons imprisoned in the entire world are imprisoned in the United States.²³ The federal sentencing scheme has contributed to these statistics. In the past 25 years since the advent of the Sentencing Guidelines and the mandatory minimum sentences for drug offenses, the average federal sentence has roughly tripled in length.

1. Crack Cocaine Sentencing

Until recently, the disparity in sentencing between crack cocaine violations and other cocaine violations was 100:1. On August 3, 2010, the Fair Sentencing Act (FSA) was signed into law, reducing the longstanding disparity in cocaine sentencing to 18:1, such that possession with intent to distribute 28 grams of crack now triggers a five-year mandatory minimum and 280 grams of crack triggers a 10-year mandatory minimum.²⁴ Although the crack sentencing disparity was not completely eliminated, the new 18:1 sentencing ratio means relief for about 3000 defendants a year, a reduction of the typical crack sentence by nearly 30 months and, a savings to the federal government of \$42 million over a five-year period.²⁵

²⁰ All sides in the debate agree that proving causality between longer mandatory sentences and crime rates is difficult. Yet the burden falls on the proponents of mandatory minimums to provide evidence that they are working. The proponents have shown none.

²¹ THE PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008* (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

²² William Sarbol, et al., *Prisoners in 2008*, NCJ 228417 (Dec. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

²³ Roy Walmsley, *World Prison Population List. (Eighth Edition)*, INT'L CENTRE FOR PRISON STUD., SCH. OF L., KING'S COLLEGE LONDON. http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppi-8th_41.pdf.

²⁴ Pub. L. No. 111-220, 124 Stat. 2372..

²⁵ CONGRESSIONAL BUDGET OFFICE, *COST ESTIMATE: FAIR SENTENCING ACT OF 2010* (2010), available at: <http://www.cbo.gov/ftpdocs/114xx/doc11413/s1789.pdf>.

Under the FSA, the U.S. Sentencing Commission (USSC) was granted emergency authority to amend the crack sentencing guidelines to ensure that the guidelines are consistent with the new law.²⁶ The temporary amendment took effect on November 1, 2010, and established the base offense level at 26 and without retroactive application of the guideline amendment. The USSC will promulgate its permanent guideline amendment in May 2011. The Commission should act to set its permanent guidelines for crack at offense levels 24 and 30, rather than 26 and 32, and make the guideline applicable to persons sentenced for offenses that took place prior to enactment of the FSA.

Senators Richard Durbin and Patrick Leahy, the lead sponsors of the Senate-passed FSA, urged that prosecutorial discretion be exercised by the Department of Justice (DOJ) such that the new sentencing guidelines be applied to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment.²⁷ In the words of Senators Durbin and Leahy, "justice requires that defendants not be sentenced for the next five years under a law that Congress has determined is unfair."²⁸ Any other interpretation of the law ensures extensive, costly federal litigation, and will likely ensure disparate sentencing outcomes in different parts of the country for many years.

Many federal judges agree with the position taken by Senators Durbin and Leahy. Judges are starting to apply the FSA to pending cases over the Government's objection. George H.W. Bush appointee Judge D. Brock Hornby has held that the FSA's reduced mandatory minimums apply to defendants who have not yet been sentenced. In his opinion, Judge Hornby wrote, "what possible reason could there be to want judges to continue to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs? ... I would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair."²⁹ As of January 10, 2011, at least 16 courts had followed Judge Hornby's lead.³⁰

2. Federal Safety Valve

In recognition of the constraints placed on judges' ability to impose appropriate sentences by mandatory minimums, Congress installed a statutory safety valve in 1994, which applies only to

²⁶ *Id.* § 8.

²⁷ Letter from Richard Durbin and Patrick Leahy, United States Senators, to Eric Holder, Attorney General of the United States (November 17, 2010).

²⁸ *Id.* at 1.

²⁹ *United States v. Douglas*, 2010 WL 4260221 (D. Me. 2010).

³⁰ *See, e.g., United States v. Johnson*, No. 6:08-cr-270 (M.D. Fla. 2011); *United States v. Cox*, No. 3:10-cr-85 (W.D. Wis. 2011); *United States v. Jones*, No. 4:10 CR 233 (N.D. Ohio 2011); *United States v. English*, No. 3:10-cr-53 (S.D. Iowa 2010). For full list of district court cases applying the ameliorative changes to the Fair Sentencing Act of 2010 to defendants whose conduct occurred before its passage but who had not yet been sentenced, see also http://www.fd.org/pdf_lib/District%20courts%20applying%20FSA.pdf.

drug mandatory minimums.³¹ The safety valve directs the court to waive the mandatory minimum in drug cases if the defendant meets five statutory criteria. The defendant must have: (i) been a low-level participant, (ii) not used a weapon, (iii) been involved in a violence-free crime, (iv) little or no criminal history, and (v) told the government the truth about his or her involvement in the instant and related offenses – the so-called “tell-all” requirement.³² Today, the safety valve is used to lower the sentences of 25% of all deserving drug defendants otherwise subject to mandatory minimums of five, 10 or more years.³³

3. Sentence Stacking Provisions

Federal law requires judges to impose a mandatory minimum sentence of five, seven or 10 years on defendants who, during and in relation to or in furtherance of a crime of violence or drug trafficking, possess, brandish, or fire a firearm, respectively.³⁴ This mandatory sentence is imposed on top of any other sentence in the case. Second and subsequent convictions under the law trigger a consecutive 25-year mandatory minimum sentence.

Though the 25-year recidivism enhancement appears designed to punish true repeat offenders -- that is, people convicted and who have served their sentence for using a firearm who then re-offend – it is also used on true first offenders.³⁵ In 1993, the Supreme Court ruled that the 25-year enhancement applies to defendants convicted of two or more separate instances of possessing a firearm, even when the defendant sustains the two convictions in the same court proceeding. Because the sentences are mandatory and consecutive, first offenders who are convicted in their first appearance in court of possessing a gun three times in violation of § 924(c) will be sentenced to 55 years. That is five years for the first possession conviction and 25 years each for the other two incidents. This results in unduly severe sentences that bear no relation to deterring true recidivists. Perversely, a true recidivist can serve a shorter sentence than a true first offender.

4. Alternative Sentencing

Federal judges currently have little authority to impose sentences other than jail or incarceration, even when the offense is relatively minor. As a result, while the federal justice system authorizes probation as an alternative to incarceration, the use of probation has declined since the

³¹ 18 U.S.C. § 3553(f).

³² *Id.*

³³ U.S. SENT’G COMMISSION, OVERVIEW OF STATUTORY MANDATORY MINIMUM SENTENCING 8, tbl. 4 (July 10, 2009), available at http://www.ussc.gov/MANMIN/man_min.pdf.

³⁴ 18 U.S.C. § 924(c).

³⁵ Recidivists in criminal law are generally only considered such after they have had an opportunity to reflect on their conduct following apprehension, prosecution and punishment. For example, the recidivist provisions in 18 U.S.C. § 841 only kick in after a conviction has been finalized, as do most other recidivist and two and three strike provisions in state and federal law.

advent of the Sentencing Guidelines. In 1984, more than 30% of defendants were sentenced to probation without any term of imprisonment; by 2006, that figure had declined to 7.5%.³⁶

Alternative sentences to incarceration under the Sentencing Guidelines should be expanded. Virtually every state criminal justice system makes use of a various forms of punishment short of pure incarceration, such as probation, home detention, intermittent confinement, and community services. In the federal criminal justice system, these alternatives have been greatly curtailed since the adoption of the Guidelines.

In 1984, more than 30% of defendants received sentences of probation without any term of incarceration.³⁷ This reflected the considered judgment of the judiciary as a whole that in nearly one-third of cases, the purposes of sentencing could be fully achieved without a period of imprisonment. By fiscal year 2008, only 7.4% percent of federal defendants received probationary sentences, 6.2% received “split” sentences of both imprisonment and home or community confinement, and the remaining 86.4% of defendants received sentences of straight incarceration.³⁸ At the same time, utilization of community confinement has been curtailed and shock incarceration (“boot camp”) programs have been eliminated.

The current federal criminal justice system, in which a prison sentence is the default and alternative sentences remain the relatively rare exception, is not what Congress envisioned in 1984 when it instructed the Commission to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” 18 U.S.C. § 994(j). The current Guidelines treat nearly every case as “otherwise serious” – in fiscal year 2008, 92.6% of offenders were sentenced to imprisonment.³⁹

5. Residential Drug Abuse Program

The Residential Drug Abuse Program (RDAP) is a voluntary six-to-twelve-month program of individual and group therapy for federal prisoners with substance abuse problems. Authorized by 18 U.S.C. § 3621, it directs the Federal Bureau of Prisons (BOP) to provide “residential substance abuse treatment and make arrangements for aftercare ... for all eligible prisoners,” giving priority to

³⁶ See BUREAU OF JUST. STAT., SPECIAL REPORT: TIME SERVED IN PRISON BY OFFENDERS, 1986-97; BUREAU OF JUST. STAT., FEDERAL CRIMINAL JUSTICE TRENDS (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjt03.pdf>; U.S. SENT’G COMMISSION, SOURCEBOOKS, available at <http://www.ussc.gov/annrpts.htm>.

³⁷ FIFTEEN YEAR REVIEW, *supra* note 19, Fig. 2.2 at 43.

³⁸ SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 20, Fig. D, at 27.

³⁹ Proposed Amendments to the Federal Sentencing Guidelines Regarding Alternatives to Incarceration: Hearing Before the U.S. Sentencing Comm., Mar. 17, 2010 (statement of James E. Felman, Co-Chair, American Bar Assoc. Criminal Justice Section Committee on Sentencing), available at: <http://www.abanet.org/crimjust/docs/felman.pdf>.

eligible prisoners closest to their release dates. As an incentive to participate, Congress authorized, in 1995, a sentence reduction of up to one year for prisoners convicted of a non-violent offense.⁴⁰

By unilateral BOP rule, the one-year sentence reduction is not available to certain classes of prisoners who are eligible under the statute, including those with immigration or state court detainers (eliminating 26.2 percent of prisoners who are removable aliens) and those who BOP classifies as having committed a "crime of violence," which includes an offense that involves the mere possession of a weapon.⁴¹

RDAP is proven to reduce the likelihood of recidivism and drug abuse relapse, as well as reduce prison costs.⁴² However, as a result of the rigid eligibility requirements, only a small percentage of prisoners who could take advantage of the incentive are allowed to receive it.

Among those who do qualify, few receive the maximum benefit Congress authorized. As of January 2009 there was a waiting list for RDAP that exceeded 7,600 prisoners.⁴³ Because priority is given to those who are closest to their release dates (without regard to whether they are RDAP participants), and there are a limited number of openings, few prisoners complete the program in time to receive the maximum sentence reduction of one year. As of January 2009, the average RDAP participant received a sentence reduction of only 7.6 months.⁴⁴

6. Good Time Credit

Good time credit is earned for good behavior, described in the law as "exemplary compliance with institutional disciplinary regulations."⁴⁵ Good time credit reduces a prisoner's sentence such that prisoners serving a term of imprisonment of more than a year may "receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days a year."⁴⁶

Since 1988, BOP has awarded good time credit based on the time actually served by the prisoner, not the sentence (or "term of imprisonment") imposed by the judge. As a result, based on the way BOP calculates good time, prisoners only earn a maximum of 47 days of good time for each year to which they are sentenced, instead of the 54 days per year contemplated by the statute. The decision results in unnecessary increases in prison sentences at significant cost to BOP.

⁴⁰ 18 U.S.C. § 3621(e)(2).

⁴¹ *Id.*

⁴² U.S. BUREAU OF PRISONS, ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS, FISCAL YEAR 2008, REPORT TO CONGRESS (2009).

⁴³ U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 2009 (2009), *available at*: <http://www.bop.gov/news/PDFs/sob09.pdf>.

⁴⁴ *Id.*

⁴⁵ 18 U.S.C. § 3624(b).

⁴⁶ *Id.*

In 2010, The United State Supreme Court upheld BOP's interpretation of good time in a 6-3 decision, with strong dissent by Justice Kennedy, joined by Justices Stevens and Ginsburg.⁴⁷ It is up to Congress to address the problem.

Studies show that prisoner participation in educational, vocational, and job training, work skills development and drug abuse, mental health and other treatment programs, all reduce recidivism significantly. Thus, proposals that reward good behavior and efforts by prisoners to improve themselves have the potential not only to reduce victimization, but to significantly reduce taxpayer's burden, by reducing time served in prison, reducing recidivism, and saving policing and prosecution costs.

7. Sentence Reductions for Extraordinary and Compelling Circumstances

The Sentencing Reform Act includes provisions for a second look at federal sentences to account for certain kinds of changed circumstances or events. [cite] As illustrated by the recent retroactive crack cocaine amendments, the sentencing court has discretion to reduce a sentence where the USSC determines that a guideline should be reduced and the reduction should apply retroactively. Congress also provided for discretion by the sentencing judge to reduce a prison term where later changes of fact make the sentence too harsh, if the court finds that "extraordinary and compelling reasons warrant such a reduction."⁴⁸ Congress realized that a wide variety of circumstances, including but not limited to "cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction" could fit into the description of "extraordinary and compelling" circumstances and delegated to the Sentencing Commission the task of setting criteria and providing examples, which it did in 2007.⁴⁹

The statute contemplates that BOP would perform a gatekeeper function, but that sentencing discretion would be exercised by the sentencing judge. This is where practice has broken down. Essentially ignoring the USSC's guidelines, BOP has persisted in following a policy that defense practitioners have called the "Death Rattle Rule."⁵⁰ Under this rule, the only circumstance that can be considered "extraordinary and compelling" is imminent proximity to death. Because BOP has sole authority to bring a sentence reduction motion to the courts, courts have no jurisdiction to consider any case, however extraordinary and compelling, that is not initiated by a BOP motion. BOP has filed fewer than 20 motions each year for the past two decades, though its prisoner population has swelled to over 210,000.⁵¹

⁴⁷ Barber v. Thomas, 560 U.S. ____ (2010)

⁴⁸ 18 U.S.C. § 3582(c)(1)(A).

⁴⁹ See USSG 1B1.13.

⁵⁰ Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable* 216, 21 FED. SENT'G REP. 211 – 225 (February 2009), available at: http://www.pardonlaw.com/materials/12.FSR.21.3_211-226.pdf.

⁵¹ *Id.* at 224.

8. Growing Population of Elderly Prisoners

The nation's state and federal prison systems are confronting the complicated and costly problem of a growing population of elderly prisoners. Mandatory minimum sentencing, the abolition of parole, and advent of truth-in-sentencing laws ensure the number of elderly prisoners will continue to rise. The Bureau of Justice Statistics reports that between 1999 and 2007 the population of inmates aged 55 or older grew 76.9% to 76,600.⁵² Elderly prisoners may someday soon make up fully one third of our prison populations.⁵³

The average cost of housing elderly prisoners is approximately twice that of those in the general population.⁵⁴ Gross functional disabilities, impaired movement, mental illness, hearing loss, vision impairment, arthritis, hypertension, and dementia are common as is the need for more frequent dental care and assistive devices. Inmates older than 55 suffer from an average of three chronic health conditions and 20 percent suffer from some form of mental illness. The increased costs stem in large measure from their significant physical and mental health treatment needs and prison systems spend two to three times more for geriatric prisoners than younger inmates, on average, \$70,000.⁵⁵

At the same time, research has conclusively shown that aging is correlated with diminishing risk of recidivism: 9.5% of former federal inmates 50 years or older reoffended within two years of release compared with 35.5 percent of their under-20 counterparts.⁵⁶ The incarceration of older prisoners who represent the smallest threat to public safety but the largest cost to taxpayers, exemplifies failed public and fiscal policy. Forty-one states offer some kind of early limited release program for elderly inmates.⁵⁷

9. United States Sentencing Commission

Congress established the USSC with the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984⁵⁸. USSC was designed to be "an ongoing, independent agency within the judicial branch. The seven voting members on USSC are appointed by the

⁵² TINA CHIU, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE (Vera Institute of Justice, April 2010), available at: <http://www.vera.org/download?file=2973/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf>.

⁵³ Molly Fairchild James, *The Sentencing of Elderly Criminals*, 29 AM. CRIM. L. REV. 1025, 1026 (1992).

⁵⁴ Chiu, *supra* note 52.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Anthony Sterns *et al.*, *A National Survey of Older Prisoner Health, Mental Health, and Programming*, CORRECTIONS TODAY (Aug. 2008), available at: http://www.aca.org/fileupload/177/ahaidar/Sterns_Keohame.pdf.

⁵⁸ 18 U.S.C. 5041 (1984) (repealed).

President and confirmed by the Senate, and serve six-year terms." The Attorney General and the Parole Commission are non-voting, ex officio members of the Commission.⁵⁹

Current law requires a representative of the Federal Public Defenders to submit a report at least annually to USSC concerning USSC's work, and USSC can invite Federal Public Defenders to testify at open USSC meetings. However, USSC has no official representative of the defense bar to balance the official representation of the Attorney General. This means that one interested adversary, the prosecution, can influence the outcome of guidelines in non-public meetings, where the real business of USSC takes place. DOJ has access to the USSC's internal information, is permitted to communicate its own information and proposals to USSC and its staff ex parte, and attends non-public meetings where final decisions are made. The Defenders do not have access to the USSC's internal information, and do not receive notice of proposals submitted by DOJ or developed by staff unless they are published for comment. Some proposals are never published for comment, but are adopted by the USSC and forwarded to Congress. In this way, the USSC is deprived of balanced input and debate at the relevant time. Its decisions thereby suffer, just as a judge could not fairly or accurately decide a case without the issues being joined, argued and tested by both sides. The presence of a Defender ex officio would ensure that all relevant issues are raised and receive timely and balanced consideration, much as the adversary system functions, and would thereby improve the quality of, and public confidence in, the USSC's work.

10. Unnecessarily High Drug Sentencing Guidelines

The passage of the Anti-Drug Abuse Act of 1986,⁶⁰ introducing mandatory minimum sentencing, interrupted the USSC's development of drug offense guidelines. Striving to keep the new sentencing guidelines and their more nuanced considerations effective,⁶¹ USSC correlated the guideline range to the new mandatory minimums, but in all cases indexed the applicable range *above the applicable mandatory minimum*, thus providing for longer guideline sentences than called for even by the applicable mandatory minimums. This twin attack on drug offenses caused the unprecedented and disproportionate incarceration of first-time and low-level drug offenders, characterized by the Justice Kennedy Commission as "far beyond historical norms." [cite?] Because of this grim reality, USSC has urged Congress to revise mandatory minimums and the guidelines, without avail. In 2007, USSC acted on its own to redress the lengthy and unjust sentences being

⁵⁹ See 28 U.S.C. § 991(a); Public Law No. 98-473 § 235.

⁶⁰ H.R. 5484, 99th Cong. (1986).

⁶¹ In its 1991 report on mandatory minimum sentencing, USSC wrote: "[F]rom a structural standpoint, the Sentencing Commission found that, while it theoretically could design a structure that would equate the lowest guideline sentence with the mandatory minimum, adherence to that approach would produce in typical cases sentences that would reach or exceed the statutory maximum and thus, there would be little if any opportunity for consideration of aggravating factors. The Sentencing Commission therefore concluded that a more reasonable, rational, and proportional approach to the sentencing of drug trafficking offenders would use the mandatory minimum penalties as starting points to determine the base offense levels." U. S. SENT'G COMMISSION, SPECIAL REPORT TO THE CONGRESS, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991) at 29, *available at* http://www.ussc.gov/r_congress/MANMIN.PDF.

served by crack offenders, calling the problem “urgent and compelling.” USSC correlated the guideline to encompass the mandatory minimum at its high end, instead of its low end—an enormously beneficial change.⁶²

The “dramatic increase in time served by federal drug offenders” includes all drug offenders and USSC admits that “relative harmfulness” of different drugs was not necessarily reflected by the guideline sentences.⁶³ There is no reason to maintain the guidelines at levels above those required by the drug mandatory minimums. Reducing them would have an immediate and salutary effect on the length of sentences for drug trafficking which have, in USSC’s words, “in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.”⁶⁴

RECOMMENDATIONS

1. Crack Cocaine Sentencing Reform

A. *Crack Cocaine Sentencing Reform Only Partially Done*

Despite significant improvements to sentencing disparity made by the FSA, the FSA is not retroactive and those incarcerated pursuant to the previous flawed sentencing scheme will receive no relief. The FSA must be strengthened by retroactive application of its provisions, and by completely eliminating the sentencing disparity.

B. *Make Changes Retroactive*

Legislative

Congress should enact legislation to make the FSA retroactive. The Fair Sentencing Clarification Act (FSCA), introduced in the 111th Congress by Robert “Bobby” Scott (D-VA),⁶⁵ would extend the application of the FSA to those whose crimes were committed prior to its enactment by permitting people incarcerated under the old crack cocaine mandatory minimums to seek a reduction of their sentence consistent with the FSA lower mandatory minimums from the sentencing court. Congress should reintroduce and pass FSCA.

⁶² Following passage of the Fair Sentencing Act of 2009, the Commission raised the crack cocaine guidelines to their pre-November 1, 2007 levels. See S. 1789, 111th Cong. (2010) (enacted).

⁶³ PAUL J. HOFER ET AL., FIFTEEN YEARS OF GUIDELINES SENTENCING (U.S. Sentencing Commission, Nov. 2004), available at: http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf.

⁶⁴ *Id.* at 49.

⁶⁵ H.R. 6548, 111th Cong. (2010).

Executive

The U.S. Sentencing Commission (USSC) should, in setting its permanent guidelines, restore the crack cocaine base offense levels at 24 and 30, rather than 26 and 32.⁶⁶ Restoring the base offense levels to 24 and 30 more accurately reflects the stated goals of Congress, which are to reduce racial disparity in drug sentencing; increase trust in the criminal justice system; reduce overincarceration; and shift federal enforcement focus from low-level offenders to kingpins.⁶⁷ Moreover, the FSA did not require the base offense levels to be set at 26 and 32. Indeed, Sen. Richard Durbin (D-Ill.) and Rep. Scott, champions of the legislation, advised the Commission of their intent that crack base offense levels not be increased.⁶⁸

Additionally, USSC should make changes to the new crack cocaine sentencing guideline retroactive. For almost two decades in four separate reports, USSC has urged Congress to address the disparities in federal cocaine sentencing policy and eliminate the statutory mandatory minimum for simple possession of crack cocaine.⁶⁹ Although the FSA is silent on retroactive application of the new sentencing structure, the USSC has authority to apply its changes to the Sentencing Guidelines retroactively. Those sentenced under the guidelines in effect prior to November 1, 2010 are the very people whose cases inspired passage of the FSA. They deserve to receive justice as well.

In implementing the FSA, DOJ should issue guidance to federal prosecutors, instructing them to seek sentences consistent with the FSA's reduced mandatory minimums for defendants who have not yet been sentenced, regardless of when their conduct took place. At a minimum, DOJ should issue a policy allowing prosecutors to support, or not oppose, defense motions to apply the FSA to such "pipeline" cases. This would be consistent with congressional intent, would further the goal of sentencing consistency, and would conserve prosecutorial and judicial resources in addressing piecemeal dispositions.

Finally, executive clemency should be granted to those whose crack cocaine sentences are unaffected by the FSA. Presidential commutations can ensure fair application of the principles embodied in the FSA. The President should appoint a clemency commission or other effective process to promptly and comprehensively identify cases that are not affected by the FSA, and grant

⁶⁶ U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1, 2D1.14, 2D2.1, 2K2.4, 3B1.4, 3C1.1 (2010).

⁶⁷ FAIRNESS IN COCAINE SENTENCING ACT, H.R. REP. NO. 111 – 670 (2010).

⁶⁸ Letter from Richard Durbin and Patrick Leahy, United States Senators, to William K. Sessions, Chairman, United States Sentencing Commission (October 8, 2010), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20101013/SenDurbin_comment_100810.pdf; Letter from John Conyers and Robert Scott, United States Representatives to William K. Sessions, Chairman, United States Sentencing Commission (October 8, 2010), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20101013/House_CrimeSubcomte_100810.pdf.

⁶⁹ U.S. SENT'G COMM., REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY (May 2007); U.S. SENT'G COMM., REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002); U.S. SENT'G COMM., SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997); U.S. SENT'G COMM., SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995).

relief where appropriate. For example, many individuals sentenced to life in prison under the “three strikes” provision of 21 USC 841(b) were not drug kingpins, did not engage in violence, and would be subject to a term of years if sentenced under the FSA. There should be an opportunity at some point to give a “second look” to these “three strikes” life sentences to determine whether they are just and necessary in particular cases.

2. Improving and Expanding the Federal Safety Valve

A. *The Safety Valve is Inadequate*

The safety valve is inadequate to address the tension between the mandate of parsimony in the federal sentencing statute and mandatory minimums in individual statutes other than drug statutes, and should be replaced with a more general waiver that can be used when necessary to mediate between conflicting demands in federal sentencing law. Barring that, the safety valve itself can be amended to address correctable structural problems. First, it defines low-level offenders much too narrowly, relying on a rigid criminal history point system in the Sentencing Guidelines.⁷⁰ Second, the safety valve’s “tell-all” requirement is confusing and has been interpreted in many courts as requiring that defendants provide information about other offenders, beyond the scope of related offenses.⁷¹ Finally, there is no sound reason to limit the application of the safety valve, which allows courts to fashion appropriate punishment for qualified offenders, to only those convicted of drug offenses.

B. *Enlarge the Safety Valve*

Legislative

i. *Amend the Safety Valve to Bypass Mandatory Minimums when Necessary to Comply with Federal Sentencing Law*

Congress should amend 18 U.S.C. § 3553 to bypass mandatory minimums when necessary to comply with federal sentencing law. Congress, should pass legislation similar to the Ramos and Compean Justice Act, a bipartisan bill introduced by Reps. Robert “Bobby” Scott (D-VA) and Ted Poe (R-TX),⁷² would amend the federal criminal code to authorize a federal court to impose a sentence below a statutory minimum if necessary to avoid violating the parsimony mandate of 18 U.S.C. § 3553(a). It would also require the court to give the parties notice of its intent to impose a lower sentence and to state in writing the factors requiring such a sentence. The Ramos and Compean Justice Act was the subject of a hearing in the House Judiciary Committee in 2009, and was successfully marked up that year by the House Judiciary Subcommittee on Terrorism, Crime and Homeland Security.

⁷⁰ U.S. Sentencing Guidelines Manual § 4A1.2.

⁷¹ Molly N. Van Etten, *The Difference Between Truth and Truthfulness: Objective Versus Subjective Standards in Applying Rule 5C1.2* 56 VAND. L. REV. 1265 (2003).

⁷² H.R. 834, 111th Cong. (2009).

ii. *Broaden the Safety Valve*

Congress should amend 18 U.S.C. § 3553(f) to broaden the safety valve and properly account for criminal history. The intent of the Safety Valve is to allow courts to recognize offenders with limited or no criminal history. At present, the law permits only defendants with no more than one criminal history point to benefit from the safety valve. Due to peculiarities of the Sentencing Guidelines' criminal history provisions, people who have been convicted of more than one even very minor offense, such as driving on a suspended license or passing a bad check, can accumulate too many criminal history points to qualify, even though they pose very little threat of serious criminal conduct.

Congress should change the criminal history criteria by eliminating the requirement that defendants have only one criminal history point. Instead, Congress can specify in the Safety Valve criteria that defendants who fall into the Sentencing Commission's Criminal History Category I can qualify. Defendants qualify for Category I either because they have no more than one criminal history point or because the sentencing judge has reduced their criminal history from a higher category to Category I. Judges do this when they think that the calculated criminal history points overstate the defendant's true criminal background and risk of recidivism.

iii. *Eliminate the "Tell All" Requirement*

Congress should amend 18 U.S.C. § 3553(f) to eliminate the "tell all" requirement.⁷³ The "tell-all" requirement is confusing to judges, defense attorneys, and prosecutors, and has been interpreted to require defendants to provide information about other offenders, not just their own conduct.⁷⁴ It has been a hotly litigated issue, as defense counsel and prosecutors argue about how much information is enough, whether it was provided in a timely fashion, and how far beyond the offense of conviction a defendant must go in the admission. There is already a separate provision in criminal law that rewards cooperators with mandatory minimum waivers.⁷⁵

Congress should replace the "tell all" requirement with one that the defendant accept responsibility for the offense. Acceptance of responsibility means that the defendant acknowledges his or her role in the offense. If done early in the process, it can save significant resources. Substituting acceptance of responsibility will eliminate the sometimes time-and resource-consuming process of determining whether a defendant has provided enough or timely information about his offense, as well as settle the law about just how much about other criminal conduct the defendant must reveal to qualify for the safety valve. Acceptance of responsibility standards are well established as they have been a longstanding feature of the Sentencing Guidelines calculations.

⁷³ 18 U.S.C. § 3553(f)(5).

⁷⁴ U.S. v. Johnson, 375 F.3d 1300.

⁷⁵ U.S. SENT'G COMMISSION, FIFTEEN YEARS, *supra* note 17, at 50.

iv. *Apply the Safety Valve to All Mandatory Minimum Offenses*

Congress should amend 18 U.S.C. § 3553(f) to apply the safety valve to all mandatory minimum offenses. Federal mandatory minimums apply to over 700 offenses, including a number of inherently non-violent offenses. The safety valve, however, only applies to drug offenses. The problems associated with mandatory minimum drug sentences are replicated in other offenses to which such sentences apply. There is no sound reason to limit the application of the safety valve, which seeks to recognize and fashion appropriate sentences for first time, low-level, non-violent offenders who recognize and accept responsibility, to only those defendants convicted of drug crimes. Congress should thus amend 18 U.S.C. § 3553(f) to ensure that it applies to all statutes that include a mandatory minimum provision.

3. *Create a Sunset Provision on New and Existing Mandatory Minimums*

A. *Lack of Data Regarding Effectiveness of Mandatory Minimums*

Currently, there is no sunset provision or statutory review process for federal mandatory minimums once they have been enacted. This lack of data, transparency, and reviews limits the ability to Congress to assess the effectiveness of these laws.

B. *Create a Sunset Provision for Mandatory Minimums*

Legislative Changes

Congress should make all new mandatory minimum laws subject to a five-year sunset provision. Congress may create such a sunset provision on new mandatory minimums through either: (i) passing legislation containing a sunset provision, or (ii) creating a sunset commission to offer recommendations to Congress ahead of reauthorization of mandatory minimum legislation. A sunset commission would review and provide recommendations to retain, refine, or end a mandatory minimum. The commission would provide recommendations based on analysis of whether a mandatory minimum has achieved its goals.

4. *Ensure that 18 U.S.C. § 924(c) Recidivism Provisions Apply Only to Repeat Offenders*

A. *Sentence Stacking Provisions Over-punish First Offenders*

Federal “sentence stacking” provisions result in unduly severe sentences that bear no relation to deterring true recidivists. Perversely, a true recidivist can serve a shorter sentence than a true first offender.

B. *Apply Stacking Provision to True Recidivists and Provide Predictability in Recidivist Sentencing*

Legislative

Congress should pass the Firearm Recidivist Sentencing Act of 2009.⁷⁶ Introduced by Congressman Robert “Bobby” Scott, the Firearm Recidivist Sentencing Act of 2009 would amend 18 U.S.C. § 924(c) to ensure that individuals who carry a firearm while committing a violent crime or drug trafficking offense face the 25-year mandatory minimum for repeat offenses only if they have been previously convicted and served a sentence for a §924(c) offense.

This bill would ensure that the recidivist enhancement is only used on true recidivists, by requiring that a previous conviction must be final before the 25-year mandatory minimum may be sought. Finally, the bill amends Part 1 of Title 18 of the United States Code to require the government to file notice with the court when it intends to invoke the enhanced recidivism penalties in the gun statutes.

5. *Expand Authority to Defer Adjudication to Avoid a Conviction Record*

A. *Federal Judges have Only Narrow Authority to Expunge Criminal Convictions for Low-Level Offenders*

Under current law, federal judges have very little authority to expunge criminal convictions. Given the collateral consequences associated with a felony conviction, such as public assistance and employment licensing exclusions, the lack of availability of punishment options that allow for eventual expungement of criminal records may serve to increase recidivism. Defendants who are not charged with offenses other than very serious offenses, such as predatory crime; a crime involving substantial violence; a crime in which the defendant played a leadership role in large-scale drug trafficking; or a crime of equivalent gravity, should be eligible for community placement, community-based treatment programs, and diversion and deferred adjudication.

