

*SMART ON CRIME:  
RECOMMENDATIONS  
FOR THE  
NEXT ADMINISTRATION  
AND  
CONGRESS*

The 2009 Criminal Justice  
Transition Coalition

November 5, 2008

## FOREWORD

After the 2008 elections, America's policymakers will take a fresh look at the criminal justice system, which so desperately needs their attention. To assist with that review, leaders and experts from all aspects of the criminal justice community spent months collaboratively identifying key issues and gathering policy advice into one comprehensive set of recommendations for the new administration and Congress. This catalogue is the fruit of those labors.

More than 25 organizations and individuals participated in developing policy recommendations across 15 broad issue areas. They then vetted those recommendations with a broader group of experts, representing a diversity of philosophies and points of view, to assess the substantive and political viability of each recommendation. For each issue area, the document:

- Identifies and summarizes problems;
- Evaluates possible solutions and identifies potential areas of agreement;
- Indicates which parts of government have jurisdiction;
- Notes potential supporters of the identified solutions and discusses opposing arguments;
- Identifies experts who can provide further analysis;
- Indicates the authors of that particular section; and
- Provides hyperlinks to other materials that explore the issues in greater depth.

In addition, the first few sections of the catalogue provide a broad overview of the criminal justice system as it now exists; indicate objectives that must be afforded priority consideration; identify items for executive and legislative action; and list participating individuals and organizations.

Please note that organizations and individuals identified as "potential allies" have indicated that they support the general principles expressed in the policy proposals described in that chapter. The allies listed do not necessarily endorse the specific language in every proposal in that chapter, but they do agree that the proposals reflect the general principles that should govern policy in that area. A potential ally signing on to one chapter is only signing on to that chapter and does not necessarily support the principles expressed in other chapters. Furthermore, the decision of a group not to sign on as a potential ally does not necessarily indicate an opposition to the policies proposed.

For policy questions, please contact the individuals or organizations identified as the authors of or policy experts for each section. However, please direct general questions to the Constitution Project, which coordinated this collaborative effort. Please contact Daniel Schuman at 202-580-6920.

The catalogue is available online at [www.2009transition.org](http://www.2009transition.org), at [www.constitutionproject.org](http://www.constitutionproject.org), and at the websites of many of the participating organizations.

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## **INTRODUCTION**

Americans depend on the criminal justice system to maintain our safety and security. We expect it to be reliable and fair in addition to being effective at deterring crime and punishing offenders. It must also treat victims and their families with compassion and provide a sense of justice to all Americans.

Today, many of those goals are unmet, and at least in some quarters, the system is regarded with distrust and suspicion. Scores of exonerations have led to the realization that the system can — and does — convict the wrong people, allowing the true perpetrators to remain free to harm others. Our forensics laboratories, on which we rely to help identify valid suspects, are underfunded and lack standards and oversight. On both the state and federal levels, investigation and identification techniques need reform to ensure objectivity and accuracy. Racial discrimination pervades the system.

We incarcerate more people than any other country in the world, and policymakers regularly increase the number of crimes and the length of criminal sentences. We imprison children with increasing frequency, sometimes to serve the rest of their lives in confinement. Our prison system is filled with non-violent offenders for whom other responses would be both more effective and more just. Some of our prisons are not just overcrowded, they are bursting at their seams, causing unsafe conditions for inmates and guards.

Political actors are fearful of being called “soft on crime” and are reluctant to grant pardons, no matter how well deserved they might be. They refuse to provide adequate funds for lawyers to represent people accused of a crime. In our adversarial system, such neglect results in costly errors that force crime victims to relive traumatic events that they had hoped to put behind them. In addition, when we release offenders without support systems, and with significant restrictions related to continued punishment rather than protection of society, we prevent them from effectively and safely reentering society.

We have too often failed to treat victims with respect, to provide them with appropriate alternatives to the criminal justice system, and to commit to a system of restorative justice.

Individuals wrongly convicted of crimes are also victims. Existing laws to protect against convicting innocent people need revision. A national commission could take a necessary hard look at why the system is convicting and imprisoning the wrong people and letting the true perpetrators remain free.

Moreover, our federal courts are too often unavailable to rectify errors, further undermining the reliability of convictions. With 130 exonerations of death row inmates since the reinstatement of capital punishment in 1973, we must reexamine our safeguards to make sure that the innocent have avenues to appeal their wrongful convictions.

Due to the undeniable human costs and the overwhelming fiscal costs, Americans of all political stripes, especially 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. Consequently, law enforcement officials, prosecutors, defenders, judges, victim advocates, and other stakeholders are working together in support of essential systemic reforms that will enhance public confidence in what is currently a failing system.

Reform of the criminal justice system is a continuing conversation. This document is meant to be a starting place; when reviewing it, please keep in mind some basic principles that should be considered when contemplating any criminal justice reform. These principles include:

1. **Fairness and Accuracy** — The criminal justice system should treat individuals fairly by providing access to all safeguards and services afforded both by law and common sense. Such treatment includes:

- Providing to people charged with crimes the presumption of innocence, effective representation, and equal access to a fair day in court;
- Ensuring the appropriateness and accuracy of law enforcement policies and practices employed to investigate, charge and prosecute individuals; and
- Working towards a restorative justice system that treats victims with respect and compassion and is responsive to their needs.

2. **Elimination of Disparities** — Governments should eliminate policies that create racial and other improper disparities, which undermine the goal of equality and fairness under the law.

3. **Alternatives to Incarceration** — Incarceration should be reserved to punish the most serious crimes. Community placement and supervision that include a combination of sanctions and access to treatment and other services, especially for individuals who have an addiction and/or mental illness, have proven successful. Government should aggressively pursue these alternatives to help ensure more effective and just outcomes.

4. **Proportionate Punishment** — Sentencing laws should ensure that the punishment fits the crime and that judges have sufficient discretion to impose a sentence no greater than necessary to achieve the ends of justice.

5. **Incarceration, Rehabilitation and Reentry** — The system should provide rehabilitation to those leaving the prison system and facilitate their participation in society for a successful reentry. Terms of incarceration must be safe and provide access to services that prepare individuals for reentry. Such services include education, training, opportunities for spiritual support, contact with families, treatment for medical and behavioral health problems, and, upon release, access to housing and other essential services.

6. **Effectiveness** — All strategies and practices that the criminal justice system employs should meet evidence-based or, when possible, scientific standards of effectiveness. This will improve the effectiveness of law enforcement, investigation, prosecution, and punishment; increase the public faith and trust in the system by minimizing mistakes and improving results; and reduce costs by increasing accuracy and reducing recidivism.

7. **Cost** — More than one in every 100 adults in the U.S. is behind bars.<sup>1</sup> If the 2.3 million people behind bars were a city, it would be the fourth largest in the country.<sup>2</sup> The U.S. prison system costs taxpayers more than \$60 billion per year. Prisons and jails are filled with persons who are non-violent, many of whom have an untreated addiction, mental illness, or other disability.

Projections are that costs will continue to increase absent significant reforms. Some jurisdictions, such as Texas, have significantly increased investment in intervention, treatment and reentry services to reverse this trend of over-incarceration and to help individuals remain outside of the criminal justice system and live law-abiding lives in their communities.

At a time when the nation is facing its worst economic crisis since the Great Depression, it is essential to review the cost of the criminal justice system to all Americans. Such a review should not only account for the cost in terms of dollars and cents, but also in terms of human lives and capital, which are our nation's most valuable resource.

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<sup>1</sup> *One in 100: Behind Bars in America 2008*. Pew Research Center for the People & the Press, January 2008.

<sup>2</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. 221944 PRISON INMATES AT MIDYEAR 2007 BULLETIN (June 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. 221945 JAIL INMATES AT MIDYEAR 2007 BULLETIN (June 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jim07.pdf>.

## **2009 CRIMINAL JUSTICE TRANSITION COALITION PRIORITIES**

### **Overcriminalization of Conduct, Federalization of Criminal Law, and the Exercise of Enforcement Discretion**

1. Passage of the Attorney-Client Privilege Protection Act of 2008 to help protect attorney-client privilege and employees' rights in internal investigations.
2. Passage of legislation modeled on H.R. 1998, 107<sup>th</sup> Congress, "Federalization of Crimes Uniform Standards Act of 2001"

### **Federal Law Enforcement Reform: Improve Investigative Techniques, Including Eyewitness Identification, Incentives to Testify, and Interrogation**

1. Ensure justice by improving investigative techniques through eyewitness identification, incentivized testimony, and interrogations reform.

### **Forensic Science Reform: Federal Oversight and Standards**

The federal government needs to authorize and fund a federal entity or capacity, located within a science-focused agency, to:

1. Conduct serious research into the validity and reliability of forensic techniques;
2. Establish standards for their use in the courts, and
3. Set enforceable standards and create a system to secure the integrity of forensic evidence through quality assurance, accreditation, training and the tracking of its use in the court system.

These are the issues brought before the National Academies of Science "Committee on Identifying the Needs of the Forensic Sciences Community," and will likely be released as recommendations from that Committee as early as December 2008. It will be imperative to capitalize on the momentum and interest generated by its publication.

### **Federal Grand Jury Reform**

1. 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 (amend Rule 6 of the Federal Rules of Criminal Procedure).

### **Federal Sentencing Reform**

1. Eliminate the crack cocaine sentencing disparity.

2. Expand alternatives to incarceration in the federal sentencing guidelines.
3. Expand the Residential Drug Abuse Program.

### **Asset Forfeiture Reform**

1. **Civil Asset Forfeiture:** Amend the federal equitable sharing law, 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 (amend 21 USC § 881(e)).
2. **Criminal Asset Forfeiture:** 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 (amend Rules 7 and 32.2 of the Federal Rules of Criminal Procedure).

### **Innocence Issues**

1. Forensic Reform (Please see "Forensic Science Reform" section above.)
2. JFAA reauthorization and reform. The JFAA funding streams, and the Innocence Protection Act in particular, expire in 2009. Congress must reauthorize funding in order to ensure that the funding streams necessary to prove innocence remain available.
3. Creation of an Innocence Commission.
4. Passage of S 2421, HR 7021: The Wrongful Convictions Tax Relief Act.

### **Prison Reform**

1. Return the rule of law to U.S. prisons and jails by fixing the PLRA
2. Reduce recidivism and strengthen families.
3. Improve transparency in the world's largest prison system.

### **Pardon Power/Executive Clemency – Breathe New Life into the Pardon Power**

1. Identify the values pardon serves, define a clear operational role for it in the criminal justice system, it, and establish a system for administering the power that will maximize its potential for correcting injustice and advancing the administration's criminal justice policy agenda.
2. Return authority to the Attorney General for signing all pardon recommendations to the President.

## **Re-Entry – Ensure Successful Reintegration after Incarceration**

1. Fully fund the Second Chance Act.
2. Extend federal voting rights to people released from prison.
3. Eliminate the lifetime bans on financial assistance and food stamps for people convicted of drug offenses.

## **Public Defense Reform – Make our Communities Safer by Supporting Quality Public Defense Systems**

1. Funding for John R. Justice Prosecutors and Defenders Act of 2008
2. Congressional authorization for and funding of National Center for Public Defense Services
3. Congressional authorization for a study to determine whether failures by states to provide constitutionally adequate public defense systems contributes to racial disparities within the criminal justice systems.

## **Death Penalty/Habeas Corpus Reform**

1. Stay all federal executions and place a moratorium on federal capital charges pending a thorough data collection and analysis of racial disparities, the adequacy of legal representation, and other inequities in the death penalty system.
2. Create and increase funding for defender organizations that provide post-conviction representation and are independent of the judiciary.
3. Amend habeas-related provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the PATRIOT Improvement and Reauthorization Act of 2005 (PIRA) so that federal courts are more accessible to prisoners asserting claims of constitutional violations with less deference to prior decisions.

## **Juvenile Justice Reforms**

1. Prioritization of Prevention and Intervention As Effective Juvenile Justice Delinquency Prevention and Crime Reduction Policy
  - Restore support for and sharpen the focus of the Office of Juvenile Justice and Delinquency Prevention (OJJDP).
  - Strengthen and reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDP).

- Increase support for prevention, education, gang intervention, mentoring, job training, health, mental health, and substance abuse community and school-based programming for youth.
2. Protection of Youth in the Juvenile Justice System and Promotion of Developmentally-Appropriate Policies
    - Promote age-appropriate treatment for youth in the justice system.
    - Screen youth for mental health and substance abuse disorders upon intake.
    - Reduce inappropriate penalties, and reform of costly policies that subject more youth – particularly poor youth and youth of color – to federal prosecution and incarceration.

### **Fixing *Medellin*: Compliance with International Law and Protecting Consular Access**

1. The United States should rejoin the Vienna Convention on Consular Relations (we withdrew in 2005).
2. The Congress should pass legislation implementing the ICJ's decision in *Avena*, such as the proposed H.R. 6481: *Avena Case Implementation Act of 2008*.

### **Victim Issues and Restorative Justice**

1. Create a National Commission on Restorative Justice to examine the effectiveness of the restorative justice paradigm in serving the needs of victims and communities and supporting offender accountability and competency both in the US and abroad and to develop a national strategy and action plan
2. Improve support to victims of crime by:
  - Allowing VOCA funds to be used for restorative justice processes at all stages (e.g., pre- and post-conviction).
  - Either allowing VOCA funds or appropriating additional funds under the Prison Rape Elimination Act to be used for victim assistance to incarcerated persons who are or become victims of violent crime.
  - Raising the Congressionally imposed cap on access to the Victims of Crime Act fund to a level which insures no funding cuts backs and additionally covers restorative justice research and programming.

- Requiring that forfeiture proceedings first go to satisfying court-ordered restitution for the victims of an individual defendant and then to services for victims, before going to law enforcement uses.
  - Permitting federal courts to adjust the amount and manner of payment of restitution to maximize victim recovery
3. Move the Office for Victims of Crime out of the US Department of Justice and set up a National Office for Victims of Crime, charged with implementation of the Victims of Crime Act, and coordination of all federal victim programs, and empowered to ensure effective response to the needs of victims of crime throughout federal agencies.

## **EXECUTIVE ACTION LIST**

### **CHAPTER 2: FEDERAL LAW ENFORCEMENT REFORM —IMPROVE INVESTIGATIVE TECHNIQUES, INCLUDING EYEWITNESS IDENTIFICATION, INCENTIVES TO TESTIMONY, AND INTERROGATION**

#### **Short-Term:**

1. 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 recording of custodial interrogations, the use of incentivized testimony, and the affirmation of judicial discretion in ordering comparisons of crime scene DNA and fingerprint evidence to relevant databases. The issuance of such an order would also provide much-needed guidance to state law enforcement agencies.

Specifically the executive order should encompass the following:

- A. Enable federal judicial orders of **comparisons of crime scene DNA and fingerprint evidence to relevant databases**. In roughly one-third of the nation’s post-conviction DNA exonerations, comparison of the crime scene DNA to the CODIS system pointed specifically and extremely strongly to what seemed to be the real perpetrator of those crimes. (We say “seemed to be” because in many instances ultimate prosecution of that person was not pursued by the government.) In many instances, the person identified as the real perpetrator committed additional crimes while the innocent person was the focus of police investigation and prosecution, and ultimately wrongfully convicted.
- B. The adoption and implementation of innocence-related reforms to identify and prevent wrongful conviction of federal crimes in the following areas:
  - I. Adopt and implement **eyewitness identification** procedures shown by reliable, scientifically-supported evidence to minimize the likelihood of misidentification, including:
    - 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 the identification procedure be administered by a blind investigator, or an individual who does not know who the suspect is;
    - The requirement that a lineup be properly composed (i.e. suspect photographs should be selected that do not bring unreasonable attention to him; 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 his own words, that articulates the level of confidence 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).

II. 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 and a law enforcement officer's questioning is likely to elicit incriminating responses. This is simply the only way to create an objective record of what transpired during the course of the interrogation process.

III. 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 must 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.

C. Preservation and Safekeeping of Records

- Require **preservation of notes and similar records.**
- Require that the FBI **create separate FD-302 forms** (reporting or summarizing interviews) **for each contact.**
- **Enhance agency record-keeping** and retrieval systems.

D. Professionalism

- Implement personnel policies that allow supervisors to **promote the best and prune the worst.**

## CHAPTER 3: FORENSIC SCIENCE REFORM—FEDERAL OVERSIGHT AND STANDARDS

### Short-Term:

1. Immediate issue of an executive order after the release of the NAS report.

The President may issue an executive order to create a federal entity or capacity to (1) conduct research on the validity and reliability of extant forensic techniques, (2) assess the reliability and validity of forensic techniques and establish standards for their use in the courts, and (3) create a system to enforce standards and secure the integrity of the final forensic product through quality assurance, accreditation, training, and the tracking of its use in the courts.

## CHAPTER 5: FEDERAL SENTENCING REFORM

### Short-Term:

1. Enhance sentence reductions for extraordinary and compelling circumstances.
2. Expand the Residential Drug Abuse Program (RDAP).
3. Revive executive clemency. (*See* Chapter 11 on Pardon Power.)

## CHAPTER 7: INNOCENCE ISSUES

### Short-Term:

1. JFAA
  - A. The Executive should not create separate, parallel programs that allow potential grant applicants to circumvent the innocence protections articulated in the Justice For All Act, as President Bush had through the President's DNA Initiative.
  - B. Loosen current procedural/administrative burdens on potential Bloodsworth applicants (e.g. certification from Chief Legal Officer; applying through State Administering Agencies (SAA's), etc.) to ensure even distribution of post-conviction DNA testing monies across deserving applicant states in need.
    - **Amend U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, Solicitation: Post-conviction DNA Testing Assistance Program to loosen requirements on potential applicants.**
  - C. Enforce forensic oversight requirements of the Coverdell grant program by ensuring existence of the appropriate forensic oversight entity and process upon

application for such funds, and appropriate responses to allegations filed under that grant program.

➤ **Enforce 42 U.S.C. 3797(k)(4).**

- D. Create a national working group to identify best practices relating to proper evidence preservation, with the goal of providing guidance to the states (see also legislative changes below).
2. Innocence Commission: Issue an executive order establishing a presidential innocence commission. Appointments are critical.

## **CHAPTER 8: PRISON REFORM**

### **Short-Term:**

#### **Examine Use of the Prison System**

1. Create a new, bipartisan commission to examine criminal justice practices and goals, and charge the commission to make recommendations regarding the appropriate use of incarceration and the use of alternative forms of punishment.

### **Long-Term:**

#### **Improve Transparency**

1. Implement PREA's comprehensive national standards. *Authors recommend this action based on current draft of PREA standards.*
2. Develop a body to oversee implementation of, and compliance with, PREA standards.

#### **Reduce Recidivism and Strengthen Families**

1. Require the Federal Bureau of Prisons to adopt policies to ensure prisoners have access to services/programs that will reduce barriers to reentry. These services/programs should include all of those listed in the proposed "reentry behind bars" bill listed below:
  - a. drug treatment programs in prison for all drug offenders as well as funding for the Residential Substance Abuse Treatment (RSAT) program to provide access to a complete continuum of addiction treatment, aftercare, and recovery support services;
  - b. government-issued ID cards upon release;
  - c. enrollment for Medicaid prior to release (so that it is available upon release);
  - d. alternatives to incarceration for non-violent offenders;
  - e. merit-based reductions in sentences for non-violent offenders;
  - f. SSA prerelease agreement;

- g. a requirement that individuals under 18 shall not be housed in adult facilities;
- h. restore Pell Grant eligibility to prisoners;
- i. access to clean needles and condoms in order to reduce the incidence of HIV/AIDS, Hepatitis, and other illnesses;
- j. access to educational programs/job training for every prisoner;
- k. access to religious services;
- l. transportation to prisons for prisoners' families;
- m. opportunities for parents in prison to visit with their children; and
- n. regulate costs of collect calls from prisons.

## **CHAPTER 9: PARDON POWER/EXECUTIVE CLEMENCY—BREATHE NEW LIFE INTO THE PARDON POWER**

### **Short-Term:**

1. In consultation with the Attorney General, the President should decide how he wishes to use his pardon power, ensure that all executive officials (including U.S. Attorneys) are on the same page, and initiate at an early date a practice of pardoning on a regular basis.

### **Long-Term:**

1. Use the pardon power to accomplish strategic policy objectives, by identifying and calling attention to shortcomings in the justice system, and to educate the public about the goals of the justice system.

## **CHAPTER 10: RE-ENTRY—ENSURE SUCCESSFUL REINTEGRATION AFTER INCARCERATION**

### **Short-Term:**

1. Appropriate full funding for Second Chance Act.

Direct the Department of Justice to repurpose existing FY09 offender reentry funding (\$10 million) for Second Chance Act programming (P.L. 110-199).

2. Extend federal voting rights to people released from prison.

Appoint a commission to document the de facto disenfranchisement of eligible voters with felony convictions in each of the 50 states.

3. Expand employment opportunities for people with criminal records.

Change regulations and guidance from the Departments of Education and Labor to ensure that state and federal in-prison educational and training programs are tied to high growth labor markets and industries.

4. Expand access to drug and alcohol treatment.

Include a request for increased funding in the President's annual budget request for the Substance Abuse Prevention and Treatment Block Grant.

## **CHAPTER 11: PUBLIC DEFENSE REFORMS—MAKE OUR COMMUNITIES SAFER BY SUPPORTING QUALITY PUBLIC DEFENSE SYSTEMS**

### **Short-Term:**

1. Bureau of Justice Assistance of the U. S. Department of Justice should use some of its discretionary funding for providing federal technical assistance and training for state, local and territorial public defense systems, and the attorneys who participate in them, comparable to the federal government's support for the prosecution function.

## **CHAPTER 12: DEATH PENALTY/HABEAS CORPUS REFORM**

### **Short-Term:**

1. Stay all federal executions and place a moratorium on federal capital charges pending an independent study of the death penalty system that examines racial disparities, prejudicial errors, adequacy of legal representation, and other inequities in capital prosecutions.
2. Exempt people with mental illness and/or developmental disabilities from capital prosecutions.
3. Begin development of an Office of the Defender General, comparable to the U.S. Department of Justice, to operate independently from the judiciary and select and monitor counsel representing state and federal capital defendants in federal proceedings.
4. Decentralize the decision to seek capital sentences so that the U.S. Attorney General does not overrule a local U.S. Attorney's decision not to seek the death penalty.
5. Begin collection and regular review of all data concerning factors relevant to the imposition of the death penalty.
6. Support a National Capital Bar of qualified and experienced attorneys to represent capital defendants.

### **Long-Term:**

1. Permanently establish an Office of the Defender General, comparable to the U.S. Department of Justice, to operate independently from the judiciary and select and monitor counsel representing state and federal capital defendants in federal proceedings.
2. Reform the process for presidential pardons to create greater transparency, reduce the backlog, and ensure equal access regardless of wealth or political influence.
3. Support an independent study of the federal death penalty system that examines racial disparities, prejudicial errors, adequacy of counsel, and other inequities in capital prosecutions to make recommendations for legislative reform.
4. Monitor compliance with provisions prohibiting imposition of the death penalty based on race, ethnicity, or national origin, based on, *inter alia*, statistical evidence.

## **CHAPTER 13: JUVENILE JUSTICE REFORMS**

### ***THE PRESIDENT SHOULD:***

### **Short-Term:**

1. Create a Federal Taskforce including the Department of Justice (DOJ), the Department of Education, the Department of Labor, the Department of Housing and Urban Development, the Department of Defense, the Department of Health and Human Services, and the Substance Abuse Mental Health Services Administration to prioritize juvenile justice prevention, intervention, and aftercare programs for youth at the cabinet and sub-cabinet levels.
2. Establish a coordinated interagency approach to ensure the provision of community-based mental health and addiction services and treatment including screening, assessment, and data collection regarding mental health and substance abuse conditions for youth who come into contact with the juvenile justice system.<sup>1</sup>
3. Express public opposition to legislation that will widen the net of youth in the juvenile and adult criminal justice systems, over-criminalize and increase federal penalties for minor and nonviolent adolescent misbehavior, exacerbate racial and ethnic disparities in the juvenile and criminal justice systems, and increase incarceration rates in the United States.
4. Promote the enforcement of national standards for safe and humane conditions of confinement in juvenile facilities.

### **Long Term:**

1. Ensure that the Office of Juvenile Justice and Delinquency Prevention (OJJDP) and the states have the necessary resources to comply with the Juvenile Justice Delinquency and Prevention Act's (JJDPA, "the Act") core requirements.
2. Restore the role of OJJDP to serve as a comprehensive agency to (1) support state compliance with the JJDPA mandates and advancing juvenile justice reforms, and (2) provide a full range of services, including conducting research and gathering data, identifying and disseminating best practices and relevant information, leading demonstration projects, providing training and technical assistance, and promoting the expansion of effective practices in the field.
3. Order DOJ to work with Congress on legislative language to strengthen and reauthorize the JJDPA.<sup>2</sup>
4. Order federal agencies to issue and/or amend administrative regulations to protect vulnerable children and families.
5. Order DOJ to work with Congress to abolish the sentence of life without parole for children convicted of federal crimes.

### ***THE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION SHOULD:***

### **Short-Term:**

1. Prioritize JJDPA implementation, promotion of state compliance with the Act, and provision of technical assistance to states.
2. Work in conjunction with the Federal Coordinating Council on Juvenile Justice to improve reporting on the prevalence of mental health and substance abuse disorders in the juvenile justice system.
3. Promote collaboration between juvenile justice and other child-serving systems, including education and mental health, to reduce racial and ethnic disparities in the juvenile justice system.
4. Support states and provide technical assistance to improve conditions of confinement and the collection of data regarding restraint and isolation.
5. Collect state and federal data regarding: (1) children who are held in adult jails and prisons, (2) children who are transferred into the adult criminal justice system, (3) the legal mechanism by which youth are transferred, and (4) the effects and collateral consequences of transfer.

**Long-Term:**

1. Update JJDP A regulations to reflect current priorities and protections.
2. Submit a timely, annual report to Congress and make all documents publicly available on the OJJDP's website.
3. Work with Congress, states, and localities to coordinate gang prevention and intervention programs, and ensure effective use of federal funds for evidence-based and promising programs to prevent and intervene in gang involvement.
4. Issue regulations governing mental health assessments and data collection for youth who come into contact with the juvenile justice system.
5. Assist states in coordinating with mental health systems to ensure that youth in the custody of the juvenile justice system receive timely mental health care when needed.
6. Provide research and data on effective practices regarding juveniles with disabilities, and provide technical assistance to states to address the needs and rights of juveniles with disabilities.
7. Promote research and data on the growing prevalence of girls in and at-risk of involvement with the juvenile justice system, and support state programming to address gender-specific needs.

***THE DEPARTMENT OF EDUCATION SHOULD:***

1. Establish and strengthen programs to encourage and support school behavior management and mental health programs, and to reduce criminalization of school misconduct.

**CHAPTER 14: FIXING *MEDELLIN*: COMPLIANCE WITH INTERNATIONAL LAW AND PROTECTING CONSULAR ACCESS**

**Short-Term:**

1. As soon as the Secretary of State is appointed, the President should rejoin the Optional Protocol to the VCCR, reversing the 2005 withdrawal from the Protocol by the Bush administration that occurred as a result of the *Avena* decision.
2. The President must work with Congress to pass legislation strengthening the United States' treaty commitments.

**Long-Term:**

1. Once the VCCR has been rejoined, the Executive should instruct and train federal law enforcement agents to emphasize the importance of making foreign nationals aware of their rights under VCCR, and specifically their right to consular access.

**CHAPTER 15: VICTIM ISSUES AND RESTORATIVE JUSTICE**

**Short-Term:**

1. Create Task Force on Restorative Justice to oversee adoption of the restorative justice paradigm as the guiding philosophy underlying policies, practices and funding in the Department of Justice, most particularly in the Office of Justice Programs and the Bureau of Prisons.

**Long-Term:**

1. Require OVC to revise its Guidelines for Victim Assistance by removing the sentence: “*VOCA funds cannot support services to incarcerated individuals, even when the service pertains to the victimization of that individual.*” (Section IV.E.3.b.)
2. Require OVC to clarify that VOCA funds may be used for victim services to incarcerated individuals who have been or become victims of violent crime.
3. Require OVC to revise its Guidelines for Victim Assistance by removing the sentence: “*VOCA assistance funds cannot be used for victim-offender meetings which serve to replace criminal justice proceedings.*” (Section IV.C.1.h.)
4. Set up advisory committee to OVC for responding to Congressional proposals for VOCA caps and to advise OVC and Congress on appropriate cap levels.

## **CONGRESSIONAL ACTION LIST**

### **CHAPTER 1: OVERCRIMINALIZATION OF CONDUCT, FEDERALIZATION OF CRIMINAL LAW, AND THE EXERCISE OF ENFORCEMENT DISCRETION**

#### **Short-Term:**

1. Enactment of procedural rules in House and Senate Chambers that require all new proposed criminal legislation to be referred to Judiciary Committees.
2. Passage of the Attorney-Client Privilege Protection Act of 2008, which already passed the House on rules suspension and enjoys wide bi-partisan support in the Senate.

#### **Long-Term:**

1. Passage of legislation modeled on H.R. 1998, 107<sup>th</sup> Congress, “Federalization of Crimes Uniform Standards Act of 2001.”
2. Passage of legislation modeled on Model Penal Code’s definitions of “knowingly” and “willfully.”
3. Limiting corporate criminal liability to situations in which management knew of or condoned employee’s behavior, or where the misconduct was widespread or high-level. Legislative solution in House and Senate Judiciary Committees.

### **CHAPTER 2: FEDERAL LAW ENFORCEMENT REFORM—IMPROVE INVESTIGATIVE TECHNIQUES, INCLUDING EYEWITNESS IDENTIFICATION, INCENTIVES TO TESTIFY, AND INTERROGATION**

#### **Long-Term:**

1. Pass legislation to enable federal judicial orders of **comparisons of crime scene DNA and fingerprint evidence to relevant databases.**
2. 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 (see details of improved procedures in description in above section 2-I). Such legislation would allow the court to render inadmissible any identification yielded from a procedure that failed to comply with those recommended procedures outlined in the legislation.

3. Pass legislation requiring 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 and a law enforcement officer's questioning is likely to elicit incriminating responses. Such legislation would allow the court to render inadmissible any untapped confession.
4. Pass legislation that would regulate the use of incentivized informants by implementing the procedures outlined in section 2-III above. Such legislation would require the court to render inadmissible any incentivized testimony that did not comply with the mandate outlined in the legislation.

### **CHAPTER 3: FORENSIC SCIENCE REFORM—FEDERAL OVERSIGHT AND STANDARDS**

#### **Short-Term:**

1. Immediate drafting and filing of legislation after the release of the NAS report.
  - Create a federal entity or capacity to (1) conduct research on the validity and reliability of extant forensic techniques, (2) assess the reliability and validity of forensic techniques and establish standards for their use in the courts, and (3) create a system to enforce standards and secure the integrity of the final forensic product through quality assurance, accreditation, training, and the tracking of its use in the courts.
    - **Amend 42 U.S.C. – New Chapter**  
This section was proposed because a number of pieces of criminal justice legislation have been codified under Title 42.

### **CHAPTER 4: FEDERAL GRAND JURY REFORM**

#### **Long-Term:**

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:

1. 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.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
2. Require that prosecutors present evidence in their possession that tends to exonerate the target or subject (other than prior inconsistent statements or *Giglio* material).
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**

3. 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.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
  
4. Provide a target or subject of a grand jury investigation the right to testify before the grand jury.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
  
5. Provide witnesses the right to receive a transcript of their federal grand jury testimony.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500**
  
6. Prohibit the practice of naming persons in an indictment as unindicted co-conspirators to a criminal conspiracy.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
  
7. Require that prosecutors give *Miranda* warnings to all non-immunized subjects or targets called before a federal grand jury.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
  
8. Require that all subpoenas for witnesses called before a federal grand jury be issued at least 72 hours before the date of appearance, not to include weekends and holidays, unless good cause is shown for an exemption.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
  
9. The federal grand jurors shall be given meaningful jury instructions, on the record, regarding their duties and powers as grand jurors, and the charges they are to consider. All instructions, recommendations and commentary to grand jurors by the prosecution shall be recorded and shall be made available to the accused after an indictment, during pre-trial discovery, and the court shall have discretion to dismiss an indictment, with or without prejudice, in the event of prosecutorial impropriety reflected in the transcript.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
  
10. 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.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**

## **CHAPTER 5: FEDERAL SENTENCING REFORM**

### **Long-Term:**

1. Eliminate the crack cocaine sentencing disparity.

2. Improve and expand the federal “safety valve.”
3. Create a sunset provision on existing and new mandatory minimums.
4. Clarify that the 924(c) recidivism provisions apply only to true repeat offenders.
5. Expand alternatives to incarceration in federal sentencing guidelines.
6. Enact a deferred adjudication statute.
7. Support alternatives to incarceration through expansion of federal drug and other problem solving courts.
8. Clarify good time credit.
9. Expand the amount of good time conduct credit prisoners may receive and ways they can receive it.
10. Expand elderly prisoners release program.
11. Support racial impact statements as a means of reducing unwarranted sentencing disparities.
12. Support analysis of racial and ethnic disparity in the federal justice system
13. Add federal public defender as an *ex officio* member of the United States Sentencing Commission.

## **CHAPTER 6: ASSET FORFEITURE REFORM**

### **Long-Term:**

#### **Civil Asset Forfeiture Reform**

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.

1. Amend the federal equitable sharing law, 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.
  - **Amend 21 USC § 881(e)**

2. Clarify CAFRA's fee shifting provision, which has been undermined by Second Circuit case law, to fully enforce the government's obligation to pay attorney fees to prevailing claimants.
  - **Amend 28 U.S.C. § 2465(b)(1)**
3. 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.
  - **Amend 28 U.S.C. § 2680(c)**
4. 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.
  - **Amend Rule 41(g) of the Federal Rules of Civil Procedure**

Congress could prohibit or restrict the use of Justice Department funds to forfeit property under the equitable sharing law.

### **Criminal Asset Forfeiture Reform**

Congress should pass comprehensive legislation to ensure fair procedures for the accused and third parties in criminal forfeiture proceedings, and curtail the government's use of criminal forfeiture as an end run around civil asset forfeiture reforms.

1. Safeguard the accused's right to a fair procedure for determining the amount of any criminal forfeiture.
  - a. Require fair notice through bill of particulars.
  - b. Provide right to challenge *ex parte* restraining orders.
  - c. Restrict the use of hearsay.
    - **Amend Rules 7 and 32.2 of the Federal Rules of Criminal Procedure**
2. Limit the use of money judgments in lieu of forfeiture of specific property
  - a. Provide the right to a jury trial.
  - b. Limit the use of joint and several liability.
  - c. Clarify that the relation back principle does not apply to substitute (clean) assets.
  - d. Limit the amount of money judgments to the defendant's known current assets, unless the government proves that the defendant has concealed assets.
    - **Amend Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 853.**
3. Safeguard the rights of third parties with interests in the property the government seeks to forfeit
  - a. Provide the right to a jury trial.
  - b. Allow third party with standing to contest the forfeiture on the merits.

- c. Require a finding that the defendant has some forfeitable interest in the property before a preliminary order of forfeiture is entered.
  - d. The following should be treated like secured interests and given priority over the government's forfeiture claims:
    - a. Court-ordered child support obligations; and
    - b. Claims for compensation by the defendant's employees.
- **Amend Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 853**

## CHAPTER 7: INNOCENCE ISSUES

### Short-Term:

1. Support continued authorization and appropriation of Bloodsworth funding, as well as three other programs governed by Section 413 innocence protection requirements, through FY2014.
  - **Reauthorize 42 U.S.C.A. § 14136e (Kirk Bloodsworth DNA Assistance Grant Program).**
  - **Reauthorize three remaining grant programs governed by Sec. 413 innocence protection requirements:**
    - **DNA Training and Education for Law Enforcement, Correctional Personnel and Court Officers (42 U.S.C.A. § 14136);**
    - **DNA Identification of Missing Persons (42 U.S.C.A. § 14136d); and**
    - **DNA Research & Development (42 U.S.C.A. § 14136b).**
2. Ensure maintenance of present statutory forensic oversight requirements for Paul Coverdell grant program. (H.R. 5107, Section 311(b))(2004).
3. Create a national working group to identify best practices relating to proper evidence preservation, with the goal of providing guidance to the states.
  - **Amend 42 U.S.C.A. § 14136e (Kirk Bloodsworth DNA Assistance Grant Program).**

### Long-Term:

1. Innocence Commission: Introduce and pass legislation that would establish an independent, federal innocence commission. Appropriate appointments are critical.
2. Compensation: Pass S. 2421, H.R. 7021 (110<sup>th</sup> Congress), The Wrongful Convictions Tax Relief Act.