B. *Expand Federal Statutory Authority for Deferred Adjudication*

Legislative

Congress should enact a statute permitting individuals charged with certain federal crimes to avoid a conviction record by successfully completing a period of probation. Congress could do this in one of two ways. First, it could pass the Federal First Offender Improvement Act⁷⁷, introduced by Rep. Pedro Pierluisi in July 2010. The Act would expand the Federal First Offender

⁷⁶ H.R. 2933, 110th Cong. (2009).

⁷⁷ H.R. 6059, 111th Cong. (2010).

Act⁷⁸ to allow (but not require) a judge to place certain first-time drug offenders on probation without entering a judgment of conviction. A drug defendant would qualify who (i) did not use violence, a firearm or other weapon, or cause death or serious bodily injury; (ii) was not an organizer, leader, manager, or supervisor of others; (iii) had not previously benefited from this provision; and (iv) had not previously been convicted of a crime of violence or other offense punishable by more than one year in prison. If, at the end of the probation term, the defendant has not violated a condition of his or her probation, the court may dismiss the proceedings.

Alternatively, Congress could reinstate the set-aside authority in the Youth Corrections Act,⁷⁹ and extend it to all first felony offenders eligible for probation. In addition, for persons with a federal conviction, Congress should enact an expungement/sealing remedy that would be available after a waiting period (e.g., five years for misdemeanors, 10 years for felonies).

6. Expand Alternatives to Incarceration in Federal Sentencing Guidelines

A. *Judges Have Insufficient Discretion to Impose Alternative Sentences*

Under the Sentencing Guidelines, federal judges currently have little authority to impose sentences other than jail or incarceration, even when the offense is relatively minor. As a result, while the federal justice system authorizes probation as an alternative to incarceration, the use of probation has declined since the advent of the Sentencing Guidelines. In 1984, more than 30% of defendants were sentenced to probation without any term of imprisonment; by 2006, that figure had declined to 7.5%.⁸⁰ Alternative sentences to incarceration under the Guidelines should be expanded.

B. *Expand Alternatives to Incarceration in the Federal Sentencing Guidelines*

Judicial

The USSC, the independent federal agency created by Congress to promulgate sentencing guidelines for use by federal judges in criminal cases and to advise Congress on federal sentencing, should amend the Sentencing Guidelines to broadly expand the availability of alternatives to incarceration. In 2010, the USSC did adopt an amendment to modestly expand the availability of alternative sentences.⁸¹ However, the USSC should adopt at least two further expansions: (i)

⁷⁸ 18 U.S.C. § 3607.

⁷⁹ 18 U.S.C. § 5005 et seq. (repealed in 1984).

⁸⁰ See SPECIAL REPORT: TIME SERVED IN PRISON BY OFFENDERS, *supra* note 39; FEDERAL CRIMINAL JUSTICE TRENDS, *supra* note 39; U.S. SENT'G COMMISSION SOURCEBOOKS, *supra* note 39.

⁸¹ *Commission Promulgates Amendments; Sends Package to Congress*, GUIDELINES (United States Sent'g Comm'n, Washington, DC), Spring 2010, at 1, available at http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Commission_Newsletters/2010_05_Guidelines_optimized.pdf.

eliminating the distinction between Zones B and C of the Sentencing Table and (ii) creating a Criminal History Category 0 for first offenders.

By merging Zone C into Zone B, the Sentencing Table would include more ranges in which a non-prison sentence is an option. This would more accurately capture the individualized sentencing processes through which judges must first determine whether any term of imprisonment is necessary to satisfy the purposes of sentencing.

The USSC should also create a new Criminal History Category 0 for true first offenders. As presently constructed, Criminal History Category I includes both first offenders and offenders who have minimal criminal records. The USSC's extensive study of criminal history and recidivism demonstrates that true first offenders are simply different—they have a significantly lower risk of recidivism than those with prior criminal experience.⁸² This reflects Congress' intuitively correct determination in the enabling legislation that first time offenders are peculiarly suited for non-imprisonment sentences. This difference between first offenders and those with prior criminal history should thus be reflected in the Guidelines.

The USSC should also further expand the option of the use of alternative sentences for offenders whose crimes are associated with substance abuse or mental illness and who pose no substantial threat to the community. Alternative sentencing programs in other jurisdictions indicates that such programs are often associated with reduced recidivism rates.⁸³ The USSC should eliminate any offense level ceiling on treatment alternatives or, at a minimum, set offense level 16 rather than Zone C of the Sentencing Table as the ceiling for eligible offenders.

7. Prison Incentives and Management: Expand the Residential Drug Abuse Program (RDAP)

A. RDAP Requirements Are Too Restrictive

Despite the fact that the Residential Drug Abuse Program (RDAP) is proven to reduce the likelihood of recidivism and reduce prison costs, rigid eligibility requirements result in only a small percentage of eligible prisoners being able to take advantage of the program. BOP rules excluding certain classes of prisoners from RDAP, as well as delayed RDAP eligibility determinations, limit the effectiveness of RDAP by excluding prisoners who would benefit from the program. For example, by unilateral BOP rule, the one-year sentence reduction for successful RDAP completion is not available to certain classes of prisoners who are eligible under the statute, including those with immigration or state court detainers (eliminating 26.2 percent of prisoners who are removable

⁸² UNITED STATES SENTENCING COMMISSION, RECIDIVISM AND THE "FIRST OFFENDER" 13-14 (May 2004), *available at* http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf.

⁸³ *See, e.g.*, PEW CENTER ON THE STATES, WHAT WORKS IN COMMUNITY CORRECTIONS: AN INTERVIEW WITH DR. JOAN PETERSILIA (Nov. 2007), *available at* <http://www.pewcenteronthestates.org/uploadedFiles/Petersilia-Community-Corrections-QandA.pdf> ("[W]e know that intensive community supervision combined with rehabilitation services can reduce recidivism between 10 and 20 percent.").

aliens⁸⁴) and those who the BOP classifies as having committed a “crime of violence,” which includes an offense that involves the mere possession of a weapon.⁸⁵

B. Expand RDAP to Include More Offenders

Executive

The BOP should remove limitations on RDAP eligibility, and make RDAP available to those with immigration or state court detainers, as well as more non-violent offenders. Under current rules, anyone who is not eligible for placement in a federal halfway house is not eligible for the RDAP. Thus, those with immigration or state court detainers are ineligible for RDAP. The Attorney General should issue a memorandum directing the BOP to administer the sentence reduction incentive consistent with federal law, such that it be made available to all prisoners with detainers, and that planning be done far enough in advance to ensure that qualified prisoners receive the full benefit Congress intended to bestow. The cost incurred in expanding the RDAP program are outweighed by the benefits in terms of costs saved by shortening sentences as well as lower recidivism rates.⁸⁶

Additionally, the BOP should expand eligibility for RDAP to more non-violent offenders. In 2000, the BOP issued a permanent rule that categorically excluded eligibility for a sentence reduction to anyone whose “current offense is a felony... [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives [.]”⁸⁷ By using this definition, the BOP disqualifies from RDAP prisoners who had merely possessed a firearm. However, 18 U.S.C. § 924(c) defines a “crime of violence” as an offense that is a felony and either (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.⁸⁸ The BOP should change the definition that it uses to determine who is excluded from RDAP, and use the definition of “crime of violence” found in 18 U.S.C. § 924(c) in determining eligibility for the program. This would allow those who had merely possessed a firearm to benefit from RDAP.

⁸⁴ David Leonhardt, *Immigrants and Prison*, N.Y. TIMES (May 30, 2007) (“According to the Department of Justice[,] [i]n 2000, 27 percent of the inmates in federal prisons were noncitizens.”), available at <http://www.nytimes.com/2007/05/30/business/30leonside.html>.

⁸⁵ 28 C.F.R. § 550.58; see also FAMILIES AGAINST MANDATORY MINIMUMS, FREQUENTLY ASKED QUESTIONS ABOUT THE RESIDENTIAL DRUG ABUSE PROGRAM (RDAP), available at <http://www.famm.org/Repository/Files/FINAL%20RDAP%20FAQs%209.9.pdf>.

⁸⁶ Office of National Drug Control Policy, Drug Policy Information Clearinghouse Fact Sheet, Drug Treatment in the Criminal Justice System (Mar. 2001), <http://whitehousedrugpolicy.gov/publications/factsht/treatment/index.html> (last visited Jan. 24, 2011).

⁸⁷ 28 C.F.R. § 550.58.

⁸⁸ 18 U.S.C. § 924(c)(3).

Finally, when calculating proximity to release for purposes of who should take part in the overall drug program, BOP should consider that a successful participant will be closer to release by one year than prisoners who are ineligible for the sentence reduction. Priority for RDAP participation is given to those prisoners who are closest to their release date. However, currently, BOP does not make eligibility determinations early enough to ensure that prisoners who qualify receive the full year credit. Thus, prisoners who are eligible for the reduction see prisoners who are not eligible for a one-year reduction take their places in programs based on release dates that do not include the one-year reduction.

8. Clarify and Expand Good Time Credit

A. *The BOP's Administration of Good Time Credits Limits its Effectiveness*

The BOP's method of calculating good time credit may only reduce a prisoner's sentence to a maximum credit of 47 days—well below the 54 days specifically mentioned in the authorizing statute.⁸⁹ This decision results in unnecessary increases in prison sentences at significant cost to the BOP and the incarcerated individuals. As the U.S. Supreme Court has upheld BOP's method of calculating good time⁹⁰, it is now up to Congress to ensure the BOP complies with the intent of the statute, and reward good behavior and efforts by prisoners to improve themselves, thereby significantly reducing taxpayers' burden by reducing time served in prison, reducing recidivism, and saving policing and prosecution costs.

B. *Clarify and Expand Good Time Conduct Credit*

Legislative

Congress should pass the Prisoner Incentive Act.⁹¹ First introduced in December 2009 by Rep. Robert “Bobby” Scott (D-VA), the bill would rewrite the good time statute to make clear that a prisoner serving a sentence of over one year may earn up to 54 days of good time credit per every year of his sentence. The bill would also change the law to permit the BOP to “subsequently restore any or all” credit previously denied the prisoner, based on his good behavior as determined by BOP.

Congress should also pass the Literacy, Education, and Rehabilitation Act⁹², introduced in the 111th Congress by Rep. Robert “Bobby” Scott (D-VA), which would provide credit toward service of sentence for satisfactory participation in a designated prison program. Under the bill, the director of the BOP may grant up to 60 credit days per year, in addition to the good conduct credit currently awarded, to a prisoner for successful participation in literacy, education, work training, treatment, and other developmental programs. The BOP Director would determine the number of

⁸⁹ 18 U.S.C. § 3624(b).

⁹⁰ *Barber v. Thomas*, 130 S. Ct. 2499 (Jun. 7, 2010).

⁹¹ H.R. 4327, 111th Cong. (2009).

⁹² H.R. 4328, 111th Cong. (2009).

days of credit to be applied for any given program, based on its difficulty, required time, responsibility requirements, rehabilitative benefits, and benefit to the BOP.

9. Sentence Reductions for Extraordinary and Compelling Circumstances

A. *BOP Prevents Consideration by Judges of Release for Changed Circumstances*

Contrary to the provisions of the Sentencing Reform Act (SRA) that granted sentencing judges the discretion to retroactively reduce sentences for certain kinds of changed circumstances or events (and granted BOP merely a gate-keeping function in the process), the BOP has effectively taken over the role of exercising this discretion. By applying the so-called “Death Rattle Rule,” the BOP has limited the sentence reduction cases that come before sentencing courts to only those with imminent proximity to death, rather than the broader “extraordinary and compelling circumstances” standard articulated by the statute.⁹³ BOP has not ensured that the courts are able to consider petitions for early release from prisoners whose conditions—medical, terminal or otherwise—might merit it.

B. *Expand BOP Motions to Consider Sentence Reductions*

Executive

The Attorney General should signal his intention that the statute be used as intended by providing a guidance memorandum laying out his support for use of the power to reduce a sentence for extraordinary and compelling circumstances consistent with that intended by Congress in the SRA and by the Commission in its recent conforming guideline amendment. This memo should instruct that BOP bring motions before the sentencing judge in all cases where the petitioner’s circumstances meet the criteria laid out in U.S.S.G. § 1B1.13. The memo may specify additional factors that may be considered by BOP in approving a motion to be filed with the court.

10. Expand the Elderly Release Provision Program

A. *Prisons Challenged by Caring for Growing Population of Elderly Prisoners*

The nation’s state and federal prison systems are confronting the complicated and costly problem of a growing population of elderly prisoners. The average cost of housing elderly prisoners is approximately two to three times that of younger prisoners.⁹⁴ At the same time, aging is

⁹³ See William W. Berry III, *Extraordinary and Compelling: A Re-examination of the Justifications for Compassionate Release*, 68 MARYLAND L. REV. 850, 852-53 (2009).

⁹⁴ See NATIONAL INSTITUTE OF CORRECTIONS, UNITED STATES DEPARTMENT OF JUSTICE, CORRECTIONAL HEALTHCARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 11 (2004), available at <http://nicic.gov/pubs/2004/018735.pdf> (“The annual cost of incarcerating this population has risen dramatically to an average of \$60,000 to \$70,000 for each elderly inmate compared with about \$27,000 for others in

correlated with diminishing risk of recidivism.⁹⁵ The incarceration of older prisoners who represent the smallest threat to public safety but the largest cost to taxpayers exemplifies failed public and fiscal policy.

B. *Extend and Expand Elderly Prisoner Home Confinement Release Program*

Legislative

In 2008, Congress authorized a pilot program through the Second Chance Act providing for the release to home confinement of some geriatric federal inmates.⁹⁶ The Elderly and Family Reunification for Certain Nonviolent Offenders (later renamed the Elderly Offender Home Detention Pilot Program) provision gave BOP authority to set up demonstration projects at BOP facilities for certain prisoners who were age 65 or older.⁹⁷ The qualified inmates must have served at least ten years or 75% of their sentence, among other criteria. Only a handful of prisoners benefitted from the early release program. That pilot program has expired. It should be extended and expanded. The Judiciary Committee should hold hearings and invite BOP to testify about its experience with the program with an eye toward expansion and improvement. Also invited to testify should be lawmakers or correctional experts from states that have implemented successful elderly release programs.

11. Add a Federal Public Defender as *Ex Officio* Member of the United States Sentencing Commission

A. *The United States Sentencing Commission Lacks Representation of the Defense Community*

The addition of a federal public defender as an *ex officio* member of the USSC would improve the quality and accuracy of USSC's work and the transparency and neutrality of its proceedings. The executive branch has two *ex officio* representatives on the USSC: the Attorney General and the Parole Commission. However, the defense community is not represented on the USSC, which means that one interested adversary, the prosecution, can influence the outcome of guidelines in non-public meetings, where the real business of the USSC takes place. The presence of a defender *ex officio* would ensure that all relevant issues are raised and receive timely and balanced consideration, much as the adversary system functions, and would thereby improve the quality of and public confidence in the USSC's work.

the general population.”).

⁹⁵ TIMOTHY A. HUGHES ET AL., TRENDS IN STATE PAROLE, 1990-2000 (Bureau of Justice Statistics 2001).

⁹⁶ 42 U.S.C. § 17541.

⁹⁷ *Id.*; see also FAMILIES AGAINST MANDATORY MINIMUMS, FREQUENTLY ASKED QUESTIONS ABOUT THE BOP'S ELDERLY OFFENDER HOME DETENTION PILOT PROGRAM, available at http://www.famm.org/Repository/Files/Elderly_Offender_Program_FAQs_03_20_09FINAL.pdf.

B. *Add a Federal Defender as an Ex Officio USSC Member*

Legislative

Congress should amend 28 U.S.C. § 991(a) by replacing “one nonvoting member” with “two nonvoting members” at the end of the first sentence, and by inserting before the last sentence: “a representative of the Federal Public Defenders, appointed by the Judicial Conference of the United States, shall be an ex officio, nonvoting member of the commission.”

12. Reduce All Drug Guideline Levels by Two Offense Levels

A. *Drug Guideline Sentences Are Set Unnecessarily High in Relation to Corresponding Mandatory Minimums*

The twin attack on drug offenses in the form of the contemporaneous passage of mandatory minimum drug laws by Congress and the USSC’s issuance of drug offense guidelines indexed to mandatory minimums caused the unprecedented and disproportionate incarceration of first-time and low-level drug offenders. Because of this grim reality, the USSC has urged Congress to revise mandatory minimums and the guidelines, without avail. There is no sound reason to maintain the USSC drug offense guidelines at levels above those required by the drug mandatory minimums.

B. *Reduce all Drug Guidelines Indexed to Mandatory Minimums by Two Levels.*

Judicial

The USSC should propose to reduce all drug guideline range triggers by two levels so that the corresponding mandatory minimum floats at the top of the range for any given drug, not below it. This will ensure that the guideline ranges correspond with the mandatory minimums while providing additional flexibility to judges in cases where the mandatory minimum is not at issue. The Commission should hold a hearing to take testimony about the proposed change and promulgate a final amendment for submission to Congress.

APPENDICES

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CHAPTER 10

IMPROVING THE PRISON SYSTEM

THE ISSUE

The United States imprisons a higher percentage of its population than any other country.¹ More than one in every 100 adults in the United States is behind bars.² If the approximately 2.3 million incarcerated people were a single city, it would be the fourth largest in the country.³ In 2008, federal, state, and local governments spent approximately \$62 billion on adult and juvenile corrections and were projected to need as much as \$27 billion in additional operating and capital funds over the next five years to accommodate projected prison expansion and operation.⁴

In the face of the financial crisis, some states have begun to recognize the need for more cost-effective approaches to criminal justice policy. In Michigan, where government spending on corrections exceeds spending on universities,⁵ the state cut its prison population by more than 10 percent in less than three years through sentencing and parole reforms.⁶ Similarly, New York reformed its harsh drug laws and saw its prison population decline significantly.⁷ In fact, 2009 saw prison populations drop in 26 states, causing the total number of inmates in state prisons to decline for the first time since 1972.⁸ Much of this progress has been made by reducing the number of non-violent offenders incarcerated unnecessarily and at great cost to taxpayers.

Reforms to our prison system are long overdue. This section provides a comprehensive summary of practical policy options to bring about significant improvements to the world's largest prison system. Prison system reforms are especially needed to (i) end the high incidence of sexual assault and rape in our nation's correctional facilities; (ii) return the rule of law to U.S. prisons and jails; (iii) improve transparency in the world's largest prison system; (iv) reduce recidivism; and (v) end over-reliance on the use of solitary confinement and long-term isolation.

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⁶ See Families Against Mandatory Minimums, FAMM's guide to Michigan sentencing reforms (2003), <http://www.famm.org/Repository/Files/Guide%20to%20MI%20reforms.pdf> (last visited Jan. 24, 2001); MICHIGAN TASK FORCE ON JAIL AND PRISON OVERCROWDING, FINAL REPORT (Mar. 2005), *available at* http://www.michigan.gov/documents/report_119595_7.pdf.

⁷ DENISE E. O'DONNELL, N.Y. DIVISION OF CRIM. JUST. SERVICES, NEW YORK STATE FELONY DRUG ARREST, INDICTMENT, AND COMMITMENT TRENDS 1973 – 2008 (2009), *available at* http://criminaljustice.state.ny.us/pio/annualreport/baseline_trends_report.pdf.

⁸ PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS (2010), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf?n=880.

HISTORY OF THE PROBLEM

The U.S. prison population does not reflect the demographics of America at large. Prisons and jails not only hold far too many people, they also hold a disproportionate number of people of color, as well as people with mental illness and addiction problems who require treatment—not incarceration—to reduce their likelihood of recidivism.

In 2009, African-American men were incarcerated at a rate of 4,749 per 100,000—or almost one out of 20. The comparable rate for Hispanic males was 1,822 per 100,000 and, for white males, 708 per 100,000.⁹ Black males were six times more likely, and Hispanic males twice as likely, to be held in custody than white males.¹⁰ Furthermore, 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates in the U.S. suffer from mental illness.¹¹ Between 60 and 80 percent of individuals under supervision of the criminal justice system in the U.S. were either under the influence of alcohol or other drugs when they committed an offense, committed the offense to support a drug addiction, were charged with a drug-related crime, or were using drugs or alcohol regularly.¹² Experts also estimate that people with developmental disabilities may constitute as much as 10 percent of the prison population.¹³

Grossly deficient medical and mental health care also plague prisons and jails across the country. In 2005, a federal court found that in California a prisoner dies a needless death due to inadequate medical care or malpractice every six to seven days.¹⁴ Prisoners are also threatened daily by sexual violence, a frighteningly common occurrence in the nation's corrections systems.¹⁵

⁹ WEST, *supra* note 3, at 2.

¹⁰ *Id.*

¹¹ DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>.

¹² Douglas B. Marlowe, *Integrating Substance Abuse Treatment and Criminal Justice Supervision*, 2(1) NIDA SCIENCE AND PRACTICE PERSPECTIVES (2003), available at <http://www.drugabuse.gov/PDF/Perspectives/vol2no1/02Perspectives-Integrating.pdf> (citing S. Belenko et al, *Substance abuse and the prison population: A three-year study by Columbia University reveals widespread substance abuse among the offender population*, 60(6) CORRECTIONS TODAY, 82-89, (1998)).

¹³ Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, available at www.thearc.org/document.doc?&id=149 (citing JOAN PETERSILIA, CALIFORNIA RESEARCH CENTER, DOING JUSTICE? CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES (2000)).

¹⁴ *Plata v. Schwarzenegger*, Slip Copy, 2005 WL 2932253 (N.D. Cal., October 2, 2005) as cited in JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 38 (June 2006).

¹⁵ See ALLEN J. BECK, PAIGE M. HARRISON, ET AL, U.S. DEPT. OF JUST. BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008 – 2009 (August 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

1. Sexual Assault in Correctional Facilities

Sexual violence behind bars has reached crisis proportions. Based on a survey in prisons and jails nationwide, the Bureau of Justice Statistics estimated that 88,500 adult inmates were sexually abused in their current facility in the past year alone.¹⁶ In a similar survey of youth in juvenile facilities, a shocking one in eight reported being sexually abused in the previous year.¹⁷ In both types of facilities, staff-on-inmate abuse was more prevalent than abuse perpetrated by inmates.¹⁸

An important step in addressing this problem has already been taken. In 2003, Congress unanimously passed, and President George W. Bush signed into law, the Prison Rape Elimination Act (PREA).¹⁹ Sponsored by Reps. Frank Wolf (R-VA), Bobby Scott (D-VA), and 30 other co-sponsors in the House,²⁰ and Senators Jeff Sessions (R-AL), Mike Dewine (R-OH), Dick Durbin (D-IL), Edward Kennedy (D-MA), and Dianne Feinstein (D-CA) in the Senate, PREA called for the development of binding national standards for the prevention, detection, response, and monitoring of sexual violence behind bars.²¹ The bipartisan National Prison Rape Elimination Commission was established to develop these standards, and the Commission submitted its recommendations to Attorney General Eric Holder on June 20, 2009.²² These standards include facility audits to certify compliance with a zero-tolerance policy for sexual abuse; specialized training of facility staff; heightened protection for identifiably vulnerable inmates; use of monitoring technology; uniform evidence-gathering protocol; and availability of independent, qualified forensic medical examiners to victims.²³

Under PREA, Attorney General Holder had one year to publish a final rule adopting national standards, after giving due consideration to the standards recommended by the Commission.²⁴ Once promulgated, these standards will be binding on federal facilities immediately, while state and county systems will have one year to comply or risk losing five percent of their federal funding.²⁵ As of the release of this report, the Attorney General has yet to implement these standards.²⁶

¹⁶ *Id.* at 5.

¹⁷ ALLEN J. BECK, PAIGE M. HARRISON & PAUL GUERINO, U.S. DEPT. OF JUST. BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-2009 (January 2010).

¹⁸ BECK, *supra* note 15; BECK, *supra* note 17.

¹⁹ 42 U.S.C. § 15601 *et seq.*

²⁰ For a full list of co-sponsors, see: Bill Summary & Status 108th Congress, H.R. 1707, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01707>: (last visited Jan 24, 2010).

²¹ 42 U.S.C. § 15606(c).

²² NAT'L PRISON RAPE ELIMINATION COMMISSION, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS (June 20, 2009), *available at* http://www.sheriffs.org/userfiles/file/5.1_MasterAdultPrison_andJail_andImmigrationStandardsClean.pdf.

²³ *Id.*

²⁴ 42 U.S.C. § 15607(a)(1).

²⁵ 42 U.S.C. § 15607(b), (c).

²⁶ *See, Disgraceful Delays*, WASH. POST, Dec. 12, 2010, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121203345.html>.

Moreover, the appropriations for PREA have been cut drastically every year since its passage, making the prospects of assisting states and monitoring their compliance with the standards even more challenging.²⁷

2. Failures of the Prison Litigation Reform Act

Congress passed the Prison Litigation Reform Act (PLRA) in 1996.²⁸ PLRA was originally intended to stem frivolous prisoner lawsuits, but in practice it often denies justice to victims of rape, assault, religious restrictions, and other rights violations. PLRA's "physical injury" and exhaustion requirements have severely limited prisoner's ability to address violations of their rights and other serious abuses. If prisoners fail to file the right paperwork when pursuing a claim, or if their injuries are not deemed sufficiently "physical," their claims may be dismissed—even if the claim involves a constitutional violation. Prior to PLRA's passage, its chief sponsor, Senator Orrin Hatch (R-UT), assured Congress that he did not "want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."²⁹ Unfortunately, it is now clear that PLRA prevents prisoners—including juveniles—who experience severe violations of their rights from seeking justice and protection from the courts.

Over a decade of experience has shown that PLRA's preliminary screening requirement is sufficient to fulfill the legislation's purpose. By requiring courts to summarily dismiss prisoner cases that are frivolous, malicious, or fail to state a legal claim, this provision has greatly reduced the burden on courts posed by prisoner cases that are not meritorious. However, certain other provisions of PLRA must be amended or repealed in order to restore meaningful access to the courts for incarcerated adults and youth.

Congress needs to fix provisions of PLRA that have created unintended consequences. Amongst these provisions is the "physical injury requirement" which prevents federal courts from reviewing serious constitutional claims. Under PLRA, prisoners can be sexually assaulted and not have access to the range of remedies available to most civil rights plaintiffs because some courts say they've suffered no "physical injury."³⁰ Claims such as disgusting, unsanitary conditions and degrading treatment also do not meet the "physical injury" requirement under PLRA.³¹ Further, any constitutional violations that do not result in physical injuries are barred under PLRA. As a result of

²⁷ STOP PRISON RAPE, PRISON RAPE ELIMINATION ACT UPDATE 7 (2007), *available at* http://www.justdetention.org/pdf/SPR_PREA_update_3-29.pdf.

²⁸ H.R. 3019, 104th Cong. (1996) (enacted).

²⁹ 141 Cong. Rec. S14626 – 14627 (September 29, 1995), *available at* <http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=jBJ8Jo/0/1/0&WAISaction=retrieve>.

³⁰ *See* *Hancock v. Payne*, 2006 WL 21751 at 1, 3 (S.D. Miss. 2006) (holding that prisoners' allegations that a staff member "sexually abused them by sodomy" did not qualify as a physical injury); *Moya v. City of Albuquerque*, No. 96-1257 DJR/RLP, Mem. Op. and Order (D.N.M. Nov. 17, 1997) (holding that male officers' strip-searches of women prisoners did not result in physical injuries, even where one woman allegedly attempted suicide due to the trauma of the search).

³¹ *See, e.g. Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).

PLRA's "physical injury" requirement, courts deny prisoners remedies for violations of their religious rights,³² free speech rights³³ and due process rights.³⁴

The Exhaustion Requirement of PLRA has also created disastrous consequences for prisoners' ability to protect themselves from abuse and harm. PLRA's exhaustion provisions require prisoners to exhaust their facilities' often lengthy administrative grievance process no matter how meritorious the claims, and no matter how legitimate the reasons for failing to follow grievance procedures might be.³⁵ Prison and jail grievance systems have created a baffling maze in which a barely literate, mentally ill, physically incapacitated, or juvenile prisoner's procedural misstep in a facility's informal grievance system forever bars even the most meritorious constitutional claims. Moreover, grievance deadlines are often a matter of days, with no exceptions for prisoners who are ill, hospitalized, traumatized, or otherwise incapacitated.³⁶

Finally, PLRA also undermines protections for incarcerated youth. The original justification for PLRA was to weed out frivolous lawsuits. But even if some adult prisoners filed frivolous lawsuits, supporters of PLRA did not claim that incarcerated *youth* filed such litigation.³⁷ This is not surprising because most prisoner lawsuits are filed *pro se*,³⁸ and youth rarely file lawsuits over their conditions of confinement. Many youth in the juvenile justice system are unable to adequately read and write, and few if any have sufficient understanding of the court system to file *pro se* litigation. Youth are even more vulnerable than adult prisoners to sexual abuse and other victimization, and many either do not know of or do not understand the grievance systems in their facilities, and many more fear retaliation for filing grievances.³⁹ As a result, the exhaustion provision effectively bars many incarcerated youths from addressing serious problems with their conditions of confinement. Additionally, the physical injury requirement works against protection of youths' rights to rehabilitation in custody. The provision undermines the rights of incarcerated youth to protect their religious rights, free speech rights, and due process rights, and jeopardizes the right to education, counseling, and other rehabilitative programming that forms the core of the juvenile justice system. These are all rights that should be protected even though they do not involve physical injury.

³² See SAVE Coalition, Top 10 Harmful Effects on Religious Freedom, *available at* http://www.savecoalition.org/pdfs/top10_religion.pdf.

³³ See, e.g., *Royal v. Kautzky*, 375 F.3d 720, 722-23 (8th Cir. 2004).

³⁴ See, e.g., *Thompson v. Carter*, 284 F.3d 411, 416-17 (2d Cir. 2002).

³⁵ 42 U.S.C. § 1997e(a) (2007).

³⁶ See *Woodford v. Ngo*, 548 U.S. 81, 118 (Stevens, J., dissenting) (noting that grievance filing deadlines "are generally no more than 15 days, and ... in nine States, are between 2 and 5 days").

³⁷ *Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses?: Hearing on H.R.1889 before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 1-2 (2007) (statement of Jessica Feierman, Juvenile Law Center).

³⁸ Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOKLYN L. REV. 519 (1996).

³⁹ Statement of Jessica Feierman, *supra* note 37.

3. Lack of Transparency in Correctional Facilities

Despite the massive expenditure of taxes and the profound effect that prison has on the individual, the community, and public safety, there is very little oversight of prisons, jails, and juvenile detention facilities, or public accountability for what takes place behind bars. While the federal courts provide some oversight, courts are unable to proactively address many systemic problems, particularly before they rise to the level of a constitutional violation. Prisons are, by their nature, closed institutions in which the State, through the prison administration and staff, has extraordinary power over every aspect of prisoners' lives. The potential for abuse of that power is always present. As noted above, the majority of sexual abuse in detention is perpetrated by corrections staff. Conditions within a prison can deteriorate to an extent which imperils the lives and human rights of those held there without anyone on the outside aware of what is happening. Prisons need effective forms of oversight to prevent abuse, encourage public officials to meet their legal obligation, and ensure constitutional conditions of confinement.

Currently, there are no national standards for the treatment of prisoners and no systemic national oversight to ensure that the constitutional rights of prisoners are protected. Traditionally, the federal courts have provided some oversight through litigation. Indeed, through the oversight provided by the federal courts in the 1970's and 1980's, the country's prisons were transformed from virtual dungeons to modern correctional institutions.⁴⁰ Since the enactment of PLRA in 1996, however, the power of the federal courts to provide oversight has been drastically undercut. Moreover, the courts are unable to proactively address many systemic and managerial problems, particularly before they rise to the level of a constitutional violation, and the courts can only act on those cases brought before them. As a result, it is essential that the government implement alternative forms of oversight.

Fortunately, Congress has taken action in the past to improve oversight. In 2000, Congress enacted the Deaths in Custody Reporting Act (DICRA)⁴¹, sponsored by Reps. Robert Scott (D-VA), James Forbes (R-VA), and Sheila Jackson-Lee (D-TX), which required local jails and state prisons to report to the federal government any deaths in their custody. DICRA expired in December 2006 and has not yet been reauthorized.⁴² Additionally, as discussed above, PREA, which was passed in 2003, requires the development of binding national standards to address prison rape.

⁴⁰ See *Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Caroline Frederickson, American Civil Liberties Union, and Elizabeth Alexander, ACLU Prison Project) (citing *Hutto v. Finney*, 437 U.S. 678 (1979); *Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980); *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977)), available at <http://www.savecoalition.org/pdfs/NPPTestimonyFINAL.pdf>.

⁴¹ H.R. 3971, 106th Cong. (2000).

⁴² H.R. 738 was introduced by Rep. Scott in the 110th Congress and passed the house with a vote of 407-1, but the bill was never considered by the Senate Judiciary Committee. H.R. 738, 110th Cong. (2009).

Further, the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP) establishes certain core requirements for the appropriate treatment of juveniles in states that receive federal funding for the juvenile justice systems.⁴³ The authorizations for JJDP expired in 2007, but Congress has yet to reauthorize it, though the Senate Judiciary Committee approved legislation in 2010.⁴⁴ Efforts have been made to include in the reauthorization oversight of conditions of confinement in juvenile facilities and to ensure that youth charged as adults are kept out of adult jails pre-trial with the ultimate goals of providing safe and humane conditions of confinement for youth in both juvenile and adult facilities and keeping youth out of adult jails and prisons completely.⁴⁵

4. Recidivism in America's Criminal Justice Population

An estimated two-thirds of the 650,000 people returning home from prison will be re-arrested for a felony or serious misdemeanor within three years.⁴⁶ Approximately 70 to 80% of people coming home from prison or jail have histories of drug or alcohol dependence.⁴⁷ Research shows that young people who are kept in the juvenile justice system are less likely to re-offend than young people who are transferred into the adult system. According to the Centers for Disease Control and Prevention, youth transferred from the juvenile court system to the adult criminal system are approximately 34% more likely than youth retained in the juvenile court system to be re-arrested for violent or other crime.⁴⁸ The Department of Justice's Office of Juvenile Justice and Delinquency Prevention has also concluded that transfer laws substantially increase recidivism, particularly for first time violent offenders, and that laws to make it easier to transfer youth to the adult criminal court system do not prevent youth from engaging in criminal behavior.⁴⁹

Maintaining family ties is also incredibly important in reducing recidivism and increasing public safety. Yet too often, families are destroyed because a parent or child is in prison. Nearly two million children have at least one parent in prison.⁵⁰ These children are six times more likely to be incarcerated than other youth, according to some public health studies.⁵¹ The vast majority of correctional institutions and systems do not foster family ties for the prisoners in their care. In fact

⁴³ 42 U.S.C. § 5601.

⁴⁴ S. 678, 111th Cong. (2010).

⁴⁵ See *Juvenile Justice*, SMART ON CRIME (2011).

⁴⁶ Christy A. Visher and Jeremy Travis, The Urban Institute Justice Policy Center, *Transitions from Prison to Community: Understanding Individual Pathways* 29 ANN. REV. SOCIOLOGY 89-113 (2003).

⁴⁷ CHRISTOPHER MUMOLA, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., SUBSTANCE ABUSE AND TREATMENT OF STATE AND FEDERAL PRISONERS (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/satsfp97.pdf>.

⁴⁸ Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, MORBIDITY AND MORTALITY WEEKLY REPORT (November 30, 2007).

⁴⁹ RICHARD E. REDDING, U.S. DEPT. OF JUST., OFFICE OF JUV. JUST. AND DELINQUENCY. PREVENTION, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? (2010), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

⁵⁰ LAUREN E. GLAZE AND LAURA M. MARUSCHAK, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., PARENTS IN PRISON AND THEIR CHILDREN (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>.

⁵¹ See, e. g., S. REP. NO. 106-404, at 56 (2000).

many policies, such as limited visitation hours or restrictions on prisoners hugging their children, exacerbate the difficulties prisoners and their families face in maintaining family bonds.⁵²

5. Lack of Effective Rehabilitation and Reentry

Good time credit is important in providing incentives for prisoner rehabilitation, as well as reducing prison costs. The Federal Bureau of Prisons (BOP), however, has adopted a method of calculating the good time credit to which most prisoners are entitled that results in only a 12.8% reduction in prisoner sentences instead of the 15% Congress intended for good behavior.⁵³ BOP's convoluted calculation method has been upheld by the Supreme Court.⁵⁴ But this difference in calculation means that each prisoner loses a full week of good time credit for each year of their sentence. The Federal Defenders estimate that BOP's method of calculation has resulted in approximately 36,000 years of over-incarceration.⁵⁵ Given the estimated \$25,894 per year costs for non-capital incarceration expenditures within BOP, this over-incarceration amounts to over \$951 million in taxpayer money that Congress never intended to authorize for federal prisoners.⁵⁶ In addition to these cost over-runs, BOP's method of calculating good time takes up sorely needed bed space within BOP facilities, particularly in higher security facilities that house prisoners with longer sentences, and adds significantly to the dangerous population pressures on a system already at 149% of capacity. A bill was introduced in the 111th Congress to fix this problem (H.R. 1475).

Additionally, BOP has failed to provide the congressionally-mandated, one-year sentence reduction incentive for thousands of drug addicted offenders who seek to participate in BOP's Residential Drug Abuse Program (RDAP). It has done this in two ways: (i) by implementing rules that disqualify statutorily eligible prisoners who successfully complete in-prison substance abuse treatment; and (ii) by administering the program in a way that deprives even those it deems eligible of the full year of credit that Congress intended. For example, in violation of the statutory mandate that all prisoners receive appropriate drug treatment, the BOP disqualifies statutorily-eligible prisoners based solely on stale convictions involving violence.⁵⁷ The BOP prevents any prisoner with

⁵² Creasie Finny Hairston, *Prisoners and Families: Parenting Issues During Incarceration*, FROM PRISON TO HOME: THE EFFECT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (2001), available at <http://aspe.hhs.gov/hsp/prison2home02/Hairston.htm>.

⁵³ See Families Against Mandatory Minimums, *Frequently Asked Questions About Federal Good Time Credit*, 8 (2008) http://www.famm.org/Repository/Files/FINAL_Good_Time_FAQs_10.21.08%5B1%5D.pdf.

⁵⁴ *Barber v. Thomas*, 130 S. Ct. 2499 (2010).

⁵⁵ The 36,000 years figure was reached by the following calculations. 195,435 prisoners x 7 days a year x 9.8 average sentence that is more than a year and less than life, divided by 365 days in a year equals 36,731 years. See Families Against Mandatory Minimums, *supra* note 53, at 8; see also Stephen R. Sady & Lynn Deffebach, *The Sentencing Commission, The Bureau Of Prisons, And The Need For Full Implementation Of Existing Ameliorative Statutes To Address Unwarranted And Unauthorized Over-Incarceration*, UNITED STATES SENTENCING COMMISSION SYMPOSIUM ON ALTERNATIVES TO INCARCERATION 2- 9 (July 2008).

⁵⁶ Families Against Mandatory Minimums, *supra* note 53.

⁵⁷ *Federal Bureau of Prisons Oversight Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Stephen R. Sady, Federal Defender for the District of Oregon), available at <http://judiciary.house.gov/hearings/pdf/Sady090721.pdf>.

a detainee from participation in the residential program, which eliminates the 26.6% of prisoners who are removable aliens within the BOP population.⁵⁸ The BOP also categorically denies participation to any eligible prisoner whose offense involved mere possession of a firearm, rather than an actual violent offense.⁵⁹

Beyond categorically denying large portions of the federal population the benefit of RDAP's sentence reduction incentive, BOP fails to provide sufficient drug abuse education classes, which is exacerbated by delayed consideration of a prisoner's application to RDAP until the end of their sentence. As a result, even eligible prisoners are deprived of the full benefit of the one-year sentence reduction. BOP's administration of RDAP has led to an average sentence reduction of only 7.64 months, rather than the full year permitted by Congress, limit the potential savings in federal corrections costs.⁶⁰

Furthermore, BOP has failed to implement the directive of the Second Chance Act to give prisoners 12 months of pre-release custody in a Community Corrections Facility (CCF), such as a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or residential reentry centers. BOP's policy is premised on two highly questionable arguments: (i) more than six months in a CCF is not beneficial for individual prisoners; and (ii) it is more expensive to house prisoners in CCFs than in secure facilities. There is no empirical support for the first proposition, nor does it take in to account the possibility of beginning the halfway house at twelve months and transitioning to home confinement once residence in the halfway house is no longer necessary. The second proposition is also hard to credit because incarceration in BOP costs about \$2,076.83 per month (not including capital costs) compared to \$1,905.92 for halfway house placement and, at least potentially, \$301.80 for home confinement.⁶¹

BOP has also persisted in an unnecessarily restrictive interpretation of its authority to designate the place of a prisoner's confinement under 18 U.S.C. § 3621(b) despite contrary rulings by at least four courts of appeal. Specifically, it has declined to return to its former practice of allowing short-sentenced prisoners to serve their sentences in community confinement upon

⁵⁸ *Id.*

⁵⁹ 28 C.F.R. § 550.55.

⁶⁰ Beth Weinman, *Prison Programs Resulting in Reduced Sentences*, THE U.S. SENTENCING COMMISSION SYMPOSIUM ON ALTERNATIVES TO INCARCERATION 72 (July 2008), available at http://www.ussc.gov/Research/Research_Projects/Alternatives/20080714_Alternatives/05_FINAL_PrisonPrograms.pdf.

⁶¹ Memorandum from Matthew Roland, Deputy Assistant Director, Administrative Office of the United States Courts, *Regarding Cost of Incarceration to Chief Probation and Pretrial Officers* (May 6, 2008). Currently, BOP utilizes its private halfway house contractors to supervise those who go to home detention through a halfway house, and they charge BOP the full cost of a halfway house placement for the entire term of home detention. BOP permits the halfway house operators to decide when a prisoner goes to home detention, and operators have a financial incentive to send people home sooner rather than later since they are paid the same for the duration of the community placement, and can fill the empty bed. Where home detainees are supervised by Federal Probation, the cost to the government is \$301.80. As of this writing, the authors know of no reason why BOP could not ask Federal Probation to supervise all those in home detention at a much lower cost.

recommendation of the sentencing judge, notwithstanding affirmation by several courts of appeal of its authority to do so.⁶² A policy memorandum issued by BOP on February 2, 2009, emphasizes that while prisoners may be eligible for community placements, such front-end placements are disfavored.⁶³

Finally, BOP has drastically underutilized its second look resentencing authority under 18 U.S.C. § 3582(c)(1)(A)(i) to petition the sentencing court for reduction of a prisoner's term of imprisonment where there have been "extraordinary and compelling" changes in the prisoner's circumstances since the sentence was imposed. Even after the U.S. Sentencing Commission (USSC) promulgated a more expansive interpretation of that phrase, BOP issued regulations reiterating a very narrow "terminal illness/total disability" basis for seeking reduction of a prison term under this statute that is inconsistent with the USSC definition. BOP has openly stated its unwillingness to comply with USSC policy guidance authorizing reductions in a wider range of cases, even though Congress explicitly delegated the authority to define "extraordinary and compelling" to USSC, not BOP.⁶⁴ BOP has administered its far narrower test to return to court in fewer than thirty cases each year.

6. Overuse of Solitary Confinement

Long-term isolated confinement is often called "solitary confinement," "ad seg," "SHU," "SMU" "the hole," or "supermax" confinement. It is the practice of placing people alone in cells for 23 hours a day or more with little or no human interaction; reduced natural light; little access to recreation; strict regulation of access to property, such as radios, television, or commissary items; greater constraints on visitation rights; and the inability to participate in group or social activities, including eating with others. The length of this type of placement varies, but it can last for years or indefinitely. The American Bar Association uses the following definition:

The term 'segregated housing' means housing of a prisoner in conditions characterized by substantial isolation from other prisoners, whether pursuant to disciplinary, administrative, or classification action. 'Segregated housing' includes restriction of a prisoner to the prisoner's assigned living quarters.⁶⁵

The term 'long-term segregated housing' means segregated housing that is expected to extend or does extend for a period of time exceeding 30 days.⁶⁶

⁶² See Brief for Families Against Mandatory Minimums, *Munis v. Sabol* 517 F.3d 29 (1st Cir. 2008).

⁶³ Memorandum from Joyce K. Conley, Assistant Director, Correctional Programs Division, U.S. Department of Justice Federal Bureau of Prisons, *Review of Inmates for Initial Designation to Residential Reentry Centers* (February 2, 2009), available at http://www.fd.org/pdf_lib/BOP.Front.end.CCCdesignationPolicy.2.11.09.pdf.

⁶⁴ 28 U.S.C. § 994(t); See Margaret Colgate Love, ABA Commission on Effective Criminal Sanctions, *Sentencing Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED. SENT'G REP. 3 (2009), available at http://www.pardonlaw.com/materials/12.FSR.21.3_211-226.pdf.

⁶⁵ AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIM. JUST.: TREATMENT OF PRISONERS 23-1.0(r) (3d ed. 2010), available at <http://www.abanet.org/crimjust/policy/midyear2010/102i.pdf>.

⁶⁶ *Id.* at 23-1.0(o).

There is a general consensus among researchers that isolated confinement is psychologically harmful for people.⁶⁷ Some experts have also documented negative physiological responses to solitary confinement as well. The European Committee for the Prevention of Torture found that such conditions amount to “inhuman treatment.”⁶⁸

Historically, American researchers and people in the legal system recognized these harms and curbed the use of solitary confinement as a method of punishment. Since the 1980s, however, “tough on crime” rhetoric has fueled a resurgence in the use of long-term isolated confinement and the building of “supermax” facilities, all justified as the only means available to punish “the worst of the worst.” Yet the vast majority of prisoners in isolation are not incorrigibly violent criminals. Instead, many are severely mentally ill or developmentally disabled prisoners who are difficult to manage in prison settings.⁶⁹ Many people subject to isolated confinement have not actually done anything violent, although they may have broken prison rules, such as those against possessing contraband.⁷⁰ Some prisoners have also been placed in isolated confinement or supermax institutions because they filed grievances against correctional officers or otherwise attempted to assert their rights.⁷¹

Despite its political popularity, there is no evidence that using isolated confinement or supermax institutions has reduced the levels of violence in prison or that such confinement acts as a deterrent.⁷² In contrast, there is ample evidence that the use of long-term isolation is considerably more expensive than general population because facilities that provide for solitary confinement are considerably more costly to build and operate, sometimes costing two or three times as much as conventional facilities.⁷³ In recognition of the inherent problems of long-term isolation, the

⁶⁷ See e.g., Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450 (1983); R. Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8 (1988); S.L. Brodsky and F.R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124 (2003); H. Miller and G. Young, *Prison Segregation: Administrative Detention Remedy of Mental Health Problem?* 7 CRIM. BEHAV. & MENTAL HEALTH 85 (1997); H. Toch, *Mosaic of Despair: Human Breakdown in Prison*, AM. PSYCH. ASS'N (1992).

⁶⁸ Leena Kurki and Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 415 (2001) (specifically, spending twenty two hours a day in a cell, without associating with other prisoners, with limited visits and activities for over a year is “inhuman treatment”).

⁶⁹ Haney, *supra* note 67, at 127.

⁷⁰ Kurki and Morris, *supra* note 68, at, 411-12.

⁷¹ Instances of retaliatory use of solitary confinement are far too numerous to list individually. See, e.g., *Adnan Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006) (finding a prison employee to have inflicted a year’s confinement in a “supermax” facility on a prisoner in retaliation for his First Amendment-protected complaints about prison conditions); SAVE: COALITION TO STOP ABUSE AND VIOLENCE EVERYWHERE, REFORM THE PRISON LITIGATION REFORM ACT (PLRA) (2008), available at http://www.savecoalition.org/pdfs/save_final_report.pdf.

⁷² Kurki and Morris, *supra* note 59, at 391.

⁷³ CAROLINE ISAACS AND MATTHEW LOWEN, BURIED ALIVE: SOLITARY CONFINEMENT IN ARIZONA’S PRISONS AND JAILS 4 (2007); Daniel P. Mears and Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUST. Q. 233, 260 (2006).

American Bar Association recently approved standards to reform the use of isolated confinement in this country.⁷⁴ The solutions presented in the Standards represent a consensus view of representatives of all segments of the criminal justice system who collaborated exhaustively in formulating the final ABA Standards.

7. Overreliance on Incarceration

In 1972, the nation's prison population was just over 300,000. Today, the nation's prison population is well over 2.3 million, and there are over 500,000 correctional officers.⁷⁵ While the U.S. contains roughly 5% of the world's population, almost 25% of all the world's prisoners are housed in U.S. prisons and jails.⁷⁶ The vast majority of these individuals are in prison for non-violent crimes, often related to drugs and drug addiction.

For decades, the ever-increasing number of inmates has proceeded unchecked and largely unexamined. "Tough on crime" political rhetoric and a purely punitive correctional purpose have fueled policy choices and financial and legal decisions. But public discourse is now changing, in part fueled by the current financial crisis. To seize this moment, a national consensus should be reached on evidence-based policies that will ensure public safety while at the same time ensuring rational, cost-effective policies that work to return prisoners to the community to be productive, law-abiding citizens.

RECOMMENDATIONS

1. Sexual Violence in Prisons

A. *The Prevalence of Sexual Assault in Correctional Facilities and Lack of Accountability for Sexual Abusers*

Sexual violence behind bars has reached crisis proportions. PREA called for the development of binding national standards for the prevention, detection, response, and monitoring of sexual violence behind bars, and for the Attorney General to publish a final rule adopting binding national standards within one year.⁷⁷ However, the Attorney General has yet to implement the standards, and appropriations for PREA have been drastically cut every year since its passage, making the prospects of assisting states and monitoring their compliance with the standards even more challenging.⁷⁸

⁷⁴ AMERICAN BAR ASSOCIATION, *supra* note 65, at 23-3.8 (3d ed. 2010).

⁷⁵ See MINTON, *supra* note 3; WEST, *supra* note 3.

⁷⁶ See SCHMITT ET AL *supra* note 1.

⁷⁷ 42 U.S.C. § 15606(c).

⁷⁸ STOP PRISON RAPE, PRISON RAPE ELIMINATION ACT UPDATE, *supra* note 27, at 7.

B. *Fully Implement PREA*

Legislative

Congress should provide sufficient appropriations for PREA. When PREA was passed, Congress authorized \$60 million per year in funding through 2010.⁷⁹ Since then, however, appropriations have dropped substantially—from an initial level of \$35 million annually in fiscal years 2004 and 2005 to approximately \$18 million annually in fiscal years 2006 through 2008. Because of the reduced funding, the state grants authorized by PREA have not been awarded since Fiscal Year 2006.⁸⁰ At a minimum, Congress should retain current funding levels for PREA, with money earmarked for state and county grants.

Additionally, Congress should hold oversight hearings with the Attorney General and relevant members of his staff to ensure that the Department of Justice is meeting its obligations under PREA. The Attorney General was obliged under PREA to ratify national standards by June 2010, but has failed to do so. Indeed, no new deadline for ratification of national standards has been set. As noted above, the Department has also failed to administer the state grants program or prioritize funding for it within its proposed budget. Congress must hold the Administration accountable for its obligations under the law.

Executive

The Attorney General should ratify national standards addressing sexual violence in detention. The National Prison Rape Elimination Commission spent more than five years holding public hearings, convening expert working groups, and consulting with the full range of stakeholders – including corrections officials, advocates, policymakers, and prison rape survivors – to come up with their proposed standards. These recommendations represent a compromise, balancing the fiscal and security concerns of officials with the rights of inmates to be free from sexual abuse. The Attorney General should defer to the expertise gathered by the Commission and the compromise it established by ratifying the basic provisions that it proposed.

The Department of Justice should establish meaningful compliance monitoring of PREA standards. For these standards to have an impact, the Department must monitor compliance and hold corrections agencies accountable for meeting these basic obligations. The Department of Justice should establish general guidelines for local compliance monitoring and then provide federal oversight to ensure sufficient accountability.

⁷⁹ See 42 U.S.C. §§ 15603(e), 15604(c), 15605(g)(1).

⁸⁰ *National Prison Rape Elimination Report and Standards: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 5 (2009) (statement of Melissa Rothstein, Just Detention International).

2. Failures of the Prison Litigation Reform Act (PLRA)

A. *The Prison Litigation Reform Act Impedes Prisoners' Access to Justice*

While PLRA was originally intended to stem frivolous prisoner lawsuits, in practice it often denies justice to victims of rape, assault, religious restrictions, and other rights violations. PLRA's "physical injury" and exhaustion requirements have severely limited prisoner's ability to address violations of their constitutional rights and other serious abuses. Certain provisions of PLRA must be amended or repealed in order to restore meaningful access to the courts for incarcerated adults and youth.

B. *Address the Problems Created by PLRA*

Legislative

To address the unintended consequences of PLRA, Congress should reintroduce and pass legislation similar to the Prison Abuse Remedies Act (PARA),⁸¹ originally introduced in the 110th Congress, and the Prison Abuse Remedies Act of 2009 (PARA),⁸² introduced in the 111th Congress.⁸³ The House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, held hearings on November 8, 2007 and April 22, 2008 regarding the problems with PLRA and the recommended reforms.⁸⁴ However, neither bill received a committee vote. Congress should pass legislation containing similar provisions to PARA's to address the over-reach of PLRA. The legislation should:

- Repeal the provision in 42 U.S.C. § 1997e(e) prohibiting prisoners from bringing lawsuits for mental or emotional injury without demonstrating a "physical injury."
- Amend the requirement in 42 U.S.C. § 1997e(a) for exhaustion of administrative remedies to instead require prisoners to present their claims to responsible prison officials before filing suit. Should prisoners fail to do so, the amendment should require courts to stay the case for up to 90 days and return those claims to prison officials to provide them the opportunity to resolve the complaint administratively.
- Repeal 18 U.S.C. § 3626(g), 28 U.S.C. §§ 1915(h), 1915A(c), and 42 U.S.C. § 1997e(h), which extend PLRA to juveniles confined in juvenile facilities.

⁸¹ H.R. 4109, 110th Cong. (2007).

⁸² H.R.4335, 111th Cong. (2009).

⁸³ The only substantive difference between the two bills, which were both introduced by Rep. Robert C. Scott (D-VA), is that the earlier bill would have eliminated PLRA restrictions on awards of attorneys fees. The later bill would not.

⁸⁴ *H.R. 4109, the Prison Abuse Remedies Act of 2007 (PARA): Hearing Before the H. Subcomm. on Crime Terrorism and Homeland Sec., 100th Cong. (2008)*. For testimony from these hearings, see STOP ABUSE AND VIOLENCE EVERYWHERE COALITION, <http://www.savecoalition.org/latestdev.html> (last visited Jan. 18, 2011).

- Restoring judicial discretion to grant the same range of remedies in prisoners’ civil rights actions that are available in all other civil rights cases by repealing 18 U.S.C. § 3626.
- Amend 28 U.S.C. §§ 1915(a), (b) to allow indigent prisoners whose cases are found to state a valid claim at the preliminary screening stage to pay a partial filing fee rather than the full filing fee (currently \$350 in district courts and \$450 in appellate courts).
- Amend the “three-strikes provision” in 28 U.S.C. §1915(g) (which requires indigent prisoners who have previously had three cases dismissed to pay the full filing fee up front, except in cases of imminent danger of serious physical harm) by limiting it to prisoners who have had three lawsuits or appeals dismissed as malicious within the past five years.

Executive

The Administration should support amending PLRA and commit to signing reforms to PLRA that Congress passes.

3. **Transparency and Oversight in Correctional Institutions**

A. ***Lack of Transparency and Accountability in Correctional Institutions***

Despite the massive expenditure of taxes and the profound effect that prison has on the individual, the community, and public safety, there is very little oversight of prisons, jails, and juvenile detention facilities, or public accountability for what takes place behind bars. Currently, there are no national standards for the treatment of prisoners and no systemic national oversight to ensure that the constitutional rights of prisoners are protected. Further, since the enactment of PLRA in 1996, the traditional power of the federal courts to provide oversight has been drastically undercut. As a result, it is essential that the government implement alternative forms of oversight.

B. ***Build Transparency and Accountability in Corrections***

Legislative

Congress should reauthorize DICRA. DICRA expired in 2006 and has not been reauthorized. Congress should reintroduce and pass this critical legislation.⁸⁵

Congress should strengthen the JJPDA⁸⁶ to include oversight of conditions of confinement in juvenile facilities and to ensure that youth charged as adults are kept out of adult jails pre-trial. This would improve the likelihood of safe and humane conditions of confinement for youth in both juvenile and adult facilities, and keep youth out of adult jails and prisons completely. .

⁸⁵ 42 U.S.C. § 13701.

⁸⁶ 42 U.S.C. §§ 5601 *et seq.*

Congress should reintroduce the Private Prison Information Act.⁸⁷ The Act, introduced in the House in April of 2007 with 25 cosponsors, would require prisons and other detention facilities holding federal prisoners or detainees under a contract with the federal government to make the same information available to the public that federal prisons and detention facilities are required to do by law. Private prisons would be subject to the same Freedom of Information Act (FOIA)⁸⁸ provisions as the BOP in order to build transparency and accountability in the work of federal contractors. Currently, BOP is subject to FOIA as a bureau of the federal government.

Congressional committees in both the House and Senate should hold oversight hearings to investigate conditions at BOP facilities. The hearing could areas of concern including:

- Federal death row conditions;
- BOP's required reporting under the Second Chance Act regarding the shackling of pregnant women prisoners under its jurisdiction;
- Medical care at federal facilities, including staffing ratios;
- Discretion given to wardens to limit First Amendment rights through special administrative measures (SAMS);
- Regulation and oversight of Communication Management Units (CMUs);
- Treatment of prisoners with mental illness;
- Treatment of prisoners held in long-term isolation and policies to ensure humane treatment and the availability of meaningful due process for prisoners who may be subject to such conditions, as well as the availability of plans for prisoners to earn their way out of restrictive housing;⁸⁹ and
- BOP's response to the findings of Office of Inspector General (OIG) audits, investigations, special reviews and reports.

Finally, Congress should fund National Institute of Justice research to look into state and local independent oversight models to determine which are most successful.

⁸⁷ H.R. 1889, 100th Cong. (2007).

⁸⁸ 5 U.S.C. § 552.

⁸⁹ See Section VI *infra*.

Executive

The role of the OIG, which conducts independent investigations, inspections, special reviews, and audits of Department of Justice programs and personnel, including the BOP, should be expanded. The OIG should be fully funded and expanded to allow for greater and more effective oversight of BOP's facilities across the nation and the over 200,000 individuals incarcerated therein. The Attorney General should ensure that BOP is held accountable for both responding to the OIG's report findings and immediately taking steps to remedy any problems or areas of concern identified by the OIG.

The Special Litigation Section of the Department of Justice's Civil Rights Division should be fully funded and expanded to enable more robust enforcement of the Civil Rights for Institutionalized Persons Act (CRIPA),⁹⁰ a federal law that enables the Attorney General to conduct investigations and litigation regarding conditions of confinement in state and local institutions, including jails, prisons, and youth detention centers.

The President should sign the Optional Protocol to the Convention Against Torture (OPCAT)⁹¹ to enhance oversight and accountability in U.S. prisons, jails, and youth detention centers. As a party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the United States is obligated to "take ...measures to prevent acts of torture" and "keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for custody and treatment of persons subjected to any form of arrest, detention or imprisonment ... with a view to preventing cases of torture."⁹² Consistent with these obligations, parties to the CAT developed the OPCAT, which seeks to prevent torture and other forms of ill-treatment by establishing a system in which independent international and national bodies send inspectors on regular visits to places of detention.⁹³ The U.S. is not currently a party to OPCAT, although it is a party to CAT. The President should join the Protocol as a first step towards creating a national system of oversight and accountability for the nation's prisons, jails, and youth detention centers that focuses on preventing abuses.

⁹⁰ 42 U.S.C. § 1997a *et seq.*

⁹¹ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, June 22, 2006, UN Doc. A/RES/57/199 (2003).

⁹² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 2, 11, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987 and ratified by the U.S. October 14, 1991).

⁹³ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (December 18, 2002).

4. The Need for Effective Rehabilitation and Reentry

A. High Rates of Recidivism

An estimated two-thirds of the 650,000 people returning home from prison will be re-arrested for a felony or serious misdemeanor within three years.⁹⁴ Basic services can and should be provided to incarcerated individuals to reduce their chances of reoffending. Alternatives to incarceration should be offered for those who do not pose a real risk to the public. In addition, merit-based programs to encourage good behavior and rehabilitation during periods of incarceration, and programs fostering family ties during incarceration are essential in the effort to reduce juvenile recidivism.

Failure to fully to provide sufficient rehabilitation to prisoners is particularly disappointing given that U.S. voters favor rehabilitation for prisoners over a punishment-only system by a margin of eight to one.⁹⁵ In fact, 80% of voters feel that job training, medical care, affordable housing, and student loans are important elements of crime prevention.⁹⁶ These measures are supported by the public, can save millions in corrections costs, and reduce recidivism.

B. Reduce Recidivism and Increase Effective Rehabilitation

Legislative

Congress should pass legislation similar to the Federal Prison Work Incentive Act of 2008⁹⁷ to reform federal “good time” calculation. This legislation should ensure that Congress original intent was met by making certain that prisoners receive the full 15% “good time” credit for maintaining good behavior while incarcerated.. The legislation should also apply to federal policies those policies now prevalent in the states and in the Model Penal Code, which provide for both presumptive good time (15%) and some amount of additional time off for participation in certain rehabilitation programming (15%) in order to encourage rehabilitation and lower recidivism rates.

Congress should draft and introduce a “reentry behind bars” bill that would provide grants to states to provide programs to better prepare prisoners for reentry following the completion of their prison sentence. A poll of both Democrats and Republicans revealed that 71% thought *more* tax dollars should be invested in job training, education and drug treatment for prisoners as an

⁹⁴ Christy A. Visher and Jeremy Travis, The Urban Institute Justice Policy Center, *Transitions from Prison to Community: Understanding Individual Pathways* 29 ANN. REV. SOCIOLOGY 89-113 (2003).

⁹⁵ BARRY KRISBERG & SUSAN MARCHIONNA, NAT’L COUNCIL ON CRIME & DELINQ., FOCUS, ATTITUDES OF U.S. VOTERS TOWARD PRISONER REHABILITATION AND REENTRY POLICIES (Apr. 2006), available at http://www.nccd-crc.org/nccd/pubs/2006april_focus_zogby.pdf.

⁹⁶ *Id.*

⁹⁷ H.R. 7089, 100th Cong. (2008).

effective means of reducing recidivism.⁹⁸ A majority thought that social services and rehabilitation were an essential element of corrections.⁹⁹ This bill should provide grants to states to provide programs that better prepare prisoners for successful reentry to the community, including:

- Drug treatment programs in prison for all drug offenders, as well as funding for the Residential Substance Abuse Treatment (RSAT) program provided that they do not impose additional penalties on participants, such as loss of good time for non-completion of a program;
- Coordination between prison programs and community providers;
- Government-issued ID cards upon release;
- Enrollment in Medicaid prior to release (so that it is available upon release);
- Alternatives to incarceration for non-violent offenders;
- Merit-based reductions in sentences for non-violent offenders;
- SSA prerelease agreements for those eligible for disability assistance;
- Requirement that individuals under 18 shall not be housed in adult facilities;
- Restoration of Pell Grant eligibility to prisoners;
- Access to clean needles and condoms in order to reduce the incidence of HIV/AIDS, Hepatitis, and other illnesses;
- Access to educational programs/job training for every prisoner;
- Access to religious services;
- Transportation to prisons for prisoners' families;
- Alternatives to incarceration for pregnant women and mothers;
- Family-friendly visitation policies and family strengthening programs to promote healthy family ties between prisoners and their families; and
- Regulating the cost of collect calls from prisons to help maintain family ties.

⁹⁸ Third Way, Third Way Crime Poll Highlights (2007) http://content.thirdway.org/publications/101/Third_Way_Polling_-_Third_Way_Crime_Poll.pdf (last visited Jan. 26, 2011).

⁹⁹ *Id.*

Congress should introduce legislation to evaluate the effectiveness of reentry by tracking of the ability of former BOP prisoners to find employment and housing, pursue education, and avoid recidivism. This would be consistent with the recommendations of the Commission on Safety and Abuse in America's Prisons.¹⁰⁰

Congress should fully fund the Elderly Prisoners program under the Second Chance Act. This program would allow prisoners 65 years old or older who have served at least ten years of their sentence the opportunity to serve the remainder of their sentence in home detention. This program would only be available for non-violent offenders who are not serving a life sentence. Given the enormous cost of eldercare in the prison system, this program would maintain public safety, while reducing prison costs.¹⁰¹

Congressional committees in both the House and Senate should conduct oversight hearings of BOP's administration of the programs described in the section below to ensure that BOP is complying with its obligations under the law, and if it is not, identifying the tools and policies necessary to ensure that BOP can and will meet those obligations.