Twenty-five states across the country have passed laws that compensate men and women who have been proven innocent after spending years behind bars for crimes they did not commit. S. 2421 (introduced and referred to the Committee on Finance in

December) and H.R. 7021 (referred to House Committee on Ways and Means in September, 2008) would clarify federal tax law so that compensation awards received through those means are not subject to federal taxes. The legislation would also exempt exonerated individuals who do not have any prior felony convictions from paying income taxes on up to \$50,000 earned per year following release (or \$75,000 if the wrongfully convicted person files a joint tax return.) This aspect of the legislation would benefit all wrongfully incarcerated individuals, regardless of whether they reside in a state that provides compensation through a statutory scheme. Finally, the legislation would also provide the wrongfully convicted with an income tax credit on payroll taxes paid over the same earnings. The benefits of the proposed legislation would remain in effect for the number of years an individual spent wrongfully incarcerated, or fifteen years, whichever is less.

- **Amend Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986.**

## **CHAPTER 8: PRISON REFORM**

### **Short-Term:**

#### **Improve Transparency**

1. Reauthorize Deaths in Custody Reporting Act (DICRA)
  - **Reauthorize 42 USC 13701 note**
2. Hold an oversight hearing on conditions at Bureau of Prison facilities that could include some of the following areas of concern:
  - a. Federal death row conditions;
  - b. Medical care at federal facilities, including staffing ratios;
  - c. Discretion given to wardens to limit First Amendment rights through special administrative measures (SAMS); and
  - d. Treatment of prisoners with mental illness and addition problems.
3. Fully fund PREA and appropriate needed resources for body to oversee implementation of/compliance with standards.
4. Fund National Institute of Justice research to look into state/local oversight models to determine which are most successful.

#### **Reduce Recidivism and Strengthen Families**

1. Draft and introduce legislation to track the success of former BOP prisoners reentering society (in terms of employment, housing, education, recidivism, etc.). This is a recommendation of the Commission on Safety and Abuse in America's Prisons.

## **Examine Use of the Prison System**

1. Hold a series of hearings regarding the appropriate use of incarceration and the use of alternative forms of punishment.

### **Long-Term:**

**Fix PLRA**—stand-alone legislation (or these provisions tacked on to another vehicle) that includes the following:

1. Repeal PLRA provision that prohibits prisoners from bringing lawsuits for mental or emotional injury without demonstrating a “physical injury.”
  - **Repeal 42 U.S.C. § 1997e(e)**
2. Amend the requirement for exhaustion of administrative remedies to require prisoners to present their claims to responsible prison officials before filing suit, and, if they fail to do so, require the court 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.
  - **Amend 42 U.S.C. § 1997e(a)**
3. Repeal the provisions extending the PLRA to juveniles confined in juvenile facilities.
  - **Amend 18 U.S.C. § 3626(g), 28 U.S.C. §§ 1915(h), 1915A(c), 42 U.S.C. § 1997e(h)**
4. Restore judicial discretion to grant the same range of remedies in prisoners’ civil rights actions that they possess in other civil rights cases.
  - **Repeal 18 U.S.C. § 3626**
5. Allow prisoners who prevail on civil rights claims to recover reasonable attorney’s fees like others whose civil rights have been violated.
  - **Repeal 42 U.S.C. § 1997 e(d)**
6. 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, now \$350 in district courts and \$450 in appellate courts.
  - **Amend 28 U.S.C. §§ 1915(a), (b)**
7. Amend “three-strikes provision” (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 3 lawsuits or appeals dismissed as malicious within the past 5 years.
  - **Amend 28 U.S.C. § 1915(g)**

## **Improve Transparency**

1. Pass strengthened Juvenile Justice and Delinquency Prevention Act.
  - **Amend 42 U.S.C. § 5601 et seq.**
2. Hold a hearing on prison oversight models that include:
  - a. an international model;
  - b. the California model of the Office of Inspector General;
  - c. Vera Institute’s project to implement oversight mechanisms in local/state jurisdictions; and
  - d. DOJ Civil Rights Division Special Litigation Section.
3. Draft/introduce legislation to implement independent oversight mechanism for BOP (based on info gathered in the hearings).
4. Draft/introduce legislation to track the success of former BOP prisoners reentering society (in terms of employment, housing, education, recidivism, etc. This is a recommendation of the Commission on Safety and Abuse in America’s Prisons.

## **Reduce Recidivism and Strengthen Families**

1. Pass the Federal Prison Work Incentive Act of 2008.
  - **Amend 18 U.S.C. §§ 4161-4165**
2. Draft and introduce a “reentry behind bars” bill that would provide grants to states to provide programs to better prepare prisoners for reentry such as the following:
  - a. drug treatment programs in prison for all drug offenders as well as funding for the Residential Substance Abuse Treatment (RSAT) program to provide access to a complete continuum of addiction treatment, aftercare, and recovery support services;
  - b. government-issued ID cards upon release;
  - c. enrollment for Medicaid prior to release (so that it is available upon release);
  - d. alternatives to incarceration for non-violent offenders;
  - e. merit-based reductions in sentences for non-violent offenders;
  - f. SSA prerelease agreement;
  - g. a requirement that individuals under 18 shall not be housed in adult facilities;
  - h. restore Pell Grant eligibility to prisoners;
  - i. access to clean needles and condoms in order to reduce the incidence of HIV/AIDS, Hepatitis, and other illnesses;
  - j. access to educational programs/job training for every prisoner;
  - k. access to religious services;
  - l. transportation to prisons for prisoners’ families;
  - m. opportunities for parents in prison to visit with their children; and
  - n. regulate costs of collect calls from prisons.

## CHAPTER 10: RE-ENTRY—ENSURE SUCCESSFUL REINTEGRATION AFTER INCARCERATION

### Long Term:

1. Appropriate full funding for Second Chance Act.
2. Extend federal voting rights to people released from prison.
  - Pass the Democracy Restoration Act, H.R. 7136 and S. 3640 from the 110<sup>th</sup> Congress.
3. Restore welfare and food stamp benefits for individuals with drug felony convictions.
  - Eliminate the lifetime ban on TANF and food stamp eligibility for people with drug felony convictions.
    - Repeal Section 115(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (21 U.S.C. 862a(a)).
4. Repeal the financial aid ban for Students with drug convictions.
  - Pass legislation to fully repeal the aid elimination penalty from the Higher Education Act.
    - Repeal 20 U.S.C. 1091 (r)
5. Remove unfair barriers to housing.
  - Pass the No One Strike Eviction Act, H.R. 6785 from 110<sup>th</sup> Congress.
    - Amend 42 U.S.C. 1437d(k)
  - Pass the Public Safety Ex-Offender Self Sufficiency Act, H.R. 6206 from 109<sup>th</sup> Congress.
    - Amend Subpart D of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1986
6. Expand employment opportunities for people with criminal records.
  - Amend the Higher Education Act to restore Pell Grant eligibility to incarcerated people.
    - Amend the Higher Education Act (most recently reauthorized in August 2008, now PL 110-315) to allow incarcerated persons to apply for Pell Grants. In 1994, Congress eliminated Pell Grant eligibility for people who are incarcerated. Most post-secondary higher education programs in prisons closed as a result. Education is one of the best deterrents to re-offending. In a study conducted for the U.S. Department of Education, researchers found that participation in state correctional education programs lowers the likelihood of re-incarceration by 29 percent. In addition, this study concluded that for every dollar spent on education,

more than two dollars in reduced prison costs would be returned to taxpayers.

- Codify Current EEOC Guidance on Hiring People with Criminal Records
  - Create a federal standard based on the Equal Employment Opportunity Commission (EEOC) policy guidance on the use of criminal background checks for employment purposes when screening for arrest and conviction. This guidance currently asks employers to consider the relationship between the offense and the job position, how long ago the offense occurred, the severity of the offense, and any evidence of rehabilitation.
  - Criminal record policies that bar applicants with criminal record histories from employment should be amended to not only include a requirement for individualized determinations but may include a graduated period of consideration of the criminal record based upon the severity of the individual's criminal history. Consideration of a criminal record should not be permitted beyond seven years.
- Strengthen the Work Opportunity Tax Credit.
- Amend the Work Opportunity Tax Credit (WOTC), authorized by the Small Business Job Protection Act of 1996 (Public Law 104-188). Currently, under the WOTC program, employers who hire low-income individuals with criminal records can reduce their federal income tax liability by up to \$2,400 per qualified new worker. Congress should increase the WOTC tax credit for individuals with criminal records to match the tax credit available for individuals who qualify as Long-term Family Assistance recipients. There is a \$6600 difference between the two credits.

Reauthorize the Workforce Investment Act.

- Any reauthorization of the Workforce Investment Act (Public Law 105- 220) should include provisions for hard to serve populations, including those individuals with criminal histories, through the WIA one-stop system.

Pass the “Fairness & Accuracy in Employment Background Checks Act.”

- Approve the “Fairness & Accuracy in Employment Background Checks Act” bi-partisan legislation introduced in the House at the end of the 110<sup>th</sup> Congress (H.R. 7033); this legislation seeks to provide critical safeguards when the FBI conducts criminal background checks for employment purposes.

7. Expand access to drug and alcohol treatment.

Appropriate increased funding for the Substance Abuse Prevention and Treatment  
Funding for the Substance Abuse Prevention and Treatment Block Grant.

## **CHAPTER 11: PUBLIC DEFENSE REFORMS—MAKE OUR COMMUNITIES SAFER BY SUPPORTING QUALITY PUBLIC DEFENSE SYSTEMS**

### **Short-Term:**

1. Fund the John R. Justice Prosecutors and Defenders Incentive Act of 2008, which authorizes student loan repayment assistance for prosecutors and public defenders.
2. Adopt the recommendation of the American Bar Association that it 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.
3. Coordinate and fund a study to determine whether failure by states to provide constitutionally adequate public defense systems contributes to racial disparities within criminal justice systems.

### **Long-Term:**

1. Provide sufficient financial support as applicable to the states, local government and territories for the provision of public defense services in state criminal and juvenile delinquency proceedings.

## **CHAPTER 12: DEATH PENALTY/HABEAS CORPUS REFORM**

### **Short-Term:**

1. Fund defender organizations providing post-conviction representation in every applicable jurisdiction in order to ensure adequate representation for all death-row inmates.
2. Hold hearings and take other necessary steps to begin the legislative process of (a) reforming the habeas provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the USA PATRIOT Improvement and Reauthorization Act of 2005 (PIRA), (b) exempting people with mental illness and developmental disabilities from the death penalty, and (c) establishing an inference of discrimination based on race, ethnicity, or national origin through statistical evidence.
3. Appoint an independent committee with substantive input from members of the criminal defense bar to recommend language amending 28 U.S.C. § 2254(d).

4. Fund an independent study of the federal death penalty system that examines racial disparities, prejudicial errors, adequacy of counsel, and other inequities in capital prosecutions to make recommendations for legislative reform.

**Long-Term:**

1. Eliminate or amend the restrictions on habeas corpus relief for only 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” pursuant to 28 U.S.C. § 2254(d).
2. Repeal or amend habeas provisions concerning statute of limitations, state exhaustion, and successive petitions.
3. Ensure that states truly provide effective post-conviction counsel consistent with the U.S. Constitution.
4. Permit claims of innocence or racial bias to overcome any statute of limitations or other procedural bar.
5. Repeal or amend the Chapter 154 Special Habeas Corpus “Opt-In” Procedures that expedite federal post-conviction proceedings.
6. Make all amendments to AEDPA and PIRA retroactively applicable.
7. Transfer the defense function from the federal courts to a new Office of the Defender General.
8. 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.
9. Regarding counsel for prisoners seeking federal habeas review, require federal judges to appoint the legal team nominated by Capital Habeas Unit attorneys or the resource counsel from the Administrative Office of the Courts unless compelling reasons deem otherwise.
10. Establish a right to counsel for capital defendants at all stages of the legal process through post-conviction proceedings and ensure appropriate funding, including funds for attorney’s fees, investigative expenses, and expert witnesses.
11. Permanently fund an Office of the Defender General and defender organizations providing post-conviction representation in every applicable jurisdiction in order to ensure adequate representation for all death-row inmates.

12. Provide funding to a National Capital Bar of qualified and experienced attorneys to represent capital defendants.
13. Establish an inference of discrimination based on race, ethnicity, or national origin through statistical evidence.
14. Require public officials to collect data on all factors relevant to the imposition of the death penalty and to make that data publicly available.
15. Eliminate the increased number of peremptory challenges given to federal prosecutors in capital cases, which has created a perverse incentive to seek death sentences when they are not warranted.
16. Exempt people with mental illness and/or developmental disabilities from capital sentences.
17. Provide continuing funding for an independent study of the federal death penalty system that examines racial disparities, prejudicial errors, adequacy of counsel, and other inequities in capital prosecutions in order to make recommendations for legislative reform.

## **CHAPTER 13: JUVENILE JUSTICE REFORMS**

1. Strengthen and reauthorize the JJDP, and authorize and appropriate sufficient federal funding to enable state compliance with the Act.
2. Include language in the JJDP requiring states to prohibit use of dangerous practices, unreasonable restraint and unreasonable isolation of youth, to improve screening and assessment for youth with mental health conditions, and to ensure prompt access to qualified counsel for all youth in the juvenile justice system.
3. Support and pass comprehensive gang prevention legislation, e.g., the Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education Act (Youth PROMISE Act),<sup>3</sup> and reject legislation that prioritizes and increases the arrest, prosecution and incarceration of youth, e.g., the Gang Abatement and Suppression Act,<sup>4</sup> when introduced in the 111<sup>th</sup> Congress.<sup>5</sup>
4. Approach mental health and substance abuse through the lens of a public health model, including the availability of broad-based mental health screening, and pass legislation to provide greater availability of mental health and addiction services to students and youth at-risk for contact with the juvenile and criminal justice systems.<sup>6</sup>
5. Exempt juveniles from the Prison Litigation Reform Act.

6. Promote the use of developmentally appropriate sanctions, remove children from adult jails and prisons, and eliminate the use of life without parole sentences for juvenile offenders.
7. Require local educational agency grantees to minimize the referral of students from schools to the juvenile and criminal justice systems, eliminate the use of zero tolerance policies, and eliminate the use of corporal punishment.<sup>7</sup>

## **CHAPTER 14: FIXING *MEDELLIN*: COMPLIANCE WITH INTERNATIONAL LAW AND PROTECTING CONSULAR ACCESS**

### **Short-Term:**

1. Beginning immediately, the 111<sup>th</sup> Congress should adopt proposed H.R. 6481: *Avena* Case Implementation Act of 2008 or similar legislation. Because the Supreme Court concluded that the VCCR was not self-executing, Congress should enact stand-alone legislation to fulfill the United States' core obligations under the VCCR, including the International Court of Justice's decision in *Avena*. The text of H.R. 6481 is presented in relevant part below:

#### JUDICIAL REMEDY:

- (a) Civil Action- Any person whose rights are infringed by a violation by any non-foreign governmental authority of article 36 of the Vienna Convention on Consular Relations may in a civil action obtain appropriate relief.
- (b) Nature of Relief- Appropriate relief for the purposes of this section--
  - (1) any declaratory or equitable relief necessary to secure the rights; and
  - (2) in any case where the plaintiff is convicted of a criminal offense where the violation occurs during and in relation to the investigation or prosecution of that offense, any relief required to remedy the harm done by the violation, including the vitiation of the conviction or sentence where appropriate.
- (c) Application- This Act applies with respect to violations occurring before, on, or after the date of the enactment of this Act.

## **CHAPTER 15: VICTIM ISSUES AND RESTORATIVE JUSTICE**

### **Short-Term:**

1. Enact legislation to establish a National Commission on Restorative Justice charged with researching restorative justice research and programs in the US and abroad in

order to develop a national strategy and action plan for developing and funding a research agenda, for supporting systemic change on the local/state level and for expanding the use of restorative approaches on the federal level.

2. Increase the VOCA Cap beyond the amount requested in the item herein about returning the cap to 2006 levels.

**Long-Term:**

1. Authorize funding a National Commission on Restorative Justice, for pilot projects on systemic change and targeted research efforts to test effectiveness of restorative justice for victims of different types of crimes, and for different cultures (and appropriate funds for National Commission over 5 years – approx \$3.5M, and for DOJ funds for pilot projects – approx \$1.5M).
2. Increase the VOCA Cap **beyond the 2006** levels to make available new funds for services to incarcerated persons who are or become victims of violent crime.
3. Add any necessary language to authorizations to permit VOCA funds 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.
4. Reauthorize and fully fund the Prison Rape Elimination Act (PREA) to implement PREA standards and provide funds for victim services.
5. Hold hearings regarding the appropriate use of restitution and alternative means of addressing compensation of crime victims within the federal system.
6. Create a Victims Restitution Fund and require that all proceeds from the sale of property forfeited under federal law be deposited in it for the disbursement to the victim(s) of the individual defendant or be used to meet other victims' needs.
7. Clarify 18 U.S.C. 3572(b) to ensure that restitution takes priority over forfeitures, so that the government cannot claim 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.
8. Protect the position that all funds collected from federal defendants under orders for restitution should be used **exclusively** to meet the needs of current or future victims of crime, either individually, or if not available or appropriate, collectively.
9. Remove requirement of “mandatory restitution,” allow judges to **acknowledge** the actual damages, but to have the discretion to order a reasonable amount and payment schedule based on a determination of the defendant's income and other financial

resources, defendant's reasonable living expenses and responsibility for support of legal dependents. Payment of restitution should have "a place in line" ahead of requirements to pay fines or court-ordered services and court- or system-imposed costs.

10. Change the current federal law stating that mandatory restitution orders may not be "settled" to permit victims and defendants to, voluntarily and without coercion, reach a settlement regarding the amount or manner of payment. The settlement process could be overseen by, or require the approval of, a federal magistrate.
11. Create or change policy to state that court orders for restitution that are not completed within the probation or parole period, if reasonably paid by the defendant according to financial capability, should not be used to extend probation or parole, although could continue to be a condition if probation or parole is extended for other reasons.

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<sup>1</sup> For information and an example of interagency collaboration in the provision of mental health services in one state (California), see [http://www.calendow.org/chc/centerscene/pdfs/CHC\\_CenterSceneFA07\\_final.pdf](http://www.calendow.org/chc/centerscene/pdfs/CHC_CenterSceneFA07_final.pdf) and NCCD, *A Survey of Mental Health Care Delivery to Youth in the California Juvenile Justice System: Summary of Findings* [http://www.nccd-crc.org/nccd/pubs/calif\\_jj\\_survey\\_2003.pdf](http://www.nccd-crc.org/nccd/pubs/calif_jj_survey_2003.pdf). For further analysis, see Thomas Grisso's *Adolescent Offenders with Mental Disorders, The Future of Children*, Vol. 18, No. 2, Fall 2008, [http://www.futureofchildren.org/usr\\_doc/Justice\\_08\\_02.pdf](http://www.futureofchildren.org/usr_doc/Justice_08_02.pdf).

<sup>2</sup> For more information, please see [http://www.act4jj.org/media/factsheets/factsheet\\_56.pdf](http://www.act4jj.org/media/factsheets/factsheet_56.pdf).

<sup>3</sup> For more information about the Youth PROMISE Act, introduced in the 110<sup>th</sup> Congress as H.R. 3846, see [http://www.house.gov/scott/hotissues\\_youthpromiseact.shtml](http://www.house.gov/scott/hotissues_youthpromiseact.shtml).

<sup>4</sup> Introduced in the 110<sup>th</sup> Congress as S. 456 and H.R. 3547.

<sup>5</sup> For more information contrasting these federal approaches to gang crime and violence, please see: [http://www.house.gov/scott/pdf/HRW\\_supportypa\\_opphr3547.pdf](http://www.house.gov/scott/pdf/HRW_supportypa_opphr3547.pdf) and <http://chhi.podconsulting.com/assets/documents/publications/NO%20MORE%20CHILDREN%20LEFT%20BEHIND.pdf>.

<sup>6</sup> One study cited in the Congressional findings of the All Healthy Children Act, H.R. 1688, revealed that when juvenile offenders arrested for minor offenses had access to intensive and coordinated mental health services, more than a third fewer were re-arrested the following year, compared to those who only had access to basic mental health services. Congressional findings for H.R. 1688, the All Healthy Children Act of 2007, finding # 15. <http://www.thomas.gov/cgi-bin/query/F?c110:1:./temp/~c1108uUEGX:e1331>.

<sup>7</sup> For more information about school referrals and zero tolerance policies, see the Children's Defense Fund Cradle to Prison Pipeline Campaign <http://www.childrensdefense.org/site/PageServer?pagename=c2pp>. For more information about the use of corporal punishment in schools, see Human Rights Watch, *A Violent Education: Corporal Punishment of Children in US Public Schools* <http://www.hrw.org/reports/2008/us0808/us0808web.pdf>.

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## CHAPTER ONE

### **OVERCRIMINALIZATION OF CONDUCT, FEDERALIZATION OF CRIMINAL LAW, AND THE EXERCISE OF ENFORCEMENT DISCRETION**

The tendency to create new federal crimes in the face of social crises is a study in misdirected intentions and misplaced effort. Criminal law loses its particular deterrent effect when it is used to prohibit and punish conduct that merely involves negligence or bad judgment. As of 2003, there were over 4,000 offenses that carried criminal penalties in the United States code. Many of these do not punish conduct that is typically considered to be “criminal.” This is because an increasing number of statutes require that the culpable party have only general intent – in other words, that he or she acted “knowing” of the facts of the underlying conduct, but not necessarily with knowledge that he or she was breaking the law. This is especially important as Congress criminalizes more and more conduct that involves regulatory violations and highly technical misconduct. Vague criminal laws, coupled with an expanding list of federal crimes, can lead and have led to abuses by the executive branch in the exercise of its prosecutorial discretion.

**Summary of the Problem:** The overcriminalization of conduct that is not inherently wrong and the federalization of criminal law enforcement are two faces of the same problem: The use of criminal sanctions is an attractive but ineffective solution for whatever crisis faces the American public, be it a surge in gang crime or a breakdown on Wall Street.

As the American Bar Association’s 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.” As of 2003, there were over 4,000 offenses that carried criminal penalties in the United States Code. In addition, it is estimated that there are at least 10,000, and possibly as many as 300,000, federal regulations that can be enforced criminally. Despite Supreme Court cases in the last 15 years that have cautioned against the federal assumption of plenary police power, Congress’ penchant for introducing new criminal legislation appears to be undiminished.

Given the sheer number of these criminal prohibitions, it follows that a low percentage of them require what jurists have traditionally considered to be “criminal intent.” Rather, federal statutes provide for more than 100 types of *mens rea*. As a prominent casebook notes, “[e]ven those terms most frequently used in federal legislation—‘knowing’ and ‘willful’—do not have one 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.” 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.

In the 1970s and into the early 1980s, Congress produced several iterations of a comprehensive and cohesive federal criminal code. After literally hundreds of markups and passage through the Senate, the effort finally died. This failure was attributable largely to the product's lack of support from major stakeholders (such as the ACLU, which opposed the bill's introduction of sentences that were appealable by the government) and its evolution into a stalking horse of new criminal provisions. Throughout the 1990s, then Chief Justice William Rehnquist 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. Endorsed by the federal judicial conference, these principles state that the exercise of federal criminal jurisdiction is appropriate in the following cases:

1. offenses against the federal government or its inherent interests;
2. criminal activity with substantial multi-state or international aspects;
3. criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise;
4. serious high level or widespread state or local government corruption; and
5. criminal cases raising highly sensitive local issues.

The ABA followed suit in 1998 with its own nearly identical recommendations for curbing the excessive costs of overcriminalization and overfederalization, and preventing the further diminishment of criminal enforcement.

Currently, there is a groundswell of unprecedented, bi-partisan support for stanching this trend to pass increasingly broad, vague, and unnecessary criminal laws. Much of the support has its roots in the business and bar community's shared concern about the vast amount of discretion that vague criminal laws give to the executive branch. For the past four years, a coalition of groups that includes the ABA, the US Chamber of Commerce, the ACLU, NACDL, and the Association of Corporate Counsel, has pressured the Department of Justice to curb its own excesses in investigating corporate crime. Because businesses in the federal system are automatically held liable for the criminal acts of their employees – regardless of how high up the wrongdoing went and who, if anyone, knew of it – the executive has tremendous leverage when it threatens to indict an entire business. When coupled with the erosion of *mens rea*, this makes crimes such as “honest services” mail fraud, environmental regulatory offenses, and any law that requires only a “knowing” violation, easy to prove. As a result, the executive branch now exercises unprecedented leverage over individual employees and their employers alike. Until recently, DOJ exercised this leverage through officially endorsing practices that included threatening a business with indictment unless it turned over “culpable” employees (with no opportunity for the employees to assert their constitutional rights) and refused to pay employees' legal costs. Because of successful lobbying by this large coalition (note: unclear who makes up this coalition), DOJ retracted some of these policies.

However, it is an increasingly commonly held view that fewer federal crimes, tighter *mens rea* requirements, and more Congressional oversight over executive branch discretion is necessary to obviate the abuses in law enforcement that are otherwise prone to occur.

## **I. RESIST OVERCRIMINALIZATION, FEDERALIZATION, AND THE EROSION OF *MENS REA***

### **A. Rules Changes and Reporting Requirements on Over-Federalization and Overcriminalization**

#### **Proposed Solutions:**

***Legislative Changes:*** New legislation and/or rules changes in the House and Senate chambers would enable both judiciary committees to assert jurisdiction over any new legislation that adds or expands criminal offenses or penalties. Legislation would also include reporting requirements similar to the Manzullo bill (H.R. 1998, 107<sup>th</sup> Congress, “Federalization of Crimes Uniform Standards Act of 2001”), or at least, a federalism impact study by the Congressional Research Service on every new proposed federal crime. Federal agencies would also be required to report to Congress all criminal referrals, including a list of each federal statute that is allegedly violated and a justification for such referrals in light of civil or state remedies.

#### **Jurisdiction:**

***Legislative Branch:*** Could be accomplished partly through a House and Senate rules change that governs the flow of new bills; the rest would need to be done via statute through House and Senate Judiciary Committees.

#### **Background:**

***Legislative Branch:*** In the 107<sup>th</sup> Congress, Rep. Don Manzullo (D.-IL) introduced HR. 1998, the “Federalization of Crimes Uniform Standards Act of 2001.” The bill would have created a commission that, within four years, would have studied all Federal criminal offenses to determine whether such offenses were “within core Federal responsibilities,” whether the efforts of states were inadequate to address the purposes of the offenses, and the burdens that the offenses posed to the Federal court system.

Hearings are expected in the 111<sup>th</sup> Congress.

#### **Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:*** A broad right-left coalition of groups has already signed off on these proposals in concept, including the Heritage Foundation, CATO, the Federalist Society, the Washington Legal Foundation, NACDL, the ACLU, the ABA, the Constitution Project, the Independence Institute, the Center for Community Alternatives, and StoptheDrugWar.org. We

have also obtained preliminary support from Reps. Bobby Scott (D-Va.) and Louis Gohmert (R.-Tx.).

**Potential Opposition:** Possible current and former prosecutors; pro-regulatory groups such as environmental and consumer rights enforcement groups. None has publicly emerged.

**Experts:**

- Former Attorneys General such as Ed Meese and Dick Thornburgh
- Stephanie A. Martz, Senior Director, White Collar Crime Policy, National Association of Criminal Defense Lawyers

**For Further Information:**

ABA Report on the Federalization of Criminal Law, available via subscription through the ABA website.

**B. Default *Mens Rea* Requirements and/or Rules of Construction for Existing *Mens Rea* Requirements**

**Proposed Solutions:**

**Legislative Changes:** The same coalition listed above is examining legislation modeled on the Model Penal Code, which would require any *mens rea* requirement to apply to each material and non-jurisdictional element of each crime. (For example, “willfulness” for each material element if no other *mens rea* requirement is specified.) Legislation could standardize interpretations of “knowingly” and “willfully” and require Congress to state a strict liability standard expressly.

**Jurisdiction:**

**Legislative Branch:** Via statute through House and Senate Judiciary Committees.

**Background:**

**Legislative Branch:** None known; possible precedent in the attempt to enact a federal criminal code in the 1970s.

Hearings are expected in the 111<sup>th</sup> Congress.

**Judicial Branch:** Various groups are engaged in *amici* efforts throughout the country when issues of *mens rea* interpretations arise. See, e.g., *United States v. Brown*, 5th Cir., No. 05-20319.

### **Potential Allies, Potential Opposition and Public Opinion:**

**Potential Allies:** A broad right-left coalition of groups has already signed off on these proposals in concept, including the Heritage Foundation, CATO, the Federalist Society, the Washington Legal Foundation, NACDL, the ACLU, the ABA, the Constitution Project, the Independence Institute, the Center for Community Alternatives, International CURE, Virginia CURE, and StoptheDrugWar.org. Likely support from academics.

**Potential Opposition:** No formal opposition yet. Expect strong opposition from law enforcement and tough-on-crime legislators, unless strong bi-partisan support can be obtained.

**Public Opinion:** No formal public opinion yet. This will probably be a difficult issue to “message” to the lay public.

### **Experts:**

- Stephanie A. Martz, Senior Director, White Collar Crime Policy, National Association of Criminal Defense Lawyers
- John A. Baker, Professor of Law, Louisiana State University
- Brian Walsh, Heritage Foundation

### **For Further Information:**

**[www.overcriminalized.com](http://www.overcriminalized.com)**

## **II. SPECIFIC EXAMPLES OF FEDERALIZATION AND PROSECUTORIAL ABUSE**

### **A. Grand Jury Reform**

*See Chapter 4 on Federal Grand Jury Reform*

### **B. Opposing Federal Gang Legislation**

### **Proposed Solutions:**

**Executive:** A reversal of the Bush Justice Department’s position that favors federal gang legislation.

**Legislative Changes:** Support Youth PROMISE Act, HR 3646. An alternative to the federal anti-gang legislation described below, the “Youth PROMISE Act,” HR. 3846, was endorsed in the House by Reps. Conyers and Scott as well as 38 other members, and this is

largely why the more punitive gang bill stalled in the House. The Youth PROMISE Act is supported by many of the organizations that opposed the gang bill, because it proactively supports local law enforcement rather than creating more federal crimes.

***Legislative Appropriations (Solutions w/ Funding Requests):*** At least \$2.9 billion/year for evidence-based prevention and intervention practices.

### **Jurisdiction:**

***Legislative Branch:*** Via statute through House and Senate Judiciary Committees.

### **Background:**

***Executive Branch:*** In the Bush Justice Department, federal gang legislation has been highly favored.

***Legislative Branch:*** The Gang Prevention and Effective Deterrence Act was introduced in both the 109<sup>th</sup> and 110<sup>th</sup> Congresses. Despite the existence of broad statutes such as RICO, and despite local law enforcement's willingness to handle the problem at the state and local level, members of Congress have pushed to criminalize "crimes of violence" at the federal level. The definition of "gang crimes" effectively incorporates any legitimate business or organization of five people or more who happen to be engaged in the same activity. The bill also operates to impute guilt to an entire group for the actions of only one member. S. 456 passed the Senate by unanimous consent in 2007.

An alternative to the federal anti-gang legislation described above, the "Youth PROMISE Act," HR. 3846, was endorsed in the House by Reps. Conyers and Scott as well as 38 other members, and this is largely why the more punitive gang bill stalled in the House. The Youth PROMISE Act is supported by many of the organizations that opposed the gang bill, because it proactively supports local law enforcement rather than piling on more federal crimes.

### **Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:*** Criminal justice reform allies have been joined by the Heritage Foundation in strongly opposing the gang bill. Heritage was instrumental in reducing Republican support for the bill with numerous memos and policy reports. They are partially in favor of the Youth Promise Act (it has a slightly higher price tag than they are comfortable with). Altogether, 140 organizations from across the national have weighed in favor of this bill. The Independence Institute, the Constitution Project, International CURE, Virginia CURE, and the Center for Community Alternatives are also potential allies.

***Potential Opposition:*** S. 456 is strongly supported by co-sponsors Sens. Dianne Feinstein and Orrin Hatch. Others signed on as co-sponsors, although it is unclear how strong their support is.

**Public Opinion:** The support for such measures as youth witnesses protection programs is likely to mute some of the law-enforcement opposition.

**Experts:**

- The Coalition for Juvenile Justice

**For Further Information:**

**<http://www.juvjustice.org/>**

**C. Opposing Overbroad Use of Identity Theft Laws in Immigration Cases**

**Proposed Solutions:**

**Executive:** The Department of Homeland Security should adopt the view that aggravated identity theft is not an appropriate basis for large-scale employer raids. As of this writing, the latest raid based on this law resulted in the arrest and detainment of 331 employees of a poultry plant in South Carolina.

**<http://www.aila.org/search/default.aspx?searchterm=aggravated+identity+theft>**

**Legislative Changes:** Legislative action involves opposing the expansion of the federal aggravated identity theft law, and /or repealing sections that can be applied to illegal immigrants who possess false, but not stolen, identification. *See* 18 U.S.C. 1028A.

**Jurisdiction:**

**Legislative Branch:** Via statute through House and Senate Judicial Committees.

**Background:**

**Legislative Branch:** The current crime of “Aggravated Identity Theft” is found at 18 U.S.C. 1028A. It carries a mandatory 2 year mandatory minimum sentence. “Aggravated Identity Theft” has been used to obtain warrants to raid numerous employers around the nation because of its stiff mandatory penalty, even though the alleged use of false citizenship documents frequently does not involve stealing another’s identity, but rather complete fabrication. Three such instances of raids have occurred in Iowa alone in 2008. In S. 2168, a Senate identity-theft bill, three new predicate offenses were added to the list of offenses comprising aggravated identity theft (mail theft, tax fraud, and securities counterfeiting), and the crime of “conspiracy” to commit any of the list of felonies was also included as a predicate offense. The House refused to the move the bill because of the mandatory minimum sentences.

The crime of aggravated identity theft should be tightened to require that a defendant is aware that the document s/he is employing is stolen, at the least, and at best should be removed

from the books with a directive to the Sentencing Commission to increase sentences that involve identity theft.

**Judicial Branch:** Defendants in an immigration raid who are represented by the Stanford Law School Supreme Court Litigation Clinic is asking the U.S. Supreme Court to hear this case. (*Flores-Figueroa v. United States*; *Nicasio Mendoza-Gonzalez v. United States*.) The question is whether “knowingly” requires knowledge that the documents belonged to a real person, on which there is a circuit split.

### **Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** The criminal justice reform community and the immigration law community are both strongly opposed to the existence and application of aggravated identity theft law. We are also likely to garner support from conservative allies such as Heritage, CATO, and business groups who represent employers, such as the National Association of Manufacturers. The Independence Institute, the Constitution Project, International CURE, Virginia CURE, and the Center for Community Alternatives are also potential allies.

**Potential Opposition:** Current enforcement officials and anti-immigration members of Congress, as well as other members of Congress who perhaps may be unaware of the impact of identity theft crimes.

**Public Opinion:** No data available; hard to predict how this issue will translate.

### **Experts:**

- Professor Jeffrey Fisher, Stanford Law School
- American Immigration Lawyers Association

### **For Further Information:**

See [www.aila.org](http://www.aila.org).

## **D. Modifying Vicarious Corporate Criminal Liability**

### **Proposed Solutions:**

**Legislative Changes:** There has been no legislation written thus far to deal with this problem. The Model Penal code provides three graduated standards of corporate criminal liability, depending in part on how Congress appeared to intend to assign blame to a corporate body. For example, a corporation could only be punished for robbery if the offense was authorized or recklessly tolerated.

### **Jurisdiction:**

***Executive Branch:*** Department of Justice, U.S. Attorneys' Office

***Legislative Branch:*** Via statute that would affect all laws other than those in which corporate criminal liability is specifically delineated.

**Background:**

***Executive Branch:*** Currently, the Executive Branch guards its own vast discretion in deciding when and whether to indict an entire organization through Chapter 9-28.00 of the United States Attorneys Manual. The manual sets forth a list of factors, including how high up and pervasive the wrongdoing appears to be, that govern whether an organization should be charged with a crime. This policy has been revised 5 times in 10 years (see attorney-client privilege issue, below), and it is the view of a large bar and business coalition that legislation is required to curb this discretion definitively and effectively.

***Legislative Branch:*** While there has been no federal legislation introduced, several lawmakers have publicly expressed concern over vicarious criminal liability the discretion that it vests with the government, including Rep. William Delahunt (D-MA).

***Judicial Branch:*** A multi-group, left-right effort has begun in the federal courts to challenge cases in which a corporation was wrongly charged with wrongdoing about which managers did not know anything, and could not have known anything. In the first such case, *United States v. Ionia Management*, in the Second Circuit, an *amicus* brief filed by NACDL, the U.S. Chamber of Commerce, the National Association of Manufacturers, the Association of Corporate Counsel, and the Washington Legal Foundation explained why the doctrine of vicarious liability is overbroad, unwarranted, and unsupported by statute or caselaw. (The doctrine stems not from statute, but from a 1909 Supreme Court case, *New York Central and Hudson River R.R. v. United States*).

**Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:*** A broad coalition of criminal justice reform and business groups would support this effort, and many (such as the U.S. Chamber of Commerce) are already undertaking studies of various reform proposals, such as a possible affirmative defense for a compliance program.

***Potential Opposition:*** Likely from consumer-rights, pro-regulatory, and possibly shareholder groups, as well as others who are concerned about economic fraud in general.

***Public Opinion:*** A difficult sell in the current Wall Street meltdown climate. However, there have so far been few calls to indict organizations, and the focus has been on individual criminal liability.

**Experts:**

- Andrew Weissmann, former director, Enron Task Force, now of Jenner & Block, NY
- Stephanie A. Martz, Senior Director, White Collar Crime Policy, NACDL

**For Further Information:**

See symposium volume of the American Criminal Law Review, volume 44, number 4 (2007).

### **III. ENACT ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT**

**Proposed Solutions:**

*Legislative Changes:* Pass the Attorney-Client Privilege Protection Act. The bill would prohibit any enforcement branch of the federal government from asking for or demanding waiver of a businesses’ attorney-client privilege (which operates to protect employee statements). In addition, the bill would prohibit federal enforcement officials from pressuring businesses to avoid indictment by refusing to pay employees’ attorneys’ fees, firing or punishing employees who take invoke the Fifth Amendment or assert other rights during criminal investigations, and refraining from entering into joint defense or information sharing agreements.

**Jurisdiction:**

*Executive Branch:* Department of Justice

*Legislative Branch:* House and Senate Judiciary Committees

**Background:**

*Executive Branch:* DOJ has now promulgated five policies in 10 years that govern what is required of corporations that wish to receive credit against indictment for cooperating with the government. (The Holder Memo (1999), the Thompson Memo (2003), the McCallum Memo (2005), the McNulty Memo (2006), the new United States Attorneys’ Manual Chapter 9-28 (2008)). In addition, other enforcement agencies such as the SEC and the CFTC have adopted similar policies. These agencies still appear to require, in various measures, that organizations waive attorney-client or work product protections and fire “culpable” employees in order to avoid indictment. As explained below, DOJ has reformed some of its policies in this regard, but these reformations are not complete and not permanent.

Specifically, in August 2008, the Department of Justice issued a new set of guidelines that govern what a prosecutor may consider in deciding whether to indict an entire business. The new guidelines prohibit prosecutors from considering whether a business is paying employees’ legal fees, and from demanding or rewarding the provision of a lawyers’ confidential legal counsel. The policy is more ambiguous about the treatment of joint defense agreements and

“facts,” some of which are privileged when they are communicated to a lawyer in the course of an internal investigation. Still, the new policy is a large step forward.

There has been discussion among members of the Coalition to Preserve the Attorney-Client Privilege (see below) about supporting an Executive Order that would make DOJ’s new policy applicable to all federal agencies in the event that the legislation ultimately fails. Because the effort to pass legislation is still very much alive, this option has not been fully vetted.

**Legislative Branch:** The Attorney-Client Privilege Protection Act was introduced in the 109<sup>th</sup> and again in the 110<sup>th</sup> Congress. In November 2007, the House passed the bill by voice vote on rules suspension. It garnered an unprecedented number of bi-partisan co-sponsors, including the chairmen and ranking members of both the House Judiciary committee and the Crime Subcommittee. As of this writing, the bill is pending in the Senate Judiciary Committee. Its 13 co-sponsors include Sens. Arlen Specter (R.-Pa.), Joseph Biden (D-De.), Dianne Feinstein (D-Ca.), Lindsay Graham (R.-N.C.), and John Cornyn (R.-Tx.).

**Judicial Branch:** On August 28, 2008 – the same day that the latest DOJ reforms were announced – the Second Circuit decided *United States v. Stein*. The court upheld the dismissal of the indictments of 13 former KPMG partners in the nation’s largest tax fraud case to date. The district court had dismissed the indictments on Sixth Amendment grounds, holding that the combination of DOJ policies that required that organizations that want to be viewed as cooperative cut off their employees’ attorneys’ fees, as well as specific prosecutorial behavior in the instant case, interfered with the defendants’ right to counsel. The Second Circuit agreed with the district court’s factual findings and application of the law. Although the case dealt only with the government’s interference with the payment of attorneys’ fees, its holding can be applied to the coercive effect of DOJ’s policies in other areas.

### **Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** A broad right-left coalition of groups has already signed off on these proposals in concept, including the Heritage Foundation, CATO, the Federalist Society, the Washington Legal Foundation, NACDL, the ACLU, the ABA, the Constitution Project, and the Independence Institute; numerous former United States Attorneys (32 of whom signed a letter to Sen. Leahy in July 2008) and former high-ranking members of the Department of Justice (11 of whom have signed numerous letters on the issue).

**Potential Opposition:** Current members of DOJ, both career and political appointees; career members of enforcement divisions of various federal agencies. Senator Leahy has not agreed to move the bill.

**Public Opinion:** This is a very popular measure across party and ideological lines.

### **Experts:**

- Stephanie A. Martz, Senior Director, White Collar Crime Policy, NACDL

- Susan Hackett, Senior VP and GC, Association of Corporate Counsel

**For Further Information:**

**[www.acc.com](http://www.acc.com)**

**[www.nacdl.org](http://www.nacdl.org)**

Letter from former U.S. DOJ officials at

**<http://www.uschamber.com/NR/rdonlyres/ep6egctpijdcqcksrawarupmudf652mq55mfqjwluuirmnfbrfy7htohstznrnido6zli5v55zkkw273zpo32dg2ktuc/AttorneyClientPrivilege7.30.07.pdf>**

Letter from former U.S. Attorneys at

**[http://www.nacdl.org/public.nsf/whitecollar/WCnews094/\\$FILE/USAs\\_Letter.pdf](http://www.nacdl.org/public.nsf/whitecollar/WCnews094/$FILE/USAs_Letter.pdf)**

## **CHAPTER TWO**

### **FEDERAL LAW ENFORCEMENT REFORM**

#### **Improve Investigative Techniques, Including Eyewitness Identification, Incentives to Testify, and Interrogation**

In order to engender public confidence in the criminal justice system, it is critical that the best possible evidence is available at trial and that the procedures and practices used to isolate that evidence can be relied upon to yield accurate results. In large part, local law enforcement agencies take cues and direction from federal law enforcement. It is therefore critically important that federal practices provide the kind of direction—and that local law enforcement agencies receive appropriate resources—to ensure accuracy from the investigative phase through post-conviction proceedings.

Unfortunately, gaps in the safekeeping of records and evidence, accounts of unprofessionalism, and the exposure of wrongful convictions across the country has undermined public confidence in criminal convictions. A number of reforms could be employed on the federal level to assure more reliable investigations, curb the production of wrongful convictions and identify the true perpetrators of crime. The implementation of these reforms might be accomplished through legislation, executive order or changes to agency policies and procedures.

The modification of existing federal law enforcement policy will not only serve to aid federal investigations, but will provide much-needed guidance to the states, who seek to make improvements to their own criminal justice systems. To ensure that local law enforcement agencies receive adequate resources to effectively implement those critical reforms that are implemented on the federal level, federal-to-state funding sources must also be made available.

**Summary of the Problem:** As the pace of DNA exonerations has grown across the country in recent years, wrongful convictions have revealed disturbing fissures in our criminal justice system. The nation's 223 DNA exonerations have exposed an overlapping array of sources of wrongful conviction. The causes of wrongful conviction that have emerged from ongoing analyses of wrongful convictions—from false confessions to deficiencies in eyewitness identification procedures to the use of incentivized testimony—also implicate non-DNA cases. Indeed, criminalists estimate that less than 10% of criminal cases contain biological evidence available for DNA testing. Therefore, the improvement of investigative techniques promises to prevent those future miscarriages of justice that would otherwise remain undiscoverable given an absence of DNA evidence. In order to prevent future wrongful convictions, it is critical that these problems be addressed through appropriately-funded reforms.

#### **Proposed Solutions:**

***Executive:*** 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 recording of custodial

interrogations, the use of incentivized testimony, and the affirmation of judicial discretion in ordering comparisons of crime scene DNA and fingerprint evidence to relevant databases. The issuance of such an order would also provide much-needed guidance to state law enforcement agencies.

Specifically the executive order should encompass the following:

1. Enable federal judicial orders of **comparisons of crime scene DNA and fingerprint evidence to relevant databases**. In roughly one-third of the nation's post-conviction DNA exonerations, comparison of the crime scene DNA to the CODIS system pointed specifically and extremely strongly to what seemed to be the real perpetrator of those crimes. (We say "seemed to be" because in many instances ultimate prosecution of that person was not pursued by the government.) In many instances, the person identified as the real perpetrator committed additional crimes while the innocent person was the focus of police investigation and prosecution, and ultimately wrongfully convicted.
2. The adoption and implementation of innocence-related reforms to identify and prevent wrongful conviction of federal crimes in the following areas:
  - I) Adopt and implement **eyewitness identification** procedures shown by reliable, scientifically-supported evidence to minimize the likelihood of misidentification, including:
    - 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 the identification procedure be administered by a blind investigator, or an individual who does not know who the suspect is;
    - The requirement that a lineup be properly composed (i.e. suspect photographs should be selected that do not bring unreasonable attention to him; 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 his own words, that articulates the level of confidence 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.).
  - II) 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 and a law enforcement officer's questioning is likely to elicit incriminating responses. This is simply the only way to create an objective record of what transpired during the course of the interrogation process.

III) 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 must 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.

3. Preservation and Safekeeping of Records

- Require **preservation of notes and similar records**
- Require that the FBI **create separate FD-302 forms** (reporting or summarizing interviews) **for each contact**
- **Enhance agency record-keeping** and retrieval systems

4. Professionalism

- Implement personnel policies that allow supervisors to **promote the best and prune the worst.**

*Legislative Changes:*

1. Pass legislation to enable federal judicial orders of **comparisons of crime scene DNA and fingerprint evidence to relevant databases.**
2. 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 (see details of improved procedures in description in above section 2-I). Such legislation would allow the court to render inadmissible any identification yielded from a procedure that failed to comply with those recommended procedures outlined in the legislation.
3. Pass legislation requiring 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 and a law enforcement officer's questioning is likely to elicit incriminating responses. Such legislation would allow the court to render inadmissible any untaped confession.

4. Pass legislation that would regulate the use of incentivized informants by implementing the procedures outlined in section 2-III above. Such legislation would require the court to render inadmissible any incentivized testimony that did not comply with the mandate outlined in the legislation.

***Legislative Appropriations (Solutions w/ Funding Requests):*** Increase funding for law enforcement technology to effect the implementation of eyewitness identification, preservation of evidence and recording of interrogation reforms on the state level. Laptop computers can assist identification reform; interrogations can be recorded with video recording equipment; and biological evidence can be barcoded and catalogued using software systems already designed for this use.

This can be accomplished through the Justice Assistance Grant Program (JAG), formerly known as the Edward Byrne Memorial Assistance Grant Program, which “allows states and local governments to support a broad range of activities to prevent and control crime and to improve the criminal justice system.” Justice Assistance Grants funding was reduced by 65% between 2007 and 2008. These allocations should be increased to meet former levels of support for law enforcement and “technology grants to solve crime and prevent future wrongful conviction” should be added as an articulated JAG “purpose area” for funding.

**Jurisdiction:**

***Legislative Branch:*** House and Senate Judiciary Committees  
House and Senate Crime, Justice and Science Appropriations  
Subcommittees

**Background:** Across the country, states have acknowledged the critical importance of reforming investigative practices to improve the quality of our justice system. North Carolina, New Jersey, and West Virginia have all required implementation of at least some eyewitness identification reforms, with Connecticut, Georgia, Maryland, Vermont and Wisconsin all also taking statewide action on the issue. Seven states and the District of Columbia have passed statewide legislation requiring the recording of custodial interrogations in at least some crime categories, and six state supreme courts have taken action to accomplish the same. In addition, over 500 jurisdictions nationwide, including large metropolitan areas such as Atlanta, Boston, Denver, Las Vegas, Louisville, and San Francisco, regularly record police interrogations. Only Illinois has passed a law aimed at regulating the use of incentivized informants. Twenty-five states, in addition to the District of Columbia, have created legislation that compels the automatic preservation of biological evidence upon conviction.

Despite all of these efforts to reform the criminal justice system, many states fall short. These time-tested and scientifically supported reforms, bolstered by practitioner experience, should be implemented uniformly across the nation. What is required is federal guidance, coupled with funding opportunities to local law enforcement to effectuate these reforms.

**Executive Branch:** NIJ, under Janet Reno, convened a Criminal Justice system-wide Technical Working Group, which closely studied the issue and issued the recommendations that became *Eyewitness Evidence: A Guide for Law Enforcement*, published in 1999. Since that time, the scientific research and practice has made even more clear the value of eyewitness identification reform. Recently, the Uniform Law Commission established a drafting committee on Electronic Recordation of Custodial Interrogations in order to spur needed reform in this area. Action in state commissions in both Illinois and California has identified the need for the regulation of incentivized informants. Efforts have begun in Congress to establish a federal commission charged with identifying best practices with respect to biological evidence preservation.

**Legislative Branch:** In 2007 Rep. Ellison drafted a “Due Process Grant Program” bill, which sought to provide \$10,000,000 in funding to support state and local law enforcement for eyewitness identification reform, the recording of interrogations, and the preservation of evidence.

Senator Amy Klobuchar, former Hennepin County Attorney, had employed the entire eyewitness “reform” package while in that role and was a public advocate of eyewitness reform, writing favorably about the practice in law review article.

Rep. Ellison introduced a bill, “Effective Law Enforcement Through Transparent Interrogations Act of 2007” (H.R. 3027), in the first session of the 110th Congress, which would require the electronic recording of custodial interrogations in Federal criminal cases. The bill has not yet been heard.

In the wake of a national series in the Denver Post on the failure to properly preserve evidence, Congressman Conyers and Senator Ken Salazar expressed interest in pushing this reform on the federal level. Rep. Ellison’s above-referenced “Due Process Grant Program” bill would have defrayed costs associated with properly preserving evidence for state and local law enforcement.

### **Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** Senator Obama sponsored legislation when he was an Illinois state legislator which required the videotaping of interrogations in homicide investigations. That bill became law, and he has cited it as one of his proudest accomplishments as a state legislator.

- Innocence Community (Innocence Network/Innocence Project)
- The Justice Project
- National Association of Criminal Defense Lawyers (NACDL)
- ACLU
- American Bar Association
- Independence Institute
- The Constitution Project

- Rep. Conyers, Jr. (held JFAA oversight hearings and is on the record discussing the importance of avoiding wrongful convictions)
- Rep. Ellison (introduced legislation mandating electronic recording of interrogations)
- Rep. Eddie Bernice Johnson (sponsored hearings about wrongful convictions in Texas)
- Rep. Hank Johnson (worked on eyewitness identification reform in Georgia)
- Rep. Sanford Bishop (trial lawyer for a subsequently exonerated Georgian man and sponsor of the Wrongful Convictions Tax Relief Act)
- Sen. Amy Klobuchar (As a County Attorney in Minnesota, Klobuchar implemented eyewitness identification procedure reforms)
- Sen. Leahy (sponsor of the Innocence Protection Act)
- Sen. Brownback (sponsor of the Wrongful Convictions Tax Relief Act)
- Sen. Schumer (sponsor of the Wrongful Convictions Tax Relief Act)
- Rep. Scott (longtime supporter of innocence issues)
- Rep. Sensenbrenner (sponsored Justice for All Act in 2004)
- Rep. Delahunt (sponsored Justice for All Act in 2004)
- Rep. Rush (sponsor of Congressional Gold Medal bill for Barry Scheck and Peter Neufeld)
- Rep. Maloney (sponsor of Congressional Gold Medal bill for Barry Scheck and Peter Neufeld)
- Rep. Gutierrez (sponsor of Congressional Gold Medal bill for Barry Scheck and Peter Neufeld)

(Note: The legislators listed above have previously supported some form of legislation that provides justice in the wake of wrongful convictions; their specific support for each of these proposals has not been established.)

***Potential Opposition:*** Federal and national law enforcement and prosecutor associations do not like having these reforms legislated or imposed on them, but are beginning to see innocence reforms as best practices. The Innocence Project, which has explored these reforms with many such organizations, would be able to provide more specifics about different organizations' regard for the different reforms.

### **Experts:**

- Barry Scheck, Co-Founder, Innocence Project
- Peter Neufeld, Co-Founder, Innocence Project
- Exonerees: Many of the nation's 223 DNA exonerees will speak in support of and the need for the abovementioned law enforcement reforms
- Representatives of Law Enforcement Agencies:
  - Chief Darryl Stephens  
Charlotte-Mecklenburg Police Department

- Ken Patenaude  
Detective Lieutenant Northampton, Mass
- Gil Kerlikowske  
Police Chief, Seattle, Washington
- Sgt. Paul Carroll's Retired Chicago PD
- Recording of Custodial Interrogations:
  - Det. James Trainum  
Violent Crime Case Review Project  
Violent Criminal Apprehension Program/ViCAP  
Metropolitan Police Department/OSD
  - Det. Jim Ryan  
South Brunswick Police Department
- Preservation:
  - Major Kevin Wittman (retired)  
Charlotte-Mecklenburg PD

**For Further Information:**

Byrne Grant Program: <http://www.ojp.usdoj.gov/BJA/grant/byrne.html>

Scheck, Barry, Peter Neufeld, and Jim Dwyer. *Actual Innocence: When Justice Goes Wrong and How to Make it Right*, New York: New American Library, 2000

*Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, Chicago, IL, American Bar Association, 2006

## **CHAPTER THREE**

### **FORENSIC SCIENCE REFORM**

#### **Federal Oversight and Standards**

At its best, the forensic sciences can be used to exclude the innocent from conviction of a crime or indict the actual perpetrator of a crime. At its worst, invalid and unreliable forensics are the second greatest contributing factor to wrongful convictions. As a consequence, not only are innocent people imprisoned, but the true perpetrators of the crime are allowed to continue to live freely in society. Since 1992, 223 wrongfully convicted people have been exonerated using post-conviction DNA analysis. Unlike other less sensitive and discriminating forensic fields, DNA analysis has been subjected to the rigors of the scientific method and peer-review and the use of post-conviction DNA testing has illuminated the glaring and persistent deficiencies in other realms for forensic science.

In 2007, Congress convened the National Academy of Sciences' Committee on *Identifying the Needs of the Forensic Sciences Community* (NAS Committee) with the purpose of studying the forensic sciences in order to make recommendations to ensure that its use in criminal justice is more science-based, more reliable and ultimately more just. Recent hearings before the committee indicated the need for an oversight body to standardize the science of forensic techniques, ensure their validity and reliability, and enforce the resulting scientific parameters on the application of these techniques in our court system. A singular source of standard-setting is essential as variable regulations and variable standards will lead to variable levels of justice. *If implemented*, these recommendations will bring forensic sciences more closely in line with other scientific disciplines and thereby ensure that forensic sciences can be applied safely, consistently, and justly. An additional and important result of the implementation of these recommendations is that the research recommended by the NAS report can be an important economic stimulus for U.S. research work in this area, which can inject government funds back into the U.S. economy.

**Summary of the Problem:** As demonstrated by many of the nation's 223 wrongful convictions proven by post-conviction DNA testing, there are serious questions about the reliability and validity of many of the non-DNA forensic analyses used by our police and legal system to determine questions of innocence or guilt. The NAS Committee has closely reviewed these concerns, and is expected to recommend that significant research be conducted—and standards established—to clarify the proper uses of such analyses in our legal system.

Based on what the NAS Committee reviewed and recommends, Congress should authorize and fund the creation of a federal government entity or capacity, located within a science-focused agency, to accomplish the following:

- conduct serious and comprehensive research into the validity and reliability of forensic techniques;
- establish standards for their use in the courts; and

- create a system to enforce standards and secure the integrity of forensic evidence through quality assurance, accreditation, training, and the tracking of its use in the courts.

The paths to implementing these recommendations can include Congressional, Executive, or Agency routes, or a combination thereof. To ensure that the NAS recommendations become reality, appropriate funding will be essential.

### **Proposed Solutions:**

***Executive: Immediate issue of executive order after the release of the NAS report (short term).*** The President may issue an executive order to create a federal entity or capacity to: (1) conduct research on the validity and reliability of extant forensic techniques, (2) assess the reliability and validity of forensic techniques and establish standards for their use in the courts, and (3) create a system to enforce standards and secure the integrity of the final forensic product through quality assurance, accreditation, training, and the tracking of its use in the courts.

***Legislative Changes: Immediate drafting and filing of legislation after the release of the NAS report (short term).*** Create a federal entity or capacity to: (1) conduct research on the validity and reliability of extant forensic techniques, (2) assess the reliability and validity of forensic techniques and establish standards for their use in the courts, and (3) create a system to enforce standards and secure the integrity of the final forensic product through quality assurance, accreditation, training, and the tracking of its use in the courts.

➤ **Amend 42 U.S.C. – New Chapter**

This section was proposed because a number of pieces of criminal justice legislation have been codified under Title 42.

***Legislative Appropriations (Solutions w/ Funding Requests):*** Appropriate funding for a federal entity or capacity to: (1) conduct research on the validity and reliability of extant forensic techniques, (2) assess the reliability and validity of forensic techniques and establish standards for their use in the courts, and (3) create a system to enforce standards and secure the integrity of the final forensic product through quality assurance, accreditation, training, and the tracking of its use in the courts.

### **Jurisdiction:**

The following are options suggested for the examination of these issues:

***Executive Branch:*** The President

***Legislative Branch:*** Senate Commerce, Science and Transportation Committee; House Science and Technology Committee; Senate Judiciary Committee; House Judiciary Committee; House Appropriations Committee; and Senate Appropriations Committee

## **Background:**

***Executive/Legislative Branches:*** As directed by Congress and President Bush under the Justice for All Act of 2004 (JFAA), the National Academy of Sciences (NAS) has undertaken a long-awaited study to examine thoroughly and comprehensively the fundamental underpinnings of forensic scientific evidence and its applications in our criminal justice system. The effort to fund this study was championed by Senator Barbara Mikulski and strongly supported by the Senate Commerce, Justice and Science Appropriations Subcommittee, which resulted in the \$1.5 million appropriation.

With funding in hand, a blue-ribbon NAS panel, comprising scientists, academics, a retired federal judge, and other notables, in 2007 convened to study forensic sciences. This Committee on *Identifying the Needs of the Forensic Sciences Community* has met seven times since, and a comprehensive report by the body is imminent—potentially arriving as soon as December. Based on the testimony provided, the Innocence Project expects the report to call for sweeping changes in the forensic sciences. These recommended changes will not, however, improve the quality of justice in America without a significant and focused legislative effort.

In the JFAA, Congress called on the NAS Committee to:

- (1) assess the present and future resource needs of the forensic science community, to include state and local crime labs, medical examiners, and coroners;
- (2) make recommendations for maximizing the use of forensic technologies and techniques to solve crimes, investigate deaths, and protect the public;
- (3) identify potential scientific advances that may assist law enforcement in using forensic technologies and techniques to protect the public;
- (4) make recommendations for programs that will increase the number of qualified forensic scientists and medical examiners available to work in public crime laboratories;
- (5) disseminate best practices and guidelines concerning the collection and analysis of forensic evidence to help ensure quality and consistency in the use of forensic technologies and techniques to solve crimes, investigate deaths, and protect the public;
- (6) examine the role of the forensic community in the homeland security mission;
- (7) examine the interoperability of Automated Fingerprint Information Systems; and
- (8) examine additional issues pertaining to forensic science as determined by the Committee.

The recommendations of the highly respected panel could dramatically shake the core of forensic sciences as applied in our criminal justice system. Invalid or improper forensic science (analysis and/or testimony) has been identified as a primary contributing factor to the 223 wrongful convictions proven by post-conviction DNA testing. The NAS Committee has been exploring the root weaknesses of many forensic sciences, voicing healthy skepticism toward the status quo, and has been considering when and how these forensic sciences can be safely and reliably applied in courts of law.

Discussion among Committee members at its public meetings indicates that the forthcoming report should stress the shortcomings present in numerous forensic sciences—other than DNA—that make their way into courtrooms. In specific, the report likely will underscore that because many forensic assays developed experientially, without objective testing to confirm or disprove their reliability and reproducibility, the absence of formal scientific vetting places their probative value in doubt.

Indeed, questions likely will be raised about whether it is ever appropriate for certain forensic sciences to be relied upon by prosecutors in criminal cases. Moreover, the committee will recommend for other assays to undergo formal and comprehensive studies that will, for the first time, clearly delineate their limits. The body also might call for the formation of national institutes to study forensic sciences in a rigorous and systematic fashion, and otherwise oversee their application in courts.

Recent hearings before the committee indicated the need for an oversight body to standardize the science of forensic techniques, ensure their validity and reliability, and enforce the resulting scientific parameters on the application of these techniques in our court system. These recommendations will, *if implemented*, bring forensic sciences more closely in line with other scientific disciplines and thereby ensure that forensic sciences can be applied safely, consistently, and justly. An additional and important result of the implementation of these recommendations is that the research recommended by the NAS report can be an important economic stimulus for U.S. research work in this area, which can pump money back into the U.S. economy.

Numerous members of Congress have taken leadership on issues closely related to the changes proposed here. For example, Sen. Patrick Leahy (D-VT) was an early champion of the Innocence Protection Act (IPA) for several years before its passage. The IPA was folded into a victims' rights bill, the Justice For All Act (JFAA), a product of bi-cameral compromise. Sen. Leahy was joined in support of the bill by Senate Judiciary Chairman Orrin Hatch (R-UT), Sen. Arlen Specter (R-PA), then-House Judiciary Chairman F. James Sensenbrenner (R-WI), and Rep. William Delahunt (D-MA). The bill was unanimously approved by the House Judiciary and then passed on the House floor in a 393-14 vote on October 6, 2004. Three days later, the bill passed the Senate by a voice vote. President Bush signed this bill into law on October 30, 2004.

A clause within JFAA authorizing the NAS study was incorporated at the urging of the Senate Commerce, Justice and Science Subcommittee. Subsequently, Sen. Barbara Mikulski championed efforts to secure the \$1.5 million funding authorized to conduct the NAS study. Once that money was in hand, by 2006 the study was underway.

## **Potential Allies, Potential Opposition, and Public Opinion:**

### ***Potential Allies:***

- Strong interest from members of the Senate Appropriations Commerce, Justice and Science Subcommittee (the initiators of the NAS request)
- Members of the Senate Judiciary Committee, including Sen. Leahy (D-VT)
- Members of the House Judiciary Committee, including Rep. John Conyers (D-MI)
- Potential allies on the House Science and Technology Committee and the Senate Commerce, Science and Transportation Committee
- Other partners still developing
- The Constitution Project

***Potential Opposition:*** Given that the NAS Report findings and recommendations are likely to point out the weaknesses of many forensic assays, the Consortium of Forensic Science Organizations (which represents the American Society of Crime Lab Directors, the National Association of Medical Examiners, the International Association for Identification, and the American Academy of Forensic Sciences), may well be opposed to certain changes called for in the report or subsequent legislation.

It is important to note that whatever federal entity is entrusted with authority over the government efforts that flow from the NAS Report recommendations must be an agency which has as its primary mission scientific research and the setting of standards.

***Public Opinion:*** Public attention to and concern about the problem of wrongful convictions has been growing in recent years as the number of exonerated individuals continues to grow. Additionally, numerous high profile crime lab scandals—in Detroit, Houston, and many other cities and states—have begun to direct attention to some of the specific weaknesses in the forensic sciences. That said, public opinion on the idea of a federal standard-setting entity is not known, and would likely be open to significant influence from potential allies (or potential opposition).

### **Experts:**

- Craig Cooley, MS, JD, *Staff Attorney, Innocence Project*
- Itiel Dror, PHD, *Senior Lecturer, Cognitive Neuroscience, University of Southampton*
- Brandon Garrett, JD, *Associate Professor, Law, University of Virginia*
- Paul C. Giannelli, MSFS, JD, *Professor, Law, Case Western Reserve University*
- Jonathan Koehler, PHD, *Professor, Behavioral Decision Making, University of Texas at Austin.*
- Roger Koppl, PHD, *Professor, Economics and Director of the Institute for Forensic Science Administration, Fairleigh Dickinson University*
- Dan Krane, PHD, *Professor, Biological Sciences, Wright State University*
- Peter Neufeld, JD, *Co-Director, Innocence Project*

- D. Michael Risinger, JD, *Professor, Law, Seton Hall University*
- Michael Saks, MA, MSL, PHD, *Professor, Law & Psychology, Arizona State University*
- William C. Thompson, JD, PHD, *Professor and Chair, Social Ecology, University of California, Irvine*
- Co-Chairs, NAS Committee on “Identifying the Needs of the Forensic Sciences Community”
  - Judge Harry T. Edwards, JD, *U.S. Court of Appeals for the District of Columbia Circuit*
  - Constantine Gatsonis, PHD, *Director of the Center for Statistical Sciences, Brown University*

**For Further Information:**

Craig M. Cooley and Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability and Minimizing Wrongful Convictions: Applying Daubert Isn't the Only Problem*, *Tulsa Law Review*, Vol. 43:285 2007

Itiel Dror, *Biased Brains*, *Police Review*, June 6, 2008, and other related publications available at <http://users.ecs.soton.ac.uk/id/biometrics.html>.

Brandon L. Garrett, *Judging Innocence*, *Columbia Law Review*, January 2008

Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, Supplement 1, 2005, Vol. 95, No. S1

Michael Saks & Jonathan Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, *Science*, Aug. 5, 2005, 892

William A. Tobin & William C. Thompson, *Evaluating and Challenging Forensic Identification Evidence*, *National Association of Criminal Defense Lawyers*, 30-JUL Champion 12 , available at <http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/8a20d040b54b23c9852571c500787130?OpenDocument> (last visited Oct. 31, 2008).

## **CHAPTER FOUR**

### **FEDERAL GRAND JURY REFORM**

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.” 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 a new 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 with them.

**Summary of the Problem:** The federal grand jury system does not adequately protect against wrongful, and often ruinous, indictments and prosecutions. While the federal grand jury was originally intended to serve both a screening and investigative function, modern grand jury procedures are incompatible with the screening function. Only before a grand jury can the government compel someone to appear and face questioning without an attorney. 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. The target of the 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. Many states have fixed these and other flaws without impairing the effectiveness of their grand jury systems.

#### **Proposed Solutions:**

***Executive:*** The Department of Justice’s United States Attorney’s Manual includes certain admonitions regarding the conduct of grand jury investigations. While the Executive has authority to strengthen the manual’s language, the most crucial reforms require statutory and/or federal rules changes. Moreover, the existing guidelines do not adequately protect against grand jury abuse, in part because the manual is unenforceable.

***Legislative Changes:*** 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:

1. 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.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
  
2. Require that prosecutors present evidence in their possession that tends to exonerate the target or subject (other than prior inconsistent statements or *Giglio* material).
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**

3. 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.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
4. Provide a target or subject of a grand jury investigation the right to testify before the grand jury.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
5. Provide witnesses the right to receive a transcript of their federal grand jury testimony.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500**
6. Prohibit the practice of naming persons in an indictment as unindicted co-conspirators to a criminal conspiracy.
  - **Amend Rule 7 of the Federal Rules of Criminal Procedure**
7. Require that prosecutors give *Miranda* warnings to all non-immunized subjects or targets called before a federal grand jury.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
8. Require that all subpoenas for witnesses called before a federal grand jury be issued at least 72 hours before the date of appearance, not to include weekends and holidays, unless good cause is shown for an exemption.
  - **Amend Rule 6 or Rule 17 of the Federal Rules of Criminal Procedure**
9. The federal grand jurors shall be given meaningful jury instructions, on the record, regarding their duties and powers as grand jurors, and the charges they are to consider. All instructions, recommendations, and commentary to grand jurors by the prosecution shall be recorded and shall be made available to the accused after an indictment, during pre-trial discovery. The court shall have discretion to dismiss an indictment, with or without prejudice, in the event of prosecutorial impropriety reflected in the transcript.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**
10. 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.
  - **Amend Rule 6 of the Federal Rules of Criminal Procedure**

**Jurisdiction:**

***Executive Branch:*** Department of Justice

***Legislative Branch:*** House and Senate Judiciary Committees

## **Background:**

***Executive Branch:*** The courts have largely abdicated any responsibility for policing the conduct of prosecutors within the grand jury room. This power vacuum is not filled by Chapter 9-11 of the United States Attorneys' Manual, which contains DOJ's policy on grand jury practice. The Manual is not enforceable at law and fails to address grand jury's most glaring inequities. Where the Manual 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. In these areas, the DOJ's opposition, essentially an effort to avoid being bound by its own policies, are particularly unjustifiable.

***Legislative Branch:*** From 1977-87, Rep. John Conyers (D-MI), among others, introduced various bills incorporating one or more of the proposed reforms and congressional hearings were held on several occasions. In 1998, Sen. Dale Bumpers (D-AR) introduced the Grand Jury Due Process Act (S. 2030), to provide a right to assistance of counsel in the grand jury room, and the more comprehensive Grand Jury Reform Act (S. 2289). In July 1998, Bumpers offered his right-to-counsel proposal as an amendment to an appropriations bill (S. Amdt. 3243 to S. 2260), but it was defeated 59-41. In 1999, in the wake of alleged grand jury abuses by Independent Counsel Kenneth Starr, Rep. 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. In 2000, the House Constitution Subcommittee held a hearing on grand jury reform, but Rep. Delahunt's grand jury bill never saw introduction. Senator Specter (who 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.

***Judicial Branch:*** In 1999, as required by H.R. 4276, 105th Cong. § 622 (1998), the Judicial Conference submitted a report "evaluating whether an amendment to Rule 6 of the Federal Rules of Criminal Procedure permitting the presence in the grand jury room of counsel for a witness who is testifying before the grand jury would further the interests of justice and law enforcement." In recommending against any amendment, the Judicial Conference's 5-page report relies extensively on a report submitted in 1975.

## **Potential Allies, Potential Opposition, and Public Opinion:**

### ***Potential Allies:***

- ABA
- National Association of Criminal Defense Lawyers
- Association of Corporate Counsel
- ACLU
- Heritage Foundation
- Constitution Project
- Cato Institute
- American College of Trial Lawyers
- Larry Thompson and other former U.S. Attorneys and DOJ officials

- Influential congressional leaders including: Sen. Patrick Leahy (D-VT), Sen. Arlen Specter (R-PA), Sen. Richard Durbin (D-IL), Sen. Russ Feingold (D-WI), Sen. Edward Kennedy (D-MA), Rep. John Conyers (D-MI), and Rep. William Delahunt (D-MA).

**Potential Opposition:** The Department of Justice and the Judicial Conference have opposed grand jury reform, arguing that that the various proposals would undermine the grand jury’s investigative function. These opponents also argue that the reforms would convert grand jury proceedings into “mini-trials.”

In response, it should be noted that all ten reform proposals are supported by a politically diverse group of former U.S. Attorneys and Department of Justice officials (e.g., NACDL’s Commission to Reform the Federal Grand Jury). In addition, several states, including New York, Massachusetts, and Colorado, have successfully incorporated many of these proposals into their grand jury systems. At least twenty states allow a witness’s attorney in the grand jury room, and a review of the case law from those states fails to reveal any problems. Dismissing this fact, the Justice Department asserts that federal prosecutions are uniquely complex, which ignores the fact that states like New York and Massachusetts handle their share of complex crimes—just as the federal system handles its share (and then some) of traditional state crimes.

**Experts:**

- Larry Thompson, Sr. Vice President and General Counsel, PepsiCo; former Deputy Attorney General and U.S. Attorney
- Gerald B. Lefcourt, *Gerald B. Lefcourt, P.C.*, New York, NY; Past President, National Association of Criminal Defense Lawyers
- Neal R. Sonnett, *Neal R. Sonnett, P.A.*, Miami, Florida; former Chief, Criminal Division, U.S. Attorney’s Office for the Southern District of Florida; Past President, National Association of Criminal Defense Lawyers; Past Chair, American Bar Association Criminal Justice Section; Executive Committee Member, American Judicature Society
- W. Thomas Dillard, *Ritchie, Dillard & Davies*, Knoxville, Tennessee; former U.S. Magistrate; former U.S. Attorney (E.D. TN & N.D. FL)

**For Further Information:**

Major reports and other resources are compiled at <http://www.nacdl.org/grandjury>.

## CHAPTER FIVE

### **FEDERAL SENTENCING REFORM**

With only five percent of the world's population, the United States holds fully 25 percent of the world's prisoners. Close to two thirds of those in prison are black or Latino. As of June 30, 2007, 2,299,116 prisoners were held in federal or state prisons or local jails and 1,528,041 were under state or federal jurisdiction.<sup>1</sup> The Federal Bureau of Prisons imprisoned more than 202,000 people at the end of October 2008.<sup>2</sup> In the federal system alone, 75,865 people were sentenced in 2007, the overwhelming majority to terms of incarceration. Of those sentenced, almost 24,000 were sentenced for drug offenses, and two thirds of them received five or ten-year mandatory minimum sentences.