Executive

To ensure lawful operation of government programs, cost-savings and efficient use of taxpayer funds, effective programming to reduce recidivism, humane treatment of prisoners, and increased safety in BOP facilities, the Attorney General and the Director of BOP should immediately review BOP's administration of the programs described below and take immediate steps to ensure that BOP is complying with its obligations under the law and fulfilling its designated role in each program area.

i. Drug Treatment

BOP has failed to provide the congressionally-mandated, one-year sentence reduction incentive for thousands of drug addicted offenders who seek to participate in BOP's RDAP. BOP should immediately change its administration of the program to permit timely participation which would allow for an immediate savings of millions of dollars.

A 2002 poll found that two-thirds of Americans agree that drug abuse is a medical problem that should be handled through counseling and treatment rather than prison sentences.¹⁰² A

¹⁰⁰ See GIBBONS & KATZENBACH, *supra* note 14.

¹⁰¹ See NATIONAL INSTITUTE OF CORRECTION, DEPT. OF JUST., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES (2004).

¹⁰² OPEN SOCIETY INSTITUTE, CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM, SUMMARY OF FINDINGS (Feb. 2002), available at http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf.

plurality of Americans think “tough on crime” strategies aren’t working and that an approach that focuses on the effectiveness of programs, like RDAP, is a more sensible approach to crime reduction.¹⁰³ Utilizing these programs will increase public safety, save money by reducing recidivism, and garner the support of the general public.

ii. *Community Corrections Facilities*

BOP should implement its mandate, as permitted under the Second Chance Act. BOP has consistently underutilized its authority under 18 USC § 3621(b) and § 3624(c) to permit prisoners to serve some or all of their sentences in CCCs and home detention as opposed to prison. On April 9, 2008, the President signed the Second Chance Act, which provides the BOP with an opportunity to substantially increase utilization of community corrections.¹⁰⁴ Unfortunately, BOP has failed to implement its new mandate, undermining the intent of Congress and opening the way for yet more litigation.

iii. *Compassionate Release and Second Look Resentencing*

BOP has drastically underutilized its authority under 18 U.S.C. § 3582(c)(1)(A)(i) to petition the sentencing court for reduction of a prisoner’s term of imprisonment where there have been “extraordinary and compelling” changes in the prisoner’s circumstances since the sentence was imposed. The BOP should more often provide sentencing judges with opportunities for second look resentencing. These sentence reductions would save the BOP resource by reducing the prison population, generally, and sparing it the particularly costly need to provide medical care costs for seriously ill prisoners whose prolonged incarceration does not further the goal of increased public safety.¹⁰⁵

iv. *Clemency Recommendations*

For at least 16 years BOP has declined to take a position on the merits of clemency applications, abdicating its historical role to assist the Pardon Attorney in identifying appropriate cases to recommend to the President for early release.¹⁰⁶ In fact, the Pardon Attorney has at this point stopped asking BOP for a recommendation on the merits of a clemency case.¹⁰⁷ Engaging in the process of evaluating the merits of clemency petitions would allow BOP to help identify those prisoners in the system most capable of taking full advantage of clemency and successfully reentering their communities.

¹⁰³ *Id.*

¹⁰⁴ Pub. L. No. 110-199.

¹⁰⁵ See *Federal Sentencing Reform*, SMART ON CRIME (2011).

¹⁰⁶ For a history of the role of the Bureau of Prisons in clemency petitions, see Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons, Reflections on the President’s Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000), available at <http://www.pardonlaw.com/materials/collarbuttons.pdf>.

¹⁰⁷ See *Pardon Power and Executive Clemency*, SMART ON CRIME (2011).

5. Over-reliance on the Use of Harmful Long-Term Isolated Confinement

A. *Isolated Confinement is Overused and Harmful*

The monetary cost of using isolated confinement, coupled with the human cost of increased physiological and psychological suffering, far outweighs any purported benefits. In order to build a fair, effective and humane criminal justice system, we must work to curb the use and misuse of isolated confinement.

B. *Reduce the Use of Long-term Isolation and Design Effective Alternatives*

Legislative

Congress should introduce a bill limiting the use of long-term isolated confinement in BOP facilities. That bill should incorporate by reference Chapter 23 of the ABA Treatment of Prisoners Standards related to long-term isolated confinement, and require compliance with these standards. The bill should also require re-socialization for prisoners subject to such isolated confinement before they are released back into the community. This will protect public safety and assist individuals subject to isolation in reintegrating successfully into society. Such “de-briefings” should take place in phases, starting at least six months before the end of their sentence. All prisoners held in isolated confinement-like housing should be included in this re-socialization process. De-briefing programs should include clinical staff, social workers, and education staff to provide counseling and life skills to prepare prisoners for release to the community.

Executive

The Government Accountability Office should conduct a study of the effectiveness and availability of mental health care for prisoners in long-term isolated confinement. The study should specifically evaluate the numbers of mentally ill prisoners confined in segregated housing as defined by ABA Treatment of Prisoners Standard 23-1.0(o); the clinical treatment being provided to those mentally ill prisoners; whether or not there are policies and protocols in place and being used to ensure that the mentally ill in BOP are not housed in segregation housing; and the length of stay for mentally ill prisoners in segregated housing.

BOP should adopt policies and practices for its use of long-term isolation consistent with the standards established by the ABA’s Treatment of Prison Standards, including:

- Adopting procedures to evaluate whether segregation is warranted prior to placing or retaining a prisoner in isolated confinement,¹⁰⁸

¹⁰⁸ ABA STANDARDS FOR CRIM. JUST., TREATMENT OF PRISONERS, *supra* note 65, at 23-2.9.

- Placing limits on disciplinary segregation. In general stays should be brief and should rarely exceed one year. Longer-term segregation should be imposed only if the prisoner poses a continuing and serious threat. Segregation for protective reasons should take place in the least restrictive setting possible;¹⁰⁹
- Decreasing extreme isolation by allowing for in-cell programming, supervised out-of-cell exercise time, face-to-face interaction with staff, access to television or radio, phone calls, correspondence, and reading material;¹¹⁰
- Decreasing sensory deprivation by limiting the use of auditory isolation, deprivation of light and reasonable darkness, and punitive diets;¹¹¹
- Allowing prisoners to gradually gain more privileges and be subjected to fewer restrictions, even if they continue to require physical separation;¹¹²
- Refraining from placing prisoners with serious mental illness in what is an anti-therapeutic environment. Instead maintain appropriate secure mental-health housing for such prisoners;¹¹³ and
- Monitoring prisoners in segregation for mental-health deterioration and dealing with deterioration appropriately if it occurs;¹¹⁴

6. Misuse of the Prison System and Over-incarceration

A. *Over-Use of Incarceration in America*

In 2008 alone, state and the federal governments spent \$68 billion on corrections. Corrections expenses were the fastest growing segment of state budgets. Over the last two decades, public spending on corrections rose over 300 percent, eclipsing funding for every other essential government service but Medicaid. There is now a sense that we must find a different way. To seize this moment, policymakers should adopt evidence-based improvement that will ensure public safety while at the same time ensuring rational, cost-effective policies that work to return prisoners to the community to be productive, law-abiding citizens.

¹⁰⁹ *Id.* at 23-2.6, 23-5.5.

¹¹⁰ *Id.* at 23-3.7, 23-3.8.

¹¹¹ *Id.*

¹¹² *Id.* at 23-2.9.

¹¹³ *Id.* at 23-2.8, 23-6.11.

¹¹⁴ *Id.* at 23-6.11.

B. *Design an Evidence-Based Approach to Criminal Justice**Legislative*

Congress should introduce and pass legislation similar to the National Criminal Justice Commission Act of 2009, introduced in the Senate by Senator Jim Webb (D-VA).¹¹⁵ The bill received widespread bipartisan support and had 39 cosponsors in the Senate, including Chairman of the Senate Judiciary Committee Senator Patrick Leahy (D-VT), former Chairman of the Subcommittee on Crime and Drugs Senator Arlen Specter (D-PA), former Judiciary Committee Chair Senator Orrin G Hatch (R-UT), and Republican Judiciary Committee member Senator Lindsey Graham (R-SC). A companion bill introduced by Rep. Delahunt (D-MA) passed the House on July 27, 2010.¹¹⁶

Congress should also appropriate funding for the bipartisan commission established by the National Criminal Justice Commission Act to examine appropriate, humane, and cost-effective use of the prison system.

Executive

The President, the Attorney General, and the Department of Justice should support re-examination of current criminal justice practices and goals, and work to implement the recommendations of the Criminal Justice Commission regarding the appropriate use of incarceration and alternative forms of punishment.

¹¹⁵ S. 714, 111th Cong. (2009); *See also System Change*, SMART ON CRIME (2011).

¹¹⁶ H.R. 5143, 111th Cong. (2010).

APPENDICES

Experts

Sexual Violence in Prisons

Lovisa Stannow, Just Detention International
(http://www.justdetention.org/en/about_bios.aspx)

Melissa Rothstein, Just Detention International
(http://www.justdetention.org/en/about_bios.aspx)

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CHAPTER 11

FEDERAL POLICY ON THE DEATH PENALTY

THE ISSUE

The irreversibility of the death penalty makes it critical that our criminal justice system administer this most severe sanction in a fair and equitable manner. Our system provides for adequate representation and the appropriate checks to remedy any errors or constitutional violations. There is no remedy for the execution of defendants to whom the criminal justice system did not afford all the processes, protections, and rights guaranteed by the Constitution. Most distressingly, dysfunctions in the criminal justice system can lead to the execution of defendants innocent of the crimes with which they were charged.

The death penalty, as currently applied, is in urgent need of reform. Capital defendants are too often not afforded adequate legal representation or a fair trial. Furthermore, alarming racial disparities exist in the application of the death penalty. The failure to provide even basic fairness in the system leads to an incontrovertible truth: the death penalty is a “broken system.” Despite these grave concerns, since the 1996 passage of the Antiterrorism and Effective Death Penalty Act (AEDPA),¹ federal courts have been severely constrained in their ability to vindicate the constitutional rights of individuals convicted of crimes in state and federal courts.

HISTORY OF THE PROBLEM

A landmark study of capital cases from 1973 through 1995 revealed that in seven out of every ten cases that were fully reviewed, courts found serious, reversible error.² Even after state courts reversed 47% of the capital convictions due to these errors, federal courts found serious error in 40% of the remaining death sentences.³ The most common errors prompting reversal of death sentences were “egregiously incompetent defense lawyers” and suppression of exculpatory evidence by prosecutors or police.⁴ At the same time, too many death row inmates suffer from severe mental illness. Additionally death sentences are disproportionately imposed on people of color, with African Americans comprising more than 40% of today’s death-row inmates while constituting only 12% of the national population.⁵

These findings reveal critical problems with capital punishment in the United States: 1) lack of sufficient review of capital convictions; 2) racial disparities in the application of the death penalty; 3) unjust application of the death penalty to the mentally ill; and 4) lack of adequate capital counsel for indigent defendants.

¹ Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

² JAMES S. LIEBMAN, ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000) at I, *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

³ *Id.*

⁴ *Id.* at ii.

⁵ AMNESTY INTERNATIONAL, *UNITED STATES OF AMERICA: DEATH BY DISCRIMINATION – THE CONTINUING ROLES OF RACE IN CAPITAL CASES* (2003) at 5, *available at* <http://www.amnesty.org/en/library/info/AMR51/046/2003>.

1. Changes to *Habeas Corpus* Limit Access to Critical Review

Despite grave concerns about the reliability and fairness of capital convictions, federal legislation, most prominently the AEDPA and the USA Patriot Reauthorization Act (PIRA),⁶ along with U.S. Supreme Court decisions interpreting these statutes, have significantly limited federal review of state court convictions. As a result, defendants who have suffered serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and suppression of exculpatory evidence, are left with no recourse.

Since AEDPA's enactment in 1996, state and federal prisoners have been forced to navigate a labyrinth of complex procedural rules and stringent deadlines to assert claims of serious constitutional violations in post-conviction proceedings. AEDPA burdens state prisoners, in particular, by requiring greater deference to state court decisions, thus constraining federal review of constitutional violations. Indeed, federal courts may only grant *habeas* relief to state prisoners where the state court's decision was "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," or was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."⁷ This is particularly troublesome given that petitioners in state post-conviction proceedings do not have a right to counsel and therefore, are too often unrepresented in these proceedings.

The constraints on the ability of federal courts to serve as a final check on state capital convictions are particularly damning for prisoners who assert claims of actual innocence, when we know with certainty that defendants have been, and will be, wrongfully convicted of capital crimes.⁸ Since 1973, 138 death-row inmates from 26 states have been exonerated and released from custody after serving years (often decades) on death row.⁹ Even more disturbing are the cases of the men and women who have been executed despite concerns over their possible innocence. For example, in 2009, five years after Texas executed Cameron Todd Willingham for killing his three daughters by setting fire to his home, a report to the Texas Forensic Science Commission concluded there was no scientific basis for claiming the fire was arson.¹⁰ A four-person panel of the Commission acknowledged that state and local arson investigators used "flawed science" in determining the blaze had been deliberately set.¹¹ Serious doubts about the accuracy of the arson investigation had been raised prior to Mr. Willingham's execution and, if heeded, could have prevented the death of a

⁶ USA Patriot Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 192 (2006).

⁷ 28 U.S.C. § 2254(d).

⁸ See *Innocence Issues*, SMART ON CRIME (2011).

⁹ Death Penalty Information Center, *Innocence: List of Those Freed From Death Row*, available at <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

¹⁰ CRAIG L. BEYLER, ANALYSIS OF THE FIRE INVESTIGATION METHODS AND PROCEDURES USED IN THE CRIMINAL ARSON CASES AGAINST ERNEST RAY WILLIS AND CAMERON TODD WILLINGHAM (2009), available at http://www.docstoc.com/docs/document-preview.aspx?doc_id=10401390.

¹¹ Allan Turner, *Panel cites 'flawed science' in arson case*, HOUSTON CHRONICLE, July 24, 2010, available at <http://www.chron.com/dispatch/story.mpl/metropolitan/7122381.html>.

potentially innocent man.¹² The conviction and execution of innocent defendants is not only a moral travesty, but also a disservice to society's need for justice and public safety. These risks can be mitigated by eliminating the unreasonable restrictions currently placed on *habeas* petitions.

2. Racial Disparities in the Federal Death Penalty

The administration of the death penalty in the U.S. has also proven to be far too susceptible to the effects of race. Since 1988, approximately 73% of all approved federal capital prosecutions have been against defendants of color.¹³ Today, African Americans comprise more than 40% of death-row inmates while constituting only 12% of the national population.¹⁴ White federal defendants are almost twice as likely to have the death penalty reduced to life sentences through plea bargains.¹⁵ An analysis for the Senate and House Judiciary Committees also revealed that, out of 28 studies on racial disparity in the death penalty, 82% found that the race of the victim influenced whether a defendant was charged and convicted of a capital murder.¹⁶ In Georgia, for example, a defendant who murdered a white victim was 4.3 times more likely to receive the death sentence than a defendant who murdered an African American victim.¹⁷

A Department of Justice study of federal cases from 1988 to 2000 also revealed especially pervasive racial disparities at the stage when prosecutors were deciding whether to charge a homicide as a federal crime or leave it in a state's criminal justice system.¹⁸ Unfortunately, the study did not examine the reasons for these racial disparities, and the Department has yet to conduct a follow up study on the role of racial bias in the application of the federal death penalty.

Despite the disturbing role race plays in the death penalty, in 1987, the U.S. Supreme Court held that statistical evidence of race disparities in the imposition of the death penalty did not violate the Eighth and Fourteenth Amendments to the U.S. Constitution.¹⁹ The Court reasoned that these statistics did not demonstrate intentional race discrimination in a specific defendant's trial.²⁰ In response, Representative John Conyers, Jr. (D-MI) drafted the Racial Justice Act as an amendment to 1994 omnibus crime legislation.²¹ The Racial Justice Act prohibited federal and state executions

¹² David Grann, *Trial by Fire: Did Texas Execute an Innocent Man*, THE NEW YORKER, Sept. 7, 2009, available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

¹³ U.S. DEPT. OF JUSTICE, SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM (2000); see also, U.S. DEPT. OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001).

¹⁴ AMNESTY INTERNATIONAL, *supra* note 5, at 5.

¹⁵ *Id.*

¹⁶ U.S. GOVT. ACCOUNTING OFFICE, REPORT TO THE SENATE AND HOUSE JUDICIARY COMMITTEES: DEATH PENALTY SENTENCING RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

¹⁷ See David Baldus, et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASHINGTON & LEE LAW REVIEW 359, 365 (1994).

¹⁸ U.S. DEPT. OF JUSTICE, SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM, *supra* note 13.

¹⁹ *McClesky v. Kemp*, 481 U.S. 279 (1987).

²⁰ *Id.*

²¹ The omnibus bill was eventually passed as the Violent Crime Control and Enforcement Act of 1994, Public L. No. 103-322.

imposed on the basis of race, permitting the use of statistical evidence to support the inference that race was a factor in decisions to seek or impose the death penalty. Although the measure passed in the House, it failed in the Senate by a 58-41 vote.

In 1995, the Department of Justice amended its regulations to require the U.S. Attorney General to review every federal death-eligible case throughout the nation, and to decide whether the death penalty will be sought in any or all of such cases, regardless of the recommendation of the local U.S. Attorneys.²² This over-centralization of the federal death penalty's decision-making process has proved cumbersome, slow, and extremely costly. It may also exacerbate racial disparities by placing the decision-making authority to not pursue capital charges in too few hands. Since the 1995 change in regulations, 31 federal defendants of color have been sentenced to death, compared with 25 white defendants.²³

3. Mental Illness and the Federal Death Penalty

It is estimated that up to 10% of death row inmates suffer from serious mental illness.²⁴ This is true despite the fact that diminished mental capacity is a mitigating factor that juries can consider when determining whether to sentence a defendant to death.²⁵ In recent years the Supreme Court has cited evolving standards of decency to protect vulnerable populations from sentences of death based on their lack of judgment and culpability.²⁶ While perhaps criminally culpable for their conduct, like juveniles and those with mental retardation, the severely mentally ill can lack the judgment, understanding, and self-control that would warrant the imposition of the death penalty.²⁷ This is particularly true when severely mentally ill defendants were suffering from psychotic delusions or other debilitating psychological conditions at the time they committed their crimes. It is unjust to exercise the most severe of sanctions on a population whose diminished capacity makes them less culpable.

4. Access to Capital Counsel for Indigent Defendants

Further exacerbating the problems in pursuing capital prosecutions, capital defendants are predominately poor and must rely upon a dysfunctional indigent defense system that is in crisis. Indigent defense attorneys are overworked, underpaid, and too often lack independence and the

²² USAM 9-10.010 *et seq.*

²³ Death Penalty Information Center, Federal Death Row Prisoners, *available at* <http://www.deathpenaltyinfo.org/federal-death-row-prisoners#1994> (last visited Jan. 4, 2011).

²⁴ Mental Health America, Death Penalty and People with Mental Illness, *available at* www.nmha.org/go/position-statements/54.

²⁵ See 18 U.S.C. § 3592(a)(1).

²⁶ See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that it is unconstitutional to execute persons who committed their crimes while juveniles); and *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute persons with mental retardation).

²⁷ THE NAT'L ALLIANCE ON MENTAL ILLNESS, DOUBLE TRAGEDIES: VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY FOR PEOPLE WITH SEVERE MENTAL ILLNESS, 1 (2009).

necessary experience and skills to effectively represent their clients—especially in capital cases. With such inadequate resources, capital defendants are at a greater risk of facing death sentences that are arbitrary and unfair. Moreover, the absence of a right to counsel in post-conviction proceedings, coupled with the myriad procedural and substantive hurdles in raising a claim of ineffective assistance of counsel, leaves capital defendants with little recourse when they are deprived of the necessary legal resources.

Federal support for capital representation is critical to ensuring that every capital defendant receives a fair and just trial. A recent report by the Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services of the Judicial Conference of the United States found that defendants whose defense costs were in the lowest one-third were more than twice as likely to be sentenced to death than those with greater defense resources.²⁸ The report also found that attorneys for defendants in low cost cases were less likely to have “distinguished prior experience” in capital cases, placing these defendants at a disadvantage.²⁹

In 2004, with large bipartisan support, Congress passed and President George W. Bush signed the Justice for All Act (JFAA).³⁰ The JFAA authorized \$75 million in annual grants to improve standards for prosecutors and defense counsel appointed to state capital cases over a five year period. Unfortunately, Congress never appropriated full funding for this provision.³¹ Additionally, many post-conviction defender organizations, known as capital resource centers, which procured and provided legal representation to death row inmates at the post-conviction stage, were forced to close when Congress eliminated their federal funding in 1996.³² These organizations demonstrated how proper training and support for competent death penalty counsel can cost-effectively and dramatically increase the quality of capital representation in state and federal post-conviction proceedings, as well as direct representation of capital defendants.

For federal defenders, a lack of independence is also an obstacle to effective representation of their clients. At the federal level, judges control many of the decisions regarding a federal defender’s budget and resources for a particular case.³³ Rules vary among federal circuits regarding presumptive limits on expenditures for cases and the ability of attorneys to obtain authorization to

²⁸ JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 44 (2010), *available at* <http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf#page=1> (finding that individuals facing federal capital prosecution and whose defense costs were in the lowest one-third, had a 44% chance of being sentenced to death at trial, while the remaining two-thirds of defendants had a 19% chance of being sentenced to death).

²⁹ *Id.* at 49.

³⁰ Justice for All Act, Pub. L. No. 108-405, 118 Stat. 2260 (2004).

³¹ In fiscal year 2009, for example, the Department of Justice was able to award \$1,828,433 in grants for capital training under JFAA based on the amount Congress appropriated. U.S. DEPT. OF JUSTICE, FY 2009 CAPITAL CASE LITIGATION INITIATIVE FUNDING RESULTS, *available at* <http://www.ojp.usdoj.gov/BJA/funding/09CCLIAwards.pdf>.

³² Alex J. Hurder, *Whatever you think about the death penalty, a system that will take life must first give justice*, Human Rights (Winter 1997) *available at* <http://www.abanet.org/irr/hr/winter97/death.html>.

³³ See 18 U.S.C. §§ 3005, 3006A, 3599; 28 U.S.C. § 2254.

hire experts and investigators. This creates inconsistencies in the quality of representation for defendants in different circuits and can prevent counsel from providing the zealous advocacy to which defendants are entitled.

Because death is different, there is an even greater urgency for the federal government to implement the following reform proposals to protect the constitutional rights of each individual at risk of execution. The guiding principle behind these recommendations is the need to administer the death penalty in a fair and equitable manner, with assurances of adequate and fully-funded legal representation and checks within the system to remedy constitutional violations and serious, reversible errors.

RECOMMENDATIONS

1. Amend *Habeas Corpus*-related provisions of AEDPA

A. *Limits to Habeas Corpus Threaten Justice*

The passage of AEDPA and PIRA, and the manner in which the Supreme Court and lower federal courts have interpreted these statutes, has created an unduly high burden for petitioners to obtain federal *habeas* relief. The Byzantine rules and procedures that have resulted create uncertainty and confusion for courts, prosecutors, and defense attorneys. Moreover, the one-year statute of limitations and prohibitions against successive *habeas* petitions can serve as an absolute bar to federal *habeas* review for some people. As a result, federal courts are unable to grant relief despite meritorious substantive claims—including claims of racial bias in jury selection, ineffective assistance of counsel, and prosecutorial misconduct—due to substantial deference to state court proceedings or mere technicalities.

B. *Reform Habeas Corpus to Address Damage Caused by AEDPA*

Legislative

Congress should amend the federal *habeas* statute,³⁴ to address the damage AEDPA has wrought in federal *habeas corpus* over the past fifteen years. Congress should revise restrictions on successive *habeas* petitions, the statute of limitations, exhaustion requirements, and procedural default standards, as well as eliminate federal court deference to state court interpretations of constitutional and federal law. These revisions will simplify a *habeas* regime that is currently failing to provide certainty and clarity for petitioners, states, or courts.

³⁴ See 28 U.S.C. § 2241 *et. seq.* These provisions govern procedures for post-conviction collateral review from convictions obtained in both state and federal court.

Congress should amend the federal *habeas* statutes to permit second or successive *habeas corpus* petitions. Allowing petitioners, particularly capital defendants, access to federal *habeas* review in instances where credible evidence of actual innocence has surfaced is a sensible and fair-minded reform designed to remedy miscarriages of justice. Despite the efforts of a defendant and his or her attorneys to discover all evidence prior to trial, new evidence— such as DNA evidence, confessions by the actual perpetrator, new eyewitnesses, recantation by prior witnesses, and new physical evidence—can emerge after all appeals and initial post-conviction reviews have been exhausted. A bar to successive petitions for claims of actual innocence³⁵ does not serve justice and risks the execution of innocent people in service of procedural rules.

Additionally, Congress should eliminate the restriction in 28 U.S.C. § 2254(d) that makes *habeas corpus* relief available only for those state court convictions that are “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “based on an unreasonable determination of the facts.” If Congress does not pursue full repeal of this provision, it should create a committee with substantive input from members of the criminal defense bar to draft amending language. Among other possible reforms, this amending language should add decisions of the U.S. Courts of Appeals as part of “clearly established Federal law.” It should also make § 2254(d) applicable only to decisions from states that qualify to opt-in to the expedited *habeas* procedures under Chapter 154, to ensure that states truly provide effective post-conviction counsel consistent with the U.S. Constitution. These reforms are critical in allowing federal courts to consider and properly apply federal law to claims that directly implicate federal and U.S. Constitutional concerns.

To ensure that individuals have a fair opportunity to have their post-conviction claims considered in federal court, Congress should repeal the one-year statute of limitations for post-conviction review of state and federal criminal convictions. If complete repeal is not pursued, Congress should pass legislation that amends the statute of limitations in 28 U.S.C. §§ 2244(d), 2255(f) to:

- Extend the one-year statute of limitations or mirror applicable state statutes of limitations, and begin running only from the date a state court denies a timely-filed *habeas* petition.
- Eliminate the absolute bar to federal *habeas* review due to the running of the statute of limitations.

³⁵ 28 U.S.C. § 2244(b)(2) bars any successive petitions for claims where new evidence is presented, unless the petitioner can show that “but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

- Waive the statute of limitations for petitions related to convictions in states that do not automatically appoint post-conviction counsel in capital cases or have a prerequisite that the petitioner make a *pro se* filing before post-conviction counsel is appointed.
- Permit the reopening of *habeas* cases based on any new rules the U.S. Supreme Court articulates, irrespective of *Dodd v. United States*.³⁶
- Require states to plead or forfeit statute-of-limitations defenses and prohibit the *sua sponte* dismissal of *habeas* petitions based on a forfeited statute-of-limitations defense, irrespective of *Day v. McDonough*.³⁷
- Clarify that a state petition dismissed by an inadequate state procedural rule does not render that petition improperly filed, irrespective of *Pace v. DiGuglielmo*.³⁸
- Make ineffective assistance by state post-conviction counsel a cause to excuse a procedural default.
- Permit claims of innocence or racial bias to overcome any statute of limitations or other procedural bar.

Legislation to reform federal *habeas* should also permit the tolling of the statute of limitations in three circumstances: 1) where a state petition is pending, even if the state petition is ultimately dismissed as time-barred and improperly filed; 2) where failure to file within the statute of limitation was due to attorney error; and 3) in cases of mixed petitions, which contain both exhausted and unexhausted claims. In the case of mixed petitions, the statute should require federal district courts to advise petitioners of the stay-and-abeyance procedure (dismissal of the unexhausted claims, stay of exhausted claims pending exhaustion of dismissed unexhausted claims, and amendment of original petition to include newly exhausted claims), and the risk of violating the statute of limitations if they decline the stay-and-abeyance procedure. This would reverse current law, under the Supreme Court decision in *Pliler v. Ford*, that district judges are not required to advise petitioners of the risk of declining the stay-and-abeyance procedures.³⁹

Congress should also repeal the Chapter 154 Special *Habeas Corpus* “Opt-In” Procedures that expedite federal post-conviction proceedings.⁴⁰ This Opt-In Procedure originated in AEDPA, and was

³⁶ *Dodd v. United States*, 545 U.S. 353 (2005) (holding statute of limitations runs from date new rule is recognized by U.S. Supreme Court, not when the rule is made retroactive).

³⁷ *Day v. McDonough*, 547 U.S. 198 (2006) (holding courts may dismiss *habeas* petition *sua sponte* for statute of limitations violation even if state forfeited the defense).

³⁸ *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) (holding state petition that is dismissed as time-barred was not properly filed and, thus, cannot toll statute of limitations for federal *habeas* petition).

³⁹ *Pliler v. Ford*, 542 U.S. 225 (2004).

⁴⁰ 28 U.S.C. §§ 2261-66.

amended in 2005 as part of PIRA. Under AEDPA, federal judges would certify that a state provides counsel to indigent capital defendants for state post-conviction review. In exchange, the states would enjoy procedural advantages to speed federal *habeas corpus* review of capital cases. The 2005 amendment moved the authority to certify the programs to the Attorney General. No state has yet to adopt a sufficiently adequate program for providing counsel to qualify for certification under the Opt-In Procedures. Absent full repeal, Congress should consider repealing the provisions from PIRA that moved authority to determine state qualification for Opt-In Procedures from the federal courts to the U.S. Attorney General.⁴¹

Overall, the current federal *habeas* regime continues to adversely impact individuals who have been denied opportunities to raise their constitutional claims. For this reason, any amendments to AEDPA and PIRA Congress adopts must be retroactively applicable to ensure individuals, particularly those facing execution, have a fair opportunity for their claims to be heard.

Executive

The President should encourage Congress to pass legislation to reform federal *habeas corpus* law as outlined above and commit to signing those reforms into law.

Absent congressional action, the Attorney General should adopt regulations pursuant to Chapter 154 that ensure states provide both qualified post-conviction counsel and adequate resources for counsel to fully litigate their client's state *habeas* petitions. The goal of Chapter 154 is to provide *habeas* petitioners full and fair state post-conviction review before expediting and limiting federal *habeas* review.⁴² Therefore, any regulations should clearly require that states appoint and compensate competent counsel who have the resources to completely investigate and present all claims before the Attorney General will certify such regimes. Additionally, any regulations must make clear that future changes to such a regime will require recertification by the Attorney General.

Judicial

Federal courts should apply the Supreme Court's recent decision in *Holland v. Florida*⁴³ to ensure that individuals whose *habeas* claims would otherwise be time-barred as the result of attorney error may still seek review under the equitable tolling doctrine. In *Holland*, the Supreme Court recognized that extraordinary circumstances may prevent a petitioner from filing a *habeas* petition within the statute of limitations, and in such cases, out of fairness, the petition should not be

⁴¹ *Id.* at § 2265.

⁴² As originally passed, the Opt-In Procedure was designed to establish "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners," and required "standards of competency for the appointment of such counsel." Pub L. No. 104-132, 110 Stat. 1214, § 107 (1996).

⁴³ *Holland v. Florida*, 130 S.Ct. 2549 (2010).

barred.⁴⁴ As federal courts begin to hear cases seeking equitable tolling, they should keep the goal of fairness in mind.

2. Addressing Inequities in the Federal Death Penalty

A. *The Federal Death Penalty Disproportionately Affects Defendants of Color*

Since the resumption of the federal death penalty in 1988, nearly 73% of all approved capital prosecutions have been against defendants of color.⁴⁵ Additionally, white federal defendants facing capital prosecution are almost twice as likely as defendants of color to successfully plea bargain for a life sentence.⁴⁶ Regulations adopted in 1995 that require the Attorney General to review every federal death-eligible case to decide whether to seek capital prosecution have served only to exacerbate problems with the application of the federal death penalty.

B. *Create Safeguards Against Racially Biased Capital Prosecutions*

Legislative

Congress should seek to address the disproportionate application of the federal death penalty to defendants of color. To establish the extent to which race affects decisions to seek federal capital prosecutions and obtain death sentences, Congress should commission an independent study of the federal death penalty system. The study should examine racial disparities, prejudicial errors, adequacy of counsel, and other inequities in capital prosecutions, and make recommendations for legislative reform.

Congress should also require the Department of Justice to collect data on all factors relevant to the Department's decision to seek and impose the death penalty in all capital prosecutions. A statutory requirement that the Department collect and maintain this data would ensure the consistency and availability of the data from administration to administration. Such data should include the race, ethnicity, national origin, gender, marital status, parental status, occupation, and criminal record of both the defendant and victim. It should also include aggravating and mitigating circumstances identified at trial as well as the type of defense counsel, whether federal public defender, community defender, appointed counsel, retained counsel, or *pro se* representation. Upon the conclusion of the prosecution, the Department must make that data publicly available.

Congress should amend Title 28 of the United States Code to expressly prohibit the imposition of the death penalty based on race, ethnicity, or national origin. This amendment should allow a

⁴⁴ *Id.* at 2553.

⁴⁵ U.S. DEPT. OF JUSTICE, SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM, *supra* note 13; *see also*, U.S. DEPT. OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW, *supra* note 13.

⁴⁶ *Id.*

defendant to use evidence that race, ethnicity, or national origin of either the defendant or the victim was a statistically significant factor in the decision to impose the sentence to establish an inference of impermissible bias. This amendment should also bar the government from rebutting such an inference through mere assertions that it did not intend to discriminate or that the imposed sentence satisfied the statutory criteria for the death penalty, unless it can prove that death sentences were sought in all cases fitting such criteria.

Congress should eliminate the excessive number of peremptory challenges given to federal prosecutors in capital cases. Currently, under Federal Rule of Criminal Procedure 24(b), in non-capital cases, the government is provided six peremptory challenges and the defense is provided ten. In capital cases, however, each party is allowed 20 peremptory challenges. This substantial increase in the government's peremptory challenges creates a perverse incentive to seek death sentences when they are not warranted. Additionally, more peremptory challenges increase the risk that jurors, while ostensibly being excluded for legitimate reasons, could in fact be excluded based on race, whether consciously or unconsciously.

Executive

The President should encourage Congress to pass legislation to address inequities in the federal death penalty, as outlined above, and commit to signing these reforms into law.

Even absent congressional action, the Department of Justice can revise its policies and regulations to ensure greater consistency and fairness in the application of the federal death penalty. To achieve these goals, the Attorney General should work in an open and transparent manner with the Department's Capital Case Unit, which reviews and recommends to the Attorney General whether to seek the death penalty, the Death Penalty Working Group, which is currently evaluating internal Department protocols related to pursuing capital prosecutions, and the Access to Justice Initiative, which is charged with improving the availability and quality of indigent defense, including capital defense.

As a first step in the revision of its policies and regulations, the Department should stay all federal executions and place a moratorium on federal capital charges pending an independent study of the death penalty system to examine racial disparities, prejudicial errors, adequacy of legal representation, and other inequities in capital prosecutions. The Department should develop metrics and methodologies to prospectively and retrospectively examine the process by which the Department initiates and prosecutes federal capital charges. This includes collecting and regularly reviewing all data concerning factors relevant to the imposition of the death penalty.

To the extent that the Department continues to pursue capital prosecutions, it should adopt policies and regulations that expressly prohibit imposition of the death penalty based on race, ethnicity, or national origin, as evidenced by statistical analysis. Similar to the legislative proposal above, under this standard, data collected regarding the prosecution of capital cases that reveals

race, ethnicity, or national origin as a statistically significant factor in the decision to impose the sentence would create an inference of impermissible bias. In order to proceed with the capital prosecution, the Department would require a showing that the crime satisfied the statutory criteria for the death penalty and that the Department sought death sentences in all cases fitting such criteria.

The Department should also decentralize the decision to pursue capital prosecutions by removing the requirements in the U.S. Attorneys' Manual that the Attorney General review all cases eligible for the death penalty.⁴⁷ Rather, the U.S. Attorneys should be permitted to pursue non-capital charges and enter into plea agreements in death-eligible cases. Only in cases where a U.S. Attorney wished to pursue a capital prosecution would the Attorney General review and authorize or deny the request to seek the death penalty. This system would increase the discretion of local U.S. Attorneys, who are better equipped to weigh the factors at play in potential capital cases. Such a change would also reduce unnecessary cost to the courts, prosecution and defense, given that delays in making a decision to pursue the death penalty caused by mandatory review by the Attorney General increases pretrial costs for additional attorneys, mitigation specialists, and other experts. These additional expenditures are unnecessary if the Attorney General decides not to pursue a capital case. Removing the requirement that all capital cases be reviewed by the U.S. Attorney General would restore capital-case procedure to the more streamlined system that prevailed prior to 1995, when only affirmative requests to seek the death penalty required approval by the U.S. Attorney General.

3. Mental Illness and the Federal Death Penalty

A. *The Mentally Ill are Unjustly Executed*

It is estimated that up to 10% of death row inmates suffer from serious mental illness.⁴⁸ While perhaps criminally culpable for their conduct, like juveniles and those with mental retardation, the severely mentally ill can lack the judgment, understanding, and self-control that would warrant the imposition of the death penalty.

B. *Protect the Mentally Ill from Unjust Execution*

Legislative

Congress should amend 18 U.S.C. § 3596 to exempt people with severe mental illness and/or developmental disabilities from capital sentences. In the case of defendants with severe mental illness and/or developmental disabilities, like juveniles⁴⁹ and those with mental retardation,⁵⁰ the

⁴⁷ USAM 9-10.010 *et seq.*

⁴⁸ MENTAL HEALTH AMERICA, DEATH PENALTY AND PEOPLE WITH MENTAL ILLNESS *available at* www.nmha.org/go/position-statements/54.

⁴⁹ See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that it is unconstitutional to execute persons who committed their crimes while juveniles).

death penalty represents a disproportionate punishment for individuals who are less culpable for their crimes, as compared to those without mental illness.

Executive

The Department of Justice should also adopt a policy that exempts people with severe mental illness and/or developmental disabilities from capital prosecutions. As explained above, the death penalty represents a disproportionate punishment for individuals who are less culpable for their crimes than those without mental illness.

4. Access to Counsel in Capital Prosecutions

A. Inadequate Counsel Puts Innocent Lives at Risk

Capital defendants are predominantly poor and rely on an indigent defense system that is overworked, under-resourced, inexperienced, or sometimes non-existent.⁵¹ The absence of adequate capital counsel increases the risk that innocent people will be sentenced to death. A recent report found that federal capital defendants whose representations cost the least were more than twice as likely than other capital defendants to receive the death penalty.⁵² The report also found that defendants in low cost cases were less likely to be represented by lawyers with “distinguished prior experience” in capital cases.⁵³ Access to qualified counsel with sufficient resources vastly increases a capital defendant’s chances for a fair trial.

B. Provide Adequate Counsel in Capital Prosecutions

Legislative

Congress should increase federal defender independence from the federal judiciary. Giving the judiciary control over defense functions creates a conflict of interest. Federal defenders will be able to operate more effectively and efficiently if the judiciary no longer appoints counsel or approves budgets for experts and other resources at any stage of a federal death penalty case, including post-conviction review.⁵⁴

⁵⁰ See *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute persons with mental retardation).

⁵¹ American Bar Association, Death Penalty Representation Project, *available at* <http://new.abanet.org/DeathPenalty/RepresentationProject/Pages/FAQ.aspx> (last visited Jan 5, 2011); National Center for State Courts, Indigent Defense FAQ, *available at* <http://www.ncsc.org/topics/access-and-fairness/indigent-defense/faq.aspx>.

⁵² GOULD & GREENMAN, *supra* note 28, at 43-44.

⁵³ *Id.* at 49.

⁵⁴ See 18 U.S.C. §§ 3005, 3006A, 3599, and 28 U.S.C. § 2254.

Congress should amend current law to vest authority over the appointment and budgets of federal defenders in local federal defender organizations, or the Administrative Office of U.S. Courts, for those districts without federal defender organizations.⁵⁵ Congress may also transfer the defense function from the federal courts to a new Office of the Defender General.⁵⁶

In the alternative, if authority remains in the judiciary, Congress should require federal courts to accept recommendations for counsel made by a federal public defender, a federal defender community organization, the Capital *Habeas* Unit, or the Administrative Office, absent good cause. Congress should also allow any lawyer appointed to represent state death-row prisoners in federal court, including without limitation Capital *Habeas* Unit attorneys, to appear in state court.

Congress should provide adequate funding for federal defenders, including funds for attorneys' fees, investigative expenses, and experts witness. This will give full effect to federal law that provides counsel for capital defendants at all stages of the legal process in federal court through post-conviction proceedings.⁵⁷

Under the Capital Case Litigation Initiative, states are currently required to divide the federal grant money they receive for capital training equally between prosecutors and defenders.⁵⁸ States are also restricted from using the money for anything other than training.⁵⁹ To increase the quality of representation at the state level, Congress should allow for exceptions to the required equal allocation. Additionally, Congress should permit states to use grants under this program to hire counsel for capital defendants, whether through existing public defender organizations or appointed counsel. States would then be permitted to use the grants to address the lack of parity in training and personnel resources that currently exists between prosecution and indigent defense.

Finally, to ensure consistent quality in capital counsel in federal and state cases, Congress should create a grant, administered by the Department of Justice's Bureau of Justice Assistance, that would help fund a National Capital Bar. This Bar would identify qualified and experienced attorneys to represent capital defendants in state and federal court. To qualify for inclusion in the bar, attorneys would need to demonstrate that they meet standards similar to those outlined in the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, including a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases, and the necessary skills and knowledge of the various complex components of capital litigation.⁶⁰

⁵⁵ *Id.*

⁵⁶ See generally *Indigent Defense*, SMART ON CRIME (2011).

⁵⁷ See 18 U.S.C. § 3599.

⁵⁸ See 42 U.S.C. § 14163 *et seq.*

⁵⁹ *Id.*

⁶⁰ AMERICAN BAR ASSOCIATION, *GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES* (2003).

Executive

The President should encourage Congress to pass legislation to reform capital representation, as outlined above, and commit to signing these reforms into law.

The President, with the assistance of the Attorney General, could also seek to strengthen the Access to Justice Initiative within the Department of Justice, giving the office greater authority to implement reforms that strengthen state and federal capital representation.⁶¹

Additionally, if authority over federal defender budgets remains with the judiciary, the Attorney General should make public the costs it expects to incur in each capital prosecution, to provide judges a better sense of the resources available to prosecutors as those judges make decisions about defender budgets.

Judicial

Absent congressional action, federal judges should give substantial weight to the recommendations of federal defender organizations with regard to the appointment of counsel and setting of budgets in capital prosecutions.

⁶¹ See generally *Indigent Defense*, SMART ON CRIME (2011) (discussing the Access to Justice Initiative).

APPENDICES**Experts***Habeas Corpus*

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CHAPTER 12

FIXING *MEDELLIN*: ENSURING CONSULAR ACCESS THROUGH COMPLIANCE WITH INTERNATIONAL LAW

THE ISSUE

In 2008, the United States Supreme Court decided *Medellín v. Texas*,¹ a case in which José Ernesto Medellín, a Mexican national on death row in Texas, challenged his conviction. Mr. Medellín claimed that after being taken into law enforcement custody he was not afforded his right of consular notification and access, pursuant to the Vienna Convention on Consular Relations (VCCR).² The Court found that the International Court of Justice's (ICJ) 2004 decision in *Avena and Other Mexican Nationals (Avena)*—which interpreted the VCCR as requiring the U.S. to provide further "review and reconsideration" of the convictions of Mr. Medellín and 51 other Mexican nationals on death row in the U.S.—was not binding domestic law.³ As a result, the Court held that, absent implementing legislation passed by Congress and signed by the President, neither the VCCR nor the ICJ's *Avena* decision were enforceable by federal courts against Texas.⁴ This decision effectively barred Mr. Medellín and others who had previously been denied their consular notification and access rights from seeking judicial review of these violations of the VCCR, and caused the U.S. to breach its commitment to the VCCR.

The President and Congress should ensure that the United States honors its commitment to the VCCR by taking the following steps: first, the President should rejoin the Optional Protocol concerning the Compulsory Settlement of Disputes of the Vienna Convention on Consular Relations; second, Congress should pass legislation providing foreign nationals with judicial remedies for violations of their rights under the VCCR; and finally, the President should require that the Department of State and the Department of Justice provide further education and support to state and local law enforcement about the right to consular access and compliance with this obligation going forward.

Addressing these issues is critical not only to protect foreign nationals in U.S. law enforcement custody, but also to ensure that U.S. citizens and service members abroad receive the full protections of the VCCR.

¹ *Medellín v. Texas (Medellín III)*, 554 U.S. 759 (2008); *Medellín v. Texas (Medellín II)*, 552 U.S. 491 (2008).

² Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

³ *Medellín II*, 552 U.S. at 504-05.

⁴ *Id.* at 522-23.

HISTORY OF THE PROBLEM

1. History of the VCCR

The United Nations proposed the VCCR in 1963.⁵ Now ratified by more than 170 countries, the VCCR regulates the establishment and functions of consulates worldwide.⁶ Article 36 of the VCCR grants a foreign citizen the right to notify and communicate with his or her country's consulate when arrested, detained, or imprisoned in a foreign country that is also a party to the treaty.⁷ Article 36 also confers on consulates the right to communicate with, visit, and offer assistance to their detained nationals, including the right to arrange for their legal representation.⁸ It further requires that local laws and regulations "must enable full effect to be given" to the rights accorded to detained foreigners and their consular representatives.⁹ These rights are entirely reciprocal in nature.¹⁰

To ensure U.S. citizens detained abroad are provided the right to consular access, the U.S. ratified the VCCR without reservation in 1969.¹¹ The understanding prior to the U.S. Supreme Court decision in *Medellín* was that the treaty's provisions would be entirely self-executing, meaning Congress would not need to pass legislation to implement it, and it would prevail over any conflicting state laws.¹² Consequently, both federal and state law enforcement agencies are required to comply with Article 36 when detaining foreign nationals, including advising them of their right to consular notification and access. Despite this requirement, U.S. domestic compliance

⁵ Juan Manuel Gómez Robledo, Deputy Foreign Minister for Multilateral Affairs and Human Rights, Ministry of Foreign Affairs, Mexico, *The Vienna Convention on Consular Relations* (2008), available at http://untreaty.un.org/cod/avl/pdf/ha/vccr/vccr_e.pdf.

⁶ See United Nations Treaty Collection Database, Status of Vienna Convention on Consular Relations, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants

⁷ Vienna Convention on Consular Relations, art. 36, *supra* note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See United Nations Treaty Collection Database, Status of the Vienna Convention on Consular Relations, *supra* note 6.

¹² See Robert Greffenius, *Selling Medellín: The Entourage of Litigation Surrounding the Vienna Convention on Consular Relations and the Weight of International Court of Justice Opinions in the Domestic*, 23 AM. U. INT'L L. REV. 943, 948 (2008) (citing, *Breard v. Pruett*, 134 F.3d 615, 621 (4th Cir. 1998) (Butzner, J. concurring) (stating that the treaty is self-executing because it confers "rights to individuals rather than merely setting out the obligations of signatories"); *Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (noting that both parties to the litigation agree that the VCCR is self-executing in the sense that it does not require any implementing legislation to become federal law); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 588 n.147 (1997) (citing governmental officials' statements referring to the VCCR as "entirely self-executive"); Howard S. Schiffman, *Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT'L & COMP. L. 27, 40-42 (2000) (citing multiple cases concluding that Article 36 conferred judicially enforceable rights and commenting that this conclusion appears logical since the construction of Article 36 sets out not merely the obligations of the signatories, but also mandatory, unequivocal recognition of the importance of consular access to those detained by foreign governments)).

with Article 36 obligations has long been significantly deficient—even in cases where foreign nationals face capital prosecution—as evidenced by the more than 50 Mexican nationals who were a party to the *Avena* case.

Also in 1969, the U.S. unconditionally ratified the Optional Protocol to the VCCR concerning the Compulsory Settlement of Disputes.¹³ Under the Optional Protocol, the U.S. consented to have the ICJ, the principal judicial body of the United Nations, settle any disagreements over the interpretation or application of Article 36.¹⁴ Article 59 of the ICJ statute makes the ICJ's decisions binding on the parties to a dispute.¹⁵ Additionally, under Article 94 (1) of the United Nation's Charter, each member nation agrees to comply with any ICJ decision to which it is a party.¹⁶

The U.S. was the first nation to bring a case under the Optional Protocol, in response to the seizure of U.S. diplomatic and consular personnel in Iran in 1979.¹⁷ The ICJ ruled in favor of the U.S., which asserted the binding nature of that judgment, insisting that Iran comply with the decision.¹⁸

2. *Avena* Litigation

In January 2003, Mexico filed with the ICJ an application instituting proceedings against the U.S. on behalf of a group of 52 Mexican nationals, including Mr. Medellín, who had been sentenced to death without being advised of their consular rights.¹⁹ Mexico asked the court to consider whether these Mexican nationals were entitled to a legal remedy for the violation of Article 36.²⁰ The U.S. participated fully in the case.²¹

¹³ See United Nations Treaty Collection Database, Status of Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3&lang=en.
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¹⁴ Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 71, 596 U.N.T.S. 487.

¹⁵ Statute of the Court of International Justice, art. 59.

¹⁶ U.N. Charter, art. 94.

¹⁷ United States Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*), 1980 I.C.J. 451 (May 24).

¹⁸ *Id.*

¹⁹ Case Concerning *Avena* and Other Mexican Nationals, (Mex. v. U.S.) (*Avena*), 2004 I.C.J. 12 (Mar. 31).

²⁰ In *LaGrand* Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), the ICJ ruled that the VCCR confers judicially enforceable rights on foreign nationals detained for prolonged periods or sentenced to severe penalties without notice of their right to communicate with their consulates. The court also ruled that states that fail to give timely notice cannot later invoke procedural default to bar individuals from judicial relief. However, the court did not clearly address other issues, such as requiring individuals to show prejudice to the outcome of the trial, or denial of certain remedies for Convention violations, which may effectively foreclose relief.

²¹ *Avena*, 2004 I.C.J. 12 (Mar. 31).

During the proceedings, Mexico did not call into question the heinous nature of the crimes or the legitimacy of the death penalty. Rather, Mexico asserted that each of its nationals was entitled to a remedy for the denial of the protections he was entitled under the VCCR.²²

On March 31, 2004, the ICJ held, by a vote of fourteen to one, that the U.S. had breached Article 36(1) in the cases of 51 of the 52 Mexican nationals.²³ The ICJ declined to vacate the convictions and death sentences of the Mexican nationals, but held that U.S. courts must provide "review and reconsideration" of the convictions and sentences to determine in each case if the Article 36 violation was harmful to the defendant.²⁴ The ICJ held that the remedy of "review and reconsideration" applied to all 51 cases, including those where the VCCR claim would otherwise be procedurally barred because of the defendants' failure to raise the issue at trial.²⁵

3. Executive, Judicial and Legislative Response to *Avena*

In 2005, President George W. Bush withdrew the U.S. from the VCCR Optional Protocol, although he recognized the ICJ decision in *Avena* as binding.²⁶ On February 28, 2005, the President issued a Memorandum to the U.S. Attorney General stating that the U.S. would "discharge its international obligations" under the ICJ's decision "by having State courts give effect to the decision," which required "review and reconsideration" of the decisions to determine if the violation prejudiced the defendant.²⁷

Texas refused to recognize the ICJ's decision or the President's Memorandum as binding law and continued its plans to execute Mr. Medellín.²⁸ The issue went to the Supreme Court in *Medellín v. Texas*, where Mr. Medellín asserted that he had a judicially enforceable right to review of his case, pursuant to *Avena*.²⁹ President Bush argued that, while he had authority to enforce the *Avena* decision, there was no private right of action under the VCCR.³⁰ The Supreme Court ruled that *Avena* is not directly enforceable in the domestic courts because none of the relevant treaty sources – the VCCR Optional Protocol, the U.N. Charter, or the ICJ Statute – create binding federal law in the absence of implementing legislation by Congress.³¹ The Supreme Court also held that the

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Letter from Condoleezza Rice, U.S. Secretary of States, to Kofi Annan, U.N. Secretary General (Mar. 7, 2005); see also Memorandum from George W. Bush, President of the United States, to the Attorney General of the United States (Feb. 28, 2005); Brief for the United States as Amicus Curiae Supporting Respondent at app. 2, *Medellín v. Dretke (Medellín I)*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490.

²⁷ Memorandum from George W. Bush, President of the United States, to the Attorney General of the United States (Feb. 28, 2005).

²⁸ *Medellín II*, 552 U.S. at 491.

²⁹ Brief for Petitioner at 30, *Medellín II*, 552 U.S. 491 (2008) (No. 06-984), 2007 WL 1886212.

³⁰ Brief for Respondent at 38-39, *Medellín II*, 552 U.S. 491 (2008) (No. 06-984), 2007 WL 2428387.

³¹ *Medellín II*, 552 U.S. at 506.

President did not have the authority to implement *Avena* unilaterally.³² The Court unanimously agreed, however, that compliance with *Avena* is an international legal obligation of the U.S. and that Congress has the authority to implement that obligation.³³

Adhering to the VCCR and its Optional Protocol would not affect the ability of states or the federal government to prosecute and subsequently jail or execute foreign nationals. Consular notification and access does not enable foreign nationals who commit crimes to avoid legal consequences. Rather, as the U.S. Department of State acknowledges, “one of the basic functions of a consular officer is to provide a ‘cultural bridge’ between the host country” and foreign nationals.³⁴ The consul helps “to ensure [a foreign national detained by law enforcement] is aware of his rights, to advise him of the availability of legal counsel, to give him a list of local attorneys, to help him get in touch with his family and friends, to alert him to the legal and penal procedures of the host country, and to observe if he has been or is in danger of being mistreated.”³⁵ The solutions outlined below would ensure that not only foreign nationals in U.S. custody but also U.S. citizens and service members traveling abroad would be afforded the full protections of consular access.

RECOMMENDATIONS

1. Rejoining the VCCR’s Optional Protocol

A. *Withdrawal from the Optional Protocol Harms U.S. Citizens*

In 2005, President Bush withdrew from the VCCR’s Optional Protocol concerning the Compulsory Settlement of Disputes.³⁶ The aim was to prevent future ICJ decisions against the U.S. similar to *Avena*. Unfortunately, because rights and obligations under the Optional Protocol are entirely reciprocal, the decision to withdraw also stripped U.S. citizens abroad of a binding enforcement mechanism for their right to access their consulate when detained or arrested outside of the U.S.

³² *Id.* at 532.

³³ *Id.* at 521-22.

³⁴ UNITED STATES DEPARTMENT OF STATE, FOREIGN AFFAIRS MANUAL (1984) Ch. 400, Introduction. In the most recent update of the *Foreign Affairs Manual* the State Department acknowledges that “Abuse is an unfortunate reality that can occur even in the most enlightened police and penal systems for any number of reasons, including... [a] reaction to cultural or language differences and misunderstandings.” UNITED STATES DEPARTMENT OF STATE, FOREIGN AFFAIRS MANUAL (2004) Ch. 420, Notification and Access.

³⁵ *U.S. Citizens Imprisoned in Mexico*: Hearing before H. Subcomm. on International, Political and Military Affairs (Part I), 94th Cong. 16 (1975) (statement of Leonard F. Walentynowicz, United States Assistant Secretary of State for Security and Consular Affairs).

³⁶ See Letter from Condoleeza Rice, U.S. Secretary of States, to Kofi Annan, U.N. Secretary General (Mar. 7, 2005)..

B. *The U.S. Should Rejoin the Optional Protocol*

Legislative

The House and Senate Judiciary and Foreign Relations Committees should examine the impact of our withdrawal from the Optional Protocol on U.S. citizens living, working, and traveling abroad. As part of their fact-finding responsibilities, these committees and their relevant subcommittees should hold hearings to determine the effects of withdrawal from the Optional Protocol.

The committees should be particularly concerned with the impact on U.S. military personnel abroad. The risks for detained American personnel if consular access is withheld are both real and widespread. In 1998, host country governments processed 5,092 cases against U.S. military personnel.³⁷ Maintaining access to consular support is indispensable for the protection of American service members facing incarceration by foreign authorities. Congressional hearings to determine the extent to which loss of the Optional Protocol's enforcement mechanism affects military personnel and other U.S. citizens are crucial to drawing attention to the issue and demonstrating the widespread support for rejoining the Optional Protocol.

Executive

The President should rejoin the Optional Protocol, reversing the 2005 withdrawal by the Bush Administration in response to the *Avena* decision. The success and usefulness of multilateral and bilateral treaties depend upon a shared trust that each nation will honor its obligations and resolve disputes in a fair manner and in accordance with the treaty's terms. In 1979, the U.S. was the first country to invoke the Protocol before the ICJ, suing Iran for taking 52 U.S. diplomats and consular personnel hostage in Tehran.³⁸ The ICJ ruled in favor of the U.S., which subsequently asserted the binding nature of that judgment and insisted that Iran comply with the decision.³⁹ U.S. withdrawal from the Protocol as the result of an adverse decision by the ICJ weakens the VCCR's effectiveness by subverting the ICJ's role as arbiter of VCCR-related disputes between nations.

Moreover, withdrawing from the Optional Protocol after the *Avena* decision sends the wrong signal to other nations. It suggests that the U.S. will only honor the rule of law embodied by the Optional Protocol so long as ICJ decisions favor the U.S. The President can undo this damage by rejoining the Optional Protocol.

³⁷ UNITED STATES. DEPARTMENT OF STATE, BACKGROUNDER: STATUS OF FORCES AGREEMENT (Jan. 4, 2000), *available at* <http://www.bu.edu/globalbeat/usdefense/USIA010400.html>.

³⁸ U.S. v. Iran, 1980 I.C.J. 451 (May 24).

³⁹ *Id.*

2. Addressing the Legacy of *Avena* and *Medellín*

A. *The U.S. is Not Honoring Its Treaty Obligations*

In the nearly seven years since the *Avena* decision, the U.S. has failed to comply with the ICJ ruling. All three branches of the federal government, along with state governments, have failed to take the measures necessary to honor the decision or the U.S.'s obligations under the VCCR and the Optional Protocol. As a result, the U.S. no longer recognizes the mechanism for the enforcement of foreign nationals' right to receive access to their consulate when detained, and can no longer expect its citizens to receive reciprocal protections abroad.

B. *The U.S. Should Implement Avena*

Legislative

Congress should pass legislation to provide judicial remedies for foreign nationals who have been denied their right to consular access pursuant to the VCCR. Such legislation would directly address the Supreme Court's holding in *Medellín* that the VCCR is not self-executing by creating binding federal law that provides remedies for foreign nationals denied consular access.

Federal legislation addressing the *Medellín* decision must give federal courts jurisdiction to review the merits of claimed violations of the VCCR and to provide appropriate relief, including overturning convictions, ordering new trials or sentencing proceedings, and providing other declaratory or equitable relief necessary to secure the foreign national's rights. Such legislation must also permit federal court review in cases where the petitioner filed a *habeas corpus* petition under chapter 153 of title 28 before enactment of the proposed legislation, though they would otherwise be procedurally barred from raising the claim. This will ensure that foreign nationals previously denied review of their claims under the *Medellín* decision will have an opportunity to assert their rights under the VCCR.

Executive

The President should encourage Congress to pass legislation implementing the *Avena* judgment and commit to signing such legislation once it passes. Demonstrating leadership on this issue will signal to the international community that the Administration is committed to meeting the U.S.'s treaty obligations. As Secretary of State Madeleine Albright wrote in 1998, "[W]e must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the U.S. and its citizens aboard."⁴⁰

⁴⁰ Letter from Madeleine Albright, Secretary of State, to Victor Rodriguez, Chairman of the Texas Board of Pardons and Paroles (Nov. 27, 1998).

The President should also direct executive agencies to provide adequate training to federal law enforcement agents regarding their obligations under the VCCR to make foreign nationals aware of their right to consular notification and access. Finally, the Administration should provide guidance and support for similar training for state and local law enforcement agents, whether through technical training or grants.

Judicial

Once federal law permits foreign nationals to pursue remedies for denial of their right to consular access pursuant to the VCCR and the *Avena* decision, federal courts should rigorously enforce these provisions to ensure that they are given full effect. In so doing, federal courts will encourage federal and state law enforcement to honor the VCCR's consular notification requirements, thereby protecting the rights of foreign nationals and preventing the need for federal courts to overturn convictions or sentences.

APPENDICES

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CHAPTER 13

PARDON POWER AND EXECUTIVE CLEMENCY: REINVIGORATE THE PARDON POWER AND MAKE OPERATIONAL AND STRATEGIC USE OF EXECUTIVE CLEMENCY

THE ISSUE

With the rapid growth of the federal prison population and the expansion of legal barriers to reentry, the presidential pardon power by rights should play a central operational role in the federal criminal justice system. However, over the past 20 years, using the pardon power has been perceived as posing too great a political risk—at least until the end of a President's term. Governors have been similarly reluctant to pardon or commute prison sentences. As a consequence, during the past several administrations, the pardon power has been allowed to atrophy as a remedy available to ordinary people, and the Department of Justice (DOJ) has neglected its historical role as steward of the pardon power. The President should recognize the values pardon serves, define a clear operational role for pardon in the criminal justice system, and establish a system for administering the pardon power that will maximize its potential for correcting injustice and advancing the administration's policy objectives.

HISTORY OF THE PROBLEM

The pardon power is exercised by the President alone, without statutory limit. The pardon power in Article II of the Constitution gives the President unlimited authority to issue full or conditional pardons, commutations of sentence, remissions of fines, amnesties, and reprieves.¹ Clemency plays a vital role in the federal criminal justice system, because many prisoners are serving extremely lengthy sentences, including mandatory minimums, with no possibility of parole; post-conviction remedies have been significantly limited in recent years; and the collateral legal and social consequences of conviction are numerous, onerous, and frequently permanent. Even when Congress has recognized the need for remedial legislation to mitigate unduly harsh sentences, as it did in the recently enacted Fair Sentencing Act of 2010², prisoners serving mandatory sentences under the previous regime do not benefit from the new law. Ultimately, federal law includes no general relief mechanism that would substitute for clemency, either to reduce a prison sentence or relieve collateral consequences after a court-imposed sentence has been served.

Despite the evident need for clemency, the current system for administration of the pardon power is inefficient, unreliable, and results in very few grants. The pardon power has been administered since the mid-19th century by the Attorney General, assisted by the Pardon Attorney. Since the late 1970s, the Pardon Attorney has reported to the Deputy Attorney General (DAG), who signs all clemency recommendations to the President.³ The Pardon Attorney, in recent years a career DOJ lawyer, is assisted by five attorneys and additional support staff. The Office of the Pardon Attorney (OPA) reviews applications for clemency, directs the investigation of each case as

¹ U.S. CONST. art. II, § 2, cl. 1.

² Pub. L. No. 111-220, 124 Stat. 2372.

³ See Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: The President's Duty to Be Merciful*, Fordham Urb. L.J., 27 FORDHAM URB. L.J. 1483, 1489-90 (2000) (hereinafter *Collar Buttons*).

appropriate, and solicits the opinions of the judges and prosecutors involved in the case.⁴ OPA drafts a recommendation to grant or deny each request, which is approved by the DAG before being sent to the Office of White House Counsel. A recommendation is sent to the White House in every clemency case filed with DOJ, unless the case is withdrawn or otherwise is not completely processed, and each case is acted upon by the President.

In the past, a report containing sufficient information about each clemency case has been provided to the White House, but in recent years these reports have become less and less informative in a majority of cases. Currently, most clemency cases are treated by OPA in a summary fashion, with only a small percentage of cases being referred to the FBI for a background investigation or to the prosecutor for a recommendation. Many case reports are only a few sentences long, and in some cases there is no report at all. According to persons familiar with the operation of DOJ's clemency program, a prosecutor's recommendation in a case is almost invariably negative, if it is sought at all; DOJ's recommendation rarely deviates from that of the prosecutor; and the President generally accepts the DOJ recommendation. At the end of the last two administrations, the slow and inhospitable pardon process in DOJ resulted in end-runs to the White House by those who either had political connections or were in a position to hire people who did. As a result, pardoning was brought into disrepute and frequently failed to provide deserved relief through the established clemency procedures.⁵

Further complicating matters, the number of clemency applications has increased dramatically in recent years, and there is now a backlog of over 4,000 requests.⁶ President George W. Bush issued fewer commutations and pardons in absolute terms than any other President in recent history, with the exception of his father, and denied many times more.⁷ This is in sharp contrast from practice prior to 1980, when grants were made regularly and frequently.⁸ To date, President Obama has issued nine pardons.⁹ These pardons were made to individuals convicted of minor offenses many years ago.¹⁰ Further, he has denied more than 1500 petitions for clemency.¹¹

⁴ United States Attorney's Manual Standards for Consideration of Clemency Petitions, Section 1-2.110, Office of the Pardon Attorney, available at <http://www.justice.gov/pardon/petitions.htm>.