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.<sup>3</sup> The drafters of the Sentencing Transition Memorandum are concerned that 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 serve any legitimate purpose of punishment.

We oppose **mandatory minimum** sentences that transfer sentencing discretion from the courts to lawmakers and prosecutors. They tie the hands of judges so that they are unable to do what federal law commands: impose a sentence "sufficient but not greater than necessary" to achieve the purposes of sentencing. *See* 18 U.S.C. § 3553(a). We support the elimination of mandatory minimums and believe they should be excised from the criminal code. As an intermediate step we would also recommend expansion of the "safety valve" to waive any mandatory minimum that would be excessive in an individual case. In this memo, however, we recommend reforms that can realistically be accomplished in the early stage of a new administration. One mandatory minimum in particular results in racially disparate incarceration trends. The crack cocaine sentencing scheme is a "poster child" for the injustices of mandatory sentencing. The federal Sentencing Commission has documented that it is the single greatest contributor to racial disparity in federal sentencing: fully 80 percent of all people sentenced for crack cocaine are black and they serve sentences significantly longer than their powder cocaine counterparts. Congress seems ready to take up genuine crack cocaine reform and the drafters encourage the new administration to support the elimination of the crack cocaine sentencing disparity vigorously.

We are encouraged by the creativity, energy and new ideas generated by the **alternatives to incarceration** movement. Many states have begun to experiment with different ways to divert or treat some low level offenders whose crimes are driven by, for example, addiction or mental health issues. A great body of evidence-based practices is emerging and in July 2008, the United States Sentencing Commission held a two day seminar to explore with practitioners, experts, academics, judges and others the various ways that states and some federal courts are using alternatives to avoid incarcerating offenders who are more amenable to diversion and treatment. We recommend several of these approaches to the new administration, including changes to the federal sentencing guidelines, which could be effected without legislation.

We also recommend various **sentencing management and incentive-based programming** changes, both to reward and encourage good conduct and to ensure that the courts or the executive are able to take a “second look” at deserving prisoners, whether to correct a mistake or an injustice, or give effect to compassion, when warranted.

Finally, in our recommendations, we address fundamental substantive and procedural fairness, including an examination of disparity in the criminal justice system.

For further information about our recommendations you may contact the authors:

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The Sentencing Project, Marc Mauer, [mauer@sentencingproject.org](mailto:mauer@sentencingproject.org) and Kara Gotsch, [kgotsch@sentencingproject.org](mailto:kgotsch@sentencingproject.org).  
Open Society Policy Center, Nkechi Taifa, [ntaifa@osi-dc.org](mailto:ntaifa@osi-dc.org)  
Families Against Mandatory Minimums, Mary Price, [mprice@famm.org](mailto:mprice@famm.org) and Jennifer Seltzer Stitt, [jstitt@famm.org](mailto:jstitt@famm.org).

Our specific recommendations include the following:

#### Federal Mandatory Minimum Reforms

- **Eliminate the crack cocaine sentencing disparity\***
- Improve and expand the federal “safety valve”
- Create a sunset provision on existing and new mandatory minimums
- Clarify that the 924(c) recidivism provisions apply only to true repeat offenders

#### Alternatives to Incarceration

- **Expand alternatives to incarceration in federal sentencing guidelines\***
- Enact a deferred adjudication statute
- Support alternatives to incarceration through expansion of federal drug and other problem solving courts.

#### Incentives and Sentencing Management

- **Expand the Residential Drug Abuse Program (RDAP)\***
- Clarify good time credit

- Expand the amount of good time conduct credit prisoners may receive and ways they can receive it
- Enhance sentence reductions for extraordinary and compelling circumstances
- Expand elderly prisoners release program
- Revive executive clemency (see separate policy paper)

#### Promoting Fairness and Addressing Disparity

- Support racial impact statements as a means of reducing unwarranted sentencing disparities
- Support analysis of racial and ethnic disparity in the federal justice system
- Add a federal public defender as an *ex officio* member of the United States Sentencing Commission

**\*Recommendations in bold are priority recommendations**

## ***FEDERAL MANDATORY MINIMUM REFORMS***

### **I. ELIMINATE THE CRACK COCAINE SENTENCING DISPARITY**

**Summary of the Problem:** In 1986, Congress enacted the Anti-Drug Abuse Act, which differentiates between two forms of cocaine—powder and crack—and singles out crack cocaine for dramatically harsher punishment. In 1988, Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for simple possession of five grams of crack cocaine. In what has come to be known as the 100:1 quantity ratio, it takes 100 times more powder cocaine than crack cocaine to trigger the harsh five and ten-year mandatory minimum sentences. When the Sentencing Commission drafted the sentencing guidelines, they indexed them to the mandatory minimums, so that a finding of drug quantity that would trigger a mandatory minimum was also the finding to trigger the relevant sentencing guideline range.

For over twenty years the 100:1 ratio has punished low-level crack cocaine offenders, many with no previous criminal history, far more severely than their wholesale drug suppliers who provide the powder cocaine from which crack is produced. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment, as well as the longest average period of incarceration.<sup>4</sup> Despite the enormous cost to taxpayers and society, the crack-powder ratio has not resulted in reduction in the cocaine trade. This sentencing scheme also has had an enormous racially discriminatory impact, resulting in blacks being disproportionately impacted by the facially neutral, yet unreasonably harsh, mandatory minimum crack penalties and corresponding guidelines.

Crack cocaine reform must be a priority for the new administration. The issue has been seeded, vetted and is ripe for congressional consideration. Indeed, within the past twenty years if there has ever been a moment when change was on the horizon with respect to crack cocaine

reform, now is that moment. There has never been as much momentum involving different key players focused on this issue.

### **Proposed Solutions:**

***Executive:*** The new President can signal to Congress his support for a bill that will eliminate the crack sentencing disparity. While the legislative process is in motion, we request that the new Attorney General ensure that those with criminal prosecution responsibility in the Department of Justice (DOJ) as well as U.S. Attorneys Offices are aware of the Supreme Court decisions, particularly *Gall v. United States*, 128 S. Ct. 596 (2007), and *Kimbrough v. United States*, 128 S. Ct. 558 (2007), and the Sentencing Commission findings and guideline amendments respecting crack cocaine, and that they take all lawful discretionary actions possible to minimize low-level crack cocaine prosecutions.

### ***Legislative Changes:***

1. **Amend 21 U.S.C. § 844** to eliminate the mandatory minimum for simple possession of crack cocaine.
2. **Amend 21 U.S.C. § 841(b)(1)(A) and (B)** to increase mandatory minimum triggers for trafficking crack cocaine from 50 grams to 5 kilograms for the ten year mandatory minimum and from 5 grams to 500 grams for the 5 year mandatory minimum.
3. **Amend 21 U.S.C. § 960(b)(1)(A) and (B)** to increase mandatory minimum triggers for importing or exporting crack cocaine from 50 grams to 5 kilograms for the ten-year mandatory minimum and from 5 grams to 500 grams for the 5 year mandatory minimum.

***Legislative Appropriations (Solutions w/ Funding Requests):*** This reform has the potential to save money because lengthy crack cocaine sentences will be reduced.

### **Jurisdiction:**

***Executive Branch:*** Department of Justice

***Legislative Branch:*** House and Senate Judiciary Committees

### **Background:**

***Legislative Branch:*** Three bills in the Senate have risen to prominence, with the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 (S.1711), introduced by Senator Joe Biden (D-DE) coming closest to rational reform of crack cocaine penalties. This bill eliminates the 100:1 ratio without increasing current powder cocaine penalties, and eliminates the mandatory minimum penalty for simple possession of crack cocaine to bring it in line with

simple possession of any other drug. While on the campaign trail, both Democratic candidates Obama and Clinton became co-sponsors of the Biden bill.

Senator Jeff Sessions (R-AL) is acknowledged for taking the first step in the Senate towards legislative reform when he introduced cocaine reform legislation in 2002. In the 110<sup>th</sup> Congress he reintroduced his bill, S.1383, narrowing the gap between crack and powder cocaine to a 20:1 ratio, providing additional sentencing relief for very low-level offenders and eliminating the mandatory minimum for simple possession of crack cocaine. His bill, with bipartisan co-sponsors, however, decreases the amount of powder cocaine that would trigger the five- and ten-year mandatory minimum sentence, despite the Sentencing Commission's finding that "there is no evidence to justify an increase in quantity-based penalties for powder cocaine offenses."<sup>5</sup> Senator Orrin Hatch (R-UT) is also commended for introducing legislation (S.1685), which also enjoys bipartisan support, to reduce the federal crack cocaine disparity without an increase in the current penalty for powder cocaine. This bill also eliminates the mandatory minimum sentence for simple possession of crack cocaine, bringing it in line with simple possession of any other drug.

On the House side, Rep. Charles Rangel's bill, H.R. 460, has been consistently introduced each Congress and is now joined by H.R. 4545, introduced by Rep. Sheila Jackson Lee as a companion to the Biden bill. The Fairness in Cocaine Sentencing Act of 2008, H.R. 5035, introduced by Rep. Bobby Scott, goes further than reform of the crack laws to include elimination of mandatory minimum penalties for all cocaine offenses.

Although none of the bills has been reported out of committee, hearings have been held in both the Senate and the House. On February 12, 2008, the Senate Judiciary's Crime and Drug Subcommittee held a hearing on reforming the federal crack cocaine law. On February 26, the House Judiciary's Crime, Terrorism and Homeland Security Subcommittee held a hearing on the various House bills addressing the crack cocaine issue. On the same day, the American Civil Liberties Union, the Open Society Policy Center, the Drug Policy Alliance, the Sentencing Project, the American Bar Association, Families Against Mandatory Minimums, and the National Association of Criminal Defense Lawyers sponsored a grassroots lobby day on the Hill advocating for an elimination of the disparity.

***Executive and Judicial Branch:*** In addition to introduction of legislation, the drive to reform the crack cocaine penalty has gained significant momentum due to decisions by the U.S. Sentencing Commission, opinions by the Supreme Court, and actions by the President. At the end of 2007, President Bush commuted the prison sentence of an individual convicted of a crack offense who served 15 years of his 19-year sentence. In November 2007, despite strenuous objections from Attorney General Mukasey, guideline amendments put forward by the U.S. Sentencing Commission were enacted. The Commission unanimously revised the federal sentencing guidelines for crack cocaine, reducing the sentences for crack cocaine offenses by an average of 15 months, and, in December, made the reductions retroactive. Also at the end of 2007, the Supreme Court ruled that federal judges can sentence crack cocaine offenders below the federal sentencing guidelines (though not below the mandatory minimum), if they find that

the calculated guideline sentence produces an unduly harsh sentence due to the 100 to 1 ratio between crack and powder cocaine. *See Kimbrough v. United States*, 128 S. Ct. 558 (2007).

### **Potential Allies, Potential Opposition, and Public Opinion:**

#### ***Potential Allies:***

***Legislative:*** Rep. Bobby Scott (D-VA), Rep. Sheila Jackson Lee (D-TX), Rep. Chris Shays (R-CT), Rep. Charles B. Rangel (D-NY), Sen. Hillary Rodham Clinton (D-NY), Sen. Richard Durbin (D-IL), Sen. Christopher J. Dodd (D-CT), Sen. Russell D. Feingold (D-WI), Sen. Carl Levin (D-MI).

***Community:*** American Civil Liberties Union, Open Society Policy Center, The Sentencing Project, Drug Policy Alliance, American Bar Association, Families Against Mandatory Minimums, National Association of Criminal Defense Lawyers, National Alliance of Faith and Justice, The United Methodist Church, Prison Fellowship, Legal Action Center, International Community Corrections Association, National Association for the Advancement of Colored People, National Council of La Raza, Leadership Conference on Civil Rights, National African American Drug Policy Coalition, National Bar Association, National Organization of Black Law Executives, Break the Chains Communities of Color & the War on Drugs, Brennan Center for Justice, NAACP Legal Defense & Educational Fund, Criminal Justice Policy Foundation, Interfaith Drug Policy Alliance, Penal Reform International, Lawyers' Committee for Civil Rights Under Law, Therapeutic Communities of America, National Juvenile Justice Network, Hip-Hop Summit Action Network, National Conference of Black Political Scientists, National Black Police Association, National Black Alcoholism and Addictions Council, Public Policy Section of the Academy of Criminal Justice Scientists, Unitarian Universalist Association of Congregations, Students for Sensible Drug Policy, National Association of Blacks in Criminal Justice, Citizens United for the Rehabilitation of Errants, Center for NuLeadership on Urban Solutions, Religious Action Center of Reform Judaism, Mennonite Central Committee Washington Office, Center for Children's Law and Policy, Center for Community Alternatives, Justice Policy Institute, Prison Legal News, StoptheDrugWar.org, International CURE, Virginia CURE, and the Constitution Project.

#### ***Potential Opposition:*** Fraternal Order of Police

***Public Opinion:*** The U.S. Sentencing Commission reported that it received public comment from over 30,000 individuals and organizations in support of making the crack cocaine guideline reduction retroactive. Public sentiment in favor of changing this sentencing structure runs deep. Many judges also favor reform. In 1996, the U.S. Judicial Conference passed a resolution opposing the existing disparity between crack and powder cocaine sentences. In 1997, a group of 27 federal judges sent a letter to the Senate and House Judiciary Committees, urging the correction of this dramatic sentencing disparity and arguing that the triggers for crack should equal those of powder cocaine. The judges pointed out that the implementation of these laws had circumvented the will of Congress, i.e., "that the Federal Government's most intense focus

ought to be on major traffickers” as opposed to bit players whose arrests will have no discernable impact on the drug trade.

**Experts:**

- Marc Mauer, The Sentencing Project
- Douglas Berman, Professor of Law, Ohio State University
- Peter Reuter, Professor in the School of Public Policy, University of Maryland
- Federal Public and Community Defenders Sentencing Resource Counsel
- Mary Price, Families Against Mandatory Minimums
- Eric Sterling, former counsel, House Crime Subcommittee
- Nkechi Taifa, Open Society Policy Center
- Professor Charles Ogletree, Harvard Law School
- Deborah Small, Break the Chains
- Kemba Smith, Kemba Smith Foundation

**For Further Information:**

U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.htm](http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm)

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U.S. Sentencing Commission, Testimony of Nkechi Taifa on Cocaine Federal Sentencing Policy, November 14, 2006

American Civil Liberties Union, *Cracks in the System: 20 Years of the Unjust Federal Crack Cocaine Law*, available at [http://www.aclu.org/pdfs/drugpolicy/cracksinsystem\\_20061025.pdf](http://www.aclu.org/pdfs/drugpolicy/cracksinsystem_20061025.pdf)

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Drug Policy Alliance, Cocaine and Pregnancy, available at <http://www.drugpolicy.org/library/research/cocaine.cfm>

U.S. Dept. of Health and Human Services data on crack and cocaine use, <http://www.oas.samhsa.gov/cocaine.htm>

Submission by NAACP Legal Defense and Educational Fund to the U.S. Senate Judiciary Committee, Subcommittee on Crimes and Drugs (Feb. 18, 2008), at available at [http://naacpldf.org/content/pdf/war\\_on\\_drugs/Letter\\_to\\_Senate\\_Sub\\_Committee\\_on\\_Crime\\_and\\_Drugs.pdf](http://naacpldf.org/content/pdf/war_on_drugs/Letter_to_Senate_Sub_Committee_on_Crime_and_Drugs.pdf).

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## II. IMPROVE AND EXPAND THE FEDERAL “SAFETY VALVE”

**Summary of the Problem:** There are two types of federal sentencing laws: mandatory minimum sentencing laws, enacted by Congress, and the sentencing guidelines, promulgated by the United States Sentencing Commission and approved by Congress. A mandatory minimum sentence is a required minimum term of punishment (typically incarceration) that is established by Congress in a statute. When a mandatory minimum applies, the judge is forced to follow it and cannot impose a sentence below the minimum term required, regardless of the unique facts and circumstances of the defendant or the offense. Sentencing guidelines, in contrast, can be nuanced and crafted to account for both consistency in sentencing and individual circumstances of the offense and offender. Where both statutory mandatory minimums and guidelines apply, the mandatory minimum trumps the guidelines.

In the mid-1980s, Congress responded to public fears about the growing crack cocaine epidemic by adopting mandatory minimums of five and ten years to punish serious and high-level drug traffickers. In 1988, mandatory minimum penalties were extended to apply to conspirators as well as principals. Because the application of these mandatory minimums depended on one factor, drug weight, they could not be adjusted to account for factors such as playing a limited role in the offense. This had the unfortunate consequence of treating all participants in a drug scheme the same way, including very low-level drug couriers and assistants, who are subject to the same lengthy sentence as kingpins.

In response to widespread criticism that mandatory minimums are unduly harsh in many circumstances, as they cannot meaningfully distinguish among defendants of different culpability, in 1994 Congress created a “safety valve” that would suspend the operation of the otherwise applicable mandatory minimum in drug cases if the defendant was a low-level participant, did not use a weapon, was involved in a violence-free crime, had little or no criminal history and told the government the truth about his or her involvement in the offense and offenses in the same course of conduct or common scheme or plan. *See* 18 U.S.C. § 3553(f).

The statutory safety valve obliges courts to impose a sentence under the advisory guidelines in place of a mandatory minimum upon a judicial finding that the conditions of 18 U.S.C. § 3553(f) are met. Today, the safety valve has been used to recognize and adjust the sentences of 25 percent of all drug offenders, benefiting first-time, low-level, nonviolent offenders. This means judges can craft sentences that more accurately punish offenders based on the severity of their offense, their culpability, and their criminal history.

The safety valve, while of great benefit, suffers from several problems that should be corrected. First, it defines low-level offenders much too narrowly, relying on the point system established by the Sentencing Commission for calculation of criminal history. Second, the “tell-all” requirement is confusing to judges, defense attorneys, and prosecutors and has been misinterpreted to require defendants to provide information about other offenders (not just themselves), which is covered by a separate statutory section, § 3553(e). Third, 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, nonviolent offenders who recognize and admit their responsibility, to only those defendants who were convicted of a drug offense.

### **Proposed Solutions:**

#### ***Legislative Changes:***

##### **1. Amend 18 U.S.C. § 3553(f) to broaden the safety valve.**

To be eligible for the safety valve waiver of the mandatory minimum, a defendant must be found to satisfy five criteria. One of them concerns the extent of the offender’s criminal history, which in turn relies on the point system established by the Sentencing Commission for calculation of criminal history. The intent of the safety valve was to allow courts to recognize offenders with no or limited criminal history. Due to the peculiarities of the sentencing guidelines’ criminal history provisions, people who have been convicted of more than one very minor offense, such as driving on a suspended license or passing a bad check, can be considered to have too much criminal background to qualify for the safety valve. Changing the criteria slightly will permit the safety valve to assist some offenders whose criminal history points overstate their actual risk of recidivism. Congress can change the criminal history criteria by including defendants who fall into the Sentencing Commission’s Criminal History Category I, whether due to the defendant’s criminal history or due to a departure from a higher criminal history category that, in the court’s opinion, overstates the actual criminal history of the defendant.

##### **2. Amend 18 U.S.C. § 3553(f) to substitute acceptance of responsibility for the tell-all requirement.**

Congress can also improve the safety valve by replacing the tell-all requirement with a requirement that the defendant accept responsibility for the offense. 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. 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 his or her submission. There is already a separate provision in criminal law that rewards cooperation with the prosecution with a reduction in sentence below the mandatory minimum when that cooperation substantially assists the government in an investigation or prosecution. Reductions for such “substantial assistance” are controlled by prosecutors pursuant to a guidelines provision requiring a government motion.

In lieu of the tell-all requirement, we would propose an acceptance of responsibility requirement. Acceptance of responsibility means that the defendant acknowledges his or her role in the offense early in the process, saving significant resources and eliminating the sometimes time- and resource-consuming process of determining whether or not a defendant has provided enough (or timely enough) information about his offense. Acceptance of responsibility standards are well established, as they have been a longstanding feature of the guidelines.

### **3. Amend 18 U.S.C. § 3553(f) to expand the safety valve.**

Federal mandatory minimum sentences have been added to a number of offenses, but the safety valve only applies to drug offenders. The problems associated with mandatory minimum drug sentences are replicated in other mandatory minimum-bearing offenses. 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 admit their responsibility, to only those defendants convicted of drug offenses. Therefore, the safety valve should be made available for all offenses that are subject to mandatory minimums.

***Legislative Appropriations (Solutions w/ Funding Requests):*** This proposal has the potential to save money due to the ability to sentence below the statutory mandatory minimum.

#### **Jurisdiction:**

***Legislative Branch:*** House and Senate Judiciary Committees

#### **Background:**

***Legislative Branch:*** See above

***Judicial Branch:*** The United States Sentencing Commission amended the Sentencing Guidelines in 1995 to include a two-level reduction for defendants who meet the criteria of § 3553(f), and in 2002 clarified that the reduction should be applied without respect to whether the defendant was subject to a mandatory minimum.

#### **Potential Allies, Potential Opposition and Public Opinion:**

**Potential Allies:** American Bar Association, Families Against Mandatory Minimums, National Association of Criminal Defense Lawyers, Federal Public and Community Defenders, American Civil Liberties Union, Independence Institute, Center for Community Alternatives, International Community Corrections Association, Prison Legal News, StoptheDrugWar.org, International CURE, Virginia CURE, and the Constitution Project.

**Potential Opposition:** Some members of Congress

**Public Opinion:** A 2007 ACLU/BRS survey found that 63 percent oppose mandatory minimums (37 percent strongly oppose). A 2001 ACLU/BRS survey found that 61 percent oppose mandatory minimums. Opposition has remained relatively constant. In August 2008, Families Against Mandatory Minimums released the findings of a public opinion poll it commissioned about public attitudes toward mandatory minimums. The poll, conducted by Strategy One, shows widespread support for ending mandatory minimum sentences for nonviolent offenses, and that Americans will vote for candidates who feel the same way.

- Fully 78 percent of Americans (nearly eight in 10) agree that courts – not Congress – should determine an individual’s prison sentence.
- Six in 10 (59 percent) oppose mandatory minimum sentences for nonviolent offenders.
- A majority of Americans (57 percent) polled said they would likely vote for a candidate for Congress who would eliminate all mandatory minimums for nonviolent crimes.

#### **Experts:**

- Mary Price, Families Against Mandatory Minimums
- Stephen Saltzburg, Professor, George Washington University Law School
- Federal Public and Community Defenders Sentencing Resource Counsel
- James Felman, American Bar Association, Criminal Justice Section

#### **For Further Information:**

Families Against Mandatory Minimums/Strategy One poll on mandatory minimums (August 2008), available at

<http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf>

Families Against Mandatory Minimums, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, available at

[http://www.famm.org/Repository/Files/8189\\_FAMM\\_BoggsAct\\_final.pdf](http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf)

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### **III. CREATE A SUNSET PROVISION ON NEW AND EXISTING MANDATORY MINIMUMS**

**Summary of the Problem:** In response to public fears about the growing crack cocaine epidemic and some high-profile cocaine-related deaths, Congress in the mid-1980s adopted mandatory minimum prison sentences for drug crimes. 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.

These harsh sentencing laws have not achieved their objectives, and their failure has come at a very high price in both economic and social terms. For example:

- Prison alone is not the most cost-effective way to increase safety. Valuable resources are being wasted on expanding prison capacity when other methods of treating offenders could eventually reduce recidivism and the number of people incarcerated.
- Mandatory minimums were designed to increase public safety through deterrence and incapacitation. They have not proven more effective than sentences that are proportionate and individualized.
- Mandatory minimums were designed to incapacitate drug kingpins and deter others from selling or using drugs. They have done little or nothing to thwart the illegal drug trade.
- Many mandatory minimum-bearing statutes overlap with state criminal code provisions. The federalization of crime is inconsistent with the long-standing principle that law enforcement and crime prevention are largely state functions.
- Mandatory minimums eliminate judicial discretion and prevent courts from fashioning sentences that include individualized consideration and comply with the purposes of sentencing set forth in the federal sentencing statute, 18 U.S.C. § 3553(a).

Because they so often fail to achieve legitimate goals, mandatory minimum laws should not be enacted without significant prior congressional consideration or the ability to review their effectiveness. We suggest that all new mandatory minimum laws, therefore, be subject to a five-year sunset provision.

A sunset provision would shine the light of review and accountability on criminal justice legislation. It would force Congress to rethink and reargue the value of the law, including reviewing cost and benefits. Not only is this a fairness measure, but it is a good government measure that will give Congress and the public the chance to evaluate the effectiveness of mandatory minimum legislation.

### **Proposed Solutions:**

***Legislative Changes:*** A sunset provision on new mandatory minimums may take one of two forms: a straight sunset provision law or the creation by Congress of a sunset commission that will 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. If Congress opted to create a commission, Congress would need to clarify in legislation the following:

- Establish criteria for appointing the commission;
- Set the length of the commission's term;
- Clarify coordination with USSC and DOJ;
- Outline powers of the commission;
- Establish criteria for reviewing mandatory minimum sentences;
- Give commission oversight and rule-making authority subject to notice and public comment; and
- Give commission oversight of existing as well as new mandatory minimum laws.

Congress may also decide to apply a similar commission review requirement to existing mandatory minimums. If deemed feasible, we recommend starting first by addressing those nonviolent, first-time or low-level offenders who are affected by mandatory minimums as a matter of political expediency.

***Legislative Appropriations (Solutions w/ Funding Requests):*** A commission would require funding authorizations and appropriation. Sunsetting mandatory minimums should reduce prison costs.

### **Jurisdiction:**

***Legislative Branch:*** House and Senate Judiciary Committees

## **Background:**

**Legislative Branch:** Congress has not applied a sunset provision to mandatory minimums nor have they eliminated existing mandatory minimums. In 1994, Congress created a safety valve designed to waive the mandatory minimum for the drug offenders who are subject to them but who meet a set of criteria. The safety valve is limited to individual sentencing. It does not allow for the type of serious review that would be afforded by the creation of a sunset provision.

## **Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** Families Against Mandatory Minimums, American Bar Association, Federal Public and Community Defenders, The Sentencing Project, Independence Institute, NAACP Legal Defense and Educational Fund, United States Judicial Conference, National Association of Criminal Defense Lawyers, the Center for Community Alternatives, International Community Corrections Association, Prison Legal News, StoptheDrugWar.org, International CURE, Virginia CURE, and the Constitution Project.

**Potential Opposition:** OMB Watch

**Public Opinion:** A 2007 ACLU/BRS survey found that 63 percent oppose mandatory minimums (37 percent strongly oppose). A 2001 ACLU/BRS survey found that 61 percent oppose mandatory minimums. Opposition has remained relatively constant. In August 2008, Families Against Mandatory Minimums released the findings of a public opinion poll it commissioned about public attitudes toward mandatory minimums. The poll, conducted by Strategy One, shows widespread support for ending mandatory minimum sentences for nonviolent offenses and that Americans will vote for candidates who feel the same way.

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## **Experts:**

- Mary Price, Families Against Mandatory Minimums
- Professor Stephen Saltzburg, George Washington University Law School
- Federal Public and Community Defenders Sentencing Resource Counsel

## **For Further Information:**

Families Against Mandatory Minimums/Strategy One poll on mandatory minimums (August 2008), available at <http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf>

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#### **IV. CLARIFY THAT THE 924(C) RECIDIVISM PROVISIONS APPLY ONLY TO TRUE REPEAT OFFENDERS**

**Summary of the Problem:** Federal law requires judges to impose mandatory minimum sentences for defendants, who, during and in relation to or in furtherance of a crime of violence or drug trafficking crime possess, brandish or discharge a firearm, of five, seven and ten years respectively. Second and subsequent convictions under the law require a 25-year mandatory minimum sentence. All sentences under this law must be served in addition to any other sentence, including the sentence for the underlying drug or violent crime.

Though the 25-year recidivist enhancement appears designed to punish true recidivists—people convicted of using a firearm once, who have served their sentence, and then used a weapon again—it also is used on first time offenders. 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 though the defendant sustains his first conviction in the same proceeding as the second.

For example, a defendant who, over the course of three days, carried a gun while making three drug sales (prosecuted in a single indictment resulting in three separate convictions) can be sentenced to a minimum sentence of 55 years for the gun charges, plus whatever other sentences result from the underlying conviction. This defendant, if convicted in one trial of three instances of carrying a gun in relation to a drug trafficking offense, will be sentenced to (1) whatever

sentence the drug trafficking conviction carries; (2) a five-year mandatory minimum sentence consecutive to the drug sentence, and (3) two 25-year mandatory minimum sentences consecutive to the drug sentence, consecutive to the five-year mandatory minimum and consecutive to each other.

This results in unduly severe sentences that do nothing to deter recidivists. One of the most prominent cases illustrating the harshness of these unintended consequences involved Weldon Angelos. In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), Judge Cassell was required to sentence a twenty-four-year-old first offender, a music executive with two young children, to a mandatory consecutive term of 55 years based on his three convictions in the same trial for simply possessing a firearm in connection with small marijuana deals.<sup>6</sup> The judge found this sentence to be “unjust, cruel, and even irrational,” but determined he had no choice but to impose it. He called upon the President to commute the sentence, and upon Congress to make the “second or subsequent” enhancement applicable only to true recidivists who *previously* had been convicted of a serious offense. One hundred and sixty-three former U.S. Attorneys, federal judges, and DOJ officials, including four former Attorneys General, signed an *amicus* brief in the appeal before the Tenth Circuit, arguing that the sentence violated the Eighth Amendment.

In the course of rational basis review under the Equal Protection Clause, Judge Cassell found that § 924(c) is not justified by its plea-inducing properties, but quite the opposite. When Angelos “had the temerity to decline” a plea bargain to drug trafficking and one § 924(c) count (with a fifteen-year sentence), the government charged him with four additional § 924(c) counts, thus demonstrating that the statute’s “harsh punishment” is not visited on “flagrantly guilty repeat offenders (who avoid the mandatory by their guilty pleas), but rather on first offenders in borderline situations (who may have plausible defenses and are more likely to insist upon trial).” *Id.* at 1254 (quoting Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199, 203 (1999)). Further, the government obtained 25 years of the 60-year mandatory minimum sentence by not arresting Mr. Angelos after the first controlled buy, but by arranging additional controlled buys which produced an additional § 924(c) count. Because the government had “in some sense procured” the additional criminal acts, the deterrence rationale did not justify the stacking feature. *Id.* at 1253.

### **Proposed Solutions:**

***Legislative Changes:*** The proposed change would clarify that the second, 25-year consecutive sentence, would only apply if the defendant has been previously convicted and served a sentence for an offense under 18 U.S.C. § 924(c). In this way the penalty will apply to true recidivists.

The bill also would amend Part 1 of Title 18 to include a notice provision similar to that in 18 U.S.C. § 851 for recidivist drug defendants. It would require the government to file a notice with the court when it intends to invoke the enhanced recidivism penalties in the gun statutes. The notice requirement will not unduly burden prosecutors, who routinely file § 851 notices. It will add a level of fairness and predictability to the proceedings that is especially

warranted in light of the fact that the enhancement is a 25-year mandatory minimum that must be served consecutive to any other sentence imposed.

**1. Amend 18 U.S.C. § 924(c) 18 U.S.C. 924 . . .**

(c)(1)(C) If any person is convicted under this subsection after a prior conviction under this subsection has become final, such person shall --

- (i) be sentenced to a term of imprisonment of not less than 25 years; and
- (ii) if the firearm involved is a machine gun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

**2. Add 18 U.S.C. § 925 to provide for proceedings to establish prior convictions in the same manner as set out in 21 U.S.C. § 851.**

**Jurisdiction:**

*Legislative Branch:* Senate and House Judiciary Committees

**Background:**

*Legislative Branch:* Section 924(c)(1) was initially passed into law in 1968, and it provided for mandatory terms of imprisonment of 2 to 25 years for second or subsequent offenders, providing judges discretion in sentencing second or subsequent offenses. Congress amended the statute to eliminate that discretion in 1998.

In 1984, Congress passed the Sentencing Reform Act, creating the Sentencing Commission and charging it with developing sentencing guidelines. The Commission has the capacity to create guidelines based on research, data, and input from the field regarding just punishment for federal criminal offenses. The guidelines provide an enhancement for armed offenses, but one that is significantly less than that imposed by Congress.

Other recidivist provisions do not operate in the same way as the stacking provision and some, like the recidivism enhancement for second and subsequent drug convictions are only triggered after a sentence for a first offense has been imposed and served. *See e.g.* 21 U.S.C. § 841(b)(1)(A). Furthermore, the government must provide the defendant notice of the intent to seek an enhanced sentence. *See* 21 U.S.C. § 851.

*Judicial Branch:* The Criminal Law Committee of the United States Judicial Conference called for the reform of the stacking provision in testimony before the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security on June 26, 2007.

**Potential Allies, Potential Opposition, and Public Opinion:**

*Potential Allies:* United States Judicial Conference, American Bar Association, Families Against Mandatory Minimums, Federal Public and Community Defenders, CATO Institute, the

Constitution Project, Prison Fellowship, National Association of Criminal Defense Lawyers, Independence Institute, the Center for Community Alternatives, International Community Corrections Association, Prison Legal News, International CURE, Virginia CURE, signers of an *amicus* brief filed in the Weldon Angelos case in the 10<sup>th</sup> Circuit Court of Appeals, including former attorneys general Janet Reno, Benjamin Civiletti, Griffin Bell and Nicholas Katzenbach; former FBI director William S. Sessions and other former prosecutors and judges, including 150 ex-Justice Department officials, some prosecutors.

***Public Opinion:*** There have been public opinion polls on mandatory minimums, but none specific to the §924(c) stacking provision. The Weldon Angelos case received significant public attention and created an outcry. At the time of the case, it was featured in national publications and news media ranging from Slate, The New York Times, and the Salt Lake Tribune to the O'Reilly Factor, The Washington Post, and the Wall Street Journal.

**Experts:**

- Former Judge Paul Cassell, University of Utah Law School
- Professor Erik Luna, University of Utah Law School
- Mary Price, Families Against Mandatory Minimums

**For Further Information:**

Testimony of the Honorable Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security on June 26, 2007, available at [http://judiciary.house.gov/hearings/June2007/hear\\_062607\\_3.html](http://judiciary.house.gov/hearings/June2007/hear_062607_3.html).

[Recommendations for Federal Criminal Sentencing in a Post-Booker World](http://constitutionproject.org/sentencing/article.cfm?messageID=245&categoryId=7)  
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## ***ALTERNATIVES TO INCARCERATION***

### **I. EXPAND ALTERNATIVES TO INCARCERATION IN FEDERAL SENTENCING GUIDELINES**

**Summary of the Problem:** Over 200,000 people are incarcerated under the jurisdiction of the Federal Bureau of Prisons, making it the largest prison system in the country. The population

has doubled in the last decade largely due to a jump in incarcerations for drug and public order offenses. Violent offenses are responsible for only eight percent of the increase in the prison population. These high rates of incarceration for nonviolent offenses, and the significant cost associated with imprisonment, highlight the need to reduce the federal prison population by diverting low-level offenders from prison.

The U.S. Sentencing Commission sets the federal sentencing guidelines to advise judges on the appropriate sentencing range for all federal offenses. Increasing the options for judges to sentence defendants to non-incarcerative terms or split sentences by removing the “zones” in the guidelines will make more low-level offenders eligible for sentences more appropriate to their culpability. The guidelines should offer a nuanced approach to every offender, responsive to the nature of the offense and the details that qualify or exacerbate that offender’s conduct. A simple expansion or outright elimination of the zones is in keeping with this nuanced approach, and will provide alternatives to incarceration for non-violent, first-time offenders.

### **Proposed Solutions:**

***Executive:*** As *ex-officio* member of the Commission, the Attorney General should urge the Commission to expand alternative sentencing options within the guidelines.

***Legislative Changes:*** Congress should draft a letter encouraging the Commission to make non-imprisonment sentencing options available under the guidelines for non-violent offenses, and confirm Commissioners who endorse this practice.

### **Jurisdiction:**

***Executive Branch:*** U.S. Attorney General

***Legislative Branch:*** Senate and House Judiciary Committees

***Judicial Branch:*** U.S. Sentencing Commission

### **Background:**

***Legislative Branch:*** When Congress established the Sentencing Commission in the Sentencing Reform Act of 1994, it included among the Commission’s duties a mandate 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 otherwise serious offense . . . .” 28 U.S.C. § 994(j). The Act also directed judges, when sentencing, to impose a sentence “sufficient but not greater than necessary” to satisfy the goals of sentencing: retribution, deterrence, incapacitation and rehabilitation.