⁵ See, e.g., GEORGE W. BUSH, DECISION POINTS 104 (Crown 2010); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY (forthcoming 2010), available at <http://www.pardonlaw.com/materials/The%20Twilight%20of%20the%20Pardon%20Power3.27%282%29.pdf> (hereinafter *Twilight*).

⁶ George Lardner, Jr., *No Country for Second Chances*, N.Y. TIMES (Nov. 23, 2010).

⁷ Margaret C. Love, Final Report Card on Pardoning by George W. Bush (January 27, 2009 (rev. March 13, 2009)), available at <http://www.pardonlaw.com/materials/FinalReportCard.3.13.09.pdf>.

⁸ *Twilight*, supra note 4.

⁹ Charlie Savage, *In a First for Obama, Nine Pardons Are Granted*, N.Y. TIMES (Dec. 3, 2010).

¹⁰ *Id.*

¹¹ Presidential Clemency Actions by Administration (1945 to Present), Office of Pardon Attorney, Department of Justice, http://www.justice.gov/pardon/actions_administration.htm#obama (last visited Jan. 20, 2011). This includes petitions closed without presidential action pursuant to 28 CFR § 1.8.

RECOMMENDATIONS

1. Executive Clemency's Role in the Justice System

A. *Executive Clemency Currently Plays No Meaningful Part in the Justice System Despite a Growing Need for the President to Exercise his Pardon Power.*

There has been no considered discussion in this Administration of what role executive clemency should play in the federal justice system in light of the abolition of parole and the increase in collateral consequences, and initial efforts to reform the clemency review process have come to naught. Nor has there been evident congressional interest in the administration's clemency policies or practices. Reinvigorating the clemency program will allow the President to do justice in individual cases, signal his law enforcement priorities within the executive branch, and highlight the need for reform of the legal system.

Congress cannot regulate or limit the Presidential pardon power, as it is a power based in Article II of the Constitution. Congress can inquire into the use of the pardon power but such inquiries are infrequent. Congress may react when a controversial grant of clemency is made¹², or express support for particular clemency applicants and make public statements calling on the President to grant clemency to certain individuals.¹³ Ultimately however, the President must take the lead in revitalizing the executive power.

B. *Revitalize Executive Clemency.*

Executive

President Obama should make granting clemency a strategic priority for the White House. The Administration should develop a strategic plan for the use of the pardon power to advance the president's criminal justice policy agenda both within and outside of the executive branch. It should identify the functions of clemency in the federal justice system, both to reduce prison sentences and to recognize and reward rehabilitation, and consider what changes in the law may be in order to reduce the need for clemency. It should make public standards to guide those who wish to apply for clemency, as well as those who are responsible for reviewing and making recommendations on clemency applications. It should publicize particular clemency grants to help make Congress and the general public more comfortable with the use of clemency by showing the "human face" of

¹² For example, Congressional hearings were held to investigate President Bill Clinton's commutation of Puerto Rican terrorists in 1999 and his pardon of Marc Rich and others in 2001. Congressional hearings were also scheduled but later cancelled in 2007 to inquire into the racial breakdown of clemency grants, and into President George W. Bush's grant of clemency to I. Lewis "Scooter" Libby.

¹³ For example, Congressional members have called for the pardons of former Border Patrol agents Ignacio Ramos and Jorge Compean, long-dead boxer Jack Johnson, and convicted spy Jonathan Pollard.

those serving harsh prison sentences or burdened by the lingering collateral disabilities of a criminal conviction.

Examples might include granting clemency to:

- Provide relief from some severe collateral penalty or disability (e.g., deportation, disqualification from employment or licensure, ineligibility for a particular benefit or opportunity);
- Recognize exemplary post-sentence rehabilitation in cases where a person has turned her life around and become an exemplary contributor to her community;
- Recognize particularly harsh sentences (e.g., nonviolent drug offenders serving life sentences or mandatory minimums that the sentencing judge believed were disproportionate to the offense);
- Remedy unwarranted sentencing disparity (e.g., in the cases of girlfriends/wives, "drug mules," and first-time drug offenders serving longer sentences than those of their more culpable boyfriends/husbands, suppliers, or co-conspirators);
- Give retroactive application to changes in the law (e.g., to crack cocaine drug offenders who did not benefit from the provisions of the Fair Sentencing Act, which increased the amount of the drug needed to trigger mandatory minimums);
- Signal disapproval of a particular investigative or prosecutorial policy or practice (e.g., sentencing entrapment, trial penalty, or appeal waivers); or
- Release seriously ill or elderly prisoners who can receive adequate care in a noncustodial setting.

The Administration should also consider using clemency grants strategically to advance criminal justice reforms by matching individual grants of clemency with proposals to change the law that made clemency necessary in that instance. For example, grants to long-time legal residents threatened with deportation for dated minor convictions, to prisoners serving mandatory minimums for drug or gun offenses, and to people who have grown old or sick while in prison might be paired with calls to Congress to change sentencing laws or laws imposing collateral consequences. Whether through press releases, the State of the Union address, or personal meetings with members of Congress, the administration could use targeted individual clemency grants to advocate for legislative reform—e.g., to expand the safety valve or allow individuals who have served at least 15 years in prison to petition a court for a “second look” at their sentence. Other potential types of legislative reform may be in the area of laws imposing collateral consequences, such as mandatory deportation, firearms disqualification, or licensing debarment.

The President should also make the process for administering the pardon power more independent, efficient, and accountable. The President should consider whether it would be beneficial to remove the pardon process from DOJ to an independent board of appointees—perhaps consisting of a panel of retired federal judges that could operate with a degree of independence from federal prosecutors and give the president additional protection from political pressure. DOJ would continue to have an important role in clemency matters through providing the President with facts about a clemency case, and recommendations reflecting law enforcement’s perspective.

If the pardon advisory function remains in DOJ, the Office of the Pardon Attorney (OPA) must be given a clear mandate to carry out the president’s direction and sufficient resources to do so. The President should direct the Attorney General (AG) to personally review and sign all clemency recommendations, as he did between 1896 and 1978. As a member of the President’s cabinet, the AG can bring to bear both law enforcement and political perspectives. The current practice of having the Deputy Attorney General (DAG) or a subordinate official within his office sign clemency recommendations has allowed the pardon program to come under the control of prosecutors, and has constrained the pardon’s operational and policy functions. Having the AG take personal responsibility for the pardon program elevates the pardon program within DOJ and allows OPA to improve its ability to provide meaningful review to pardon applications.

In recognition of the strategic importance of clemency grants, the President should assign a senior official in the White House Counsel’s office to review and advise the President on pardon matters, and to review clemency recommendations on a regular basis. This would allow for regular opportunities for the President to review and act on clemency requests with his counsel.

Regardless of whether the responsibility for clemency recommendations stays with DOJ or is moved to a more independent board, the entity responsible for preparing clemency recommendations should develop a strategic plan for the use of the pardon power to accomplish the President’s criminal justice policy agenda. This entity should also issue specific standards to guide those who wish to apply for clemency and those who are responsible for reviewing and making recommendations on clemency applications. Furthermore, the President’s pardon policy and the standards for favorable consideration of pardon applications should be made public. Steps should be taken to introduce a degree of transparency and accountability into the pardon process, consistent with the privacy of clemency applicants and the prerogatives of the President. Pardon authorities should be afforded sufficient resources to ensure that applications are promptly and thoroughly reviewed, with a goal of ensuring that most cases are decided within two years of their receipt.

Finally, the AG should make maximum use of statutory alternatives to clemency in the form of commutation, such as the sentence reduction¹⁴ and the deportation authority.¹⁵ The

¹⁴ 18 U.S.C. § 3582(c)(1)(A)(i).

administration should develop alternatives to pardon to avoid or mitigate the collateral consequences of conviction, including advocating for expansion the Federal First Offender Act¹⁶, and creation of a program for awarding certificates of good conduct. Collateral consequences in federal law and regulations should be catalogued, and the administration should devise ways of enabling persons with convictions to avoid or mitigate these collateral consequences, either through federal agency waiver programs or by giving effect to state relief mechanisms.

Judicial

Judges should assist in the clemency process by including in the court record their opinion as to the appropriateness of the sentence imposed. The judicial branch generally becomes involved in the pardon process only when a sentencing judge is asked to make a recommendation in a particular pardon case, or to write a letter of support for a commutation applicant. However, in several cases, a judge has taken the initiative to recommend clemency either at sentencing or when a substantial portion of the sentence has been served, which may assist the President in making decisions.¹⁷

¹⁵ 8 U.S.C. § 1231(a)(4).

¹⁶ 18 U.S.C. § 3607.

¹⁷ See Joanna M. Huang,, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE. L. J. 131 (2010).

APPENDICES

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George Lardner, Journalist; Author of forthcoming study of presidential pardon
(<http://niemanwatchdog.org/index.cfm?fuseaction=about.viewcontributors&bioid=237>)

Sam Sheldon, Assistant U.S. Attorney, Southern District of Texas; successfully represented several clemency recipients in 2001

Further Information

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CHAPTER 14

REENTRY—ENSURE SUCCESSFUL REINTEGRATION AFTER INCARCERATION

THE ISSUE

Reentry, the period following incarceration or conviction during which a person (adult or juvenile) reintegrates into the community, is a time of paramount importance to both public safety and the rehabilitative process. Many obstacles stand between the individual with a criminal record and successful reentry. Policies that create barriers to employment, education, civic participation, public benefits, housing, medical care, and substance abuse treatment, to name a few, make it increasingly difficult for the person in reentry to remain crime free and to become a positively contributing member of his or her community.

HISTORY OF THE PROBLEM

Studies conducted by the Bureau of Justice Statistics and other leading researchers conclude that more than two-thirds of the individuals released from prison are rearrested within three years.¹ This year an estimated 700,000 people will leave prison² and another 12 million will leave local jails.³ They return to communities lacking appropriate support services for substance addiction and mental illness, and with limited job prospects and affordable housing options. Most have children who will depend on them for support, but these families are often impoverished. The prospects for successful reintegration are further compromised by the many collateral consequences of criminal convictions—often recently enacted policies—that make reentry after incarceration enormously difficult.

The costs of failed reentry are not only social, but also fiscal. The federal and state governments spend tens of billions of dollars on corrections, the majority on incarceration. Reducing the number of non-violent offenders in prison and jail by half would save taxpayers \$16.9 billion annually.⁴ The need for fiscally responsible criminal justice reform is a nonpartisan issue with support across the political spectrum. Conservatives recently joined together to establish Right on Crime, a research project of the Texas Public Policy Foundation, to put forward a conservatively motivated reform agenda. According to their Statement of Principles:

¹ National Institute of Justice, Recidivism, <http://www.ojp.usdoj.gov/nij/topics/corrections/recidivism/welcome.htm> (last visited Jan. 18, 2011) (citing Allen J. Beck & Bernard E. Shipley, *Recidivism of Prisoners Released in 1983*, Bureau of Justice Statistics Special Report (1989), abstract available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1135>; Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics Special Report (2002), abstract available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1134>); Richard Freeman, *Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S.* (2003), available at http://www.urban.org/uploadedpdf/410857_freeman.pdf.

² Legal Action Center, *After Prison: Roadblocks to Reentry*, <http://www.lac.org/roadblocks-to-reentry/main.php?view=overview>. (last visited Jan. 18, 2011).

³ AMY L. SOLOMON, ET AL., *LIFE AFTER LOCKUP: IMPROVING REENTRY FROM JAIL TO THE COMMUNITY*, URBAN INST. XV (May 2008), available at http://www.urban.org/UploadedPDF/411660_life_after_lockup.pdf.

⁴ JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CENTER FOR ECONOMIC AND POLICY RESEARCH, *THE HIGH BUDGETARY COST OF INCARCERATION*, (June 2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

Conservatives correctly insist that government services be evaluated on whether they produce the best possible results at the lowest possible cost, but too often this lens of accountability has not focused as much on public safety policies as other areas of government. As such, corrections spending has expanded to become the second fastest growing area of state budgets—trailing only Medicaid.⁵

Fiscal responsibility, social justice, public safety, or good governance—no matter the motivation, the need to examine and adjust our policies to make our communities safer has never been more urgent or obvious.

Accordingly, this section identifies nine obstacles to reentry and makes federal policy recommendations to promote reintegration and reduce recidivism.⁶ Each issue outlined is vitally important to successful reentry. Without a comprehensive strategy that incorporates employment, education, housing, civic engagement, treatment and health services, as well as welfare assistance, the chances of success diminish and the likelihood of recidivism grows. The federal government plays a critical role here, as it is often federal laws and policies that can either create reentry barriers or eliminate them.

1. The Second Chance Act

Congress demonstrated the federal commitment to improving reentry when it passed the Second Chance Act of 2007, authorizing \$165 million in federal aid to state, local, and tribal governments to support programming to assist people exiting incarceration, including competitive grants to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family services, mentoring, victims support and other services that help reduce recidivism and improve public safety.⁷

The Act was signed into law by President George W. Bush in April 2008 to combat the “high recidivism rate [that] places a huge financial burden on taxpayers . . . deprives our labor force of productive workers, and . . . families of their daughters and sons, and husbands and wives, and moms and dads.”⁸ It is now due for reauthorization. It is imperative that it continues to “live up to its name . . . [to] help ensure that where the prisoner's spirit is willing, the community's resources are available.”⁹

⁵ Right on Crime, *The Conservative Case for Reform, Statement of Principles*, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/> (last visited Jan 18, 2011) (signatories include Newt Gingrich, Grover Norquist, Edwin Meese, III, William J. Bennett, Asa Hutchinson, and other leading conservatives).

⁶ See *generally Juvenile Justice*, SMART ON CRIME (2011) (discussing additional reentry barriers for youth).

⁷ Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008); see also Second Chance Act, National Reentry Resource Center, <http://www.nationalreentryresourcecenter.org/about/second-chance-act> (last visited Jan. 18, 2011).

⁸ Press Release, George W. Bush, President of the United States, Statement at Signing of the Second Chance Act of 2007 (Apr. 9, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/04/20080409-2.html>.

⁹ *Id.*

2. Voting Rights

Although the right to vote forms the core of American democracy, one significant group of American citizens is still denied the right to the franchise; 5.3 million Americans are not allowed to vote because of felony convictions.¹⁰ Four million of these people live, work, and raise families in our communities, and many others will eventually return after completing their sentences.¹¹ However, because of past convictions, these people are still denied the right to vote. In addition, among those individuals with criminal records who are in fact eligible to vote, there is considerable confusion about their eligibility or ineligibility to vote since most “restoration processes are so cumbersome that few [individuals with criminal records] are able to take advantage of them.”¹² This confusion results in the de facto disenfranchisement of eligible voters with criminal convictions.¹³

Denying individuals the right to vote even after they have repaid their debts to society perpetuates the insidious discrimination against this population that makes reentry so difficult. Furthermore, voting promotes reentry because it encourages individuals to become engaged in their communities and to engage in socially responsible conduct.¹⁴ In fact, a study by sociologists Christopher Uggen and Jeff Manza found that, among persons with a prior arrest, “27% of non-voters were re-arrested over a three-year period, compared with only 12% of voters.”¹⁵

3. Welfare and Food Stamp Benefits for Individuals with Drug Felony Convictions

The Personal Responsibility and Work Opportunity Reconciliation Act prohibits anyone convicted of a drug-related felony from receiving either federally-funded cash assistance through the Temporary Assistance for Needy Families (TANF) program, or food stamps, unless states opt out of or modify the ban.¹⁶ Under the ban, which only applies to drug felonies, individuals are barred for life from obtaining cash assistance and food stamps even after completing their sentences or

¹⁰ THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (Mar. 2010), *available at* http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusMarch2010.pdf.

¹¹ ERIKA WOOD, BRENNAN CENTER FOR JUSTICE, RESTORING THE RIGHT TO VOTE, (May 11, 2009), *available at* http://brennan.3cdn.net/5c8532e8134b233182_z5m6ibv1n.pdf.

¹² FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 10, at 1.

¹³ ERIKA WOOD & RACHEL BLOOM, AMERICAN CIVIL LIBERTIES UNION AND BRENNAN CENTER FOR JUSTICE, DE FACTO DISENFRANCHISEMENT (Oct. 2008), *available at* http://brennan.3cdn.net/578d11c906d81d548f_1tm6iiqab.pdf.

¹⁴ *Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (Mar. 16, 2010) (statement of Carl Wicklund, Executive Director, American Probation and Parole Association), *available at* http://brennan.3cdn.net/047d04ef2d0893df95_t8m6y9g01.pdf; *Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (Mar. 16, 2010) (statement of Marc Mauer, Executive Director, The Sentencing Project), *available at* http://www.sentencingproject.org/doc/publications/fd_DRATestimonyMarch2010.pdf.

¹⁵ Statement of Marc Mauer, *supra* note 14, at 3.

¹⁶ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 115, 110 Stat. 2105, 2180-81 (1996).

overcoming their addictions. Currently, 13 states have opted out of the ban entirely, and 11 states completely enforce the ban.¹⁷ All other states have limited or modified the ban in some way.¹⁸

The ban denies necessary cash assistance to individuals seeking to improve their lives without regard to their rehabilitation. It also exacerbates the financial pressures that lead many individuals to commit financially motivated crimes and stress that can trigger relapse into active addiction.¹⁹ Furthermore, the ban negatively impacts the innocent children of individuals who have committed drug crimes. Since many individuals with criminal records are parents with employment and income challenges, the ban has devastating consequences for these children, increasing the likelihood that they, too, will become ensnared in cycles of poverty, drug use, and crime.²⁰ The purpose of welfare reform, of which the ban was a small part, was to create incentives for individuals to move from public support to self-sufficient employment. Unfortunately, this provision has the perverse consequence of making it more difficult for individuals to move from lives of dependence on crime and state supervision to lives of employment and contribution. There is no indication that the drug felony ban acts as a deterrent to crime or drug use, and every indication that it acts as a barrier to rehabilitation and successful reentry.

4. Financial Aid Ban for Students with Drug Convictions

In 1998, the Higher Education Act was amended to prohibit anyone with a drug conviction from receiving federal financial aid for post-secondary education.²¹ By 2005, the drug offense ban was modified to prohibit federal financial aid for only those individuals convicted of a drug offense while receiving financial aid.²² The Free Application for Federal Student Aid (FAFSA), however, continues to ask about an applicant's drug offense history without first explaining that drug convictions obtained while the applicant was not receiving federal student financial aid are irrelevant to student aid eligibility. Anecdotal and analogical evidence suggests the question discourages many qualified applicants from further pursuing federal student aid due to their mistaken belief that a conviction in their past excludes them.

The drug offense ban on federal student aid prevents individuals from obtaining the education they need to access better employment opportunities, even though many of those affected by the ban were actively addicted to drugs when they engaged in the conduct for which they were convicted, and have since entered into or completed treatment for their addictions.

¹⁷ See LEGAL ACTION CENTER, *AFTER PRISON: ROADBLOCKS TO REENTRY 2009 UPDATE* (2009), available at <http://www.lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry--2009.pdf>.

¹⁸ *Id.*

¹⁹ See Letter from Nora D. Volkow, M.D., Director, National Institute on Drug Abuse (NIDA), to Friends, Colleagues and Parents (Jan. 2002) ("Researchers have long recognized the strong correlation between stress and substance abuse, particularly in prompting relapse."), available at <http://archives.drugabuse.gov/stressalert/StressAlert.html>.

²⁰ See LEGAL ACTION CENTER, *GETTING TO WORK: HOW TANF CAN SUPPORT EX-OFFENDER PARENTS IN THE TRANSITION TO SELF-SUFFICIENCY* (2001).

²¹ 1998 Amendments to the Higher Education Act of 1965, Pub. L. No. 105-244, § 483(f) (1998).

²² Higher Education Reconciliation Act of 2005, Pub. L. No. 109-171, § 8021(c) (Feb. 8, 2006).

Education is not only the key to a better life; it is also an important component of a crime-free lifestyle for many people.

In addition to its practical function as a credential in the job market, participation in higher education has been shown to lower recidivism by 15% and 13% for people who earn an associate's or bachelor's degree, respectively.²³ Providing individuals with criminal records an opportunity to obtain higher education creates cost savings for state correctional systems. In fact, the Correctional Education Association calculated that states experience a "[return of] at least \$2 for every \$1 spent in terms of saving in cell space on those who do not return to the system."²⁴ By preventing individuals from obtaining the education and training necessary to become more desirable candidates for employment and to advance in their careers, the drug felony ban, rather than acting as a deterrent to crime, serves as a barrier to success and to the empowerment of communities where individuals are unlikely to be able to access educational opportunities without financing from the federal government.

5. Barriers to Housing and Employment

Federal public housing law contains provisions that require or permit local authorities to deny Section 8 and other federally assisted housing to certain individuals. Two classes of applicants are permanently barred from federal public housing eligibility. Any household with a member who either: (i) is subject to a lifetime registration requirement under a state sex offender registration program²⁵ or (ii) has been convicted of methamphetamine production on public housing premises,²⁶ is permanently ineligible for public, Section 8, and other federally assisted housing.

Other provisions in federal law create exclusions from eligibility for public housing for certain individuals, but provide some discretion for these individuals to have their eligibility restored or a limitation on the duration of the exclusion. For example, any tenant who has been evicted from public, federally assisted, or Section 8 housing because of drug-related criminal activity is ineligible for public or federally assisted housing for three years. The housing provider has the discretion to shorten the three year period if the person successfully completes a rehabilitation program approved by the local housing provider, or the circumstances leading to the eviction no longer exist (e.g., the family member responsible for the eviction has died or is imprisoned).²⁷ The three year time period begins to run from the date of the eviction.²⁸

²³ See Center on Crime Communities & Culture, Occasional Paper Series No. 2, *Research Brief: Education as Crime Prevention* (Sept. 1997), available at http://www.prisonpolicy.org/scans/research_brief__2.pdf.

²⁴ STEPHEN STEURER, LINDA SMITH & ALICE TRACY, THE THREE STATE RECIDIVISM STUDY SUMMARY, CORRECTIONAL EDUCATION ASSOCIATION (2001), available at <http://dpscs.md.gov/publicinfo/publications/pdfs/three-state-recidivism-study-summary.pdf>.

²⁵ 42 U.S.C. §13663(a) (2006).

²⁶ 42 U.S.C. §1437n(f) (2006).

²⁷ 42 U.S.C. §13661(a) (2006).

²⁸ *Id.*

In addition, individuals with criminal records “often find that a conviction record is the main stumbling block in obtaining housing, whether in the private sector or in public and Section 8 supported housing.²⁹ Many housing authorities and private landlords use overly restrictive policies, (e.g. excluding all people with convictions or all people with felony convictions) which results in the exclusion of people with conviction records who pose no threat to the public, tenants or property. “Oftentimes the policies are based on a misunderstanding of federal law, or on the landlord placing a premium on ease of administration, believing that it’s easier to ‘just say no’ to all people with conviction records than to perform individualized analyses of their applications.”³⁰

Similarly, while obtaining employment is one of the most important factors for successful reentry, many barriers remain for former prisoners. Unfortunately, individuals with criminal records who are unable to obtain employment are three times more likely to return to prison than those individuals who are able to find work.³¹

6. Addiction and Recidivism

Addiction is a public health issue with public safety implications. Addiction is an incredibly widespread disease. In fact, estimates of the number of Americans who suffer from diagnosable drug or alcohol disorders are as high as 23.2 million people. Of these, only about 10% have received treatment.³² Furthermore, youth attitudes about substance use are beginning to soften, which generally precedes an increase in drug use.³³

Statistics demonstrate the link between addiction and crime, one which accounts for much of the crime in this nation. One in four individuals incarcerated in American prisons and jails is serving time for a drug offense, and the United States incarcerates more people for drugs than any other country. “[O]ffender drug use is involved in more than half of all violent crimes and in 60 to 80 percent of child abuse and neglect cases. It is estimated that 70 percent of the people in state prisons and local jails have abused drugs regularly, compared with approximately nine percent of the general population.”³⁴ Furthermore, in 1991, an astonishing 49% of all individuals incarcerated

²⁹ Legal Action Center, *Advocacy Toolkit: Improving Housing Opportunities for Individuals with Conviction Records*, <http://www.lac.org/toolkits/housing/housing.htm> (last visited Jan. 19, 2011).

³⁰ *Id.*

³¹ M. Eisenberg, *Project RIO: Twelve Month Follow-up; March 1989 Intakes*, TEX. DEPT. OF CRIM. JUSTICE (1990); Jeremy Travis, Amy L. Solomon & Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, URBAN INST. JUSTICE. POLICY CENTER (June 1, 2001).

³² Nat’l Inst. On Drug Abuse, U.S. Dept. of Health and Human Servs., *Treatment Approaches for Drug Addiction 1* (Sept. 2009), *available at* http://www.nida.nih.gov/PDF/InfoFacts/IF_Treatment_Approaches_2009_to_NIDA_92209.pdf.

³³ NAT’L INST. ON DRUG ABUSE, U.S. DEPT. OF HEALTH AND HUMAN SERVS., *MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE* (2009), *available at* <http://monitoringthefuture.org/pubs/monographs/overview2009.pdf>.

³⁴ Nora D. Volkow, *Treat the Addict, Cut the Crime Rate*, THE WASHINGTON POST, Aug. 19, 2006, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/18/AR2006081800799.html>.

in federal or state prisons were under the influence of drugs or alcohol at the time of their crime.³⁵ Often, the only time individuals have the opportunity to access addiction services is through their involvement in the criminal justice system. In fact, in 2007, the criminal justice system was the largest source of referrals to the addiction treatment system.³⁶

Untreated alcohol and drug addiction costs society approximately \$366 billion per year, and the cost of addiction treatment is 15 times less than the cost of incarcerating a person for a drug-related crime. The Washington State Institute for Public Policy estimates that for every dollar spent on community-based drug treatment, society receives a return of \$18.52 in benefits, including reductions in corrections and prosecution costs.³⁷ Fiscally, it makes sense to focus resources on addiction prevention and treatment before untreated addictions create higher costs in the law enforcement and corrections systems. Ensuring that individuals have access to addiction treatment services and reducing or eliminating barriers that prevent individuals from obtaining addiction treatment are ways to improve public health and safety while saving taxpayers money on corrections spending.

Additionally, many individuals face barriers to accessing addiction services after they are released from prison, as a result of state laws revoking or limiting the driver's licenses of some or all drug offenders. In 1992, Congress amended the Federal Highway Apportionment Act to withhold 10% of certain federal highway funds from states that failed to enact and enforce laws that revoke or suspend the driver's license of an individual convicted of any drug offense for at least six months after the time of conviction.³⁸ States may opt out of the law by limiting the revocation or suspension to those individuals whose convictions were for drug crimes related to driving (i.e. driving under the influence of a controlled substance) or to other limited categories, but they can also impose revocations or suspensions that endure for longer than the six months required by the federal law.

In response, 28 states have enacted laws that automatically suspend or revoke licenses for all or some drug offenders. The remaining states have either adopted laws that suspend or revoke a license only for driving-related convictions, or have opted out of the federal law altogether. Many states provide no opportunity for drivers to obtain restricted licenses so they can get to work, school, or treatment. These misguided and overbroad policies harm communities by making it more difficult for residents to obtain and retain a job, to attend school, or to access needed healthcare, including addiction treatment and recovery support services. This is especially true in suburban and rural areas where public transportation is less developed or non-existent.

³⁵ The National Center on Addiction and Substance Abuse at Columbia University, *Behind Bars: Substance Abuse and America's Prison Population*, 34 (Jan. 1998).

³⁶ Substance Abuse and Mental Health Servs. Admin., U.S. Dept. of Health and Human Servs., *Substance Abuse Treatment Admissions Referred by the Criminal Justice System*, THE TEDS REPORT (Aug. 13, 2009), available at <http://oas.samhsa.gov/2k9/211/211Cjadmits2k9.htm>.

³⁷ Elizabeth Drake, et al., *Evidence-based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, WASHINGTON STATE INST. FOR PUB. POLICY (2006).

³⁸ 23 U.S.C. §159 (2006).

Furthermore, federal Department of Transportation (DOT) regulations restrict certain individuals receiving drug addiction treatment from obtaining commercial driver's licenses (CDL), even though commercial driving is one of the industries in which individuals with criminal records are often able to find work. Currently, DOT regulations prohibit individuals who are receiving methadone and who are stabilized in treatment from obtaining their CDLs. There is an exception to the prohibition against drug use for individuals taking prescribed drugs who have been informed by a medical professional that their prescription drug use will not negatively impact their ability to drive a commercial motor vehicle.³⁹ However, prescribed methadone use is specifically excluded from the exception.⁴⁰

7. Mental Health and Income Support for Released Prisoners

Access to federal disability and health benefits is a critical component of successful reentry into the community for individuals released from jail or prison. This is particularly important for individuals with mental illnesses who cycle through corrections facilities repeatedly—often the event leading to arrest is linked to both lack of income and unmet need for services, such as mental health and addiction treatment, and supports, such as housing⁴¹ and employment. In a recent study, 16.9 percent of individuals entering jail were found to have a severe mental illness such as schizophrenia or manic depression.⁴² It is reported that the Los Angeles County Jail, the Cook County (Chicago) Jail and Riker's Island (New York City) each hold more people with mental illness on any given day than any psychiatric facility in the United States.⁴³ Nearly a quarter of both state prisoners and jail inmates with a mental health problem, compared to a fifth of those without, had served three or more prior incarcerations.⁴⁴

When an individual enters jail or prison, Supplemental Security Income (SSI) benefits are suspended (after one calendar month),⁴⁵ and Medicaid benefits are often terminated (although federal law does not require states to terminate Medicaid eligibility.) After 12 consecutive months of suspension, SSI benefits terminate, as well.⁴⁶ It can take several months to reinstate benefits after termination, and this lag can be critical for individuals with a serious mental illness in need of treatment services (via Medicaid health coverage) and income support (through SSI) in order to thrive in the community.

³⁹ See 49 C.F.R. 391.41(b)(12) (2009).

⁴⁰ *Id.*

⁴¹ BAZELON CENTER FOR MENTAL HEALTH LAW, FINDING THE KEY TO SUCCESSFUL TRANSITION FROM JAIL OR PRISON TO THE COMMUNITY (Nov. 2009), available at

<http://www.bazelon.org/LinkClick.aspx?fileticket=Bd6LW9BVRhQ%3d&tabid=104>

⁴² See Henry Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVICES 761-65 (2009) (accessed on July 21, 2009), available at <http://psychservices.psychiatryonline.org/cgi/reprint/60/6/761>.

⁴³ See E. Fuller Torrey, *Reinventing Mental Health Care*, 9-4 CITY JOURNAL, (Autumn 1999), available at http://www.city-journal.org/html/9_4_a5.html (last visited Jan. 19, 2011).

⁴⁴ DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUST. STAT., SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf> (last visited Jan. 19, 2011).

⁴⁵ SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY: WHAT PRISONERS NEED TO KNOW (May 2010), available at <http://www.ssa.gov/pubs/10133.pdf>.

⁴⁶ *Id.*

RECOMMENDATIONS

1. The Second Chance Act

A. *Federal Role is Essential in Reentry Programming*

Second Chance Act funding makes it possible for states to test old and the develop and test new program models, introduce different approaches to addressing reentry, and disseminate information and research to guide states as they address the complex challenge of prisoner reentry. Without the Second Chance Act, each individual state would be left to devise solutions to its version of a national problem that is of much greater scope and very different from what it was in the past. Without a federal role, states would waste resources reinventing solutions to complex problems, duplicating both mistakes and successes in reentry programming. The Act's reauthorization and full funding is critical to continue and strengthen the ground-breaking work it supports to reduce recidivism and enhance public safety.

B. *Reauthorize and Fully Fund the Second Chance Act*

Legislative

Congress should reauthorize and fully fund the Second Chance Act⁴⁷ to expand access to reentry support services nationwide.

Executive

The Attorney General should oversee and coordinate Second Chance reentry programs with reentry programs in other federal agencies through the Department of Justice's (DOJ) new Inter-agency Reentry Working Group that the Attorney General convened on January 5, 2011.⁴⁸

⁴⁷ Second Chance Act of 2007, *supra* note 7.

⁴⁸ Press Release, Dep't of Just., Att'y Gen. Eric Holder Convenes Inaugural Cabinet-Level Reentry Council: Interagency Meeting Focuses on Reducing Recidivism, Saving Taxpayer Dollars, Making Communities Safer (Jan. 5, 2011) ("The council will address short-term and long-term goals through enhanced communication, coordination and collaboration across federal agencies. The mission of the council is threefold: to make communities safer by reducing recidivism and victimization; to assist those returning from prison and jail in becoming productive, tax paying citizens; and to save taxpayer dollars by lowering the direct and collateral costs of incarceration."), *available at* <http://www.justice.gov/opa/pr/2011/January/11-ag-010.html>.

2. Voting Rights

A. *Former Prisoners are Denied the Right to Vote*

Denying individuals the right to vote even after they have repaid their debts to society perpetuates the insidious discrimination against this population that makes reentry so difficult. Furthermore, voting encourages individuals to become engaged in their communities and to engage in socially responsible conduct, improving chances for successful reentry and reducing recidivism.⁴⁹ Denying the franchise to people who should instead recommit themselves to the social contract is counterproductive to public safety and community well-being.

B. *Extend Federal Voting Rights to People Released from Prison*

Legislative

Congress should pass legislation similar to the Democracy Restoration Act⁵⁰ to restore the rights of individuals released from prison to vote in federal elections. The legislation has a broad and diverse base of public support including leaders in the law enforcement and criminal justice field, clergy and faith-based organizations, voting rights and civil rights groups and criminal justice advocates.⁵¹

Executive

The DOJ should appoint a commission to document the *de facto* disenfranchisement of eligible voters with felony convictions in each of the 50 states. This will provide policymakers with reliable information upon which to base decisions regarding voting rights restoration policies they enact or enforce.

3. Welfare and Food Stamp Benefits for Individuals with Drug Felony Convictions

A. *Individuals with Drug Felony Convictions are Permanently Barred from Benefits*

Individuals convicted with drug felonies are permanently barred from obtaining cash assistance and food stamps, even after completing their sentences or overcoming their addictions. The ban denies necessary cash assistance to individuals seeking to improve their lives, as well as their dependent children. It also exacerbates the financial pressures that lead many individuals to

⁴⁹ Statement of Carl Wicklund, *supra* note 14; Statement of Marc Mauer, *supra* note 14.

⁵⁰ Democracy Restoration Act, H.R. 3335 and S. 1516, 111th Cong. (2009).

⁵¹ For a complete list of individuals and groups that support the Democracy Restoration Act, see, Brennan Center for Justice, Democracy Restoration Act, http://www.brennancenter.org/content/resource/democracy_restoration_act_of_2008/ (last visited Jan. 18, 2011).

commit financially motivated crimes and cause stress that can trigger relapse into active addiction.⁵²

B. *Restore Benefits to Individuals with Drug Felony Convictions*

Legislative

Congress should eliminate the lifetime ban on TANF and food stamp eligibility for people with drug felony convictions by repealing Section 115(a) of the Personal Responsibility and Work Opportunity Act of 1996.⁵³ Two bills were introduced during the 111th Congress to address this issue: the Food Assistance to Improve Reintegration Act,⁵⁴ introduced by Representative Barbara Lee; and a bill to restore eligibility for benefits under Temporary Assistance for Needy Families to people with drug felony convictions,⁵⁵ introduced by Representative Andre Carson.

4. Unintended Impact of Financial Aid Ban for Students with Drug Convictions

A. *Students with Drug Conviction are Barred from Receiving Federal Student Financial Aid*

By preventing individuals in need from obtaining the education and training necessary to become more desirable candidates for employment and to advance in their careers, the drug felony ban, rather than acting as a deterrent to crime, serves as a barrier to success and to the empowerment of communities where individuals are unlikely to be able to access educational opportunities without financing from the federal government.

B. *Repeal the Unintended Drug Ban on Federal Student Aid*

Legislative

Congress should pass legislation to fully repeal the drug offense ban on federal student aid from the Higher Education Act.⁵⁶ The drug offense ban on federal student aid prevents individuals from obtaining the education they need to access better employment opportunities, even though many of those affected by the ban were actively addicted to drugs when they engaged in the conduct for which they were convicted, and have since entered into or completed treatment for their addictions. Congress should repeal that ban in recognition of the critical role education plays in reducing recidivism.

⁵² See Letter from Nora D. Volkow to Friends, Colleagues and Parents, *supra* note 19.

⁵³ Personal Responsibility and Work Opportunity Reconciliation Act, *supra* note 16.

⁵⁴ Food Assistance to Improve Reintegration Act, H.R. 329, 111th Cong. (2009).

⁵⁵ To amend the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to repeal the denial to drug felons of eligibility for benefits under the program of temporary assistance for needy families, H.R. 3053, 111th Cong. (2009).

⁵⁶ Higher Education Act, 20 U.S.C. § 1091(r) (2009).

Executive

The Department of Education should eliminate the question about drug convictions from the FAFSA and implement another mechanism to confirm the eligibility of applicants for financial aid. The FAFSA continues to ask applicants to disclose their drug offense histories without specifying that drug convictions obtained while the applicant was not receiving federal student financial aid are irrelevant to student aid eligibility. This question discourages many qualified applicants from further pursuing federal student aid due to their mistaken belief that a conviction in their past excludes them.

5. Barriers to Housing**A. Former Prisoners Face Unfair Barriers to Housing**

Federal public housing law contains provisions that require or permit local authorities to limit, exclude, or permanently deny Section 8 and other federally assisted housing to certain individuals, including those with criminal records. Further, those with criminal records often find that their record is the main stumbling block to obtaining private sector housing, as many housing authorities and private landlords use overly restrictive policies to exclude people with conviction records who pose no threat to the public, tenants or property.

B. Remove Unfair Barriers to Housing*Legislative*

Congress should amend 42 U.S.C. §1437d(k) by passing legislation similar to the No One Strike Eviction Act,⁵⁷ which would require public housing authorities to provide administrative grievance procedures for one-strike evictions of recipients of publicly assisted housing for criminal activity. It would also provided protections from eviction for family members of individuals engaged in criminal activity. Congress also should amend Subpart D of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1986 by passing legislation similar to the Public Safety Ex-Offender Self Sufficiency Act,⁵⁸ which would create a tax credit for investment in low-income housing for individuals with criminal records who participate in supportive programming.

Executive

The Department of Housing and Urban Development (HUD) should encourage public housing authorities and private landlords who take HUD subsidies to adopt policies that, rather than barring applicants who have criminal records, make an individualized assessment of each

⁵⁷ No One Strike Eviction Act, H.R. 69, 111th Cong. (2009).

⁵⁸ Public Safety Ex-Offender Self-Sufficiency Act, H.R. 6205, 109th Cong. (2006).

applicant's suitability for public housing. HUD should also develop guidance for public housing authorities and their staffs about the requirements of federal law with respect to the use of HUD funds to support housing for individuals with criminal records.

6. Expand employment opportunities for people with criminal records

A. *Individuals with Criminal Records Face Barriers to Employment*

A number of federal policies create or authorize the creation of barriers that prevent individuals with criminal records from obtaining employment for which they are qualified and in which they pose no increased risk to public safety. Other policies prevent these same individuals from obtaining the knowledge or skills they need to advance in the labor market. Reducing barriers in employment will improve public safety, reduce correctional spending and other costs associated with mass incarceration, including the maintenance of children of incarcerated and formerly incarcerated individuals, and promote the well-being and productive citizenship of individuals with criminal records.

B. *Remove or Reduce Barriers to Employment*

Legislative

There are a number of steps Congress can take to expand and improve employment opportunities for individuals with criminal records. First, Congress should amend the Higher Education Act⁵⁹ to restore Pell Grant eligibility for in-prison education programs so that individuals can obtain the education that will make them competitive in the employment market after they are released.

Second, Congress should create a federal standard requiring employers to consider the relationship between an applicant's criminal history and the position being sought, the length of time since an offense was committed, the severity of an offense, and any evidence of rehabilitation. Congress should also modify federal profession-specific restrictions on employment to not only include requirements for individualized determinations, but also to include graduated periods of consideration of the criminal records based on the severity of the crime. In no case should consideration of a criminal record be permitted beyond eight years after an individual's reaching the age of majority, conviction, or release from prison, whichever occurs latest.⁶⁰

⁵⁹ In 1994, Congress eliminated Pell Grant eligibility for individuals who are incarcerated because of concerns that allowing individuals to receive the need based grants while in prison was taking money away from law abiding citizens. These concerns existed despite the fact that prison-based higher education accounted for only 0.1% of the Pell Grant budget. Between 1995 and 2005, the number of college degree programs inside state prisons plummeted from about 350 to about 12.

⁶⁰ See Alfred Blumstein & Kiminori Nakamura, "*Redemption*" in *an Era of Widespread Criminal Background Checks*, 263 NAT'L INST. JUST. J. 10-17 (June 2009) (discussing research that suggests a convicted individual's risk of

Third, Congress should reduce the unintended and unfair consequences of the widespread availability of Federal Bureau of Investigation (FBI) background checks conducted for employment and retention purposes by passing legislation similar to the proposed Fairness and Accuracy in Employment Background Checks Act,⁶¹ which would have required the FBI to update and verify information in the reports it submits to employers conducting background checks. In performing roughly 6 million background checks per year for employment purposes, the FBI relies on state records, half of which the Attorney General believes are incomplete or inaccurate.⁶² These “rap sheets” often report incorrect information, information about arrests without any information about the dispositions of the cases, and information about non-serious or extremely old convictions that undoubtedly make qualified candidates less able to successfully compete in an already tight job market. Providing inaccurate or incorrect information to employers is not only an injustice to the job applicant, but also a major disservice to the employer in need of qualified workers.

Fourth, Congress should reauthorize the Workforce Investment Act (WIA),⁶³ which provides funding and directives for the delivery of employment services including assessment, training, and placement services. The Act should be reauthorized with provisions for hard-to-serve populations, including those individuals with criminal histories, through the WIA one-stop systems, which provide information about and access to a wide array of job training, education, and employment services at a single neighborhood location. Further, Congress should increase funding for WIA programming aimed at serving hard-to-serve individuals, including those with criminal records.

Finally, Congress should strengthen the Work Opportunity Tax Credit⁶⁴ for individuals with criminal records by (i) increasing the tax credit for hiring individuals with criminal records to match the tax credit available for hiring long-term family assistance recipients, and (ii) extending the tax credit to cover the same amount of wages paid during the second year of employment to encourage employers to retain hard-to-serve individuals. Increasing the amount and duration of the tax credit will encourage employers who might otherwise be wary to hire and retain qualified employees with criminal records who pose no increased risk to their employers, co-workers, or customers. Further, in appropriate circumstances, employers who take advantage of federal-sourced funds or tax incentives designed to induce private businesses to move to or remain in a state or locality should be encouraged, if not required, to hire individuals with criminal records on the same competitive basis that it would hire people without criminal convictions.

Executive

The Department of Labor should increase the amount the federal bonding program indemnifies employers who hire individuals with criminal records or who otherwise qualify for

recidivism after 8 years post-conviction is equal to or lesser than the risk a similarly aged member of the general public will commit a crime), *available at* <http://www.ncjrs.gov/pdffiles1/nij/226872.pdf>.

⁶¹ Fairness and Accuracy in Employment Background Checks Act, H.R. 5300, 111th Cong. (2010).

⁶² See NATIONAL EMPLOYMENT LAW PROJECT, FBI BILL FACT SHEET (June 1, 2010), *available at* <http://www.nelp.org/page/-/SCLP/2010/FBIBillFactSheet.pdf?nocdn=1>.

⁶³ Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936 (1998).

⁶⁴ 26 U.S.C. § 51 (2006).

bonding. The current level ranges from \$5,000 to \$25,000 per bond. The Department could raise all bonds to a uniform \$25,000.⁶⁵

7. Expand Access to Drug and Alcohol Treatment and Recovery

A. *Insufficient Attention to the Link between Addiction and Recidivism*

While addiction is a preventable, treatable disease, untreated addiction is a major cause of crime and recidivism. Often the only time individuals have the opportunity to access addiction services is through their involvement in the criminal justice system. Further, some former prisoners face barriers to obtaining addiction treatment following their release from prison because of state laws restricting the driver's licenses of drug offenders. Ensuring that these individuals have access to addiction treatment services, and reducing or eliminating barriers that prevent individuals from obtaining addiction treatment will improve public health and safety while saving taxpayers money on corrections spending.

B. *Remove Barriers and Disincentives to Addiction Treatment*

Legislative

Congress should increase funding for the Substance Abuse Prevention and Treatment Block Grant,⁶⁶ the formula grant administered by the Substance Abuse and Mental Health Services Administration (SAMHSA). This grant delivers vital federal funding to states, territories, and tribes to support substance abuse and mental health prevention and treatment programs. It is the only federal grant that provides funding to all states for these important services, and its continued robust funding is critical to our citizens' behavioral healthcare, particularly over the next few years while healthcare reform is implemented.

Congress should also amend the Federal Highway Apportionment Act to encourage states to limit driver's license suspensions and revocations to individuals convicted of driving-related drug offenses, rather than to individuals convicted of any drug-related offense. and to allow states with such restricted licenses to receive full federal funding of their highways. This will allow individuals in recovery to attend work, healthcare appointments, and needed addiction treatment or support.

Executive

The President should include a request for increased funding of the Substance Abuse Prevention and Treatment Block in the Administration's fiscal year 2012 budget proposal.

⁶⁵ See Department of Labor, Federal Bonding Program: A US Department of Labor Initiative, <http://www.bonds4jobs.com/> (last visited Jan. 19, 2011).

⁶⁶ 42 U.S.C. § 300x-21 *et seq.*

SAMHSA should engage in outreach and technical assistance efforts to educate drug court professionals and judges, as well as parole and probation professionals, about the effectiveness of medication-assisted treatment. SAMHSA should also publish guidance for drug court professionals and judges about the benefits of medication-assisted treatment.

DOT should amend its regulations that prevent individuals who are taking methadone and stabilized in treatment from obtaining a commercial driver's license, to allow such individuals to qualify for the existing prescription drug exception in the same way as individuals receiving any other type of medication-assisted healthcare.⁶⁷ Such an amendment will both allow former prisoners to find employment, but also remove current disincentives from obtaining and continuing much needed addiction treatment.

Judicial

Drug court judges should receive additional training about the benefits of medication assisted treatment of drug addictions, such as methadone maintenance treatment for opiate addiction. According to the National Association of State Alcohol and Drug Abuse Directors, many drug court judges “completely reject the evidence regarding [Methadone Maintenance Treatment] efficacy and efficiency, viewing opiate addiction as a purely social problem best resolved by imposed abstinence while the offender is in the correctional setting.”⁶⁸

8. Expand Access to Mental Health and Income Support Services

A. *Mental Health and Income Support Services are Unavailable upon Release from Prison*

Access to federal disability and health benefits is a critical component of successful reentry into the community for individuals released from jail or prison. This is particularly important for individuals with mental illnesses who cycle through corrections facilities repeatedly. Often the event leading to arrest is linked to both lack of income and unmet need for services, such as mental health and addiction treatment, and supports, such as housing and employment.⁶⁹ However, many recently released prisoners or inmates find themselves without Supplemental Security Income, Medicaid, and other mental health and income support services they need to survive outside of prison and avoid recidivism.

⁶⁷ See 49 C.F.R. 391.41(b)(12) (2009).

⁶⁸ NAT'L ASS'N OF STATE ALCOHOL AND DRUG ABUSE DIRECTORS, INC., METHADONE MAINTENANCE TREATMENT AND THE CRIMINAL JUSTICE SYSTEM, 11-12 (April 2006), available at http://www.nasadad.org/resource.php?base_id=650. In an open letter to her colleagues, Judge Karen Freeman-Wilson, then Executive Director of the National Drug Court Institute, commented that “the review of our positions regarding the use of pharmacotherapies will require us to examine our own opinions and biases. Early in my career as a drug court judge, I announced that methadone had no place in my court. When my position was challenged, I did [my] homework and learned that the use of drugs to address opiate addiction was often necessary in assisting our clients....” *Id.* at 12 (quoting Karen Freeman-Wilson, *NADCP News: From the Chief Executive's Desk*, Nat'l Ass'n of Drug Court Prof'ls, 6 (2004)).

⁶⁹ BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 41.

B. Increase Immediate Access to Much Needed Support Programs*Legislative*

Congress should pass legislation similar to the Recidivism Reduction Act⁷⁰ (RRA) to provide timely restoration of federal disability and health benefits to individuals with a mental illness upon reentry into the community. RRA would reinstate provisional benefits for eligible individuals with a mental illness whose SSI benefits have been suspended for no more than 12 months or terminated for no more than 36 months. Reinstatement would occur on the day of their release from incarceration. The legislation would also provide for immediate reinstatement of Medicaid upon release for individuals enrolled prior to incarceration, and provide up to three case management services to incarcerated individuals to assist in planning for and obtaining post-release services.

Executive

The Centers for Medicare & Medicaid Services (CMS) should provide technical assistance to states to ensure that inmates Medicaid enrollment is not terminated, but rather suspended for the term of their incarceration. CMS should issue a State Medicaid Director Letter to explain and articulate federal law in this area and assist states in implementing suspension, rather than termination of Medicaid benefits.

The President should include a request for increased funding of the mental health and criminal justice collaboration grant⁷¹ in the fiscal year 2012 budget proposal. The mental health and criminal justice collaboration grant, administered by DOJ, provides grants to assist with diversion, treatment, and transition services for youth and adults with mental illness who come into contact with law enforcement.

The President should also include a request for increased funding of the Jail Diversion Program⁷² in the fiscal year 2012 budget proposal. The Jail Diversion Program grant, administered by the Center for Mental Health Services within SAMHSA, assists with diverting individuals with serious mental illness and co-occurring substance use disorders from jail to community-based treatment and support services.

⁷⁰ Recidivism Reduction Act, H.R. 2829, 111th Cong. (2009).

⁷¹ Mentally Ill Offender Treatment and Crime Reduction Act, Pub. L. No. 108-414, 118 Stat. 2327 (2004).

⁷² See Children's Health Act of 2000, Pub. L. No. 106-310, § 3210, 114 Stat. 1101, 1201-03 (2000).

9. Expand and Improve Relief from Collateral Consequences

A. *Collateral Consequences of Remain with Individuals Long after their Release*

Policies that create barriers to employment, education, civic participation, public benefits, housing, medical care, and substance abuse treatment, to name a few, make it increasingly difficult for a person in reentry to remain crime-free and to become a positively contributing member of his or her community. Many of these policies are permanent, impacting individuals long after they have repaid their debts to society and demonstrated their ability to live as law-abiding citizens.

B. *Reduce or Remove Collateral Consequences of Incarceration*

Legislative

Congress should create a program that permits individuals charged with certain federal crimes to avoid a conviction record by successfully completing a period of probation. This could be accomplished either by: (i) expanding the Federal First Offender Act⁷³ in a manner similar to the Federal First Offender Improvement Act,⁷⁴ which would make available pre-judgment probation and eventual expungement for individuals who have not previously been convicted of a felony, or (ii) reinstating the set-aside authority in the Youth Corrections Act⁷⁵, and extending it to all first felony offenders eligible for probation.⁷⁶ In addition, for people with a federal conviction, Congress should enact an expungement or sealing remedy that would be available after a waiting period (e.g., five years for misdemeanors, 10 years for felonies).

Congress should catalogue all collateral sanctions and disqualifications in federal statutes and regulations, and consider whether any of them should be repealed or made subject to waiver. Congress should enact a relief mechanism to enable state and federal offenders to avoid or mitigate federal collateral consequences, similar to the ones that now apply to federal firearms disabilities, federal jury service, and deportation.

Executive

The President should expand the use of and improve the process for receiving executive clemency in the form of Presidential pardons.⁷⁷

⁷³ 18 U.S.C. § 3607

⁷⁴ H.R. 6059, 111th Cong. (2010).

⁷⁵ 18 U.S.C. § 5005 *et seq.* (repealed in 1984).

⁷⁶ “Between 1950 and 1984, federal law provided an additional avenue of relief for offenders between the ages of 18 and 26, who could petition to have their convictions ‘set aside’ after successful completion of probation under the Federal Youth Corrections Act (YCA). While the effect of this set-aside was never settled in the courts, the Sentencing Reform Act repealed the YCA, and nothing replaced it.” Margaret C. Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences* 22-1 FED. SENT’G REP. 6, 8 (Oct. 2009).

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APPENDICES

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CHAPTER 15

VICTIM ISSUES AND RESTORATIVE JUSTICE

THE ISSUE

Restorative justice is a set of concepts, values, and practices that emphasizes repairing the harm caused by criminal behavior, and requires examining and addressing the rights and responsibilities of victims, offenders, and the community.¹ It applies to individual cases, and more broadly, in the planning and implementation of policies and programs, as well as the allocation of funds.² These rights and responsibilities are best addressed through cooperative processes that include all stakeholders in the criminal justice system.³

Victim recovery and repairing the harm caused by crime are both cornerstones of restorative justice.⁴ The approach has been proven to enhance victim healing and promote healthier communities, while simultaneously holding offenders accountable, encouraging them to repair the harm they caused, and improving chances of their positive reintegration into the community.⁵ The federal government should continue to create policies and provide sufficient and fair funding mechanisms for effective practices of restorative justice, victim assistance, and victim compensation.

HISTORY OF THE PROBLEM

Restorative justice provides a better alternative to purely punitive responses to crime, which the high recidivism rate suggests are deficient.⁶ Additionally, victims and affected members of the community continually voice concerns that the criminal justice system fail to show them respect, validate their experiences of trauma and loss, or address their needs for safety, reparation, and accountability.⁷ Some victims and community members also feel excluded when they do not

¹ Fundamental Concepts of Restorative Justice, National Institute of Justice, adopted from Dr. Howard Zehr and Harry Mika, <http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/fundamental-concepts.htm> (last visited Jan. 25, 2011).

² *Id.*

³ “A restorative justice process maximizes the input and participation of [victims, offenders, and the affected community] -- but especially primary victims as well as offenders -- in the search for restoration, healing, responsibility and prevention.” *Id.*

⁴ Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, Sentencing & Corrections: Issues for the 21st Century, Sep. 1999, at 1 (noting that “because crime harms the victim and the community, the primary goals [of restorative justice] should be to repair the harm and heal the victim and the community”).

⁵ See, e.g., LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE (2007), available at <http://www.smith-institute.org.uk/file/RestorativeJusticeTheEvidenceFullreport.pdf>.

⁶ In a [2002] 15 State study, over two-thirds of released prisoners were rearrested within three years. See Bureau of Justice Statistics, Reentry Trends in the United States: Recidivism, <http://bjs.ojp.usdoj.gov/content/reentry/recidivism.cfm> (last visited Jan. 25, 2011).

⁷ In response to their alienation from the criminal justice system, victims have sought greater input and participation into the criminal proceedings, as well as recognition of the harm they have suffered personally. See, e.g., ELLEN ALEXANDER & JANICE HARRIS LORD, IMPACT STATEMENTS -- A VICTIM'S RIGHT TO SPEAK... A NATION'S RESPONSIBILITY TO

have a say in determining the proper response to a crime that affects them, despite the existence of constitutional and/or statutory victim rights requirements [which afford them that right] in every state.⁸

The failure to incorporate victims' perspectives in the criminal justice system has negative practical effects. Victims may become unwilling to report crimes or participate in the criminal justice system, making convictions more difficult.⁹ When victims do participate, they may feel frustrated by the lengthy processes of the traditional system, evidentiary rules that do not permit them to ask questions, and the lack of compliance with restitution orders.

1. Overview of Restorative Justice

In 1997, Drs. Howard Zehr and Harry Mika developed the following “markers” that form the foundation of the restorative justice paradigm:

- Focus on the harm of wrongdoing more than the rules that have been broken;
- Show equal concern and commitment to victims and offenders, involving both in the process of justice;
- Work towards restoration of victims, empowering them and responding to their needs as they see them;
- Support offenders while encouraging them to understand, accept, and carry out their obligations;
- Recognize that while obligations may be difficult for offenders, they should not be intended as harms and they should be achievable;
- Provide opportunities for direct and indirect dialogue between victims and offenders as appropriate;
- Involve and empower the affected community through the justice process and increase its capacity to recognize and respond to community bases of crime;
- Encourage collaboration and reintegration rather than coercion and isolation;

LITSEN, NATIONAL CENTER FOR VICTIMS OF CRIME (1994), *available at*
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⁸ *Id.*

⁹ A major deterrent to reporting the crime is the victims' concerns about their treatment by the criminal justice system stemming from a belief that the system was 1) powerless to help them, and 2) might further victimize them. *See id.*

- Give attention to the unintended consequences of our actions and programs;
- Show respect to all parties including victims, offenders, and justice colleagues.¹⁰

Research has demonstrated that restorative justice approaches can reduce recidivism, cut costs, and improve victims' satisfaction with the system more effectively than punitive measures.¹¹ Drs. Lawrence Sherman and Heather Strang, internationally known criminologists from the Jerry Lee Center of Criminology at the University of Pennsylvania, reviewed research conducted in the United States, the United Kingdom, and Australia regarding restorative justice approaches. After reviewing 36 direct comparisons of restorative justice to conventional criminal justice practices, they found that restorative justice approaches were proven to have:

- Substantially reduced repeat offending for certain offenders;
- Reduced recidivism *more than* prison (for adults) or detention (for youth);
- Reduced crime victims' post-traumatic stress symptoms and related costs;
- Provided both victims and offenders with more satisfaction than the traditional approach;
- Reduced crime victims' desire for violent revenge against their offenders;
- Doubled (or more) the offenses that could be addressed through the restorative justice model, thus diverting them from the traditional criminal justice system; and
- Reduced costs when used as diversion from the traditional justice system.¹²

Indeed, where victims and affected community members have a say in the appropriate punishment and manner in which the offender repairs the harm, the offender is both more likely to comply, and less likely to commit another crime.¹³ Moreover, diverting cases out of the traditional judicial system and into restorative processes may ease the caseload on over-burdened courts.¹⁴ Yet, despite its proven effectiveness, many providers of restorative practices are losing funding. Although the DOJ paid some attention to restorative justice in the past -- providing funding for

¹⁰ Umbreit, et al. at 259 (citing *Howard Zehr & Harry Mika, Fundamental Concepts of Restorative Justice*, 1CONTEMP. JUST. REV. 47, 54-55 (1998)).

¹¹ "RJ has been tried and tested, and it works. It is good for victims, offenders and communities. The evidence base for RJ is stronger than for that of almost any other criminal justice intervention." LUCIAN J. HUDSON, RESTORATIVE JUSTICE: THE CASE FOR WIDER ADOPTION (Dec. 2010)

¹² SHERMAN & STRANG, *supra* note 5, at 4.

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¹⁴ Mark S. Umbreit, et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQUETTE L. REV. 251, 259-63, 282-83 (2005).

research on promising practices, seed money for start-up programs, and for some training and technical assistance -- little support has been provided over the past decade. Little to nothing has been done by the Bureau of Prisons to consider incorporation of restorative approaches. It is time for the U.S. to explore systemic change based on restorative principles and values and to promote evidence-based practices from the restorative justice model.

Restorative justice seeks to expand the characterization of a “case” within the criminal justice system from one that focuses solely on the appropriate punishment for an offender to one that also focuses on the victim and the community. In accordance with this approach, the case process under the restorative model would involve: (i) determining the harm (assessment); (ii) determining how to repair the harm (case plan); and (iii) determining who is responsible for repairing the harm (assigning roles and responsibilities).¹⁵

Examples of restorative justice practices include victim-offender dialogue and “community circles of support,”¹⁶ These practices, which would be voluntary for victims, would help to serve victims’ needs, regardless of judicial outcome or correctional decisions. To be effective, these practices should be available as early as possible to victims and offenders, and continue to be available throughout the judicial process, from the first point of police contact through court proceedings and reentry. Through these restorative encounters, whether face-to-face meetings guided by trained facilitators, or meetings conducted via intermediaries, victims would have an opportunity to get answers about the crime and the person who committed it, as well as to get their material and emotional needs met.

The restorative justice case model also provides offenders with an opportunity to take responsibility for the harms they caused. Offenders learn the impact of their actions on others. They take an active role in correcting the wrongs they caused by, for example apologizing to the victim or community, performing community service, and/or providing material restitution. Offenders can participate in these activities even when victims choose not to participate.

The Department of Justice (DOJ) has paid attention to restorative justice in the past – providing funding for research on promising practices and seed money for start-up programs, training, and technical assistance, but has provided negligible support over the past decade. The Bureau of Prisons (BOP) has done little to nothing to consider incorporating restorative approaches. It is time for the U.S. to explore systemic change based on restorative principles.

¹⁵ (“The conventional criminal justice system focuses upon three questions: (1) What laws have been broken?; (2) Who did it?; and (3) What do they deserve? From a restorative justice perspective, an entirely different set of questions are asked: (1) Who has been hurt?; (2) What are their needs?; and (3) Whose obligations are these?”) *Id.* at 258.

¹⁶ *See Id.* at 269 (discussing the types of restorative justice dialogue).

Congress has also acted in the area of restorative justice. In the Victim and Witness Protection Act of 1982 (VWPA),¹⁷ Congress authorized courts to routinely impose restitution as part of sentencing for any crime arising under Title 18.¹⁸ In determining the amount of restitution to impose, VWPA requires courts to consider the loss sustained by the victim, the defendant's financial resources, and the financial needs and earning ability of the defendant and his or her dependents.¹⁹

Congress later enacted the Mandatory Victims Restitution Act of 1996 (MVRA),²⁰ making restitution mandatory for crimes of violence and most property crimes, regardless of the defendant's ability to pay.²¹ As the vast majority of federal defendants are indigent, and therefore much of federal restitution is uncollectible, growth in unpaid criminal restitution debts resulted from MVRA's enactment.²²

During the 110th Congress, Senator Byron Dorgan (D-ND) and Rep. Steve Chabot (R-OH) introduced legislation that sought to extend mandatory restitution to all federal crimes, which would have made the situation even worse.²³ The Senate bill passed, although the Senate Judiciary Committee did not consider or hold hearings on the bill. The House bill did not pass, but the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing on the legislation in April 2008.²⁴

Congress has taken steps to assist victims of crime through state and local programs. In 1984, as part of the Victims of Crime Act (VOCA), Congress created the Victims of Crime Fund.²⁵ The VOCA fund provides money for state and federal victim assistance and compensation programs and is made up mostly of money collected from penalties, fees, and fines that have been paid by federal criminals.²⁶ The VOCA fund contains no taxpayer dollars. Both VOCA state victim assistance grants (which support direct victim services including rape crisis centers, domestic violence shelters, and counseling) and the VOCA compensation grants (which provide financial reimbursement to victims

¹⁷ Victim and Witness Protection Act of 1982, Pub. Law No 97-291, 96 Stat. 1248.

¹⁸ CHARLES DOYLE, RESTITUTION IN FEDERAL CRIMINAL CASES (Congressional Research Service Aug. 2007), *available at*: http://assets.opencrs.com/rpts/RL34138_20070817.pdf.

¹⁹ 18 U.S.C. § 3663.

²⁰ Mandatory Victims Restitution Act, Pub. Law 104-132, 110 Stat. 1214.

²¹ DOYLE, *supra* note 18, at 11.

²² *Legislative Proposals Before the 110th Congress to Amend Federal Restitution Laws: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary* (Apr. 3, 2010) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University), *available at*: <http://judiciary.house.gov/hearings/pdf/Turley080403.pdf>.

²³ Restitution for Victims of Crime Act of 2007, S.973, 110th Cong. (2007); Criminal Restitution Improvement Act of 2007, H.R. 845, 110th Cong. (2007).

²⁴ Turley, *supra* note 22.

²⁵ U.S. Dept. of Justice Office for Victims of Crime, About OVC, *available at*: <http://www.ojp.usdoj.gov/ovc/about/index.html> (last visited Jan. 27, 2011).