Additionally, the guidelines were to address the “determination *whether* to impose a sentence to probation, a fine, or a term of imprisonment,” and if a term of imprisonment was appropriate, the length of such term. 28 U.S.C. § 994(a)(1)(A) and (B) (emphasis supplied). In

addition, the “Commission, in promulgating guidelines pursuant to subsection (a)(1) ... shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated under this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.” 28 U.S.C. § 994(g).

**Judicial Branch:** The U.S. Sentencing Commission has proposed to “consider alternatives to incarceration” as a priority policy issue for its amendment cycle ending May 1, 2009. In July 2008, the Commission hosted the “Symposium on Crime and Punishment in the United States: Alternatives to Incarceration,” and has plans to disseminate information and materials produced for the event.

### **Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** Advocacy organizations including American Bar Association, The Sentencing Project, Families Against Mandatory Minimums, Open Society Policy Center, the Constitution Project, American Civil Liberties Union, NAACP Legal Defense and Educational Fund, National Association of Criminal Defense Lawyers, American Psychological Association, Federal Public and Community Defenders, Legal Action Center, Public Policy Section of the Academy of Criminal Justice Scientists, Center for Community Alternatives, International Community Corrections Association, Justice Policy Institute, Prison Legal News, International CURE, Virginia CURE, and Reps. Bobby Scott (D-VA) and Rep. John Conyers (D-MI)

**Potential Opposition:** May include some law enforcement

**Public Opinion:** In 2002, a poll conducted by Peter D. Hart Research Associates for the Open Society Institute, entitled Changing Public Attitudes toward the Criminal Justice System, found strong support for alternatives to incarceration. For example, 71 percent of respondents favored a policy that would mandate drug treatment and community service rather than prison for people found guilty of selling small amounts of drugs. A strong majority of Americans also supported greater use of alternative sentences for two other types of offenders: youth and the mentally ill. Fully 85 percent supported placement of more youthful offenders in community prevention programs that teach job skills, moral values and self-esteem, rather than prison. More than eight in ten (82 percent) also believed that mentally ill offenders should receive treatment in mental health facilities, instead of serving time in prison. More broadly, three-quarters (75 percent) of all adults favored sentencing non-violent offenders to supervised community service or probation instead of imprisonment, including 41 percent who strongly favored this proposal.

### **Experts:**

- George Keiser, National Institute of Corrections
- Michael Jacobson, Vera Institute of Justice
- Federal Public and Community Defenders Sentencing Resource Counsel

- Margaret Love, ABA Commission on Effective Criminal Sanctions
- Nora V. Demleitner, Hofstra University Law School
- James Felman, ABA Criminal Justice Section.

**For Further Information:**

United States Sentencing Commission Discussion Paper, *Sentencing Options Under the Guidelines*, <http://www.ussc.gov/simple/sentopt.pdf>; an overview of the Commission’s symposium on alternatives to incarceration, [http://www.ussc.gov/symp\\_agenda7\\_08.pdf](http://www.ussc.gov/symp_agenda7_08.pdf); and this Washington Post article on Commission’s plans to address alternatives to incarceration, <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/11/AR2008101102051.html>.

Papers from the Alternatives to Incarceration Symposium available from the United States Sentencing Commission, available at [http://www.ussc.gov/SYMPO2008/NSATI\\_0.htm](http://www.ussc.gov/SYMPO2008/NSATI_0.htm).

Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies, ABA Commission on Effective Criminal Sanctions (2007).

Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339 (October 2005).

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**II. ENACT A DEFERRED ADJUDICATION STATUTE**

**Summary of the Problem:** Offenders who are not charged with very serious offenses, such as a 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, and for community-based treatment programs, diversion and deferred adjudication.

Community-based sanctioning programs will be most effective if they hold out the prospect of the offender’s ending up with no criminal record. The collateral consequences triggered by a conviction record can make it very difficult for offenders to get a job or housing and, generally, to put their lives back on track after their court-imposed sentence has been served. Sometimes the collateral consequences of conviction are far more severe than the direct ones, and it is therefore of considerable concern to defense counsel, in assessing whether to

recommend a guilty plea to their clients, whether their client will end up with a felony conviction on their record.

Therefore, when a deferred adjudication/deferred sentencing/diversion option requires a defendant to enter a guilty plea as a condition of participation, such programs should also offer the incentive to defendants of having the charges dismissed and the record expunged if they successfully complete the terms of probation. Collateral consequences will not be triggered when the defendant meets the conditions of probation. Deferred adjudication should be an alternative available, for example, for drug offenses in which the defendant did not play a leadership role in large scale drug trafficking and did not engage in violence.

### **Proposed Solutions:**

***Legislative Changes:*** Hold hearings on state deferred adjudication statutes and related programs. Draft/introduce a “federal deferred adjudication” bill that would authorize federal pilot programs in U.S. District Courts and provide funding for grants to states to develop/expand such programs.

### **Jurisdiction:**

***Legislative Branch:*** Senate and House Judiciary Committees

### **Background:**

***Legislative Branch:*** A number of states and localities have developed programs to defer adjudication while defendants pursue drug treatment or to provide for expungement of conviction records after a period of good conduct. In these states, prosecutors take advantage of laws that authorize diversion of offenders into probation programs, with the promise of a clear record upon successful completion. In Maryland, for example, prosecutors may allow a defendant to obtain “probation before judgment” to avoid a criminal conviction. The Maryland statute authorizes courts to defer judgment and place a defendant on probation under reasonable conditions, if (i) the court finds that the best interests of the defendant and the public welfare would be served; and (ii) if the defendant gives written consent after determination of guilt or acceptance of a *nolo contendere* plea. If probation is successfully completed, the court discharges the defendant from probation without judgment of conviction. The person discharged from probation may also petition the court for expungement of police or court records relating to the charges after a several-year waiting period, as long as the petitioner has no subsequent offense that involves a possible sentence of imprisonment.

### **Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:*** Families Against Mandatory Minimums, American Bar Association, National Association of Criminal Defense Lawyers, Federal Public and Community Defenders, the Constitution Project, American Civil Liberties Union, The Sentencing Project, Center for Community Alternatives, International Community Corrections Association, National Alliance

of Faith and Justice, Prison Legal News, StoptheDrugWar.org, International CURE, Virginia CURE, drug policy organizations, prisoner rights advocacy groups, National District Attorneys Association, corrections officials, some law enforcement officials, and NAACP Legal Defense and Educational Fund

**Potential Opposition:** Some prosecutors, Federal Bureau of Prisons, some corrections officials

### **Experts:**

- Stephen A. Saltzburg, Professor, George Washington University Law School
- Margaret C. Love, Washington, D.C.
- Joseph Cassily, NDAA, Harford County Prosecutor, MD
- Nancy LaVigne, The Urban Institute
- Lisa Schreibersdorf, Executive Director, Brooklyn Defenders Office
- William Carbone, Executive Director, Court Support Services Division, State of Connecticut Judicial Branch

### **For Further Information:**

A joint policy statement adopted by the American Bar Association, the National Association of Criminal Defense Attorneys, and the National District Attorneys Association, supporting deferred adjudication and endorsing a range of alternatives to incarceration, can be found online at: [www.abanet.org/dch/committee.cfm?com+CR209800](http://www.abanet.org/dch/committee.cfm?com+CR209800).

Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (2006) (inventory of state deferred adjudication statutes).

#### **Recommendations for Federal Criminal Sentencing in a Post-Booker World**

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### **III. SUPPORT ALTERNATIVES TO INCARCERATION, SUCH AS FEDERAL DRUG COURTS**

**Summary of the Problem:** Among federal prisoners, more than half (55 percent) are serving time for a drug offense. In 2007, drug offenses were the most frequently prosecuted cases in U.S.

district court, representing 34.4 percent of all prosecuted offenses that year. According to the U.S. Sentencing Commission, over 51 percent of those federal drug offenders have no or very minimal criminal history and over 82 percent had no weapon involvement in 2007. Over 95 percent of all people convicted of federal drug offenses are sentenced to incarceration although a significant proportion of drug defendants are low level couriers and street level dealers (in 2005, 53 percent of powder and 61.5 percent of crack cocaine offenders). Despite the high number of low-level drug offenders entering the system and the increasing popularity of alternatives to incarceration programs in the states such as drug courts (over 2100 exist nationally), defendant diversions to federal drug courts are nonexistent.

Currently in the federal system, drug courts operate in selected districts for eligible defendants who have already served their federal sentence and are under post-release supervision. The programs have been created by judges in those districts, in cooperation with Probation and the Federal Public Defenders and with the assent of the United States Attorney. The programs have been successful and the enthusiasm of judges and probation officers for them has spurred the creation of additional post-release supervision and re-entry courts in other federal districts.

Their success demonstrates that prison first, re-entry courts later, is not the answer. Spending significant federal resources on the prosecution and confinement of tens of thousands of men and women for low-level drug offenses has cost taxpayers, but failed to stop drug addiction. For many people, low-level involvement in the drug trade is the result of their own addiction to drugs. Diverting defendants with minor roles to alternatives to incarceration programs such as drug courts, which focus on treatment and rehabilitation instead of prison, is appropriate. The President should support and Congress should pass legislation authorizing programs, including federal drug courts, which divert defendants pre-trial or pre-sentence.

### **Proposed Solutions:**

*Legislative Changes:* Draft new legislation authorizing alternatives to incarceration such as federal drug courts as diversion from incarceration for federal drug offenses.

### **Jurisdiction:**

*Legislative Branch:* Senate and House Judiciary Committees

### **Background:**

*Legislative Branch:* Rep. Bobby Scott introduced legislation in 2008 that contains a provision to authorize \$10,000,000 to provide pre-trial diversion and post-conviction drug courts at the federal level for people charged with illegal use of controlled substances. The bill has 26 co-sponsors and was reviewed in a subcommittee hearing held in February. However, the subcommittee never voted on the legislation.

**Judicial Branch:** The U.S. Sentencing Commission held a conference on Alternatives to Incarceration (July 14-15, 2008 in Washington, D.C.) where discussion of drug courts at the state and federal level figured prominently.

**Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** National Association of Criminal Defense Lawyers, American Bar Association, National African American Drug Policy Association, NAACP Legal Defense and Educational Fund, The Sentencing Project, Federal Public and Community Defenders, the Constitution Project, Public Policy Section of the Academy of Criminal Justice Scientists, Center for Community Alternatives, International Community Corrections Association, Justice Policy Institute, Prison Legal News, Legal Action Center, International CURE, Virginia CURE, Joseph Califano, National Center on Addiction and Substance Abuse at Columbia University, Kurt Schmoke, Dean, Howard University Law School and former mayor of Baltimore, Rep. Bobby Scott (D-VA)

**Potential Opposition:** Opponents, such as Heather Mac Donald at Manhattan Institute, will argue that incarceration is a more effective strategy to combat drug offending, but the history of the war on drugs indicates that the punitive approach to stopping drug abuse has been unsuccessful.

**Public Opinion:** The poll, *Raising the Topic of Race: Analysis of a national survey on race, crime, drugs and justice*, by Belden, Russonello & Stewart, found that the majority of Americans support community service and drug treatment over more prisons. Eight in ten Americans would support “replacing prison sentences with required community service for non-violent offenders” (80 percent support; 46 percent strongly). Three-quarters of the public favors a proposal to increase the criminal justice system’s effectiveness in dealing with illegal drugs through a stronger focus on drug treatment: “taking away some of the money the government spends on prisons and spending that money on drug treatment programs” (72 percent support; 40 percent strongly). Similarly, in a 2002 poll conducted by Peter D. Hart Research Associates for the Open Society Institute, entitled Changing Public Attitudes toward the Criminal Justice System, 71 percent of respondents favored a policy that would mandate drug treatment and community service rather than prison for people found guilty of selling small amounts of drugs.

**Experts:**

- C. West Huddleston III, National Association of Drug Court Professionals
- Judge John Creuzot, Dallas, TX
- Federal judges and magistrate judges who preside over the supervised release drug courts, such as Magistrate Judge Leo Sorokin

**For Further Information:**

Drug Court Clearinghouse at <http://www.dcpj.ncjrs.org/dcpj/dcta.html#clear>.

Papers presented at the United State Sentencing Commission symposium on Alternatives to Incarceration available at [http://www.ussc.gov/SYMPO2008/NSATI\\_0.htm](http://www.ussc.gov/SYMPO2008/NSATI_0.htm).

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## ***PRISON INCENTIVES AND MANAGEMENT***

### **I. EXPAND THE RESIDENTIAL DRUG ABUSE PROGRAM (RDAP)**

**Summary of the Problem:** RDAP is a voluntary six-to-twelve-month program of individual and group therapy for federal prisoners with substance abuse problems. It is authorized by 18 U.S.C. § 3621, which 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 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. Participation in the drug abuse program increased greatly. By unilateral BOP rule, the one-year reduction is not available to certain classes of prisoners who are eligible under the statute, including those with detainers (eliminating 26.2 percent of prisoners who are removable aliens) and those who the Bureau of Prisons classifies as having committed a “crime of violence,” which includes an offense that involves the mere possession of a weapon.

RDAP is proven to reduce the likelihood of recidivism and drug abuse relapse, as well as reduce prison costs, both by shortening sentences and reducing recidivism. 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. There is currently a waiting list for RDAP that exceeds 7,600 prisoners.<sup>7</sup> Because priority is given to those who are closest to their release dates, 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 July 2008, the average RDAP participant received a sentence reduction of only 7.64 months.

#### **Proposed Solutions:**

***Executive:*** The new Attorney General should issue a memorandum directing the BOP to administer the sentence reduction incentive consistent with federal law and to ensure that it be

made available to all qualifying non-violent prisoners and those with detainees, and that the planning be done far enough in advance to ensure that qualified prisoners receive the full benefit Congress intended to bestow.

### **Jurisdiction:**

*Executive Branch:* Department of Justice

### **Background:**

*Executive Branch, Legislative Branch and Judicial Branch: Prisoners with detainees:* Nothing in federal law ties successful completion of RDAP to participation in community corrections. Instead, as originally conceived, success in a community corrections program *or* in a program within a prison facility would qualify. A rule change in 1996, prompted by a misunderstanding of guidance from the American Psychological Association (APA), limited the incentive to success in the former, thus eliminating all removable aliens. Their successful treatment would help them live drug free lives and not saddle their home countries with untreated substance abusers. The APA in 2000 encouraged the BOP to reinstate eligibility for prisoners with detainees, but the BOP has declined to change its policy.

*Crimes of violence:* Several lawsuits have challenged BOP's restrictions on eligibility for the sentence reduction incentive, particularly BOP's designation of certain crimes as "crimes of violence." In 1995, the BOP adopted a regulation defining nonviolent offenses by reference to "crimes of violence" in 18 U.S.C. § 924(c). It then began treating prisoners who had not committed such crimes, but who had merely possessed a firearm, as disqualified. In response to court challenges, in 1997, the BOP issued a new temporary 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[.]" That temporary rule became permanent in 2000 and survived a Supreme Court challenge in *Lopez v. Davis*, 531 U.S. 230, 239-41 (2001). It made anyone convicted under §§ 922, 924, 841, or 846 (with a gun enhancement) ineligible for the RDAP sentence reduction. Then, in *Paulsen v. Daniels*, 413 F.3d 999, 1004-05 (9th Cir. 2005), the Ninth Circuit found that the BOP's interim rule had not been created properly under the Administrative Procedures Act (APA). In early 2008, the Ninth Circuit handed down *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008), finding that a replacement rule in 2000 also violated the APA because the rule was "arbitrary and capricious" and was invalid.

*Underutilization:* The BOP does not make eligibility determinations early enough to ensure that prisoners who qualify receive the full year credit. This is because the BOP, when calculating proximity to release for purposes of who should take part in the overall drug program, does not include the possibility that a successful participant will be closer to release by one year. In other words, prisoners who are eligible for the reduction see non-eligible prisoners take their places in programs based on release dates that do not include the one-year reduction. The district courts are split on the issue of waiting until it is too late to evaluate and place

prisoners in the program.<sup>8</sup> The interpretation of “proximity to release” in 18 U.S.C. § 3621(e)(1)(C) is pending.<sup>9</sup>

### **Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:*** National Council on Crime and Delinquency, Federal Public and Community Defenders, American Bar Association, Families Against Mandatory Minimums, National Association of Criminal Defense Lawyers, Public Policy Section of the Academy of Criminal Justice Scientists, International Community Corrections Association, Prison Legal News, StoptheDrugWar.org, International CURE, Virginia CURE, and the Constitution Project

***Public Opinion:*** A poll done by Zogby International on behalf of the National Council on Crime and Delinquency (2006) found “by almost an 8 to 1 margin (87 percent to 11 percent), the US voting public is in favor of rehabilitative services for prisoners as opposed to a punishment-only system. Of those polled, 70 percent favored services both during incarceration and after release from prison.” Of those polled, 79 percent agreed that drug treatment was “very important” for successful reintegration into society after incarceration.<sup>10</sup>

A poll conducted by Peter D. Hart (2001) found that 63 percent of respondents were in favor of “reduc[ing] prison sentences for people convicted of nonviolent crimes.” While 68 percent of those polled supported rehabilitative programming, only 28 percent favored longer sentences.

### **Experts:**

- Bryan Feinstein, Correctional Programs Specialist, Federal Bureau of Prisons
- Dr. Doris L. MacKenzie, Professor, Criminology and Criminal Justice, University of Maryland
- Federal Public and Community Defenders Sentencing Resource Counsel

### **For Further Information:**

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* (June 2008) paper presented to the USSC Alternatives to Incarceration Seminar.

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## II. CLARIFY GOOD TIME CREDIT CALCULATIONS

**Summary of the Problem:** Good time credit is earned for good behavior, described in the law as “exemplary compliance with institutional disciplinary regulations.” Good time credit reduces a prisoner’s sentence. This time off is also called “good conduct time.” The law governing good time is found at 18 U.S.C. § 3624(b), which provides 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.”

Since 1988, the 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 the 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.

### **Proposed Solutions:**

***Legislative Changes:*** The problem can be fixed with legislative language clarifying the statute to underscore that “term of imprisonment” means length of sentence imposed by the judge. **Amend 18 U.S.C. § 3624(b).**

***Legislative Appropriations (Solutions w/ Funding Requests):*** Changing the way good time is administered would result in significant costs savings to the Bureau of Prisons.

### **Jurisdiction:**

***Legislative Branch:*** Senate and House Judiciary Committees

### **Background:**

***Legislative Branch and Executive Branch:*** Historically, good time credit was always calculated based on the length of the sentence imposed. The use of time served as the measure of good time occurred once before. In 1948, Congress added some clarifying words to the then existing good time statute, requiring that good time be “credited as earned and computed monthly.” The BOP interpreted this addition as requiring that calculation of good time be based on the time prisoners actually served in prison. This change had the effect of shortening good conduct sentence reductions. Because Congress did not intend this outcome, in 1959 it corrected the BOP’s interpretation by amending the statute again. Congress deleted the words “be credited as earned and computed monthly” so that the BOP would not base its calculations on the time actually served but on the entire sentence imposed.

Twenty-five years later, when Congress eliminated parole and adopted determinate sentencing in the Sentencing Reform Act, it shortened the amount of good time a prisoner could earn to 54 days per year, or roughly 15 percent of the sentence. Congress did not indicate in any

way that it sought to disturb the practice of calculating good time based on the length of the prisoner's sentence. When the Sentencing Commission drafted sentencing guidelines pursuant to the Sentencing Reform Act, it understood that good time was to continue to be computed against time imposed, not time served. The Commission, which was to use average sentences served in the pre-guideline era as the starting point, calibrated the guideline ranges in the Sentencing Table to include an extra 15 percent in sentence length based on the assumption that prisoners would serve 85 percent of sentences imposed.

Congress shared that understanding. In legislative floor debates in 1993 and 1994, Senator Joe Biden (D-DE) made explicit reference to the calculation of good time at 85 percent of an imposed sentence, using the example of a ten year sentence that could be reduced to 8 years and six months if the prisoner received all of his or her good time. In fact, because the calculation is based on time served, a ten year sentence can only be reduced to 8 years, 8 months, and 19 days, which amounts to an extra 2 months and 19 days, due to the method the BOP uses to calculate good time.

**Judicial Branch:** Thus far, the courts have tended to support the BOP's flawed calculation. Nine of the 11 federal circuits have held that the good time statute is ambiguous and that it is unclear whether Congress intended to base good time on the "term of imprisonment" imposed by the judge or on the "time served" by the prisoner. Because of the perceived ambiguity, the courts have deferred to the BOP's interpretation of the statute.

The U.S. Supreme Court has not decided the question. *Moreland v. Federal Bureau of Prisons*, 431 F.3d 180 (5th Cir. 2005) *cert. denied*, 547 U.S. 1106 (2006). Justice Stevens however, in an opinion respecting denial of certiorari on the issue, strongly indicated that the BOP has misinterpreted the statute and suggested Congress address the problem.

I think it appropriate to emphasize that the Court's action does not constitute a ruling on the merits and certainly does not represent an expression of any opinion concerning the wisdom of the Government's position. ...both the text and the history of the statute strongly suggest that it was not intended to alter the pre-existing approach of calculating good-time credit based on the sentence imposed. ... Congress of course has the power to clarify the matter. Indeed, Congress has done so once before – in 1959 Congress amended the predecessor statute to §3624(b) for the specific purpose of undoing a judicial determination that credit should be based on time served rather than on sentence imposed. ... This same concern may well prompt Congress to provide further guidance as to what §3624(b) means by term of imprisonment.

### **Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** Federal Public and Community Defenders, Families Against Mandatory Minimums, American Bar Association, National Association of Criminal Defense Lawyers,

Professor Erwin Chemerinsky, Duke University Law School, International Community Corrections Association, Prison Legal News, StoptheDrugWar.org, International CURE, Virginia CURE, and the Constitution Project

**Public Opinion:** The Federal Public and Community Defenders and Families Against Mandatory Minimums have heard from hundreds of prisoners who called and wrote about this issue as they worked on legal challenges to the way the federal BOP calculates good conduct credit. They and their families feel strongly about this issue.

**Experts:**

- Federal Public and Community Defenders Sentencing Resource Counsel

**For Further Information:**

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 (June 2008)*, paper for the USSC Alternatives to Incarceration Seminar.

Families Against Mandatory Minimums (FAMM), [www.famm.org](http://www.famm.org) (Good Time FAQs).

Recommendations for Federal Criminal Sentencing in a Post-Booker World  
<http://constitutionproject.org/sentencing/article.cfm?messageID=245&categoryId=7>

Principles for the Design and Reform Of Sentencing Systems: A Background Report  
<http://constitutionproject.org/sentencing/article.cfm?messageID=148&categoryId=7>

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### **III. IMPROVE PRISON MANAGEMENT BY EXPANDING PRISONERS' GOOD CONDUCT CREDITS**

**Summary of the Problem:** Over 200,000 people are incarcerated under the jurisdiction of the Federal Bureau of Prisons, making it the largest prison system in the country. The federal prison population has increased at least three times the rate of state prisons since 1995,<sup>11</sup> and costs the taxpayers over \$5 billion per year.<sup>12</sup> As of year end 2006, the Bureau of Prisons was 37 percent over capacity.<sup>13</sup> Yet nearly three-fourths of federal prisoners are serving time for a non-violent offense and have no history of violence. Moreover, federal sentences are often long and excessive, particularly for non-violent offenses, and prisoners are required to serve at least 85 percent of their sentences. From 1992 to 2002, the average time served in prison for a drug offense increased by 31 percent, from 32.7 months to 42.9 months. Curbing this exponential

prison growth is critical. In comments to the U.S. Sentencing Commission in July 2008, Stephen R. Sady, Chief Deputy Federal Defender in Portland, Oregon, defined the point. “Over-incarceration of federal prisoners takes a huge societal toll: the hundreds of millions of taxpayer dollars wasted; the human costs of individual freedom lost and families broken; and the redefinition of our society as one willing to incarcerate more than is necessary to accomplish legitimate goals of sentencing.”

To alleviate the unwarranted over-incarceration in the federal prison system, the President should support and Congress should pass legislation to expand the amount of and ways to earn good time credit.

### **Proposed Solutions:**

***Legislative Changes:*** Pass the Literacy, Education, and Rehabilitation Act, H.R. 4283 from 110<sup>th</sup> Congress.

➤ **Amend Section 3624 of Title 18, United States Code.**

***Legislative Appropriations (Solutions w/ Funding Requests):*** Increasing the amount of good time awards can result in significant cost savings for the Bureau of Prisons.

### **Jurisdiction:**

***Legislative Branch:*** House and Senate Judiciary Committees

### **Background:**

***Legislative Branch:*** Rep. Bobby Scott introduced H.R. 4283 - the Literacy, Education, and Rehabilitation Act (LERA), which provides credit toward service of sentence for satisfactory participation in a designated prison program. The director of the Bureau of Prisons 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. Rep. Scott has introduced LERA in the last two Congresses and the bill currently has three co-sponsors. No hearings have been held on the legislation.

Rep. Danny Davis (D-IL) introduced the Federal Prison Work Incentive Act, H.R. 7089 in October 2008 regarding good time credits for federal prisoners. That bill would restore the pre-Sentencing Reform Act good conduct credit system.

### **Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:*** Citizens United for the Rehabilitation of Errants (CURE), the Constitution Project, National Association of Criminal Defense Lawyers, Families Against Mandatory Minimums, The Sentencing Project, Federal Public and Community Defenders, International Community Corrections Association, Prison Legal News, International CURE,

Virginia CURE, Reps. Bobby Scott (D-VA), Danny Davis (D-IL), John Lewis (D-GA) and John Conyers (D-MI), and FedCURE

**Potential Opposition:** Opponents of expanded good time credits will charge that these policies are coddling prisoners, but the reality is that federal prisons are overcrowded, and prisoners lack incentives for good behavior. Some opponents may include the Fraternal Order of Police and some law enforcement groups.

**Public Opinion:** In a poll conducted by Peter D. Hart Research Associates for the Open Society Institute, entitled Changing Public Attitudes toward the Criminal Justice System, education and job training programs for prisoners were among the most popular policy proposals tested. Three-quarters of the public favored early release for prisoners who participated in rehabilitation programs and considered prisoners engaged in rehabilitative programming a low risk for further offenses.

**Experts:**

- James Gondles, American Correctional Association
- Jeremy Travis, John Jay College of Criminal Justice

**For Further Information:**

Read more about the good time legislation here:

<http://famm.org/ExploreSentencing/FederalSentencing/BillsinCongress/HR7089FederalPrisonWorkIncentiveAct.aspx>.

Recommendations for Federal Criminal Sentencing in a Post-Booker World

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#### **IV. SENTENCE REDUCTIONS FOR EXTRAORDINARY AND COMPELLING CIRCUMSTANCES**

**Summary of the Problem:** The Sentencing Reform Act included provisions for a second look at federal sentences to account for certain kinds of changed circumstances or events. As illustrated by the recent retroactive crack cocaine amendments, the sentencing court has discretion to reduce a sentence where the Sentencing Commission has determined 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.” 18 U.S.C. § 3582(c)(1)(A). 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.<sup>14</sup>

The statute contemplates that the BOP would perform a gatekeeper function but sentencing discretion was to be exercised by the sentencing judge. This is where practice broke down. The BOP adopted a rule that defense practitioners have called the “Death Rattle Rule”: the only circumstance that can be considered “extraordinary and compelling” is imminent proximity to death. Because the 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. The result of the policy is brutal: with almost 200,000 federal prisoners, the BOP recently filed fewer than 20 motions each year for the past five years.

### **Proposed Solutions:**

***Executive:*** Congress in the Sentencing Reform Act and the U.S. Sentencing Commission signaled clearly that the courts be afforded the discretion to make decisions about which motions for early release to grant. The BOP has not, however, acted to ensure that the courts are able to consider petitions for early release from prisoners whose conditions, medical, terminal or otherwise, might merit it. The Attorney General can signal his intention that the statute be used as intended by providing a guidance a memo 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 Sentencing Reform Act and by the Commission in its recent guideline amendment. This memo should instruct that the BOP bring motions before the sentencing judge in all cases where the petitioner’s circumstances meet the criteria laid out at 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.

### **Jurisdiction:**

***Executive Branch:*** Department of Justice

***Legislative Branch:*** Senate and House Appropriations Committees

### **Background:**

***Executive Branch and Judicial Branch:*** Last year, the Sentencing Commission adopted a rule that guides courts in considering reduction motions, consistent with the statutory language. It provides examples of “extraordinary and compelling” circumstances:

- a permanent physical or medical condition that substantially diminishes the ability of the prisoner to provide self-care within a prison environment;
- the death or incapacitation of the prisoner’s only family member capable of caring for the prisoner’s minor child or children; and
- other factors that, alone or in combination, constitute extraordinary and compelling circumstances, with rehabilitation a factor that can only be considered in combination with others.

It instructs that rehabilitation alone cannot be considered sufficient, consistent with the specific direction of 28 USC § 994(t). This new policy was approved by Congress in November 2007.

The BOP explicitly stated in an interim rule that the Commission’s then proposed factors, which had been circulated since May 2006, would not be considered: “It is important to note we do not intend this regulation to change the number of . . . cases recommended by the Bureau to sentencing courts. It is merely a clarification that we will only consider inmates with extraordinary and compelling medical conditions for [reduction in sentence], and not inmates in other, non-medical situations which may be characterized as “hardships,” such as a family member’s medical problems, economic difficulties, or the inmate’s claim of an unjust sentence.” Reduction in Sentence for Medical Reasons, 71 Fed. Reg. 76619-01 (Dec. 21, 2006). BOP has not modified this rule since Congress approved the Commission’s policy in November 2007. Moreover, the Department of Justice, in commenting on the Sentencing Commission’s proposed guideline, stated that it has sought reductions “in a small number of cases” and only “for inmates suffering from a profoundly debilitating (physical or cognitive) medical condition that is irreversible and cannot be remedied through medication or other measures, and that has eliminated or severely limited the inmate’s ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others . . . .”<sup>15</sup>.

Therefore, although the Guideline became effective on November 1, 2007, not a single motion has been filed pursuant to the new U.S.S.G. § 1B1.13. The old rule remains on the books, and the BOP, in an interim rule, is instructing Wardens to deprive sentencing judges of the opportunity to exercise their discretion and is, in effect, assuring that the range of discretion contemplated by the statute is never exercised.

**Potential Allies, Potential Opposition, and Public Opinion:**

*Potential Allies:* American Bar Association, Families Against Mandatory Minimums, Federal Public and Community Defenders, Independence Institute, National Association of Criminal Defense Lawyers, Center for Community Alternatives, International Community Corrections Association, Justice Policy Institute, Prison Legal News, International CURE, Virginia CURE, and the Constitution Project

**Experts:**

- Margaret Colgate Love, Esq.
- Mary Price, Vice President, FAMM Foundation
- Federal Public and Community Defenders Sentencing Resource Counsel

**For Further Information:**

U.S.S.G. § 1B1.13

Letter from the American Bar Association to Ricardo H. Hinojosa (March 12, 2007) and recommended policy.

Mary Price, *The Other Safety Valve: Motions Under 18 U.S.C. § 3582(1)(A)*, 13 Federal Sentencing Reporter, No 3-4, 188 (November/December 2000 – January/February 2001).

Public Hearing Testimonies of Mary Price, FAMM and Stephen Saltzburg, American Bar Association on Sentence Reduction Motions (March 20, 2007), available at [http://www.ussc.gov/hearings/03\\_20\\_07/AGD03\\_20\\_07.HTM](http://www.ussc.gov/hearings/03_20_07/AGD03_20_07.HTM).

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**V. EXPAND THE ELDERLY PRISONERS EARLY RELEASE PROGRAM**

**Summary of the Problem:** The nation's state and federal prison systems, already straining as they handle more and more prisoners sentenced to longer and longer terms, are confronting the complicated and costly problem of a growing population of elderly prisoners. Because of mandatory minimum sentences, “three strikes” laws, and limited grants of, or outright elimination of parole, more inmates are growing older in prison than ever before. Many new prisoners in their 20s, 30s, 40s and even older enter prison to serve decades-long terms.

A 2004 report by the National Institute of Corrections found that the number of state and federal prisoners ages 50 or older rose 172 percent between 1992 and 2001, and some estimates suggest that the elderly inmate population has grown by as much as 750 percent over the last two decades. Most estimates suggest that the population of elderly inmates will represent 33 percent of the total prison population in the near future.

The average cost of housing the increasing number of elderly inmates has been estimated at approximately twice that of younger prisoners, largely due to health-related expenses. Often they require treatment for chronic and terminal diseases, protection from younger prisoners, mental health care, and physical plant alterations to accommodate walkers, canes, and geriatric chairs. Neither federal nor state facilities are currently meeting the healthcare needs of elderly prisoners or investing needed capital in adapting prison facilities to accommodate their needs. These current cost factors, a burgeoning elderly prisoner population, and a realistic assessment of the adequacy of projected increased resources to address them, call into question the wisdom of committing such vast economic resources for the continued punishment of older prisoners, the group with the lowest recidivism rate of any segment of the prison population.

The incarceration of older prisoners, who represent the smallest threat to public safety but the largest cost to taxpayers to imprison, exemplifies failed public policy that favors imprisonment over more cost-effective alternatives. The current strategy of incarcerating elderly inmates who are no longer a threat to the community is a waste of government resources and a humanitarian failure, and the problem only worsens as the elderly prison population grows. Forty one states already offer some kind of early limited release program for elderly inmates, and Congress this year established a federal pilot program through the Second Chance Act providing for the release to home confinement of some elderly federal inmates. The next Congress should build the groundwork to expand the elderly prisoner release program toward an eventual policy favoring eligibility for release of all non-violent prisoners over age 55.

### **Proposed Solutions:**

***Legislative Changes:*** Amend provisions of the United States Code to expand duties of the BOP to establish early release programs for elderly prisoners, and extend related authority of the U.S. Attorney General to authorize early release of all eligible elderly offenders from the BOP to home detention.

- **Amend duties of Bureau of Prisons, Section 4042(a) of Title 18, United States Code**
- **Amend authorization of Attorney General to release eligible elderly offenders, Section 3624 of Title 18, United States Code**

Hold Judiciary Committee hearings on the issue of healthcare and prison conditions for elderly prisoners and state programs aimed at early release. Draft/introduce an “elderly prisoner release” bill that would authorize federal programs at all BOP facilities and provide funding for grants to states to develop/expand programs for early release for elderly prisoners.

### **Jurisdiction:**

***Executive Branch:*** Department of Justice, Bureau of Prisons

***Legislative Branch:*** House and Senate Judiciary Committees  
House and Senate Appropriations Committees

## **Background:**

**Legislative Branch:** The Second Chance Act, signed into law in April 2008 (P.L. 110-199), represents a bipartisan effort to reduce recidivism rates. It was supported by an extraordinarily broad coalition of advocates, corrections officials, faith-based organizations, liberals, and conservatives. The Act includes a pilot program for elderly federal prisoners called the Elderly and Family Reunification for Certain Nonviolent Offenders that authorizes Bureau of Prisons (BOP) to set up one or more demonstration projects at a BOP facility for qualified individuals (individuals who are 65 years or older; serving a term of imprisonment that is not life imprisonment and based on conviction for an offense or offenses that do not include any crime of violence, sex offense or offense described in USC 18 § 2332b(g)(5)(B) or USC 18 chapter 37; who have served the greater of 10 years or 75 percent of the term of imprisonment, and who meet certain additional other criteria). BOP must find that the release of individual eligible elderly prisoners to home detention would result in a substantial net reduction in costs to the federal government, and that the individual poses no substantial crime risk or danger to any person or the public if released to home detention. Authorization for the pilot program runs through fiscal year 2010.

## **Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** American Bar Association, American Civil Liberties Union, Families Against Mandatory Minimums, National Association of Criminal Defense Lawyers, the Constitution Project, Open Society Policy Center, The Sentencing Project, Center for Community Alternatives, International Community Corrections Association, Prison Legal News, International CURE, Virginia CURE, Federal Public and Community Defenders, corrections officials, some law enforcement officials, faith-based organizations, organizations focusing on re-entry

**Potential Opposition:** Bureau of Prisons, some corrections officials

## **Experts:**

- Margaret Colgate Love, ABA Commission on Collateral Sanctions
- James Felman, ABA Criminal Justice Committee
- Jonathan Turley, Professor, George Washington Law School
- Ronald M. Shansky et al., authors of NIC report on correctional health care for elderly and ill inmates (see below).

## **For Further Information:**

As noted above, a leading report issued by the National Institute of Corrections in 2004, *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, can be found (with numerous related studies) online at [www.nicic.org/library/018735](http://www.nicic.org/library/018735).