²⁶ The USA PATRIOT Act expanded the possible sources of Fund deposits by authorizing the deposit of private gifts, bequests, or donations into the Fund beginning in Fiscal Year 2002. Pub. L. No. 107-56, 115 Stat. 272 (2001).

of violent crime for certain out-of-pocket medical and mental health expenses) are provided to all 50 states and the District of Columbia.²⁷

Because the VOCA fund is comprised of money collected from penalties, fees, and fines, amount of the fund fluctuates from year to year. In 2000, Congress capped the amount of money that could be removed from the fund each year in order to ensure that money would be available for victims in the future.²⁸ While a cap is appropriate for the local programs receiving the assistance funds to maintain stability and have ability to plan from year to year, the cap must be reasonable and not a reduction from previous years. Yet, in 2006, VOCA assistance grants began to be cut, resulting in the reduction of services to victims.²⁹ In 2009, Congress raised the VOCA cap and, with the addition of Recovery Act funds, raised state assistance grants back to the 2006 level.³⁰

The President's proposed FY 2011 Budget included a \$95 million increase for the VOCA cap over the FY 2010 level (\$705 million), raising the VOCA cap to \$800 million, and the Senate Consolidated Appropriations Act, 2011 contained an increase to \$820 million.³¹ However, as of the January 2011, Congress has not enacted new spending bills for FY 2011; the Senate failed to consider the Consolidated Appropriations Act, 2011, and instead Congress passed a Continuing Resolution to keep the government funded through March 2011.³²

The following questions can help to shape and analyze policies and practices to ensure that they fit within the restorative justice paradigm:

- Do they help identify and acknowledge the harm experienced by victims and communities?
- Do they help victims and communities in their healing in ways which empower the direct participants and provide needed support?
- Do they push offenders to develop the competencies necessary to understand and repair the harm they committed and to successfully reintegrate into their communities?
- Do they assist offenders in acknowledging and recovering from their own victimizations, which may have contributed to their committing harm to others?

²⁷ U.S. Dept. of Justice Office for Victims of Crime, What Is the Office for Victims of Crime? *available at*: http://www.ojp.usdoj.gov/ovc/publications/factshts/what_is_OVC2010/intro.html#go1 (last visited Jan. 27, 2011).

²⁸ *Id.*

²⁹ National Alliance to End Sexual Violence, Victims of Crime Act 2009 Fact Sheet (2009), *available at*: http://www.naesv.org/Resources/VOCA_2009_Fact_Sheet.pdf.

³⁰ *Id.*

³¹ National Network to End Domestic Violence, VOCA: Legislative Action, *available at*: <http://www.nnedv.org/policy/issues/voca.html> (last visited Jan 27, 2010).

³² Press release, Senate Comm. on Appropriations, Summary of Continuing Resolution through March 4, 2011 (December 19, 2010), *available at*: <http://appropriations.senate.gov/news.cfm?method=news.view&id=4841b7f6-bbac-486b-959f-43b1979a60ff>.

- Do they recognize and address differences (e.g., cultural and gender) in the development of practices and programs by being sensitive to these to maximize the response?
- Do they assist both governmental entities and, more importantly, communities in promoting positive behavior, individual responsibility and collective responsibility?
- Do they promote and support community connections and strengths?

RECOMMENDATIONS

1. National Task Force on Restorative Justice

A. Insufficient Focus on Restorative Justice Processes, Despite their Proven Efficacy

Despite the proven efficacy of restorative justice processes, to date, education and funding have been inadequate to promote its development.

B. Establish and fund a National Commission on Restorative Justice

Legislative

Congress should establish and fund a National Commission on Restorative Justice, akin to the National Prison Rape Elimination Commission.³³ This Commission should perform a national study to examine the restorative justice paradigm. This study should explore the effectiveness of restorative justice in serving the needs of victims and communities, supporting offender accountability and competency, and ensuring the protection of constitutional rights. Using the results of the study, the Commission could recommend how best to incorporate restorative justice options into the responses of law enforcement, courts, probation officers, correctional institutions, and parole boards.

Executive

Absent congressional action, the President should establish a Task Force on Restorative Justice within the DOJ Office of Justice Programs. DOJ has been supportive of the development of restorative justice programming in the past and is in a good position to take the lead on the issue. The DOJ Task Force should develop a research agenda and explore the creation of a national strategy and action plan directed at supporting and expanding restorative approaches and systemic change on the local, state, and federal levels. A portion of DOJ funding should be dedicated to

³³ National Institute of Corrections, National Prison Rape Elimination Commission, *available at*: <http://nicic.gov/PREACCommission> (last visited Jan. 27, 2010). *See also* SMART ON CRIME: Prisons.

targeted research efforts to test the effectiveness of restorative justice for victims of different types of crimes and from different kinds of communities.

2. Restitution and Support for Victims of Crime and Use of VOCA Funds for Restorative Justice Activities

A. *Insufficient Funding to Provide Necessary Services*

Providing restitution and support for victims of crime requires funding. Existing federal funding sources must be modified in order to operate more efficiently and effectively, and other funding streams must be developed. Further, current regulations regarding the use of VOCA funds for restorative justice efforts are unclear and confusing, and the regulations governing VOCA are not consistent in regards to restorative justice activities.

B. *Expand Funding Streams for Victims of Crime*

Legislative

Congress should improve the likelihood of victims actually receiving restitution by creating a “Restitution Fund” and expanding judicial discretion in restitution orders. Congress should hold hearings and fully consider the issue before passing such legislation. Congress’s proposed mandatory requirement for restitution under the Dorgan and Chabot bills³⁴ would have denied virtually all discretion for judges in fashioning equitable and case-specific sentences involving restitution. The imposition of orders which have little to no chance of fulfillment due to a defendant’s lack of assets and limited earning power simply provides another source of frustration—both for victims and the professionals responsible for enforcement.

To address the problem of unpaid victim restitution, Congress should instead pass legislation creating a separate “Restitution Fund” which would receive any restitution payments that cannot be delivered to or received by the actual victims. This should be separate from the Crime Victims Fund, in order to allow for withdrawal of paid-in funds if victims are located at a later time.

Congress should also remove the requirement of “mandatory restitution” for crimes and restore judicial discretion to order restitution. While it is reasonable for judges to acknowledge the actual damages victims suffered in open court and in the case file, judges should be granted the discretion to order a reasonable amount and a workable (and modifiable) payment schedule based upon a determination of the defendant’s income and other financial resources, reasonable living expenses, and responsibility for support of legal dependents. Payment of restitution should be prioritized ahead of court-ordered fines, services, and other court-system-imposed costs. In the

³⁴ S.973 and H.R. 845(110th Cong.), *supra* note 23.

case of multiple unidentified victims, or where the cost of locating the victims far exceeds the dollar amount due per person, the court should be allowed to fashion an order using the restitution dollars in creative ways that benefit crime victims, repair the harm that was caused, or prevent future harm. Civil consumer class action awards provide models.

Further, Congress should change current federal law regarding mandatory restitution, which currently prohibits victims and defendants from “settling” mandatory restitution orders, i.e., reaching a settlement regarding the amount or manner of payment even when done voluntarily and without coercion on either side.³⁵ Settlements could increase the likelihood of victims actually receiving at least a portion of the restitution owed to them. The settlement process could be overseen by, or require the approval of, a federal magistrate.

Congress should also pass legislation stipulating that failure to fulfill court orders for restitution during periods of probation or parole due to the defendant’s proven limited ability or inability to pay is not a probation or parole violation. Extending or violating probation or parole based on an inability to pay may forestall or limit defendants’ ability to pay in the future, thus lessening victims’ chances of receiving restitution.

In budgeting federal funding for the remainder of FY 2011, the 112th Congress should ensure VOCA caps are high enough to provide services to victims budget for a VOCA cap that increases spending levels from FY 2010 to ensure that victims will receive the services that they need. According to the National Association of VOCA Assistance Administrators, a 2011 cap of \$867 million would be adequate to “ensure a modest growth in state victim assistance grants.”³⁶

Congress should also ensure that forfeiture funds are used for victim restitution. Currently, items retrieved in forfeiture actions and the proceeds of their sale are kept by law enforcement. Congress should require that all proceeds from the sale of property forfeited under federal law be deposited in the VOCA Fund, or, preferably, in a separate Restitution Fund (as described above). Alternatively, Congress could set a cap on the amount of forfeiture proceeds that law enforcement could keep and require that the remainder be deposited into such a fund. That would not only enable many more victims to actually receive at least some portion of court-ordered restitution, it also would take away the pecuniary incentive that law enforcement now has to seek forfeitures.³⁷

Congress should also clarify that restitution takes priority over forfeitures, so that the government would not be able to trump victims’ claims by interposing a forfeiture claim that “relates back” to the time when the offense was committed. Many legal scholars believe that Congress has already done so in 18 U.S.C. 3572(b), but DOJ has consistently disputed that view,

³⁵ DOYLE, *supra* note 18, at 35.

³⁶ National Association of VOCA Assistance Administrators, VOCA Funding: Current Status/Action News—FY 2011, <http://www.navaa.org/budget/index.html> (last visited Jan. 19, 2011).

³⁷ See *Asset Forfeitures*. SMART ON CRIME (2011).

claiming that the words “other monetary penalty” does not include criminal forfeitures, even when the forfeiture is in the form of a money judgment against the defendant.

Executive

The Department of Justice should amend VOCA guidelines in several ways. The state agencies responsible for managing allocation of VOCA victim assistance grant funds operate under the 1996 *Guidelines on Victim Assistance* (Guidelines) from the Office for Victims of Crime (OVC) of DOJ. OVC should amend and clarify the following guidelines to ensure that the goals of VOCA are being met.

OVC should amend Guideline Section IV.C.1.h., on Restorative Justice, which contains the following prohibition: “VOCA assistance funds cannot be used for victim-offender meetings which serve to replace criminal justice proceedings.”³⁸ This has been interpreted to prohibit funds to go to restorative conferences, i.e., facilitated victim-offender meetings, in certain cases. This guideline should be amended so that restorative conferences are allowed in lieu of criminal proceedings.

OVC should amend Guideline Section IV.E.3.b, which provides that “VOCA funds cannot support services to incarcerated individuals, even when the service pertains to the victimization of that individual.”³⁹ To encourage states to serve incarcerated persons who are also victims, the sentence in the Guidelines prohibiting services to incarcerated persons should be eliminated, allowing these victims to benefit from VOCA funding.⁴⁰

OVC should clarify the allowable use of VOCA funds for restorative justice services. OVC response to public comment on these guides describes corrections-based restorative practices, such as victim-offender dialogue and victim impact panels as permissible,⁴¹ but Guidelines Section IV(C)(1)(h) states that VOCA funds “cannot support services to incarcerated individuals...”. It is not possible to provide services to victims in the context of meeting with their own perpetrator (dialogue) or with a group of different prisoners (panel) without “serving” offenders—the fact that the activity benefits prisoners as well as victims is a natural byproduct.⁴²

³⁸ Victims of Crime Act Victim Assistance Grant Program Guidelines § IV(C)(1)(h), 62 Fed. Reg. 7256, *available at*: <http://www.gpo.gov/fdsys/pkg/FR-1997-02-18/pdf/97-3836.pdf>.

³⁹ *Id.* Guidelines § IV(E)(3)(b).

⁴⁰ See *Prison Reform*, SMART ON CRIME (2011) for recommendations for Congress to provide sufficient appropriations for PREA. To the extent appropriations under PREA are insufficient to meet the demand for serving currently incarcerated victims, Congress should increase the VOCA cap to make available new funds for services to incarcerated persons who are victims of violent crime under the VOCA funding scheme.

⁴¹ Guidelines, *supra* note 38, § A(h), *available at*: <http://www.ojp.usdoj.gov/ovc/voca/vaguide.htm>.

⁴² If necessary, Congress should also add any necessary language to authorizations to permit VOCA funds to be used for assisting victims in restorative justice practices used in place of conventional court proceedings and in corrections-based victim services in which offenders may also benefit.

DOJ should also establish within its existing OVC an advisory committee to analyze and respond to Congressional proposals for VOCA caps, as well as advise OVC and Congress on appropriate cap levels.

APPENDICES**Experts***Restorative Justice*

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Crime Victim Restitution & Services

Steve Derene, Executive Director, National Association of Victim Assistance Administrators (<http://www.navaa.org/>)

Dan Eddy, Executive Director, National Association of Victim Compensation Boards
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Anne Seymour, Co-founder and Senior Advisor, Justice Solutions
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Further Resources

The Center for Justice & Peacebuilding, Eastern Mennonite University,
<http://www.emu.edu/cjp/restorative-justice> (last visited Jan. 19, 2011).

Center for Restorative Justice & Peacemaking, School of Social Work, University of
Minnesota, <http://www.cehd.umn.edu/ssw/rjp> (last visited Jan. 19, 2011).

International Institute for Restorative Practices, Real Justice, Research,
<http://www.realjustice.org/Research.html> (last visited Jan. 19, 2011).

U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, Library &
Multimedia, <http://www.ojp.usdoj.gov/ovc/library/index.html> (last visited Jan. 19, 2011).

Australian Institute of Criminology, Reintegrative Shaming Experiments,
http://www.aic.gov.au/criminal_justice_system/rjustice/rise.aspx (last visited Jan. 25,
2011).

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Discharges*, presented at the American Society of Criminology annual meeting (November
2004), available at: http://www.realjustice.org/uploads/article_pdfs/erm2.pdf.

Abby J. Porter, *The Jerry Lee Program Research on Restorative Justice: Promising Results*,
RESTORATIVE PRACTICES E-FORUM (April 13, 2006), available at:
http://www.realjustice.org/uploads/article_pdfs/jerryleeresearch.pdf.

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CHAPTER 16

SYSTEM CHANGE: ADDRESSING THE AFFORDABILITY, ACCOUNTABILITY, AND ACCURACY OF THE CRIMINAL JUSTICE SYSTEM TO REDUCE COST AND INCREASE PUBLIC SAFETY

THE ISSUE

Americans are calling for criminal justice reform to address the affordability, accountability, and accuracy of the criminal justice system. Annually, millions of persons are adversely impacted by the criminal justice system, including the wrongfully accused and convicted; racial and ethnic minorities who are arrested and incarcerated at disproportionately high rates, individuals who struggle with mental illness or drug addiction who need appropriate medical treatment, and impoverished youth who do not have access to necessary supports or services. Additionally, the criminal justice system is expensive—the Bureau of Justice Statistics estimates that, in 2006, federal, state and local governments spent approximately \$68 billion on corrections.¹ In some states, criminal justice spending outpaces spending on higher education—and investing in incarceration over education is no formula for achieving America’s economic success or security.

A 2010 bipartisan poll funded by the Pew Center on the States and conducted by polling firms that worked for both President Obama and Senator John McCain found that a majority of voters support criminal justice reform.² The poll, which surveyed conservative, liberal, independent, and law-enforcement affiliated households, found that voters believe that it is possible to maintain a strong public safety system while reducing the size and cost of the prison system. Additionally, voters believe that prisons, as government programs, should be put to a cost-benefit test that allows taxpayers to ensure they are getting “the most bang for their buck.” In short, voters value reform as a way to improve system outcomes and increase public safety.

In December 2010, the National Governors Association and the National Association of State Budget Officers released their biannual fiscal survey of the states.³ This report predicts that despite some incremental increase in state revenues, 2011 will be another extremely tough economic year in which states will experience major budgetary gaps. During this severe economic downturn, it is imperative to review the significant costs of the criminal justice system to ensure that these expenditures achieve the important and desired outcomes of protecting the public safety to the greatest extent possible, while maximizing criminal justice system accountability and efficiency.

¹ Bureau of Justice Statistics, U.S. Department of Justice, Employment and Expenditure, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=5> (last visited January 12, 2011).

² THE PEW CENTER ON THE STATES, NATIONAL RESEARCH OF PUBLIC ATTITUDES ON CRIME AND PUNISHMENT 1 (2010), *available at* http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/PSPP/PSPP_National%20Research_web.pdf?n=6608.

³ NATIONAL GOVERNORS ASSOCIATION & THE NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF THE STATES (2010), *available at* <http://www.nga.org/Files/pdf/FSS1012.PDF>.

HISTORY OF THE PROBLEM

The United States currently incarcerates over 2.3 million individuals—the highest incarceration rate in the world and a 500 percent increase over the past thirty years.⁴ Over-incarceration has had a disproportionate impact on communities of color, with over 55 percent of those incarcerated being African-American or Hispanic.⁵ According to the Pew Center on the States and the NAACP, one in 31 adults in America is incarcerated or on probation or parole; twenty-five years ago, this rate was only one in 77.⁶

Over the past two decades, state spending on corrections has increased by 127 percent⁷; the current cost of state corrections is approximately \$44 billion annually.⁸ The dramatic expansion of the criminal justice system over the past twenty years has stretched the system beyond its limits and has placed an unmanageable cost burden on local, state, and federal taxpayers. Such high costs are unsustainable during these times of economic uncertainty.

Experts representing law enforcement, state and local governments, academia, crime victims, and criminal justice reform advocates have studied the issues and have identified key ways to improve the criminal justice system. The policy solutions presented in this chapter reflect some of their ideas, and include reforms that would help achieve strategic system change through:

- Comprehensive review of the criminal justice system by a commission of policy makers, stakeholders, practitioners, and experts;
- Strategic reinvestment of resources to improve system outcomes; and
- New policies to address pervasive racial and ethnic disparities.

Developing a strategy for system change based on research and knowledge about what works would improve criminal justice system outcomes, including reducing costs and increasing public safety. Given the state of the economy, as well as voter receptiveness to reform efforts, the time to achieve strategic system change is now.

⁴ The Sentencing Project, Incarceration, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Jan. 12, 2010).

⁵ NAACP, *NAACP Supports Legislation to Help States Reduce Prison Populations*, <http://www.naacp.org/action-alerts/entry/naacp-supports-legislation-to-help-states-reduce-prison-populations/> (last visited Jan. 12, 2010).

⁶ THE PEW CENTER ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5* (2009), available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf [hereinafter ONE IN 31]

⁷ THE PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 4* (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf [hereinafter ONE IN 100].

⁸ *Id.*

RECOMMENDATIONS

1. National Criminal Justice Commission

A. *The Pressing Need for Criminal Justice System Review*

The last comprehensive, national review of the criminal justice system occurred over forty years ago during the Johnson Administration. The President's Commission on Law Enforcement and Administration of Justice was established in 1965 and promulgated a landmark report in 1967 entitled, "The Challenge of Crime in a Free Society."⁹ The recommendations presented in that report have helped shape the criminal justice system for the past 40 years.

However, in the four decades since this last comprehensive review, crime and the tools to address it have evolved, and a current, comprehensive review of the system is needed. At every stage of the criminal justice system—from the time preceding arrest to obstacles upon reentry after incarceration—serious problems exist that undermine principles of fairness and equity, as well as the public's expectations for cost-effectiveness and security. The result is an overburdened, expensive, and ineffective criminal justice system. Review of the system would increase its affordability, accountability, and accuracy, resulting in improved public safety and confidence.

B. *Establish a National Criminal Justice Commission to Issue Recommendations to Reduce Costs, Improve Outcomes, and Increase Public Safety*

Legislative

Congress should authorize and fund a National Criminal Justice Commission to conduct a comprehensive review of the criminal justice system through a bipartisan panel of experts. The Commission would make thoughtful, evidence-based recommendations for reform. Congress should model this commission on The National Criminal Justice Commission Act of 2009.¹⁰

In the Senate, The National Criminal Justice Commission Act of 2009, sponsored by Senator Jim Webb (D-VA) and introduced on March 26, 2009, passed out of the Senate Judiciary Committee on January 21, 2010.¹¹ The bill received bipartisan support and had 39 cosponsors in the Senate, including Chairman of the Senate Judiciary Committee Senator Patrick Leahy (D-VT), Chairman and Ranking Member of the Subcommittee on Crime and Drugs, Senators Arlen Specter (D-PA) and Lindsey Graham (R-SC), and Judiciary Committee member Senator Orrin Hatch (R-UT).

⁹ THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967), available at <http://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

¹⁰ S. 714, 111th Cong. (2009); H.R. 5143, 111th Cong. (2010).

¹¹ S. 714, 111th Cong. (2009).

The House companion bill, The National Criminal Justice Commission Act of 2010, was introduced on April 27, 2010, by Representatives William Delahunt (D-MA), Darrel Issa (R-CA), Marcia Fudge (D-OH), Tom Rooney (R-FL) and Robert C. “Bobby” Scott (D-VA), who at the time was the chairman of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. The current House Judiciary Committee Chairman, Lamar Smith (R-TX), signed on as a co-sponsor shortly thereafter.¹² Just three months later, on July 27, 2010, the House passed this bill on suspension of the rules.

Both pieces of legislation won wide-ranging support from Republican and Democratic lawmakers, as well as over 160 organizations—including law enforcement organizations and state and local organizations, criminal justice reform advocates, academics and religious leaders. This broad, bipartisan support demonstrates a widely shared belief that having a transparent and bipartisan commission conduct a comprehensive review of criminal justice policies and make recommendations would lead to positive innovations in public safety.

Executive

Absent congressional action, the President should establish an independent National Criminal Justice Commission by executive order or other administrative process. This commission would use the “National Criminal Justice Commission Act” from the 111th Congress as a guide to create an independent, bipartisan commission to carry out a comprehensive review of the criminal justice system.

As outlined above, there is historical precedent for a presidential commission on crime, the most famous and impactful being President Lyndon Johnson’s 1965 Commission on Law Enforcement and Administration of Justice.

2. Criminal Justice Reinvestment Act

A. Exploding Prison Populations and Shrinking Budgets Create Crisis

States spent more than \$52.3 billion on corrections in 2009, representing a nearly four-fold increase in spending over the past 20 years.¹³ Federal, state, and local prisons and jails incarcerate 2.3 million Americans.¹⁴ To support this population explosion, in 2009, the federal government provided more than \$215 million in grants for state corrections and community corrections.¹⁵ The

¹² H.R. 5143, 111th Cong. (2010).

¹³ See NAT’L ASS’N OF STATE BUDGET OFFICERS, FISCAL YEAR 2009 STATE EXPENDITURE REPORT 53 (2010); NAT’L ASS’N OF STATE BUDGET OFFICERS, FISCAL YEAR 1989 STATE EXPENDITURE REPORT 71 (1990) (calculating state spending on correction in 1989 at \$14.5 billion dollars).

¹⁴ ONE IN 100, *supra* note 7, at 5.

¹⁵ National Criminal Justice Association, *Byrne JAG Funding by States Across the Criminal Justice System* (2010), available at

increase in prison populations, coupled with tightening state budgets, has prompted many state and local officials to consider cost cutting measures, such as the use of intermediate sanctions, such as electronic monitoring, and modifications of probation and parole policies.¹⁶ To ensure such measures are undertaken in a manner that maintains public safety, holds offenders accountable, and controls correctional costs, states and localities must have the tools necessary to implement evidence-based reforms.

B. *Congress Should Pass the Justice Reinvestment Act*

Legislative

Congress should pass legislation to provide states with resources to develop and to implement innovative, data-driven, cost-saving corrections policies. This will help states increase public safety while cutting prison costs and reinvesting the savings into alternatives to incarceration, such as community-based reentry programs and programs proven to reduce recidivism.

Over the past three years, states have grappled with a fiscal crisis that has devastated their budgets and increased their reliance on federal grant programs to subsidize their corrections costs. Legislation like the Criminal Justice Reinvestment Act,¹⁷ which has bipartisan support in both the House and Senate, would aid states in performing an intensive analysis of criminal justice data, policies, and the cost-effectiveness of current spending on corrections. Coupled with the savings created through reduced corrections costs, the legislation would also provide resources to implement these data-driven solutions.

Notably, the Act would respect the central role states play in the nation's criminal justice systems, by allowing them to develop and evaluate policies and programs that work best for their unique circumstances. State and local policymakers are well-situated to identify the structural problems with their corrections systems, but do not have the research capacity to perform the sophisticated modeling necessary to forecast the costs and benefits of proposed policy changes. States such as Texas, Kansas, Vermont, and South Carolina all have had success using a justice reinvestment model.¹⁸ Combining state expertise with the resources only available to the federal government will result in lower correction costs and greater public safety.

http://www.ncja.org/NCJA/Navigation/PoliciesPractices/Byrne_JAG_Data/Byrne_JAG_Spending_by_Purpose_Area_and_Project_Type.aspx (click "Spending by Purpose Area and Project Type").

¹⁶ See ONE IN 31, *supra* note 6; National Conference of State Legislatures, *Cutting Corrections Costs: Earned Time Policies for States Prisoners* (July 2009).

¹⁷ S. 2772, 111th Cong. (2009); H.R. 4080, 111th Cong. (2009).

¹⁸ See JUSTICE CENTER, THE COUNCIL OF STATE GOVERNMENTS, *JUSTICE REINVESTMENT IN TEXAS: ASSESSING THE IMPACT OF THE 2007 JUSTICE REINVESTMENT INITIATIVE* (2009), *available at*

[http://www.pewcenteronthestates.org/uploadedFiles/TX_Impact_Assessment_April_2009\(4\).pdf](http://www.pewcenteronthestates.org/uploadedFiles/TX_Impact_Assessment_April_2009(4).pdf); *Justice Reinvestment: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the H. Comm. on Appropriations*, 111th Cong. 481 (2009) (statement of Roger Werholtz, Secretary, Kansas Department of

Executive

The President should encourage Congress to pass legislation like the Criminal Justice Reinvestment Act and should commit to signing the Act once it passes. The Department of Justice (DOJ) and its Office of Justice Programs and Bureau of Justice Assistance should implement the grant program in a manner that allows for the maximum number of states to take advantage of training and technical assistance, while also requiring states to demonstrate a commitment to working across party lines and branches of government to develop and implement evidence-based policies.

3. Racial and Ethnic Disparity in the Criminal Justice System**A. *Extensive Racial and Ethnic Disparity Exists in the Criminal Judicial System***

For more than two decades, the proportion of racial and ethnic minorities entangled within the criminal justice system has grown considerably.¹⁹ Members of minority populations now comprise more than two-thirds of persons convicted of offenses in federal courts,²⁰ and nearly three-quarters of federal prisoners are either black or Hispanic.²¹ At the state level, similar disparities exist.²² These extreme racial disparities result from a complex set of factors, including the influence of bias and disparate treatment, prosecutorial decision-making, and sentencing and drug policies. The consequences of these disparities have had a detrimental impact on communities of color and contribute to distrust of the justice system within those impacted communities and beyond.

Corrections); JUSTICE CENTER, THE COUNCIL OF STATE GOVERNMENTS, JUSTICE REINVESTMENT STATE BRIEF: VERMONT (2008), available at http://justicereinvestment.org/files/Vermont_State_Brief.pdf; THE PEW CENTER ON THE STATES, SOUTH CAROLINA'S PUBLIC SAFETY REFORM (Washington, DC-The Pew Charitable Trusts (2010), available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_South_Carolina_brief.pdf?n=5221.

¹⁹ See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

²⁰ BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, Table 4.5 at 65 (Oct. 2004), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf> (last visited January 14, 2011).

²¹ *Id.*, Table 7.10 at 108.

²² BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 (Dec. 2009), Table 13 at 36, <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf> (last visited January 14, 2011).

B. Promote Fairness by Evaluating and Limiting Racial and Ethnic Disparities*Legislative***i. Enact the Justice Integrity Act**

The Justice Integrity Act²³, introduced by Senator Ben Cardin and Representative Steve Cohen during the 111th Congress, would establish pilot programs in 10 federal districts to evaluate issues of racial and ethnic fairness in the practices of U.S. Attorney offices. The Act is intended to develop data that will disclose whether and to what extent: (i) racial and ethnic disparities are attributed to criminal justice policies and practices; (ii) any policies and practices that do produce disparities are fully justified as an appropriate response to criminal behavior; and (iii) disparities contribute in whole or in part to discrimination or unconscious bias.

In previous Congresses this legislation was referred to the Senate and House Judiciary Committees. During the 111th Congress, the House Judiciary Committee's Subcommittee on Crime held a hearing on racial disparity in the criminal justice system and reviewed this legislation at the hearing.²⁴

ii. Require Racial Impact Statements Prior to the Passage of Sentencing Legislation

In order to avoid unwarranted disparities within the federal criminal justice system, policymakers should examine the potential racial impact of proposed sentencing legislation prior to its enactment. One means of accomplishing this would be to mandate "Racial Impact Statements" for any proposed legislation. Similar to fiscal or environmental impact statements, such a policy would enable Congress to anticipate any unwarranted racial or ethnic disparities, and to consider alternative policies that could accomplish the goals of proposed sentencing legislation without causing avoidable racial disparity.

No racial impact statement bill has been introduced in Congress, but the concept was discussed in the 111th Congress during a hearing of the House Judiciary Committee's Subcommittee on Crime.²⁵ Several states, including Iowa, Connecticut and Minnesota, use racial impact statements before enacting new sentencing laws.²⁶

²³ S. 495, 111th Cong. (2009); H.R. 1412, 111th Cong. (2009).

²⁴ *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/hear_091029.html [hereinafter *Racial Disparities Hearing*].

²⁵ *Id.* (statement of Rep. Steve Cohen), available at <http://judiciary.house.gov/hearings/pdf/Cohen091029.pdf>.

²⁶ *Id.* (statement of Marc Mauer, Executive Director, The Sentencing Project), available at <http://judiciary.house.gov/hearings/pdf/Mauer091029.pdf>.

iii. *Enact the Byrne/JAG Program Accountability Act*

Issues of racial disparity at every level of the criminal justice system are of national concern and necessitate analysis to ensure fairness. The Edward Byrne Memorial Justice Assistance Grant Program (“Byrne/JAG”) Program, with roots reaching back into the 1980s, is the cornerstone federal grant program to provide criminal justice funding to states. During the 111th Congress, Representative Steve Cohen (D-TN) introduced the Byrne/JAG Program Accountability Act²⁷, which seeks to assess and limit racial and ethnic disparity in state, local, and tribal systems that receive Byrne/JAG funding. Pursuant to the legislation, government beneficiaries of Byrne/JAG funding must: (i) establish coordinating bodies to oversee and monitor efforts to reduce racial and ethnic disparities; (ii) identify and analyze key decision points in the criminal justice system to determine where racial and ethnic disparities are created among those who come into contact with the justice system; (iii) implement data collection on racial disparities and analyze such disparities; (iv) develop a work plan that measures objectives for system changes, based on the needs identified; and (v) publicly report on these efforts.

Executive

Under its own authority, DOJ could develop a similar pilot project as outlined in the Justice Integrity Act to collect and assess data and evaluate the impact its prosecutorial practices have on racial and ethnic disparity in the federal justice system. DOJ is currently funding demonstration projects similar to those contemplated by the proposed Act in four states to collect data and evaluate racial and ethnic disparity in selected county or local criminal justice systems.²⁸

²⁷ H.R. 5304, 111th Cong. (2010).

²⁸ American Bar Association, Criminal Justice Section, Racial Justice Improvement Project, <http://new.abanet.org/sections/criminaljustice/Pages/racialjustice.aspx> (last visited Jan. 12, 2011).

APPENDICES

Experts

National Criminal Justice Commission Act

Doug Ierley, Counsel, Office of Senator Jim Webb
(http://webb.senate.gov/aboutvirginia/about_va_reg_offices.cfm)

Pat Nolan, Vice President, Prison Fellowship (<https://www.prisonfellowship.org/why-pf/bios-of-key-staff/296>)

Judge Patricia Wald, retired judge from the U.S. Court of Appeals, the District of Columbia Circuit

Criminal Justice Reinvestment Act

Nancy G. La Vigne, Ph.D., Center Director, Justice Policy Center, The Urban Institute
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Michael Thompson, Director, Council of State Governments Justice Center
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Promote Fairness and Address Racial and Ethnic Disparity in the Criminal Justice System

Steve Saltzburg, ABA Criminal Justice Section and George Washington University law professor (<http://www.law.gwu.edu/Faculty/profile.aspx?id=1761>)

Marc Mauer, Executive Director, The Sentencing Project
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Angela Jordan Davis, ABA Criminal Justice Section and American University Washington College of Law professor (<http://www.wcl.american.edu/faculty/adavis/>)

Wayne McKenzie, Vera Institute of Justice (<http://www.vera.org/users/wmckenzie>)

Further Resources

National Criminal Justice Commission Act

Senator Jim Webb’s collection of information related to the *National Criminal Justice Commission Act*, available at http://webb.senate.gov/issuesandlegislation/criminaljusticeandlawenforcement/Criminal_Justice_Banner.cfm.

Criminal Justice Reinvestment Act

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Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19 (2007), *available at*
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Racial Disparities in Federal Prosecutions, a joint project of the Brennan Center for Justice and the National Institute on Law and Equity. Originally published in the Federal Sentencing Reporter, Vol. 19, No. 3: 193-201, 2007. Re-published with updated material (2010), *available at* http://www.brennancenter.org/page/-/Justice/ProsecutorialDiscretion_report.pdf?nocdn=1.

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SMART ON CRIME

Recommendations for the
Administration and Congress

The Smart on Crime Coalition

www.besmartoncrime.org