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## ***PROMOTE FAIRNESS AND ADDRESS DISPARITY***

### **I. SUPPORT RACIAL IMPACT STATEMENTS AS A MEANS OF REDUCING UNWARRANTED SENTENCING DISPARITIES**

**Summary of the Problem:** The extreme racial disparities in rates of incarceration and prison populations in the United States result from a complex set of factors. Among these are sentencing and drug policies, which produce disproportionate racial/ethnic effects. In retrospect, it is clear that many of these effects could have been predicted prior to the adoption of the legislation that put these policies in place. Once legislation is enacted, it is very difficult to change it, even to correct the racial disparity it causes. 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 enactment. One means of accomplishing this would be through the establishment of “Racial Impact Statements.” 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.

#### **Proposed Solutions:**

***Legislative Changes:*** Enact federal racial impact statement legislation.

#### **Jurisdiction:**

***Legislative Branch:*** Senate and House Judiciary Committees

#### **Background:**

***Legislative Branch:*** No racial impact statement bill has been introduced in Congress. Two states, Iowa and Connecticut, passed laws in 2008 requiring racial impact statements for newly proposed sentencing laws. Legislators in Oregon and Illinois have introduced similar bills.

#### **Potential Allies, Potential Opposition and Public Opinion:**

### ***Potential Allies:***

- Advocacy organizations like The Sentencing Project, American Bar Association, NAACP Legal Defense and Educational Fund, Vera Institute of Justice, the Constitution Project, Center for Community Alternatives, International Community Corrections Association, Prison Legal News, International CURE, Virginia CURE, National Network for Women in Prison, Legal Services for Prisoners with Children, and National Association of Criminal Defense Lawyers
- Representative Michael Lawlor, chair of the House Judiciary Committee in Connecticut; Representative Wayne Ford of Iowa, the lead sponsor of that state's racial impact legislation; Iowa Governor Chet Culver

**Public Opinion:** The poll, *Raising the Topic of Race: Analysis of a national survey on race, crime, drugs and justice*, by Belden, Russonello & Stewart asked participants to rank the importance of reasons to change the criminal justice system. The poll reports that 70 percent of Americans believe it is “extremely important” people are not treated unfairly, no matter what the color of their skin or the size of their bank account. Over half said it is extremely important that we not tolerate a criminal justice system that is unfair to racial and ethnic minorities.

### **Experts:**

- Marc Mauer, The Sentencing Project
- Rep. Wayne Ford, Iowa Legislature
- Professor Angela Jordan Davis, Washington College of Law at American University
- Professor Michael Tonry, University of Minnesota Law School
- Professor Charles Ogletree, Harvard Law School

### **For Further Information:**

*Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*,  
[http://www.sentencingproject.org/Admin/Documents/publications/rd\\_racialimpactstatements.pdf](http://www.sentencingproject.org/Admin/Documents/publications/rd_racialimpactstatements.pdf)

Iowa’s recently passed legislation, found at  
[http://search.legis.state.ia.us/NXT/gateway.dll?qt=&f=templates&xhitlist\\_q=racial+impact+statements&fn=default.htm&xhitlist\\_d=current-legislation](http://search.legis.state.ia.us/NXT/gateway.dll?qt=&f=templates&xhitlist_q=racial+impact+statements&fn=default.htm&xhitlist_d=current-legislation).

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## **II. SUPPORT ANALYSIS OF RACIAL AND ETHNIC DISPARITY IN THE FEDERAL JUDICIAL SYSTEM**

**Summary of the Problem:** A fair system of justice is a cornerstone of our legal system and guaranteed by our Constitution. The influence of bias and disparate treatment in this system is unacceptable, and should be guarded against through a review and evaluation of racial and ethnic disparity in federal prosecutions.

For more than two decades, the proportion of racial and ethnic minorities entangled within the criminal justice system has grown exponentially: members of minority populations now comprise more than two-thirds of persons convicted of offenses in federal courts; and nearly three-quarters of federal prisoners are either black or Hispanic. Decisions made by U.S. Attorneys about whom they will prosecute and the types of offenses they prioritize for enforcement can have a strong impact on this disparity.

The bipartisan Justice Integrity Act, introduced in the 110th Congress by Sens. Biden, Cardin, Kerry, and Specter, provides a mechanism by which pilot programs would be established in ten 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 (a) racial and ethnic disparities are attributable to criminal justice policies and practice; (b) any policies and practices that do produce disparities are fully justified as appropriate responses to criminal behavior; and (c) disparities may be attributable in whole or in part to discrimination or unconscious bias.

### **Proposed Solutions:**

***Legislative Changes:*** Pass the Justice Integrity Act, S. 3245 and H.R. 6518 from 110<sup>th</sup> Congress.

### **Jurisdiction:**

***Legislative Branch:*** Senate and House Judiciary Committees

### **Background:**

***Legislative Branch:*** The bill was first introduced at the end of the 110th Congress. In the Senate, it has two Republican co-sponsors. The U.S. Sentencing Commission has indicated strong support for the legislation. In the House, where it was introduced by Rep. Cohen and Rep. Bobby Scott, has indicated interest in holding a subcommittee hearing on the bill before the end of the session.

### **Potential Allies, Potential Opposition and Public Opinion:**

***Potential Allies:***

- Advocacy organizations, including The Sentencing Project, American Bar Association, Vera Institute of Justice, United Methodist Church, National Association of Black Prosecutors, Brennan Center for Justice, National Institute for Law and Equity, NAACP, National Criminal Justice Association, NAACP Legal Defense and Educational Fund, National Association of Criminal Defense Lawyers, National Alliance of Faith and Justice, Center for Community Alternatives, International Community Corrections Association, Justice Policy Institute, Prison Legal News, International CURE, Virginia CURE, National Network for Women in Prison, Legal Services for Prisoners with Children, and the Constitution Project
- Stephen Salzborg, Professor of Law at George Washington University; Angela J. Davis, Professor of Law at American University; Judge Patricia Wald, former Chief Judge for U.S. Court of Appeals for the District of Columbia
- Sens. Biden, Cardin, Kerry, Feingold, Specter, Murkowski; and Rep. Cohen

***Potential Opposition:*** Sen. Sessions (R-AL) was unsupportive of the legislation before the bill's introduction because of objections raised by the Department of Justice about inserting questions of racial disparity in assessing prosecutorial decisions. The Department's position was that no racial disparity was unwarranted. Given the recent history of law enforcement using racial profiling, and the significant discretion granted to federal prosecutors, it seems essential to study and ensure that bias and unwarranted disparity does not exist.

***Public Opinion:*** According to a poll conducted by Belden, Russonello & Stewart for the ACLU, entitled *Raising the Topic of Race: Analysis of a national survey on race, crime, drugs and justice*, a majority of Americans believe the criminal justice system is doing a poor job of assuring fair treatment for everyone accused of a crime, regardless of income or race. Furthermore, 58 percent of respondents believe an African American who is arrested receives worse treatment than a white person charged with the same crime. About half believe the same is true for Hispanics.

**Experts:**

- Erek Barron, Sen. Biden's Judiciary Counsel
- Steve Salzborg, ABA Criminal Justice Section and George Washington University law professor
- Marc Mauer, The Sentencing Project
- Angela Jordan. Davis, ABA Criminal Justice Section and Washington College of Law at American University
- Wayne McKenzie, Vera Institute of Justice

**For Further Information:**

See page 47 of the ABA's Justice Kennedy Commission Report,  
<http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

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<http://constitutionproject.org/pdf/mandatoryjusticerevisited.pdf>

### **III. ADD FEDERAL PUBLIC DEFENDER AS AN *EX OFFICIO* MEMBER OF THE UNITED STATES SENTENCING COMMISSION**

**Summary of the Problem:** The addition of a federal public defender as an *ex officio* would improve the quality and accuracy of the Sentencing Commission's work and the transparency and neutrality of the Commission's proceedings. The executive branch has two *ex officio* representatives on the Commission, the Attorney General and the Parole Commission. The defense community is not represented on the Commission.

Congress established the U.S. Sentencing Commission with the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. The Commission was designed to be "an ongoing, independent agency within the judicial branch. The seven voting members on the Commission are appointed by the 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 (see 28 U.S.C. § 991(a) and § 235 of Public Law No. 98-473, respectively). Current law requires a representative of the Federal Public Defenders to submit a report at least annually to the Commission concerning the Commission's work, and the Commission can invite Federal Defenders to testify at open Commission meetings. However, the *ex officio* members attend and provide input at all Commission meetings, including its non-public meetings. The Federal Public Defenders, like the United States Attorneys, work with the sentencing guidelines in nearly every case they represent. They are sentencing experts by training and experience in every kind of criminal case. They take the job of providing input to the Sentencing Commission very seriously and routinely provide detailed and informed information, comments, and evaluation of the impact of the guidelines on the interests of defendants and the system as a whole. The Commission also invites the Defenders to participate in roundtables and other forums. They provide practice-based information from a defense perspective that is crucial to the Commission's consideration.

While the Defenders provide an important voice, the Commission 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 the Commission takes place. The Department of Justice has access to the Commission's internal information, is permitted to communicate its own information and proposals to the Commission and its staff *ex parte*, and attends non-public meetings where final decisions are made. The Defenders do not have access to the Commission's internal information, and do not receive notice of proposals submitted by the Department or developed by staff unless they are published for comment. Some proposals are never published for comment, but are adopted by the Commission and forwarded to Congress. In this way, the Commission 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 Commission's work.

### **Proposed Solutions:**

***Legislative Changes:*** 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.”

### **Jurisdiction:**

***Legislative Branch:*** House and Senate Judiciary Committee

### **Background:**

***Legislative Branch and Judicial Branch:*** The Judicial Conference of the United States, which has supported the addition of a defender *ex officio* since 2004, sent proposed legislation to the House and Senate Judiciary Committees, entitled the Criminal Judicial Procedure, Administration and Technical Amendments Act of 2007, Sec. 12 of which would add a non-voting *ex officio* Federal Public Defender to the Commission, appointed by the Judicial Conference. The bill was passed and signed into law without the *ex officio* provision.

### **Potential Allies, Potential Opposition and Public Opinion:**

***Potential Allies:*** Judicial Conference of the United States, Federal Public and Community Defenders, National Association of Criminal Defense Lawyers, Center for Community Alternatives, International Community Corrections Association, Prison Legal News, International CURE, Virginia CURE, National Network for Women in Prison, Legal Services for Prisoners with Children, and the Constitution Project

### **Experts:**

- Federal Public and Community Defenders Sentencing Resource Counsel

## **For Further Information:**

### Recommendations for Federal Criminal Sentencing in a Post-Booker World

<http://constitutionproject.org/sentencing/article.cfm?messageID=245&categoryId=7>

### Principles for the Design and Reform Of Sentencing Systems: A Background Report

<http://constitutionproject.org/sentencing/article.cfm?messageID=148&categoryId=7>

### *Mandatory Justice: The Death Penalty Revisited*

<http://constitutionproject.org/pdf/mandatoryjusticerevisited.pdf>

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<sup>1</sup> <http://www.ojp.usdoj.gov/bjs/prisons.htm>

<sup>2</sup> Federal Bureau of Prisons, Weekly Population Report (October 9, 2008) , available at

[http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp)

<sup>3</sup> The Sentencing Project, *Incarceration and Crime: A Complex Relationship* (2005), available at

<http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

<sup>4</sup> U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (1995); U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (1997); U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (2002); U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (2007).

<sup>5</sup> See USSC, Cocaine and Federal Sentencing Policy 8 (May 2007).

<sup>6</sup> In 1993, the Supreme Court interpreted “second or subsequent” in § 924(c) to refer to convictions on separate counts in the same proceeding. *Deal v. United States*, 508 U.S. 129 (1993).

<sup>7</sup> The Federal Bureau of Prisons Annual Report on Substance Abuse Treatment Programs Fiscal Year 2007, Report to Congress, 10 (January 2008).

<sup>8</sup> See *Salvador-Orta v. Daniels*, 531 F.Supp.2d 1252 (D.Or. 2008) (citing cases).

<sup>9</sup> *Thurman v. Thomas*, No. 06-1400 (D.Or. filed Oct. 2, 2006).

<sup>10</sup> Krisberg, Barry, Ph.D. & Marchionna, Susan. Attitudes of U.S. Voters toward Prisoner Rehabilitation and Reentry Policies. National Council on Crime and Delinquency, 1, 5 (April 2006).

<sup>11</sup> Sentencing Project, *The Federal Prison Population: A Statistical Analysis*,

[http://www.sentencingproject.org/Admin/Documents/publications/inc\\_federalprisonpop.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf).

<sup>12</sup> Costs of Incarceration and Supervised Release (\$24,922 per inmate in FY 2007), available at

<http://www.uscourts.gov/newsroom/2008/costs.cfm>.

<sup>13</sup> U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2006* at 5, available at

<http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf>.

<sup>14</sup> S. Rep. No. 225, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. 37-150, 121

<sup>15</sup> Letter from Michael J. Elston, Senior Counsel to Assistant Attorney General to Hon. Ricardo H. Hinojosa, Chair, United States Sentencing Commission (July 14, 2006)

## **CHAPTER SIX**

### **ASSET FORFEITURE REFORM**

Asset forfeiture has become a permanent part of our legal framework based on the notion that it constitutes a powerful crime control weapon. But due to the steady erosion of procedural protections and other adverse developments, forfeiture powers too often skew law enforcement priorities in ways that threaten individual rights and disregard public safety.

In particular, statutes that give law enforcement agencies a direct financial stake in forfeiture proceeds invite overreaching. 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 change is relatively simple: Congress should amend the federal equitable sharing law, 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.

While civil asset forfeiture was receiving the bulk of attention from Congress, reformers and influential lobbies, the scope and unfairness of *criminal* asset forfeiture laws mushroomed unnoticed. Comprehensive reform in this area, which can impair the accused's ability to retain counsel as well as the rights of third-parties not involved in the criminal case, is long overdue. Paramount among the needed reforms are changes to the federal rules 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.

#### **I. CIVIL ASSET FORFEITURE REFORM**

**Summary of the Problem:** The Civil Asset Forfeiture Reform Act of 2000 (CAFRA) delivered several meaningful and overdue reforms — for example, it placed the burden of proof on the government, by a preponderance of the evidence, in all civil forfeiture cases covered by the Act. It also abolished the cost bond, the tariff claimants had to pay before they could proceed legally for return of their own property. Unfortunately, many of the law's important reforms have been undermined by statutory loopholes or judicial decisions.

Several states have enacted similar or broader reforms, including provisions to require criminal conviction prior to any forfeiture. Federal law has frustrated some of these reforms. 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 — they simply turn the forfeiture over to federal law enforcement authorities. Federal authorities keep 20% and return roughly 80% to the state police. We believe that federal legislation or regulation to halt this circumvention of state law and fiscal policy would garner strong bipartisan

support. This issue also possesses a “states’ rights” component, allowing states to enact their own reforms without federal interference.

### **Proposed Solutions:**

***Executive:*** An executive order or agency regulation is an available, though not preferred, remedy for use of equitable sharing to circumvent state law.

***Legislative Changes:*** 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.

1. Amend the federal equitable sharing law, 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.  
➤ **Amend 21 U.S.C. § 881(e)**
2. Clarify CAFRA’s fee shifting provision, which has been undermined by Second Circuit case law, to fully enforce the government’s obligation to pay attorney fees to prevailing claimants.  
➤ **Amend 28 U.S.C. § 2465(b)(1)**
3. 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.  
➤ **Amend 28 U.S.C. § 2680(c)**
4. 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.  
➤ **Amend Rule 41(g) of the Federal Rules of Civil Procedure**

***Legislative Appropriations (Solutions w/ Funding Requests):*** Congress could prohibit or restrict the use of Justice Department funds to forfeit property under the equitable sharing law.

### **Jurisdiction:**

***Executive Branch:*** Department of Justice

***Legislative Branch:*** House and Senate Judiciary Committees  
House and Senate Appropriations Committees

## **Background:**

**Legislative Branch:** In 2000, Congress unanimously enacted the Civil Asset Forfeiture Reform Act (CAFRA), the only major reform of our Nation’s civil forfeiture laws in over 200 years. The CAFRA had strong bipartisan support, reflecting the public’s concern that our property rights were in danger from overzealous enforcement of unduly harsh forfeiture laws. *See U.S. v. James Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 505 (1993) (“Individual freedom finds tangible expression in property rights”).

In 1988, Congress passed an amendment requiring that federal transfers of forfeited assets to a state be allocated according to the state’s asset distribution formula. However, the amendment was repealed in 1989 before it took effect (Public Law 101-189, §1215(a)).

**Judicial Branch:** Judicial decisions have undermined the rights of prevailing parties to obtain attorney fees and damages from the government. *See, e.g., United States v. Khan*, 497 F.3d 204 (2d Cir. 2007); *Foster v. United States*, 522 F.3d 1071 (9<sup>th</sup> Cir. 2008); *Adeleke v. United States*, 355 F.3d 144, 154 (2d Cir. 2004); *Diaz v. United States*, 517 F.3d 608 (2d Cir. 2008).

## **II. CRIMINAL ASSET FORFEITURE REFORM**

**Summary of the Problem:** The 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. Federal rules changes and ill-considered judicial decisions have greatly expanded the government’s power to obtain criminal forfeitures.

Many of these changes were at odds with the language and intent of the criminal forfeiture statutes enacted by Congress. In short, criminal forfeiture procedure became less fair to defendants and third parties at the same time as Congress was leveling the playing field in civil forfeiture cases. Not surprisingly, the government decided to use criminal forfeiture instead of civil forfeiture whenever it was able to do so, i.e., in the vast majority of cases.

The reforms that we propose fall into three broad categories. The first is a group of three proposals that would help safeguard the accused’s right to a fair procedure for determining what is subject to criminal forfeiture. The second is a group of four proposals that would limit the use of so-called personal “money judgments” in lieu of orders forfeiting specific property. These money judgments are a judicially-crafted remedy that was never authorized by Congress. Short of abolishing the money judgment, Congress needs to rein in the abuses that have arisen in connection with the use of money judgments. The third group of proposed reforms is intended to safeguard the rights of third parties who have an interest in the property allegedly subject to forfeiture.

## **Proposed Solutions:**

**Legislative Changes:** Congress should pass comprehensive legislation to ensure fair procedures for the accused and third parties in criminal forfeiture proceedings, and curtail the government's use of criminal forfeiture as an end run around civil asset forfeiture reforms.

1. Safeguard the accused's right to a fair procedure for determining the amount of any criminal forfeiture.
  - a. Require fair notice through bill of particulars.
  - b. Provide right to challenge ex parte restraining orders.
  - c. Restrict the use of hearsay.➤ **Amend Rules 7 and 32.2 of the Federal Rules of Criminal Procedure**
  
2. Limit the use of money judgments in lieu of forfeiture of specific property
  - a. Provide the right to a jury trial.
  - b. Limit the use of joint and several liability.
  - c. Clarify that the relation back principle does not apply to substitute (clean) assets.
  - d. Limit the amount of money judgments to the defendant's known current assets, unless the government proves that the defendant has concealed assets.➤ **Amend Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 853**
  
3. Safeguard the rights of third parties with interests in the property the government seeks to forfeit.
  - a. Provide the right to a jury trial.
  - b. Allow third party with standing to contest the forfeiture on the merits.
  - c. Require a finding that the defendant has some forfeitable interest in the property before a preliminary order of forfeiture is entered.
  - d. The following should be treated like secured interests and given priority over the government's forfeiture claims:
    1. court-ordered child support obligations; and
    2. claims for compensation by the defendant's employees.➤ **Amend Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 853**

## **Jurisdiction:**

**Executive Branch:** Department of Justice

**Legislative Branch:** House and Senate Judiciary Committees

## **Background:**

***Judicial Branch:*** While Congress was writing the civil forfeiture reform legislation, the Department of Justice was persuading the Advisory Committee on Criminal Rules, meeting in secret, to radically alter the existing criminal forfeiture procedures in favor of the government. This one-sided process resulted in the promulgation of Federal Rule of Criminal Procedure 32.2 on December 1, 2000. 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 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 substantially restricted the rights of third parties—most of whom are completely innocent – in criminal forfeiture proceedings.

## **Potential Allies, Potential Opposition, and Public Opinion for Civil & Criminal Asset Forfeiture Reform:**

### ***Potential Allies:***

- Cato Institute
- ACLU
- NRA and other second amendment groups
- Heritage Foundation
- ABA
- National Association of Criminal Defense Lawyers
- Americans for Tax Reform
- U.S. Chamber of Commerce and other business associations
- Institute for Justice
- Independence Institute
- Influential congressional leaders including Rep. John Conyers (D-MI), Rep. Bobby Scott (D-VA), and Sen. Patrick Leahy (D-VT).

***Potential Opposition:*** The Department of Justice, represented by forfeiture attorneys for the Asset Forfeiture and Money Laundering Section, would oppose the reforms just as they opposed CAFRA. However, without appropriate limitations, forfeiture laws skew law enforcement priorities, reward constitutional violations, and jeopardize innocent property owners.

### **Experts:**

- David B. Smith, English & Smith, Alexandria, VA; member, Board of Directors, National Association of Criminal Defense Lawyers; author, *Prosecution and Defense of Forfeiture Cases*.
- Roger Pilon, Vice President for Legal Affairs, Cato Institute.

**For Further Information:**

David B. Smith, English & Smith, Alexandria, VA; member, Board of Directors, National Association of Criminal Defense Lawyers; author, *Prosecution and Defense of Forfeiture Cases*.

## CHAPTER SEVEN

### INNOCENCE ISSUES

Across the nation, 223 individuals have been exonerated through DNA testing. Collectively, these men and women served more than 2,500 years in prison for crimes they did not commit. In 86 of these 223 cases, the true perpetrators were identified in the process of settling claims of innocence. Many of them had gone on to commit additional crimes while the innocent languished behind bars.

In order to address the causes of wrongful conviction, prevent their recurrence, and mitigate further hardship for those who have successfully proven their innocence, the following issues require federal action:

1. Reauthorization and reform of the innocence protections established in the Justice For All Act of 2004 (Public Law No: 108-405). These protections are set to expire in 2009 and Congressional reauthorization of funding for these critical innocence programs and protections must be secured.
2. Creation of a federal commission on the causes and remedies of wrongful conviction.
3. Passage of S. 2421, H.R. 7021: The Wrongful Convictions Tax Relief Act.

These exonerations have demonstrated with absolute certainty that mistaken convictions can and do happen across the country. Without access to DNA testing and preserved evidence, however, none of these exonerations would have been possible. **It is therefore critically important that incentives and programs that make testing possible, such as those included in the Justice For All Act, continue to be funded and enforced.**

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 that all who care about justice conscientiously review what went wrong in the process to lead fact finders to believe beyond a reasonable doubt that the exonerated person was, in fact, guilty of the crime. 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, there are thousands that do not. Reviewing the cases of those for whom DNA has proven innocence allows us to pinpoint weaknesses in our justice system that, if addressed, can help reduce the number of wrongful convictions.

Learning from wrongful convictions does not “just” protect the innocent; it also enhances the accuracy of our criminal investigations. Every time an innocent person is wrongfully convicted, the real perpetrators of these serious crimes elude justice, and public safety is put at risk. **A federal commission should be established to examine the causes of wrongful convictions and to determine how to strengthen the justice system by avoiding wrongful convictions and convicting the guilty.**

Just as it is important to learn from wrongful convictions and seek to prevent them, **it is also imperative that those men and women who suffered wrongful conviction and imprisonment are not wrongfully taxed by the federal government when they are compensated for that harm.** Such compensation is critical to the ability of such persons to rebuild their lives in earnest. Men and women who have been wrongfully convicted face myriad, significant challenges to successfully returning to the community from which they were wrongfully removed. Upon their release from prison these individuals deserve, at minimum, the removal of avoidable financial roadblocks in their efforts to begin their lives anew.

The unique horrors suffered by the 223 men and women who have spent an average of 12 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.

## **I. ENSURE EFFECTIVE ADMINISTRATION OF INNOCENCE PROTECTIONS ESTABLISHED UNDER THE JUSTICE FOR ALL ACT OF 2004 (JFAA)**

**Summary of the Problem:** Passed as part of the Justice for All Act (Public Law No: 108-405) (JFAA) in 2004 with overwhelming bi-partisan support, the Innocence Protection Act (title IV of the Justice for All Act), was intended to prevent future wrongful convictions. It established a funding mechanism to settle claims of innocence through post-conviction DNA testing and produced a set of innocence protections.

Specifically, the innocence protection provisions of the JFAA include:

- Requirements that recipients of Paul Coverdell Forensic Science Improvement Grant funding (a fertile 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 Kirk Bloodworth Postconviction DNA Assistance Grant Program, which defrays costs associated with post-conviction DNA testing of state crimes;
- A directive that the recipients of certain grant monies create statewide schema for both access to post-conviction DNA testing and adequate preservation of biological evidence.

Unfortunately, since its passage, this Congressional mandate has faced significant roadblocks due to Executive maneuvering and the selective enforcement of the grant requirements by the Office of Justice Programs (OJP), the entity charged with distributing the funding. This troubled history has had the following adverse results:

- dissuaded states from properly preserving biological evidence, thereby hindering not only innocence claims, but also the ability to solve cold cases;
- limited the reach of post-conviction testing to a few states; and
- defeated or slowed a ripe opportunity for effective forensic oversight of the crime labs.

### **Proposed Solutions:**

#### *Executive:*

1. The Executive should not create separate, parallel programs that allow potential grant applicants to circumvent the innocence protections articulated in the Justice For All Act, as President Bush did through the President's DNA Initiative.
2. Loosen current procedural/administrative burdens on potential Bloodsworth applicants (e.g. certification from Chief Legal Officer; applying through State Administering Agencies (SAA's), etc.) to ensure even distribution of post-conviction DNA testing monies across deserving applicant states in need.
  - **Amend U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, Solicitation: Postconviction DNA Testing Assistance Program to loosen requirements on potential applicants.**
3. Enforce forensic oversight requirements of the Coverdell grant program by ensuring existence of the appropriate forensic oversight entity and process upon application for such funds, and appropriate responses to allegations filed under that grant program.
  - **Enforce 42 U.S.C. 3797(k)(4)**
4. Create a national working group to identify best practices relating to proper evidence preservation, with the goal of providing guidance to the states (see also legislative changes below).

#### *Legislative Changes:*

1. Support continued authorization and appropriation of Bloodsworth funding, as well as three other programs governed by Section 413 innocence protection requirements, through FY2014.
  - **Reauthorize 42 U.S.C.A. § 14136e (Kirk Bloodsworth DNA Assistance Grant Program)**
  - **Reauthorize three remaining grant programs governed by Section 413 innocence protection requirements:**
    - **DNA Training and Education for Law Enforcement, Correctional Personnel and Court Officers (42 U.S.C.A. § 14136)**
    - **DNA Identification of Missing Persons (42 U.S.C.A. § 14136d)**

- **DNA Research & Development (42 U.S.C.A. § 14136b)**
- 2. Ensure maintenance of present statutory forensic oversight requirements for Paul Coverdell grant program. (H.R. 5107, Section 311(b))(2004)
- 3. Create a national working group to identify best practices relating to proper evidence preservation, with the goal of providing guidance to the states.
  - **Amend 42 U.S.C.A. § 14136e (Kirk Bloodsworth DNA Assistance Grant Program)**

**Legislative Appropriations (Solutions w/ Funding Requests):** Fully fund the Justice For All Act grant programs (Sections 303, 305, 308 and 412 above), as governed by Section 413 of the Justice For All Act (as reauthorized). Fully fund the Paul Coverdell Forensic Science Improvement Grant program (Section 311).

**Jurisdiction:**

**Executive Branch:** Office of Justice Programs (OJP)

**Legislative Branch:** Senate and House Appropriations Committees  
Senate and House Judiciary Committees

**Background:**

**Executive Branch:** Since its passage, the Congressional mandate to establish state-level innocence protections has faced significant roadblocks due to Executive maneuvering. The President, through his President's DNA's Initiative, established an executively-funded rival to three of the four grant programs—all but the Kirk Bloodsworth Postconviction DNA Testing Assistance Grant Program—that were originally conditioned upon statewide establishment of innocence protections (Section 413 of the JFAA). This executive strategy effectively allowed grant recipients to sidestep the innocence-related requirements created under the Justice for All Act, thereby dishonoring Congressional intent.

**Legislative Branch:** Senator Patrick Leahy championed the Innocence Protection Act (IPA) for several years before its passage in 2004. The IPA was folded into a victims' rights bill, the Justice For All Act (JFAA), a product of bi-cameral compromise, and Senator Leahy was joined in support of the bill by Senate Judiciary Chairman Orrin Hatch (R-UT), Sen. Arlen Specter (R-PA), then-House Judiciary Chairman F. James Sensenbrenner (R-WI) and Rep. William Delahunt (D-MA). The bill was unanimously approved by the House Judiciary and then passed on the House floor in a 393-14 vote on October 6, 2004. Three days later, the bill passed the Senate by a voice vote.

After the passage of the IPA, as part of JFAA, OJP's enforcement of the two grant programs—Bloodsworth and Coverdell—rendered the innocence protections anticipated by the passage of the JFAA meaningless. Though the Bloodsworth program was funded by Congress in 2006 and 2007, these grant monies were never disbursed. Instead, OJP claimed that none of the applicants met the program requirements. Moreover, OJP's extraordinary delay in processing

the 2006 applications somehow prevented them from offering a solicitation in 2007. While five states were finally awarded funding under the Bloodsworth grant program this year, the existence of several procedural and administrative hurdles are likely to dissuade potential applicant states from applying for this funding in the future. In stark contrast to the Bloodsworth Program, OJP failed to even minimally enforce the requirements of the Coverdell program, giving out grants to crime labs with no proven external oversight mechanism in place to investigate allegations of forensic misconduct and negligence in earnest.

After learning of OJP's failure to properly administer the Bloodsworth and Coverdell grant programs, Senator Leahy, Chairman of the Senate Judiciary Committee, held a hearing on January 8th of this year to discuss oversight of the JFAA's grant programs entitled, "Oversight of the Justice For All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell Grant Programs?" In a related press release, Sen. Leahy issued the following statement: "It is passed [sic] time for the executive to fulfill its constitutional duty and faithfully execute the law and implement these vital programs reasonably and meaningfully as Congress intended." At the hearing, John Morgan of the National Institute of Justice was taken to task for failing to either distribute the Bloodsworth funds or adequately enforce the requirements of the Coverdell grant program.

In April of 2008, another hearing was held by the House Judiciary Committee on Crime, Terrorism and Homeland Security entitled "Reauthorization and Improvement of DNA Initiatives of the Justice For All Act of 2004."

Subsequent to the hearing, the House Judiciary Committee passed a bill to re-authorize the three grant programs governed by Section 413 in the JFAA that had previously been funded under the President's DNA Initiative. The Senate Judiciary Committee is considering similar legislation.

The House Judiciary Committee is presently considering a draft of a bill that would establish a national working group charged with identifying best practices relating to evidence preservation. Such practices would provide desperately needed guidance to the states in their efforts to properly preserve biological evidence.

### **Potential Allies, Potential Opposition, and Public Opinion:**

#### ***Potential Allies:***

- Innocence Community (Innocence Network/ Innocence Project)
- The Justice Project
- National Association of Criminal Defense Lawyers (NACDL)
- ACLU
- The Constitution Project
- American Bar Association
- Public Policy Section of the Academy of Criminal Justice Scientists
- Center for Community Alternatives
- International CURE
- Virginia CURE

- National Legal Aid & Defender Association
- Rep. Conyers, Jr. (held JFAA oversight hearings and is on the record discussing the importance of avoiding wrongful convictions)
- Rep. Ellison (drafted legislation mandating electronic recording of interrogations)
- Rep. Eddie Bernice Johnson (sponsored hearings about wrongful convictions in Texas)
- Rep. Hank Johnson (worked on eyewitness identification reform in Georgia)
- Rep. Sanford Bishop (trial lawyer for a subsequently exonerated Georgian man and sponsor of the Wrongful Convictions Tax Relief Act)
- Senator Amy Klobuchar (As a County Attorney in Minnesota, Klobuchar implemented eyewitness identification procedure reforms)
- Sen. Leahy (sponsor of the Innocence Protection Act)
- Sen. Brownback (sponsor of the Wrongful Convictions Tax Relief Act)
- Sen. Schumer (sponsor of the Wrongful Convictions Tax Relief Act)
- Rep. Scott (longtime supporter of innocence issues)
- Rep. Sensenbrenner (sponsored Justice for All Act in 2004)
- Rep. Delahunt (sponsored Justice for All Act in 2004)
- Rep. Rush (sponsor of Congressional Gold Medal bill for Barry Scheck and Peter Neufeld)
- Rep. Maloney (sponsor of Congressional Gold Medal bill for Barry Scheck and Peter Neufeld)
- Rep. Gutierrez (sponsor of Congressional Gold Medal bill for Barry Scheck and Peter Neufeld)

***Potential Opposition:***

- Innocence Protection Act (Section 413 of the Justice For All Act):

*Summary:* The potential recipients of funding under Sections 303, 305, and 308 might not wish to be governed by the Section 413 innocence protection requirements.

*Response:* Congress expressly governed those grant programs under Section 413 to compel states to implement innocence protections.

- Paul Coverdell Forensic Science Improvement Grant Program (Section 311 of the Justice for All Act):

*Summary:* The Consortium of Forensic Science Organizations (which represents American Society of Crime Lab Directors, the National Association of Medical Examiners, the International Association for Identification, and the American Academy of Forensic Sciences) may express concerns that the Coverdell forensic oversight requirements are too burdensome and/or unnecessary.

*Response:* The need for forensic oversight is tremendous. The Innocence Project is aware of numerous instances of forensic error that occur annually and without

the Coverdell requirements, seem likely not to be properly investigated. Indeed, even with the Coverdell program requirements, many states have not properly investigated such situations.

- The proper entity and process for conducting such investigations has not proven to be a fiscal burden on any state.

*Summary:* The Current DOJ/NIJ Administration claims that it is not their responsibility to police the Coverdell program.

*Response:* The DOJ Office of Inspector General (OIG) has issued two reports specifying that oversight of the Coverdell grant program is their responsibility.

### **Experts:**

- Barry Scheck, Co-Founder, Innocence Project
- Peter Neufeld, Co-Founder, Innocence Project
- Exonerees: many of the nation's 223 DNA exonerees will speak in support of and the need for reauthorization and reform of the Justice For All Act.

### **For Further Information:**

Justice for All Act of 2004 (Public Law No: 108-405):

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_bills&docid=f:h5107enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h5107enr.txt.pdf)

Testimony provided by Peter Neufeld, Co-founder and Co-director of the Innocence Project, before the Senate Judiciary Committee, United States Senate, regarding "Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell Grant Programs?" (January 23, 2008):

[http://judiciary.senate.gov/hearings/testimony.cfm?id=3068&wit\\_id=6847](http://judiciary.senate.gov/hearings/testimony.cfm?id=3068&wit_id=6847)

Testimony provided by Peter Neufeld, Co-founder and Co-director of the Innocence Project, before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, regarding "**Reauthorization and Improvement of DNA Initiatives of the Justice For All Act of 2004**" (April 10, 2008):

<http://judiciary.house.gov/hearings/pdf/Neufeld080410.pdf>

## II. ESTABLISH A FEDERAL COMMISSION ON THE CAUSES AND REMEDIES OF WRONGFUL CONVICTION

**Summary of the Problem:** The United States has had 223 DNA exonerations to date. While these wrongful convictions represent lost years and opportunities for the wrongfully convicted, their suffering need not be entirely in vain. Each wrongful conviction should and must be looked upon as a learning moment, an opportunity to identify both our system's shortcomings and the remedial steps that can be taken to prevent their recurrence.

It is critically important that policymakers closely track these cases, for while DNA is only probative of innocence or guilt in a small fraction of all criminal cases, the practices leading to wrongful convictions are fundamental to the vast majority of criminal investigations.

### **Proposed Solutions:**

***Executive:*** Issue an executive order establishing a presidential innocence commission. Appropriate appointments are critical.

***Legislative Changes:*** Introduce and pass legislation that would establish an independent, federal innocence commission. Appropriate appointments are critical.

Whether established via executive order or through legislative action, such a commission should be an independent investigative committee 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
- innocence project representatives

The commission should be charged with examining post-conviction DNA exoneration cases to establish their causes, identifying recommended fixes to the federal criminal justice system and creating a template for reform that can be adopted by the individual states. Key features of an effective commission include access to first-rate investigative resources, political independence, and subpoena power.

***Legislative Appropriations (Solutions w/ Funding Requests):*** Up to \$2 million

## **Jurisdiction:**

***Executive Branch:*** President by Executive Order

***Legislative Branch:*** Senate and House Judiciary Committees  
House and Senate Appropriations Committees

**Background:** In response to the proliferation of wrongful convictions and the attendant diminution in public confidence in the criminal justice system they engender, many states have formed statewide commissions to identify and remedy the causes of wrongful conviction (see <http://www.innocenceproject.org/news/LawView6.php> for information on each commission). These commissions have comprehensively examined post-conviction DNA exonerations and begun to implement the readily available reforms that go to the root causes of wrongful convictions, including mistaken identification, false confessions, unreliable forensic science, unregulated use of incentivized informants, law enforcement misconduct, and ineffective defense counsel.

Nonetheless, a more uniform and comprehensive approach is needed if we are to truly learn the lessons that can be culled from DNA exonerations. A federal examination of the causes of wrongful conviction will yield constructive efforts to strengthen the capacity of the criminal justice system to make more accurate guilt/innocence determinations, which promises in turn to provide guidance to states in their efforts to bolster their respective fact-finding endeavors.

One great benefit of the establishment of such a commission is its ability to focus upon deficiencies in the system without casting blame on individual actors. Such a framework simply provides an opportunity to objectively review the operation of the criminal justice system. Another value of the commission structure is the assurance that many varied voices can be heard, as membership, by design, is to be drawn from a broad range of criminal justice stakeholders representing a variety of interests and concerns. When problems of shared concern are identified and discussed in an open forum, thoughtful remedies which strengthen the quality of justice will be isolated, and impediments to their implementation—such as limited resources and a dearth of best practices in certain areas—can collectively be addressed.

## **Potential Allies, Potential Opposition, and Public Opinion:**

### ***Potential Allies:***

- Innocence Community (Innocence Network/Innocence Project)
- The Justice Project
- National Association of Criminal Defense Lawyers (NACDL)
- ACLU
- The Constitution Project
- Public Policy Section of the Academy of Criminal Justice Scientists
- Center for Community Alternatives
- International CURE

- Virginia CURE
- National Legal Aid & Defender Association
- Sen. Leahy (sponsor of the Innocence Protection Act)
- Sen. Klobuchar (as a County Attorney in Minnesota, Klobuchar implemented eyewitness identification procedure reforms)
- Sen. Brownback (sponsor of the Wrongful Convictions Tax Relief Act)
- Sen. Schumer (sponsor of the Wrongful Convictions Tax Relief Act)
- Rep. Conyers, Jr. (held JFAA oversight hearings and on record discussing importance of avoiding wrongful convictions)
- Rep. Ellison (drafted legislation mandating electronic recording of custodial interrogations)
- Rep. Eddie Bernice Johnson (sponsored hearings about wrongful convictions in Texas)
- Rep. Hank Johnson (worked on eyewitness identification reform in Georgia)
- Rep. Sanford Bishop (trial lawyer for a subsequently exonerated Georgia man and sponsor of the Wrongful Convictions Tax Relief Act)
- Rep. Scott (long time supporter of innocence issues)
- Rep. Sensenbrenner (sponsored Justice for All Act in 2004)
- Rep. Delahunt (sponsored the Justice for All Act in 2004)
- Rep. Rush (sponsor of Congressional gold medal bill for Barry Scheck and Peter Neufeld)
- Rep. Maloney (sponsor of Congressional gold medal bill for Barry Scheck and Peter Neufeld)
- Rep. Gutierrez (sponsor of Congressional gold medal bill for Barry Scheck and Peter Neufeld)

(Note: The legislators listed above have previously supported some form of legislation that sought to implement innocence protections or provide justice in the wake of wrongful convictions; their specific support for the creation of such a Commission has not officially been established.)

**Potential Opposition:** None on record

**Public Opinion:** A number of states across the nation—California, Illinois, North Carolina, Pennsylvania, Texas, and Wisconsin—have established commissions with little or no opposition.

Please see attached editorials:

Editorial. (2008, January 10). More Than A Steak Dinner. *New York Times*.  
<http://www.nytimes.com/2008/01/10/opinion/10thu3.html>

Editorial. (2008, June 17). To Right the Wrongs; Group Will Study Wrongful Convictions. *Newsday (New York)*.

<http://pqasb.pqarchiver.com/newsday/access/1495736131.html?dids=1495736131:1495736131&FMT=CITE&FMTS=CITE:FT&type=current&date=Jun+17%2C+2008&author=Anonymous&pub=Newsday&edition=&startpage=n%2Fa&desc=To+right+the+wrongs+Group+will+study+wrongful+convictions>

### **Experts:**

- Hon. John K. Van de Kamp, Chair, California Commission on the Fair Administration of Justice
- Senator Stewart J. Greenleaf
- Pennsylvania Republican Senate Judiciary Chair and Sponsor of legislation establishing an Advisory Committee on Wrongful Conviction in Pennsylvania
- I. Beverley Lake, Jr., former Chief Justice of the North Carolina Supreme Court and created the North Carolina Actual Innocence Commission
- Exonerees: Many of those men and women exonerated by DNA evidence have testified in various forums across the country and would be willing to speak about the issues associated with their wrongful convictions.

### **For Further Information:**

**Innocence Project website:** [www.innocenceproject.org](http://www.innocenceproject.org)

Scheck, Barry, Peter Neufeld, and Jim Dwyer. *Actual Innocence: When Justice Goes Wrong and How to Make it Right*, New York: New American Library, 2000.

California Commission on the Fair Administration of Justice's Final report:  
<http://ccfaj.org/documents/CCFAJFinalReport.pdf>

Gould, Jon B. *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System*, New York: New York University Press, 2008.

## **III. EXEMPT COMPENSATION TO THE WRONGFULLY CONVICTED FROM FEDERAL INCOME TAX**

**Summary of the Problem:** When an innocent person is convicted of a crime, that person is robbed of his freedom, his family, and his livelihood to be put through the unique horror of prison. Unfortunately, the nightmare does not end there. With no money, housing, transportation, health services or insurance, and a criminal record that is rarely cleared despite innocence, the punishment lingers long after innocence has been proven. The difficulty of reentering society is profound. Only half of the states in the nation have passed laws that provide compensation to the wrongfully convicted upon release. These laws vary greatly, with some providing caps on monetary reparation regardless of the number of years an individual spent in prison. Moreover, all compensation packages are currently subject to federal taxation.

### **Proposed Solutions:**

**Legislative Changes:** Pass S. 2421, H.R. 7021 (110<sup>th</sup> Congress): The Wrongful Convictions Tax Relief Act

Twenty-five states across the country have passed laws that compensate men and women who have been proven innocent after spending years behind bars for crimes they did not commit. S. 2421 (introduced and referred to the Committee on Finance in December) and H.R. 7021 (referred to House Committee on Ways and Means in September 2008) would clarify federal tax law so that compensation awards received through those means are not subject to federal taxes. The legislation would also exempt exonerated individuals who do not have any prior felony convictions from paying income taxes on up to \$50,000 earned per year following release (or \$75,000 if the wrongfully convicted person files a joint tax return.) This aspect of the legislation would benefit all wrongfully incarcerated individuals, regardless of whether they reside in a state that provides compensation through a statutory scheme. Finally, the legislation would also provide the wrongfully convicted with an income tax credit on payroll taxes paid over the same earnings. The benefits of the proposed legislation would remain in effect for the number of years an individual spent wrongfully incarcerated, or fifteen years, whichever is less.

- **Amend Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986.**

**Jurisdiction:**

**Executive Branch:** No jurisdiction; IRS may have to administer changes

**Legislative Branch:** Senate and House Judiciary Committees

**Background:**

**Legislative Branch:** In December of 2007, Senator Charles Schumer (D-NY) introduced The Wrongful Conviction Tax Relief Act. Senator Brownback (R-KS) co-sponsored the legislation on the Senate side. On the House side, Representatives John Larson (D-CT), Sam Johnson (R-TX) and Sanford Bishop (D-GA) introduced a slightly revised version of the legislation in September 2008.

**Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:***

- Innocence Community (Innocence Network/Innocence Project)
- The Justice Project
- National Association of Criminal Defense Lawyers (NACDL)
- Center for Community Alternatives
- National Legal Aid & Defender Association
- Sen. Schumer, sponsor of the Wrongful Conviction Tax Relief Act
- Sen. Brownback, sponsor of the Wrongful Conviction Tax Relief Act

- Rep. Sam Johnson, sponsor of the Wrongful Conviction Tax Relief Act
- Rep. Sanford Bishop, sponsor of the Wrongful Conviction Tax Relief Act

***Potential Opposition:*** None on record

**Experts:**

- Barry Scheck, Co-Founder, Innocence Project
- Peter Neufeld, Co-Founder, Innocence Project
- Exonerees: Many of the nation's 223 DNA exonerees will speak in support of and the need for passage of these bills.

**For Further Information:**

See [www.innocenceproject.org](http://www.innocenceproject.org)

## **CHAPTER EIGHT**

### **PRISON REFORM**

More than one in every 100 adults in the United States is behind bars.<sup>1</sup> If the 2.3 million people behind bars were a city, it would be the fourth largest in the country.<sup>2</sup> The U.S. prison system costs taxpayers more than \$60 billion per year and it is bursting from the seams, so projections for costs will continue to skyrocket in the absence of significant reforms. Such reforms are needed not only to reduce costs, but also to ensure fairness and humane treatment behind prison walls.

Because of deeply flawed and discriminatory sentencing policies, our prisons hold a disproportionate number of people of color, and people with mental illness and addiction problems. At mid-year 2007, the rate at which African-American men were serving sentences was an astounding 4,618 per 100,000. The comparable rates for Hispanic males were 1,747 sentenced prisoners per 100,000 and, for white males, 773 per 100,000.<sup>3</sup> This means black males were four times more likely, and Hispanic males twice as likely, to be held in custody than white males.<sup>4</sup> According to the most recent report by the U.S. Department of Justice, Bureau of Justice Statistics, 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates in the United States suffer from mental illness.<sup>5</sup> 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.<sup>6</sup> Experts also estimate that people with developmental disabilities may constitute as much as 10 percent of the prison population.<sup>7</sup>

Grossly deficient medical and mental health care 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.<sup>8</sup> Prisoners are also threatened daily by sexual violence, a frighteningly common occurrence in the nation's corrections systems. The Bureau of Justice Statistics estimates that there are more than 8,000 reported incidents of sexual assault in prisons nationwide each year. Staff sexual misconduct comprised 42 percent of reported allegations while 37 percent involved prisoner-on-prisoner violence. The number of sexually violent incidents that goes unreported due to victims' fear of reprisal cannot even be estimated.<sup>9</sup>

The profound failures of the U.S. prison system defy our common values of human dignity, justice, and respect. If Fyodor Dostoevsky is correct when he argues, "A society should be judged not by how it treats its outstanding citizens but by how it treats its criminals," then Americans should truly be ashamed. Dramatic reforms to our prison system are long overdue. This section provides a comprehensive summary of practical policy options to bring about significant improvements to our nation's prisons and jails. The prison section priorities focus on needed reforms to return the rule of law to U.S. prisons and jails, reduce recidivism, and improve transparency in the world's largest prison system. This chapter concludes with a

recommendation to the next president to examine the current use of the prison system and its impact on the economy, public safety, and the welfare of our society.

## **I. RETURN THE RULE OF LAW TO U.S. PRISONS AND JAILS BY FIXING THE PRISON LITIGATION REFORM ACT (PLRA)**

**Summary of the Problem:** The PLRA was intended to stem frivolous prisoner lawsuits. Too often, however, it denies justice to victims of rape, assault, religious restrictions, and other constitutional violations in prisons and jails. When prisoners fail to file the right paperwork, or if their injuries are deemed insufficiently “physical,” their claims may be—and usually are—dismissed. During a 1995 hearing prior to the PLRA’s passage, its chief sponsor, Senator Orrin Hatch, assured the Congress that “I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised.” It’s become clear, however, that the PLRA does just that.

Over a decade of experience has shown that the 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, other provisions of the PLRA must be amended or repealed in order to restore the rule of law to prisons and jails so that people, including children, can have their meritorious constitutional claims heard in court.

### **Proposed Solutions:**

*Executive:* Supporting role

*Legislative Changes:* Stand-alone legislation (or these provisions tacked on to another vehicle) that includes the following:

1. Repeal PLRA provision that prohibits prisoners from bringing lawsuits for mental or emotional injury without demonstrating a “physical injury.”
  - **Repeal 42 U.S.C. § 1997e(e)**
2. Amend the requirement for exhaustion of administrative remedies to require prisoners to present their claims to responsible prison officials before filing suit, and, if they fail to do so, require the court 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.
  - **Amend 42. U.S.C. § 1997e(a)**
3. Repeal the provisions extending the PLRA to juveniles confined in juvenile facilities.
  - **Amend 18 U.S.C. § 3626(g), 28 U.S.C. §§ 1915(h), 1915A(c),**

**42 U.S.C. § 1997e(h)**

4. Restore judicial discretion to grant the same range of remedies in prisoners' civil rights actions that they possess in other civil rights cases.
  - **Repeal 18 U.S.C. § 3626**
5. Allow prisoners who prevail on civil rights claims to recover reasonable attorney's fees like others whose civil rights have been violated.
  - **Repeal 42 U.S.C. § 1997e(d)**
6. 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, now \$350 in district courts and \$450 in appellate courts.
  - **Amend 28 U.S.C. §§ 1915(a), (b)**
7. Amend "three-strikes provision" (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 3 lawsuits or appeals dismissed as malicious within the past 5 years.
  - **Amend 28 U.S.C. §1915(g)**

**Jurisdiction:**

*Executive Branch:* Supporting role

*Legislative Branch:* Senate and House Judiciary Committees

**Background:**

*Legislative Branch:* The PLRA was passed in 1996 as Title VII of the FY 1996 appropriations act for the Departments of Commerce, Justice, State and related agencies. Its major supporters were state Attorneys General (including Rep. Dan Lungren, California's then AG) and Senators Hatch, Robert Dole, Phil Graham, and Jon Kyl. Senators Edward Kennedy, Paul Simon, and Joseph Biden were its most vocal opponents on Capitol Hill. After the law was enacted, there were no hearings or reports on the impact of the law until more than 11 years later.

Representatives Bobby Scott and John Conyers introduced the Prison Abuse Remedies Act (H.R. 4109) on November 7, 2007, which addresses many of the problems with the PLRA. There was a hearing regarding these problems in the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on November 8, 2007.

The testimony can be found online at: <http://www.savecoalition.org/latestdev.html>.

There was also a hearing regarding H.R. 4109 on April 22, 2008 in the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security.

## **Potential Allies, Potential Opposition, and Public Opinion:**

### ***Potential Allies:***

- Broad, bipartisan coalition that includes numerous advocacy organizations (HRW, Sentencing Project, United Methodist Church, New York Legal Aid Prisoners Rights Project, Center for Community Alternatives, Justice Policy Institute, Prison Legal News, International CURE, Virginia CURE, etc.)
- Prison Rape Elimination Commission
- Commission on Safety and Abuse in America's Prisons
- Some corrections officials
- Some prosecutors
- Faith-based organizations
- ACLU

### ***Potential Opposition:***

- The National Association of Attorneys General (NAAG) sent a letter to Congress signed by 40 Attorneys General, arguing that the PLRA is serving its purpose to reduce frivolous litigation and has served an additional purpose of lessening the burden on courts by limiting the scope of consent decrees. It argues that to enact HR 4109 would "eviscerate" the PLRA and all of its protections for the courts, which is simply untrue. It acknowledges, however, that some minor changes may need to be made to the law.
- Marty Horn, Commissioner of the New York Department of Correction, wrote a letter to Congress stating that the PLRA makes it easier for corrections officials to do their jobs. He argues that the exhaustion provision of the PLRA helps to get internal issues resolved expeditiously and does not bar claims from court. In response, however, numerous other corrections officials have argued that the PLRA has hindered their ability to fix systemic problems within their prison/jail systems because they often require resources or court orders that result through litigation. See hearing testimony by Jeanne Woodford, former warden of San Quentin Prison and former Secretary of the California Department of Correction and Rehabilitation:  
<http://www.savecoalition.org/pdfs/woodfordtestimonyFINAL.pdf>
- Sarah Hart, Assistant Philadelphia District Attorney, and an author of the PLRA, makes very similar arguments to those included in the letter from NAAG, since she is the person who informs them about this issue. She insists that the current law is successful in fulfilling its purpose, but her written testimony submitted to the House Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security was very misleading in some areas. For example, she stated that the PLRA reform bill, H.R. 4109 would eliminate the PLRA's limits on consent decrees that establish prison population caps. This is absolutely untrue, however, as H.R. 4109 does not even address the PLRA's requirement of a three-judge panel for the imposition of any prison population caps and PLRA reform advocates have never called for the removal of those provisions of the law.

**Public Opinion:** There have been several articles and opinion pieces done about the problems with the PLRA, which can be found here:  
<http://www.savecoalition.org/moreinfo.html>

In March 2008, David Keene wrote the following op/ed about the deeply flawed PLRA for *The Hill*: <http://thehill.com/david-keene/rule-breakers-inside-and-out-2008-03-03.html>

- The American Bar Association approved a policy recommendation in February 2007 urging support for federal and state reforms to ensure that prisoners are afforded meaningful access to the judicial process to vindicate their constitutional and other legal rights and assure that they are subject to procedures applicable to the general public when bringing lawsuits. Further, the ABA specifically urges Congress to substantially amend the PLRA, consistent with those provisions outlined in this transition recommendation. The ABA's specific policy recommendation can be found online at:  
<http://www.savecoalition.org/americanbar.html>
- The Commission on Safety and Abuse in America's Prisons, a commission of criminal justice experts including corrections officials and prosecutors, conducted an inquiry into the most serious issues of safety in American corrections systems. They found that because of the PLRA, prisoners with meritorious claims have been deterred from filing suit, and federal courts have, at times, been rendered impotent in their ability to protect prisoners who are in danger and subject to abuse. As a result, they recommended reforms to the PLRA that are laid out in their report, which can be found online at:  
[http://www.savecoalition.org/pdfs/Commission\\_recommendation\\_re\\_PLRA.pdf](http://www.savecoalition.org/pdfs/Commission_recommendation_re_PLRA.pdf)
- The National Prison Rape Elimination Commission, a delegation formed by Congress in conjunction with the passage of the Prison Rape Elimination Act of 2003, conducted a legal and factual study on prison sexual assaults and urges the reform of the PLRA to empower federal courts to bring attention and justice to sexual violence in prisons. Their letter to leaders in Congress can be found online at: [http://www.savecoalition.org/pdfs/PREA\\_letter\\_urging\\_reform\\_PLRA.pdf](http://www.savecoalition.org/pdfs/PREA_letter_urging_reform_PLRA.pdf)
- The United States ratified the United Nations Convention Against Torture in 1994, in which "torture" is defined as any punishment that may inflict severe pain or suffering, whether mental or physical. However, under the PLRA, a prisoner must prove physical injury in order to obtain compensatory damages, meaning countless prisoners who experience unconscionable living conditions or sexual and emotional abuses do not have access to appropriate judicial remedies. The Committee Against Torture recently reviewed the United States' compliance with the treaty and found the PLRA's physical injury requirement to be an explicit violation. The Committee urges the repeal of the physical injury requirement.

For more information, read testimony by David C. Fathi, Director of U.S. Programs for Human Rights Watch:  
[http://hrw.org/english/docs/2008/04/22/usdom18610\\_txt.htm](http://hrw.org/english/docs/2008/04/22/usdom18610_txt.htm)

**Experts:**

- Elizabeth Alexander, ACLU National Prison Project
- John Boston, New York Legal Aid Prisoners Rights Project

*Witnesses in favor of amending the PLRA who testified at the November 2007 hearing on problems with the PLRA:*

- Margo Schlanger, Washington University Law School
- David Keene, American Conservative Union
- Pat Nolan, Prison Fellowship
- Garrett Cunningham, former prisoner and rape victim

*Witnesses in favor of amending the PLRA who testified at the April 2008 hearing on H.R. 4109, the Prison Abuse Remedies Act:*

- Jeanne Woodford, former warden of San Quentin Prison in California, former Secretary of the California Department of Corrections and Rehabilitation
- Stephen Bright, Southern Center for Human Rights
- Ernie Preate, former Pennsylvania Attorney General
- Hon. John Gibbons, former Chief Judge of the U.S. Court of Appeals for the Third Circuit

**For Further Information:** Studies written about the PLRA and inmate litigation, as well as examples of cases dismissed because of the law, can be found online at: [www.savecoalition.org](http://www.savecoalition.org).

## **II. IMPROVE TRANSPARENCY IN CORRECTIONAL INSTITUTIONS**

**Summary of the Problem:** The United States imprisons a higher percentage of its population than any other country. One in every 100 adults in the U.S. is behind bars. Federal, state, and local governments currently spend approximately \$62 billion per year on adult and juvenile corrections and are 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. However, 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 or public accountability for what takes place behind bars.

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. Conditions within the prison can deteriorate to an extent which imperils the lives and human rights of those held there without anyone on the outside being aware of what is happening. In order to prevent abuse, prisons need effective

forms of oversight to ensure that public officials meet their legal obligation to ensure constitutional conditions of confinement.

Oversight is particularly essential given the increasing numbers of children locked up in adult facilities, where they are especially vulnerable. According to the Campaign For Youth Justice:

An estimated 200,000 youth are tried, sentenced, or incarcerated as adults every year across the United States. On any given day, nearly 7,500 young people are locked up in adult jails. On any given day, more than 2,600 young people are locked up in adult prisons. Youth housed in adult jails and prisons are at a higher risk of violence and suicide than those in the juvenile justice system. For example, youth housed in adult jails are 36 times more likely to commit suicide than are youth housed in juvenile detention facilities.

For more information, please see the attached document, Key Facts: Youth In The Justice System.

Currently, there are no national standards for the treatment of prisoners and no systemic national oversight to ensure that the constitutional and human rights of prisoners are protected. The Prison Rape Elimination Act of 2003 (PREA) mandated the development of standards for the prevention, detection, response, and monitoring of sexual abuse in detention. The National Prison Rape Elimination Commission is in the process of finalizing its proposed standards, which will then be submitted to the Attorney General. The Attorney General will have one year to publish a final rule adopting national standards. These standards will be binding on the Federal Bureau of Prisons immediately and state corrections systems will have one year to come into compliance or risk losing 5% of their federal funding. While paving the way for groundbreaking standards, PREA provides no mechanism for measuring and monitoring compliance. Moreover, the appropriations for PREA have been cut drastically every year since its passage, making the prospect of monitoring compliance with the standards even more challenging.

In our nation, the federal courts have traditionally provided some necessary oversight. While limited to the cases before it, the courts could ensure that no prison can wall off the constitution. Indeed, through the oversight provided by the federal courts in the 1970's and 1980's, the country's prisons were transformed—from dungeons that betrayed American ideals of innate human dignity to modern correctional institutions. Since the enactment of the Prison Litigation Reform Act (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. In addition, there is increasing reluctance of federal courts to provide oversight. As a result, it is essential that the government implement alternative forms of oversight.

## **Proposed Solutions:**

### ***Executive:***

1. Implement PREA's comprehensive national standards. *Authors recommend this action based on current draft of PREA standards.*
2. Develop a body to oversee implementation of, and compliance with, PREA standards

### ***Legislative Changes:***

1. Reauthorize Deaths in Custody Reporting Act (DICRA)
  - **Reauthorize 42 U.S.C. § 13701 note**
2. Pass strengthened Juvenile Justice and Delinquency Prevention Act
  - **Amend 42 U.S.C. §§ 5601 et seq.**
3. Hold an oversight hearing on conditions at Bureau of Prison facilities that could include some of the following areas of concern:
  - a. Federal death row conditions;
  - b. Medical care at federal facilities, including staffing ratios;
  - c. Discretion given to wardens to limit First Amendment rights through special administrative measures (SAMS); and
  - d. Treatment of prisoners with mental illness and addiction problems
4. Hold a hearing on prison oversight models that include:
  - a. an international model;
  - b. the California model of the Office of Inspector General;
  - c. Vera Institute's project to implement oversight mechanisms in local/state jurisdictions; and
  - d. DOJ Civil Rights Division Special Litigation Section.

### ***Legislative Appropriations (Solutions w/ Funding Requests):***

1. Fully fund PREA and appropriate needed resources for body to oversee implementation of/compliance with standards.
2. Fund National Institute of Justice research to look into state/local oversight models to determine which are most successful.
3. Draft/introduce legislation to implement independent oversight mechanism for BOP (based on info gathered in the hearings).

4. Draft/introduce legislation to track the success of former BOP prisoners reentering society (in terms of employment, housing, education, recidivism, etc.). This is a recommendation of the Commission on Safety and Abuse in America's Prisons.

**Jurisdiction:**

***Executive Branch:*** Attorney General, DOJ Civil Rights Division Special Litigation Section

***Legislative Branch:*** House and Senate Oversight and/or Judiciary Committees  
Senate and House Appropriations Committees

**Background:**

***Executive Branch:*** In 1980, Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA), which authorizes the Attorney General to conduct investigations and pursue litigation relating to conditions of confinement in state or locally operated institutions (the statute does not cover private facilities). Under the statute, the DOJ Civil Rights Division Special Litigation Section investigates covered facilities to determine whether there is a pattern or practice of violations of residents' federal rights. However, there has been concern in recent years that very few prisons have been investigated.

In 2003, Congress passed the Prison Rape Elimination Act (PREA), which, among other things, requires the development of the first-ever binding national standards for the prevention, detection, response, and monitoring of sexual violence behind bars. The law mandates that the National Prison Rape Elimination Commission develop standards, and that the Attorney General publish a final rule adopting national standards, after giving due consideration to the standards recommended by the Commission. The Attorney General is also charged with issuing annual reports on non-compliance and reducing by 5% the federal funds awarded to any state that is not in full compliance with the standards.

PREA was sponsored by Rep. Frank Wolf (R-VA), Rep. Bobby Scott (D-VA), and 31 others; Sen. Jeff Sessions (R-AL), Sen. Mike Dewine (R-OH), Sen. Dick Durbin (D-IL), Sen. Edward Kennedy (D-MA), and Sen. Dianne Feinstein (D-CA).

***Legislative Branch:*** Congress has taken action in the past to improve oversight; some of the relevant measures are discussed below.

In 2000, Congress enacted the Deaths in Custody Reporting Act (H.R. 3971), sponsored by Rep. Robert Scott (D-VA), Rep. James Forbes (R-VA), and Rep. 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.

As discussed above, Congress passed the Prison Rape Elimination Act (PREA) in 2003, and in this law mandated the creation of the first binding national standards for correctional

facilities. The National Prison Rape Elimination Commission is in the process of finalizing its recommended standards, which are due to be released in 2009. (Draft standards, which were released this past summer for public comment, can be found online at: <http://www.nprec.us/standards.htm>). How compliance with the standards will be measured and enforced remains unclear, and is compounded by concerns about appropriations. When PREA was passed, Congress authorized \$60 million per year in funding through 2010. 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 and 2007. For this fiscal year, \$17.86 million is authorized for PREA implementation, \$470,000 of which is earmarked for a report to the Appropriations Committees.

The Private Prison Information Act (H.R. 1889) 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. The bill was introduced in the House in April, 2007 and currently has 25 cosponsors.

The Juvenile Justice and Delinquency Prevention Act (JJDP A) establishes certain core requirements for the appropriate treatment of juveniles in states that receive federal funding for the juvenile justice systems. The act is due for renewal (it was introduced in the Senate this summer) and could be strengthened to include oversight of conditions of confinement in juvenile facilities and by ensuring that youth charged as adults are kept out of adult jails pre-trial with the ultimate goals of: (1) ensuring safe and humane conditions of confinement for youth in both juvenile and adult facilities, and (2) keeping youth out of adult jails and prisons completely.

For more information, *see* Chapter 13 regarding juvenile justice recommendations.

**Judicial Branch:** The federal courts have traditionally provided some necessary oversight, but their role has been dramatically undercut since the enactment of the PLRA. In addition, federal courts are growing increasingly reluctant to provide oversight of prisons and jails. For more information, *see* Section I, *supra*, regarding the PLRA.

### **Potential Allies, Potential Opposition, and Public Opinion:**

#### ***Potential Allies:***

- American Bar Association
- Prisoner Rights Advocates
- Human Rights Organizations
- Criminal Defense/Prison Attorneys
- Council of Juvenile Correctional Administrators
- National Commission on Correctional Health Care
- Commission on Safety and Abuse in America's Prisons
- Offices of Inspectors General
- National Prison Rape Elimination Commission
- National Alliance of Faith and Justice

- Prison Legal News
- Center for Community Alternatives
- ACLU
- International CURE
- Virginia CURE

**Potential Opposition:** Some corrections administrators see any suggestion of independent inspections and oversight as an implicit criticism of the way prisons are run, and fear uninformed outsiders making unfair criticisms that will potentially damage their careers. There is also concern about “one-size fits all” solutions being imposed. Hearings that look at different approaches to successful oversight and include administrators who operate under systems of oversight and find them helpful rather than damaging would help to counter this opposition.

**Public Opinion:** There is concern among policymakers and taxpayers about growing public expenditures on prisons and whether this money is being well spent. There is also some public sentiment against abusing prisoners. The issue of oversight has received considerable attention over the past few years, for example:

- The Report of the Commission on Safety and Abuse in America’s Prisons (June 2006) included among its four major recommendations a call for oversight and accountability through investment in external oversight, strengthened accountability within the profession, and the education and involvement of the public.  
[http://www.prisoncommission.org/pdfs/Confronting\\_Confinement.pdf](http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf)
- The American Bar Association approved a policy recommendation in August 2008 calling for federal and state governments to establish public entities independent of any correctional agency to regularly monitor and report publicly on the conditions in all correctional facilities. The report includes key requirements for the effective monitoring of correctional and detention facilities.  
<http://www.abanet.org/crimjust/policy/am08104b.pdf>
- The Lyndon B. Johnson School of Public Policy at the University of Texas – Austin held a conference in April 2006, “Opening up a Closed World: What Constitutes Effective Prison Oversight,” which brought together representatives of more than 20 corrections departments, along with national and international experts on prison oversight, lawyers and advocates to review existing oversight mechanisms and plan for their extension and strengthening within the U.S.  
<http://www.utexas.edu/lbj/prisonconference/index.php>
- The United Nations’ Committee Against Torture expressed concern about instances of cruel, inhuman, and degrading treatment in U.S. prisons when it reviewed the U.S. government report to the Committee in 2006. Among its concluding recommendations, the Committee called for the U.S. to ratify the new

Optional Protocol to the Convention Against Torture (OPCAT), which provides for international monitoring of places of detention by a committee of experts and requires states to develop their own national oversight mechanisms. Many U.S. advocates strongly support this recommendation.

<http://www2.ohchr.org/english/law/cat-one.htm>

### **Experts:**

- Michele Deitch, Lyndon B. Johnson School of Public Policy, University of Texas at Austin
- Matthew Cate, Secretary of California Dept. of Corrections and Rehabilitation, formerly Inspector General of the Department
- Michael Gennaco, Los Angeles County Office of Independent Review
- William Yeomans, former supervisor of litigation at the Civil Rights Division of the U.S. Department of Justice
- National Institute of Corrections
- Alex Busansky, Vera Institute
- American Correctional Association
- Penal Reform International
- Just Detention International
- Prison inspectors from Canada, England, European Union, South Africa, Mexico, etc.

**For Further Information:** In the Spring of 2006, a conference on prison oversight was held at the University of Texas's Lyndon B. Johnson School of Public Affairs in Austin, Texas. Experts in the field discussed the reasons for oversight, as well as models. Information from this conference can be found online at:

[http://www.utexas.edu/lbj/news/spring2006/prison\\_conf02.html](http://www.utexas.edu/lbj/news/spring2006/prison_conf02.html).

## **III. REDUCE RECIDIVISM AND STRENGTHEN FAMILIES**

**Summary of the Problem:** 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. Approximately 70-80% of people coming home from prison or jail have histories of drug or alcohol dependence. 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. The Department of Justice's Office of Juvenile Justice and Delinquency Prevention also released a report that concluded 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.

There are basic services that should be provided to people when they are in prison in order to reduce their chances of reoffending and improve public safety. In addition, for those who do not pose a real risk to the public, alternatives to incarceration such as drug and alcohol treatment, community service, payment of a fine, and probation have been shown to lead to significantly lower recidivism rates. There should be alternatives in place for non-violent offenders so that taxpayers do not have to pay the cost of incarcerating individuals who are not a risk to the public and may receive better services in the community. There also need to be merit-based programs to encourage good behavior and rehabilitation during periods of incarceration.

Family ties are incredibly important to maintain in order to reduce recidivism and increase public safety. Too often, families are destroyed because a parent or child is in prison. Nearly 3 million children have at least one parent in prison. These children are 6 times more likely to be incarcerated than other youth, according to some public health studies: <http://www.ncbi.nlm.nih.gov/pubmed/15488438>

In a recent article, Pat Nolan, Vice President of Prison Fellowship, wrote:

Of all the factors that help inmates after their release, an intact family is the most important in helping them stay on the right path. Research shows that when returning inmates have a supportive family, they are more likely to find a job, less likely to use drugs, and less likely to be involved in criminal activities. The support and accountability that a stable family provides have a clear, positive impact. Studies also show that children of inmates who are able to visit with their parents have increased cognitive skills, improved academic self-esteem, and greater self control, and they change schools much less often. The improvement of the children has an amazing impact on the incarcerated parent, too, with significantly reduced recidivism of the parent after release.

### **Proposed Solutions:**

***Executive:*** Require the Federal Bureau of Prisons to adopt policies to ensure prisoners have access to services/programs that will reduce barriers to reentry. These services/programs should include all of those listed in the proposed “reentry behind bars” bill listed below.

### ***Legislative Appropriations (Solutions w/ Funding Requests):***

1. Pass the Federal Prison Work Incentive Act of 2008 (H.R. 7089)
  - **Amend 18 USC §§ 4161-4165**
2. Draft and introduce a “reentry behind bars” bill that would provide grants to states to provide programs to better prepare prisoners for reentry such as the following:
  - a. 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;
  - b. government-issued ID cards upon release;

- c. enrollment for Medicaid prior to release (so that it is available upon release);
  - d. alternatives to incarceration for non-violent offenders;
  - e. merit-based reductions in sentences for non-violent offenders;
  - f. SSA prerelease agreement;
  - g. a requirement that individuals under 18 shall not be housed in adult facilities;
  - h. restore Pell Grant eligibility to prisoners;
  - i. access to clean needles and condoms in order to reduce the incidence of HIV/AIDS, Hepatitis, and other illnesses;
  - j. access to educational programs/job training for every prisoner;
  - k. access to religious services;
  - l. transportation to prisons for prisoners' families;
  - m. opportunities for parents in prison to visit with their children; and
  - n. regulate costs of collect calls from prisons.
3. Draft and introduce legislation to track the success of former BOP prisoners reentering society (in terms of employment, housing, education, recidivism, etc.). This is a recommendation of the Commission on Safety and Abuse in America's Prisons.

**Jurisdiction:**

***Executive:*** Federal Bureau of Prisons, DOJ

***Legislative Branch:*** Senate and House Judiciary Committees and/or Appropriations Committees

**Background:**

***Executive Branch:*** In his January 2004 State of the Union Address, President Bush expressed the need to address high recidivism rates in his statement:

*In the past, we've worked together to bring mentors to children of prisoners, and provide treatment for the addicted, and help for the homeless. Tonight I ask you to consider another group of Americans in need of help. This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. So tonight, I propose a four-year, \$300 million prisoner re-entry initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups. America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.*

***Legislative Branch:*** The Second Chance Act passed Congress and was signed into law in April 2008, as a bipartisan effort to reduce recidivism rates. It was supported by an

extraordinarily broad coalition of advocates, corrections officials, faith-based organizations, liberals, and conservatives. This was the first federal law of its kind that provides funding to states to reduce barriers to reentry once prisoners are released back into the community.

Additionally, a very small percentage of incarcerated individuals are served by the Residential Substance Abuse Treatment (RSAT) program under the Department of Justice. This program provides funding for addiction treatment services in state and local correctional facilities, in addition to aftercare services for individuals released back into the community.

The Federal Work Incentive Act of 2008, H.R. 7089, introduced by Representative Danny Davis of Illinois, establishes a process by which federal prisoners can earn merit-based early releases. Under H.R. 7089, all prisoners who have been given sentences other than life and who have exhibited a willingness to follow prison regulations are eligible for deductions from their sentences. Prisoners who have participated in industrial work or service programs are eligible for a further deduction.

### **Potential Allies, Potential Opposition, and Public Opinion:**

#### ***Potential Allies:***

- Mental health advocates
- Homelessness/housing advocates
- Prisoners' rights advocates
- Drug policy reform advocates
- Corrections officials and some others in law enforcement
- Youth advocates
- Progressive and conservative faith-based organizations
- Commission on Safety and Abuse in America's Prisons
- Addiction treatment and prevention advocates
- Public Policy Section of the Academy of Criminal Justice Scientists
- Center for Community Alternatives
- Justice Policy Institute
- Prison Legal News
- ACLU
- International CURE
- Virginia CURE

***Potential Opposition:*** Some prosecutors and fiscal conservatives due to the cost of funding programs.

***Public Opinion:*** According to a 2006 National Council on Crime and Delinquency report, U.S. voters favor rehabilitation for prisoners as opposed to a punishment-only system by a margin of eight to one. The report also concluded that an overwhelming majority of American voters support the Second Chance Act, and more than eighty percent of voters feel that job

training, medical care, affordable housing and student loans are important elements of crime prevention. A 2001 study by Belden, Russonello & Stewart commissioned by the ACLU, found that three in four Americans support drug rehabilitation over incarceration for non-violent drug offenders.

The NCCD report can be found online at:  
[http://www.nccd-crc.org/nccd/pubs/2006april\\_focus\\_zogby.pdf](http://www.nccd-crc.org/nccd/pubs/2006april_focus_zogby.pdf).

The Belden, Russonello & Stewart findings can be accessed online at:  
[http://www.njisj.org/reports/eagleton\\_report.html](http://www.njisj.org/reports/eagleton_report.html).

### **Experts:**

#### *On barriers to reentry:*

- Charlie Sullivan, CURE
- Gene Guerrero, Open Society Policy Center
- Pat Nolan, Prison Fellowship
- Council of State Governments, Reentry Project

#### *On drug policies:*

- Graham Boyd, Drug Law Reform Project of the ACLU
- Nkechi Taifa, Open Society Policy Center
- Eric Sterling, Criminal Justice Policy Foundation
- Jenny Collier, independent consultant (formerly at the Legal Action Center)

#### *On youth in adult facilities:*

- Liz Ryan, Campaign for Youth Justice

### **For Further Information:**

Pat Nolan's article on strengthening families can be found online at:  
<http://www.justicefellowship.org/article.asp?ID=8031>.

For more information about the Second Chance Act, please visit:  
[http://www.reentrypolicy.org/government\\_affairs/second\\_chance\\_act](http://www.reentrypolicy.org/government_affairs/second_chance_act).

## **IV. EXAMINE USE OF THE PRISON SYSTEM**

**Summary of the Problem:** 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. 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.

In spite of this huge increase in incarceration, the U.S. continues to have much higher rates of violence than other comparable countries. Over one million Americans are victims of violent crime each year. In 1996, for example, 5,665 Americans died of homicide. If the U.S. had the same homicide rate as England, the death toll would have been 210. England has high rates of violence by European standards. By way of further example, an American woman in her sixties is more likely to be a murder victim than a man of any age in France.

### **Proposed Solutions:**

***Executive:*** Create a new, bipartisan commission to examine criminal justice practices and goals, and charge the commission to make recommendations regarding the appropriate use of incarceration and the use of alternative forms of punishment.

***Legislative Changes:*** Hold a series of hearings regarding the appropriate use of incarceration and the use of alternative forms of punishment.

***Legislative Appropriations (Solutions w/ Funding Requests):*** Appropriate funding for a bipartisan commission to examine use of the prison system.

### **Jurisdiction:**

***Executive Branch:*** Presidential appointment

***Legislative Branch:*** House and Senate Judiciary Committees

### **Background:**

***Executive Branch:*** In 1971 President Richard Nixon established a National Advisory Commission on Criminal Justice Standards and Goals. The Commission's 1973 report concluded in part that, "[n]o new institutions for adults should be built and existing institutions for juveniles should be closed... (because) the prison, the reformatory, and the jail have achieved only a shocking record of failure."

***Legislative Branch:*** On October 4, 2007, Senator James Webb (D-VA) held a Joint Economic Committee hearing on over-incarceration. Among those who participated were Senator Robert Casey (D-PA), Senator Sam Brownback (R-KS), Congressman Phil English (R-PA), Congressman Bobby Scott (D-VA), and Representative Carolyn Maloney (D-NY). Witnesses: Prof. Glenn Loury; Prof. Bruce Western; Alphonso Albert; Michael P. Jacobson; Pat Nolan.

A detailed description of the hearing can be found online at:  
[http://jec.senate.gov/index.cfm?FuseAction=Hearings.HearingsCalendar&ContentRecord\\_id=7a22e2ab-7e9c-9af9-7bb7-4a1b88554f61&Region\\_id=&Issue\\_id.](http://jec.senate.gov/index.cfm?FuseAction=Hearings.HearingsCalendar&ContentRecord_id=7a22e2ab-7e9c-9af9-7bb7-4a1b88554f61&Region_id=&Issue_id.)

### **Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:***

- ACLU
- Center for Community Alternatives
- Justice Policy Institute
- Prison Legal News
- International CURE
- Virginia CURE
- Most of the organizations that supported the Second Chance Act including drug treatment groups, civil rights organizations, and Prison Fellowship.
- A number of criminologists who study the impact of incarceration and the relationship of incarceration to crime rates may also be allies; e.g., Marc Mauer of the Sentencing Project; Michael Jacobson of the Vera Institute for Justice, and Jeremy Travis of the John Jay School of Criminal Justice.

***Potential Opposition:*** There is potential opposition from some prosecutors and some law enforcement groups, but that would likely be countered by strong support from others in those same communities.

***Public Opinion:*** In a 2007 poll conducted by Third Way, a non-profit, non-partisan think tank, subjects who described themselves as both Democrats and Republicans overwhelmingly agreed that crime is a problem in the United States. Instead of viewing rehabilitative services as wasteful, 71 percent thought *more* tax dollars should be invested in job training, education and drug treatment for prisoners as an effort to reduce recidivism. A majority of those polled felt that social services and rehabilitation should be an essential and obligatory element of corrections. [http://www.thirdway.org/data/product/file/120/TW\\_Crime\\_Poll\\_Toplines\\_wHighlights.pdf](http://www.thirdway.org/data/product/file/120/TW_Crime_Poll_Toplines_wHighlights.pdf)

Multilingual polling in 2004 conducted by New California Media, a San Francisco-based ethnic media network, found that a majority of Californians of all ethnicities support state investment in rehabilitation over incarceration. The poll of nearly 2,000 California adults in 12 languages showed a strong majority favor alternatives to imprisonment in a state whose prison population has grown by 600 percent since 1980. Majorities in all groups also supported counseling over punishment for convicted youth. <http://articles.latimes.com/2004/feb/21/local/me-poll21>

A 2002 poll conducted by the Open Society Institute found that two-thirds of Americans agree the best way to reduce crime is to rehabilitate prisoners through education and job training. The public also favors addressing the roots of crime over strict sentencing by a margin of two to one. Those same Americans agree that drug abuse is a medical problem that should be handled through counseling and treatment rather than prison sentences. This is a marked change since 1994 when polls showed the public evenly divided on these questions. Now, a plurality of Americans think “tough on crime” strategies aren’t working and that a more progressive approach, like rehabilitation, would be a much more effective way to reduce crime.

[http://www.soros.org/initiatives/usprograms/focus/justice/articles\\_publications/publications/hart\\_poll\\_20020201/Hart-Poll.pdf](http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/hart_poll_20020201/Hart-Poll.pdf)

**Experts:**

- Gene Guerrero, Open Society Policy Center
  - Michael Jacobson, Vera Institute
  - Marc Mauer, The Sentencing Project
- 

<sup>1</sup> *One in 100: Behind Bars in America 2008*. Pew Research Center for the People & the Press, January 2008.

<sup>2</sup> See Bureau Of Justice Statistics, U.S. Dep't Of Justice, Publ'n No. 221944 Prison Inmates at Midyear 2007 Bulletin (June 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf>; Bureau Of Justice Statistics, U.S. Dep't Of Justice, Publ'n No. 221945 Jail Inmates at Midyear 2007 Bulletin (June 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jim07.pdf>.

<sup>3</sup> *Prison Statistics*, U.S. Department of Justice Bureau of Justice Statistics, December 2007, available <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

<sup>4</sup> Sabol, William J. & Heather Couture, *Prison Inmates at Midyear 2007*, U.S. Department of Justice Bureau of Justice Statistics, June 2008, available <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf>.

<sup>5</sup> James, Doris J. & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates, Bureau of Justice Statistics Special Report 1*, Department of Justice, Bureau of Justice Statistics, December 14, 2006.

<sup>6</sup> "Substance abuse and the prison population: A three-year study by Columbia University reveals widespread substance abuse among the offender population." *Corrections Today*, 60(6), 82-89, Belenko, S., Peugh, J., Califano, J.A., Usdansky, M., & Foster, S.E. (1998) as cited in "Integrating Substance Abuse Treatment and Criminal Justice Supervision," Douglas B. Marlowe, J.D., Ph.D. NIDA Science and Practice Perspectives, Volume 2, Number 1 – September 2003, <http://www.drugabuse.gov/PDF/Perspectives/vol2no1/02Perspectives-Integrating.pdf>

<sup>7</sup> Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, available at [www.thearc.org/faqs/crimqa.html](http://www.thearc.org/faqs/crimqa.html).

<sup>8</sup> Gibbons, John J. & Nicholas de B. Katzenbach, *Confronting Confinement*, The Commission of Safety and Abuse in America's Prisons, June 2006.

<sup>9</sup> Beck, Allen J. & Timothy A. Hughes, *Sexual Violence Reported by Correctional Authorities*, U.S. Department of Justice Bureau of Justice Statistics, July 2005.

## **CHAPTER NINE**

### **PARDON POWER/EXECUTIVE CLEMENCY**

#### **Breathe New Life Into the Pardon Power: How to Make Operational and Strategic Use of Executive Clemency**

With the rapid growth of the federal prison population and the expansion of legal barriers to reentry, the president's pardon power now plays a central operational role in the federal criminal justice system. However, the past four presidents have allowed the pardon power to atrophy as a remedy available to ordinary people, and the Justice Department has neglected its historical role as steward of the pardon power. There has been no considered discussion of the role that pardon should play in the justice system in light of the transformation of federal sentencing to a determinate no-parole system. Our next president ought to identify the values pardon serves, define a clear operational role for it in the criminal justice system, and establish a system for administering the power that will maximize its potential for correcting injustice and advancing the administration's policy objectives.

**Summary of the Problem:** The pardon power in Art. II, Section 2, cl. 1, of the Constitution gives the president unlimited authority to issue full or conditional pardons, commutations of sentence, remissions of fines, amnesties, and reprieves. 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 consequences of a federal conviction are numerous, onerous, and sometimes permanent.

Despite the evident need for clemency, the current system for administration of the pardon power is inefficient and unreliable, and results in very few grants. As of October 2008, President George W. Bush had issued fewer commutations and pardons in absolute terms than any other president in recent history, except for President George H.W. Bush. The Justice Department's Office of the Pardon Attorney (OPA) takes many years to process a case and evidently makes few favorable recommendations. The number of clemency applications has increased dramatically in recent years, producing a backlog of over 2,000 requests. Applicants have waited as long as eight years before receiving notice of the president's final decision and only a small percentage of requests are granted. This is a sharp contrast from practice prior to 1980, when grants were made regularly and frequently. Granting clemency in this manner helped the public see clemency as an integral part of the criminal justice system. Revitalizing executive clemency will allow the president to give deserving individuals a second chance, signal his law enforcement priorities within the executive branch, and highlight the need for reform of the justice system.

## **Proposed Solutions:**

*Executive:* Establish standards for the exercise of clemency that will provide guidance for all those involved in making recommendations to the president, and for individuals who are considering applying for clemency.

1. **Make the Justice Department's clemency process more efficient, reliable, and accountable by taking the following actions:**
  - a. Make the Attorney General (AG) personally responsible for signing all pardon recommendations to the President. As a member of the President's cabinet, the AG can bring to bear both a law enforcement and a political perspective. The current practice of having the Deputy Attorney General (DAG) sign clemency recommendations has allowed the pardon program to come under the control of prosecutors, and has constrained pardon's operational and policy functions. Having the Attorney General sign pardon recommendations elevates the pardon function within DOJ and allows it to perform better its function of giving meaningful review to pardon applicants.
  - b. Direct the Pardon Attorney to develop a strategic plan for the use of the pardon power to accomplish the President's criminal justice policy agenda; build up OPA staff to ensure that clemency applications are promptly and thoroughly reviewed, with a goal of ensuring that most cases are disposed of within two years of their receipt by OPA.
  - c. Make public the President's pardon policy and the standards for favorable consideration of pardon applications; establish a policy of disclosure after a clemency case has been finally acted upon, to introduce a degree of accountability into the pardon process, while respecting the privacy of clemency applicants and the prerogatives of the president.
  - d. Direct the Attorney General to make maximum use of statutory alternatives to clemency, such as the sentence reduction authority of 18 USC 3582(c)(1)(A)(i) and the deportation authority of 8 USC § 1231(a)(4).
2. **Make granting clemency a strategic priority for the White House.**
  - a. Assign a senior attorney in the White House Counsel's office to review and advise the president on pardon matters, and to review OPA's clemency recommendations on a regular basis.
  - b. Schedule regular opportunities for the President to review and act on clemency requests with his counsel.

- c. Consider making grants to advance the Administration’s criminal justice policy goals both within and outside of the executive branch, including with the public. Examples might include granting clemency to:
  - Recognize particularly harsh sentences, such as nonviolent drug offenders serving life without parole sentences or mandatory minimums that the sentencing judge believed did not fit their crimes;
  - Remedy disparity 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 offenders who did not benefit from the U.S. Sentencing Commission’s recent changes to the crack guidelines;
  - Signal disapproval of a particular investigative or prosecutorial practice, such as sentencing entrapment, or imposing a penalty on those who exercise their right to take their cases to trial;
  - Give effect to a judge’s expression of regret over having been required to impose too harsh a sentence;
  - Send home seriously ill or elderly prisoners who can receive adequate care from their families; and
  - Restore rights to individuals who have fully served their sentence and desire forgiveness, or who have a need for relief from some collateral penalty or disability (e.g., deportation, disqualification from employment or licensure, or ineligibility for a government benefit).
  
- d. Use clemency grants strategically to advance criminal justice reforms:
  - Pair grants of clemency to particular offenders (i.e., drug offenders serving mandatory minimums for crack cocaine) with calls to Congress (in press releases, State of the Union, personal meetings) to change sentencing laws (i.e., eliminate the 100:1 crack-powder cocaine disparity); and
  - Publicize clemency grants to make the public and Congress more comfortable with the use of clemency and to show the “human face” of those serving harsh prison sentences, or laboring under the lingering collateral disabilities of a criminal conviction.

**Jurisdiction:**

*Executive Branch:* The pardon power is exercised by the President alone, without statutory limit. The Office of the Pardon Attorney advises the President, and has been located within the Department of Justice (DOJ) since the 19<sup>th</sup> century.

**Background:**

*Executive Branch:* The pardon power in Art. II, Section 2, cl. 1, of the Constitution gives the President unlimited discretion to issue full or conditional pardons, commutations of sentence, remissions of fine, amnesties, and reprieves. Clemency plays a vital role in the federal

criminal justice system because it represents the only prospect of early release for prisoners serving extremely lengthy sentences (including mandatory minimums) with no possibility of parole. There is no other way of mitigating the collateral consequences of a federal conviction, which are numerous, onerous, and sometimes permanent.

Historically, most clemency grants have gone to ordinary offenders with no political connections, and that has remained true in this administration as well. Traditionally acceptable grounds for granting the “extraordinary remedy” of clemency include: to reward an offender’s extraordinary rehabilitation, heroism, or community service; to correct an unjust or inequitable conviction or sentence that cannot be corrected by any other legal avenue (e.g., a law that should have been made retroactive, but was not); to eliminate extreme sentencing disparity among similarly culpable codefendants or coconspirators; to alleviate undue hardship on the offender or his/her family members as a result of incarceration; to allow a sick or terminally ill offender to be treated or die at home; to recognize an offender’s cooperation or assistance to the government that he/she has not otherwise been given the benefit of; to remove an unduly burdensome collateral consequence of a conviction; to restore to law-abiding former offenders the full rights and benefits of citizenship. Standards for recommending pardon and commutation are set forth in §§ 1-2.110 through 2.113 of the *U.S. Attorney’s Manual*.

The pardon power has been administered since the mid-19<sup>th</sup> century by the Attorney General, assisted by the Pardon Attorney. Since the late 1970’s, the Pardon Attorney has reported to the Deputy Attorney General (DAG), who signs all clemency recommendations to the President. The Pardon Attorney, traditionally 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 appropriate, and solicits the opinions of the judges and prosecutors involved in the case. 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 report and 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.<sup>1</sup>

In recent years, most clemency cases have been handled by OPA in 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. Most case reports are only a few sentences long. If a case is referred to the prosecutor for a recommendation, the Justice Department’s recommendation rarely deviates from that of the prosecutor. The President generally accepts the DOJ recommendation. The application review process is governed by 28 C.F.R. Part I, §§ 1.1-1.11. These rules do not create due process rights in the applicant and do not bind the President, who can grant clemency to anyone, for any reason, regardless of whether they have submitted an application.

**Legislative Branch:** Congress cannot regulate or limit the presidential pardon power in Article II. Congressional inquiries into the use of the pardon power are infrequent, and usually occur when a controversial grant of clemency is made (e.g., 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; hearings were 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). Members of Congress may express support for particular clemency applicants and occasionally make public statements calling on the President to grant clemency to certain individuals (e.g., statements from multiple Members in favor of clemency for former Border Patrol agents Ignacio Ramos and Jorge Compean).

***Judicial Branch:*** The judicial branch is involved in the pardon process only when a sentencing judge is asked to make a recommendation in a particular pardon case.

### **Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:*** Families Against Mandatory Minimums, American Bar Association, American Civil Liberties Union, National Association of Criminal Defense Lawyers, The Sentencing Project, United Methodist Church, Prison Fellowship, the National Alliance of Faith and Justice, StoptheDrugWar.org, and federal prisoners and their families

***Potential Opposition:*** Career prosecutors

***Public Opinion:*** Pardon has generally been viewed by the public with cynicism and distrust. The next president should act promptly to restore a degree of regularity and predictability into the pardon process, and use his power generously to benefit ordinary people, thereby shoring up public confidence in the operation of the criminal justice system.

### **Experts:**

- Margaret Colgate Love, former U.S. Pardon Attorney
- Sam Sheldon, current Assistant U.S. Attorney, Southern District of Texas; successfully represented several clemency recipients in 2001
- Dan Kobil, Capital University Law School
- Molly Gill, Commutations Project Director, Families Against Mandatory Minimums

### **For Further Information:**

Love, "Reinventing the Pardon Power,"  
<http://www.pardonlaw.com/materials/FSR.Pardon.2007.final.pdf>

Lardner, "Begging Push's Pardon," <http://www.nytimes.com/2008/02/04/opinion/04lardner.html>

Savage, "Felons Seeking Bush Pardon Near a Record,"  
[http://www.nytimes.com/2008/07/19/us/19pardon.html?\\_r=1&hp=&pagewanted=all&oref=slogin](http://www.nytimes.com/2008/07/19/us/19pardon.html?_r=1&hp=&pagewanted=all&oref=slogin)

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<sup>1</sup> In this Administration, each pardon warrant indicates that the grants were made pursuant to a favorable recommendation from DOJ. Five of the six commutation grants to date by President Bush were also made pursuant to a Justice Department recommendation (though the warrant does not indicate whether or not the recommendation was favorable). To date, the grant to Scooter Libby is the only one by President Bush that was not staffed through the Justice Department.

## **CHAPTER TEN**

### **RE-ENTRY: ENSURE SUCCESSFUL REINTEGRATION AFTER INCARCERATION**

The Bureau of Justice Statistics estimates that more than two-thirds of the individuals released from prison will be rearrested within three years. This year nearly 700,000 people will leave prison and another 9 million will leave local jails. They return to communities lacking appropriate support services for substance addiction and mental illness, limited job prospects and few 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 a criminal conviction -- often recently enacted policies that make reentry after incarceration enormously difficult. Persons who are not sentenced to prison are also affected by these legal barriers to reintegration, which are onerous and often permanent.

This section identifies seven obstacles to reentry and makes federal policy recommendations that would promote reintegration and reduce rates of recidivism. Each issue outlined is vitally important to a person's successful reentry because 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 role the federal government plays in this policy area is critical because it is often federal laws and policies that have created reentry barriers, or that can eliminate them. In an effort to expedite government action, the top three priorities for reformers are listed first. These recommendations are:

- Fully fund the Second Chance Act and repurpose existing FY09 DOJ offender reentry funding to support this programming;
- Extend federal voting rights to people who are not incarcerated; and
- Eliminate the lifetime bans on financial assistance and food stamps for people convicted of drug offenses

#### **I. APPROPRIATE FULL FUNDING FOR SECOND CHANCE ACT AND REPURPOSE EXISTING FY09 DOJ OFFENDER REENTRY FUNDING TO SUPPORT THIS PROGRAMMING**

**Summary of the Problem:** In April 2008, President George W. Bush signed the Second Chance Act which authorizes \$330 million over two years to expand assistance for people currently incarcerated, those returning to their communities after incarceration, and children with parents in prison. The Second Chance Act seeks to promote public safety by reducing

recidivism. Presently, two-thirds of formerly incarcerated people are rearrested within three years after release. The services to be funded under the Second Chance Act include:

- mentoring programs for adults and juveniles leaving prison;
- drug treatment during and after incarceration, including family-based treatment for incarcerated parents;
- education and job training in prison;
- alternatives to incarceration for parents convicted of non-violent drug offenses;
- supportive programming for children of incarcerated parents; and
- early release for certain elderly prisoners convicted of non-violent offenses.

State and local governments burdened by the unprecedented growth in jail and prison populations need these important programs to ensure public safety. The sustained high rates of recidivism are a key reason prison populations continue to increase nationally. As of October 1, 2008, no money has been appropriated to carry out this Act.

### **Proposed Solutions:**

***Executive:*** Direct the Department of Justice to repurpose existing FY09 offender reentry funding (\$10 million) for Second Chance Act programming (P.L. 110-199).

***Legislative Appropriations (Solutions w/ Funding Requests):*** As Congress continues to work on the FY 2009 appropriations bills it should protect funding for the Second Chance Act (P.L. 110-199) and appropriate the total amount (\$165 million) authorized under the law.

### **Jurisdiction:**

***Executive Branch: Department of Justice***

***Legislative Branch:*** House and Senate Appropriations Committees, including subcommittees on Commerce, Justice, Science and Related Agencies

### **Background:**

***Executive Branch:*** The Second Chance Act (P.L. 110-199) was signed into law in April 2008. However, as newly authorized programming, it is at risk of spending one of its two critical years of authorization unfunded since Congress has not appropriated new funding for FY 2009. The 2008 Omnibus included \$10 million for an offender re-entry program, which was used for the third and final year of funding for the Prisoner Reentry Initiative (PRI) administered by the Department of Justice. Since PRI has expired, it would be possible to repurpose this allocation for Second Chance Act programming.

***Legislative Branch:*** In June, the Senate Appropriations Committee approved the Commerce, Justice, Science (CJS) 2009 appropriations bill, which allocated \$20 million for

programs under the Second Chance Act. In the House of Representatives, the Appropriations Committee reserved \$45 million for Second Chance Act funding. The totals not only fell short of the money authorized for the year, but were not appropriated by the start of Fiscal Year 2009.

### **Potential Allies, Potential Opposition, and Public Opinion:**

#### ***Potential Allies:***

- The bill received bipartisan support in both chambers of Congress in its passage, including Senators Biden (D-DE), Brownback (R-KS), Specter (R-PA), Leahy (D-VT), Kennedy (D-MA), Hatch (R-UT) and Representatives Davis (D-IL), Coble (R-NC), Cannon (R-UT), Conyers (D-MI), Scott (D-VA), Smith (R-TX), and Sensenbrenner (R-WI).
- Over 200 organizations supported passage and endorse funding of the Second Chance Act, including the National Sheriffs' Association, Fraternal Order of Police, American Correctional Association, the Council of State Governments, National Association of Counties, Prison Fellowship Ministries, the United Methodist Church, The Sentencing Project, American Bar Association, Open Society Policy Center, Academy of Criminal Justice Sciences, Center for Community Alternatives, Justice Policy Institute, National Alliance of Faith and Justice, Prison Legal News, International CURE, Virginia CURE, and the International Community Corrections Association.
- The Editorial Boards of the New York Times, Washington Times and many other newspapers have endorsed the Second Chance Act.

***Potential Opposition:*** Senator Coburn's (R-OK) opposition to enhanced federal expenditures made him a formidable opponent of the Second Chance Act. Ultimately the broad support for the bill created enough pressure on the Senator to lift his hold on the legislation. During the appropriations process he and other like-minded Members may pose a problem again. However, opponents who object to the cost of funding reentry programs for prisoners do not take into consideration the net saving achieved by supporting programs that ultimately reduce recidivism and crime.

***Public Opinion:*** In 2006, Zogby International conducted a poll for the National Council on Crime and Delinquency, entitled *Public Attitudes toward Rehabilitation and Reentry*. The poll found 80% of the American voting public believe job training and drug treatment is "very important" to a person's successful reintegration into society after incarceration. Strong majorities also believe mental health services, mentoring and housing are "very important." The Second Chance Act was supported by 78% of the voting public, according to the Zogby poll.

#### **Experts:**

- Jessica Nickel, Council of State Governments, Justice Center
- Gene Guerrero, Open Society Policy Center
- Pat Nolan, Prison Fellowship Ministries
- Art Wallenstein, Montgomery County, Maryland, Department of Corrections

### **For Further Information:**

More resources on the Second Chance Act are available here:  
[http://www.reentrypolicy.org/government\\_affairs/second\\_chance\\_act](http://www.reentrypolicy.org/government_affairs/second_chance_act).

## **II. EXTEND FEDERAL VOTING RIGHTS TO PEOPLE RELEASED FROM PRISON**

**Summary of the Problem:** 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 a felony conviction. Four million of these people live, work, and raise families in our communities, but because of a conviction in their past they are still denied the right to vote. These laws serve no legitimate purpose, and in fact are deeply rooted in the Jim Crow era when they were designed to lock freed slaves out of the voting process. The disproportionate impact on people of color continues to this day. Nationwide, 13 percent of African-American men have lost the right to vote, a rate that is seven times the national average.

Since 2003, the Brennan Center and the ACLU, working with state allies, have conducted 25 surveys in 21 states documenting the failure of local election officials to comply with existing state restoration laws. These surveys present overwhelming evidence that election officials are confused and misinformed about existing eligibility rules and registration procedures. The findings range from misrepresenting the law to imposing illegal registration and documentation requirements on eligible voters. These surveys reveal that untold hundreds of thousands of *eligible* voters are de facto disenfranchised because of elections officials' failure to comply with current law.

The solution to this widespread disenfranchisement of American citizens is to automatically restore the right to vote upon release from prison. Under this system, citizens would be immediately eligible to vote while on probation and parole. In addition, these voting rights would not be contingent upon submission of special paperwork, or the payment of fees, fines, or restitution. Other remedies include giving notice to persons leaving prison that they will be eligible to vote upon release; making departments of correction, probation and parole responsible for voter registration; synchronizing state voter rolls to ensure accuracy; and educating eligible voters about their rights.

### **Proposed Solutions:**

***Executive:*** Appoint a commission to document the de facto disenfranchisement of eligible voters with felony convictions in each of the 50 states.

***Legislative Changes:*** Pass the Democracy Restoration Act  
➤ **H.R. 7136 and S. 3640 from the 110<sup>th</sup> Congress**

## **Jurisdiction:**

***Executive Branch:*** Department of Justice  
U.S. Election Assistance Commission

***Legislative Branch:*** Senate and House Judiciary Committees  
Senate Finance Committee  
House Ways and Means Committee

## **Background:**

***Legislative Branch:*** In September 2008, Senator Russ Feingold and Representative John Conyers introduced the Democracy Restoration Act. The bill seeks to restore the right to vote in federal elections to all persons with felony convictions who are not in prison. While similar bills introduced in past years have moved very little, there is general agreement among advocates and policy makers that 2009-2010 will provide a unique opportunity to restore voting rights at the federal level. First, there has been tremendous momentum built in the states. Over the last decade, 19 states have changed their laws to restore voting rights or ease the restoration process. Since 2005, Florida, Iowa, Maryland, Nebraska, Rhode Island, and Tennessee have all restored voting rights to substantial numbers of former offenders in their states.

Many of these changes occurred in states with Republican leadership. George W. Bush, as Governor of Texas, eliminated the state's two-year waiting period for restoration of voting rights. Florida Governor Charlie Crist, also a Republican, amended the clemency rules to simplify the restoration process for some people with non-violent convictions. And Louisiana Republican Governor Bobby Jindal signed a bill this year that requires the Department of Corrections to notify people coming off probation and parole about their voting rights and to provide them with a voter registration form.

## **Potential Allies, Potential Opposition, and Public Opinion:**

### ***Potential Allies:***

- Law enforcement, including organizations listed below, and state corrections directors Theodis Beck (SC), Christopher Epps (MS), Justice Jones (OK), and Ashbel T. Wall (RI)
- Faith-based organizations, including Prison Fellowship Ministries, the United Methodist Church, the Aleph Institute and the American Friends Service Committee
- Civil rights and justice reform organizations, including the Brennan Center for Justice, the American Civil Liberties Union, The Sentencing Project, Drug Policy Alliance, NAACP Legal Defense and Educational Fund, Center for Community Alternatives, International Community Corrections Association, Prison Legal News, StoptheDrugWar.org, International CURE, Virginia CURE, and American Bar Association

***Potential Opposition:***

- Roger Clegg, Center for Equal Opportunity
- Todd Gaziano, Heritage Foundation
- Sens. McConnell (R-KY) and Sessions (R-AL)

Like any election reform initiative, restoration of voting rights often falls along strict partisan lines. In an effort to pull this issue out of partisan battles and refocus the debate to one of democracy, not politics, the Brennan Center has built a substantial network of high level law enforcement and criminal justice leaders to support post-incarceration restoration of voting rights. The Brennan Center Law Enforcement and Criminal Justice Advisory Council stands ready to spread the message that restoration of voting rights is an important aspect of successful reentry and in fact works to protect public safety. The American Probation and Parole Association, the Association of Paroling Authorities International, and the National Black Police Association have all passed resolutions in favor of post-incarceration restoration. Organizing new allies will help build new, strong bipartisan support for reform.

***Public Opinion:*** The public supports voting rights, and this is evidenced by public opinion polls on the issue. A 2002 survey of 1,000 Americans, entitled Public Attitudes towards Felon Disenfranchisement in the United States, found that substantial majorities (64% and 62%, respectively) supported allowing people on probation and parole to vote. In addition, a 2006 survey, entitled Public Attitudes toward Rehabilitation and Reentry, found that 60% of Americans think the right to vote is an important factor in a person's successful reintegration into society after incarceration.

Moreover, several national organizations representing law enforcement officials and legal professionals recognize the fundamental unfairness of continuing to exclude people from the franchise when they re-enter the community. Organizations that support automatic post-incarceration of voting rights include:

- American Bar Association
- American Law Institute
- American Probation and Parole Association
- National Black Police Association
- National Organization of Black Law Enforcement Executives
- Association of Paroling Authorities International

**Experts:**

- Erika Wood, Brennan Center for Justice at NYU School of Law
- Marc Mauer, The Sentencing Project
- Christopher Uggen, University of Minnesota, Department of Sociology
- Jeff Manza, New York University, Department of Sociology

- Pat Nolan, Prison Fellowship Ministries

### **For Further Information:**

Read Restoring the Right to Vote,  
[http://www.brennancenter.org/content/resource/restoring\\_the\\_right\\_to\\_vote/](http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/), and

Felony Disenfranchisement Laws in the United States,  
<http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=335>.

## **III. RESTORE WELFARE AND FOOD STAMP BENEFITS FOR INDIVIDUALS WITH DRUG FELONY CONVICTIONS**

**Summary of the Problem:** Food stamps and cash support are essential to the health and stability of families. Individuals with criminal convictions face considerable barriers, often needing transitional services and support to improve their ability to acquire gainful employment and transition after incarceration. The Personal Responsibility and Work Opportunity Reconciliation Act prohibits anyone convicted of a drug-related felony from receiving both federally-funded cash assistance through the Temporary Assistance for Needy Families (TANF) program and food stamps, unless states opt out of or modify the ban. 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 sentence, and overcoming an addiction. Currently, 22 states have imposed the ban in part and 14 states completely enforce the ban. The ban is an additional barrier to addressing addiction and to reintegrating individuals with criminal histories into the community because it makes it more difficult for them to obtain treatment, food and to secure employment. Numerous other collateral consequences are mandated or encouraged by federal law that should be analyzed to determine which ones are reasonably necessary to public safety, and which should be eliminated or revised.

### **Proposed Solutions:**

***Legislative Changes:*** Eliminate the lifetime ban on TANF and food stamp eligibility for people with drug felony convictions.

- **Repeal Section 115(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (21 U.S.C. 862a(a)).**

### **Jurisdiction:**

***Legislative Branch:*** Senate Finance Committee and House Ways and Means oversee TANF and the House and Senate Committees on Agriculture oversee the food stamps program, now Supplemental Nutrition Assistance Program.

### **Background:**

**Legislative Branch:** In April 2008, Rep. Barbara Lee introduced H.R. 5802, the Food Assistance to Improve Reintegration Act of 2008 (FAIR Act). The bill amends the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to repeal the denial of food stamp eligibility for a person convicted of a drug felony offense. The bill has 55 Democratic cosponsors in the House. No hearing has been held on the bill. During the 109<sup>th</sup> Congress, Rep. John Conyers introduced H.R. 4202, the Reentry Enhancement Act, which contained a provision to substitute the exclusions from TANF and food stamps for people with drug felonies with bars on assistance and benefits for welfare fraud convictions. The overall bill had six cosponsors. No hearing was held on the bill during the 109<sup>th</sup> Congress.

### **Potential Allies, Potential Opposition and Public Opinion:**

#### ***Potential Allies:***

- Legal Action Center, National Association of Social Workers, The Sentencing Project, Drug Policy Alliance, Rebecca Project for Human Rights, American Bar Association, Center for Community Alternatives, International Community Corrections Association, Justice Policy Institute, Prison Legal News, StoptheDrugWar.org, International CURE, Virginia CURE
- Representatives Conyers (D-MI), Scott (D-VA), Lee (D-CA), Jackson Lee (D-TX)

***Potential Opposition:*** Opponents of the expansion of welfare programming.

***Public Opinion:*** In 2006, Zogby conducted a poll for the National Council on Crime and Delinquency, entitled *Public Attitudes toward Rehabilitation and Reentry*. It found that 90% of respondents thought help for families was an important service that should be made available to people reentering society after being incarcerated. The poll also asked participants the major causes contributing to high rates of people returning to prison after release. Nearly two in three said that when people leave prison, they have no more life skills than they had before they entered prison (66%) and people returning to society from prison experience too many obstacles to living a crime-free life (57%).

#### **Experts:**

- Malika Saada Saar, Rebecca Project for Human Rights
- Amy Hirsch, Community Legal Services of Philadelphia

#### **For Further Information:**

The most recent information on state eligibility requirements for the food stamp program is available from the Department of Agriculture at:

[http://www.fns.usda.gov/fsp/rules/Memo/Support/State\\_Options/7-State\\_Options.pdf#xml=http://65.216.150.153/texis/search/pdfhi.txt?query=drug+felony&pr=FN](http://www.fns.usda.gov/fsp/rules/Memo/Support/State_Options/7-State_Options.pdf#xml=http://65.216.150.153/texis/search/pdfhi.txt?query=drug+felony&pr=FN)

S&order=r&cq=&id=4823852611. For an example of reform initiatives, go to:  
[http://www.drugpolicy.org/docUploads/LS\\_Full\\_Letter.pdf](http://www.drugpolicy.org/docUploads/LS_Full_Letter.pdf).

#### **IV. REPEAL THE FINANCIAL AID BAN FOR STUDENTS WITH DRUG CONVICTIONS**

**Summary of the Problem:** In 1998, Congress reauthorized the Higher Education Act (HEA), which funds educational financial aid for students. During consideration of the HEA, Congress approved an amendment to the legislation that delayed or denied federal financial aid for students convicted of a drug offense. Students applying for federal financial aid are asked on the FAFSA (Free Application for Federal Student Aid) form whether they have ever been convicted of “possessing or selling illegal drugs.” If an applicant answers anything other than “no,” the applicant is required to fill out a worksheet to determine if and when the applicant will resume eligibility for federal student financial aid. It is estimated that over 128,000 students applying for federal financial aid have been denied assistance because of this provision.

In February of 2006, legislation signed into law by President Bush that partially addresses this student aid provision. Public Law 109-171 partially repeals the ban on student federal financial aid for persons convicted of drug crimes so that only students who are convicted of a drug offense while they are in school and receiving federal financial assistance will be affected by the ban. By continuing to cut off necessary financial assistance, this provision decreases the number of people completing college, thus diminishing their employment prospects and potential contributions to the economy. For individuals who are eligible for aid since their conviction was previous to their enrollment, the question about drug convictions remains on the FAFSA form and potentially discourages thousands of these individuals from applying for financial aid because of the uncertainty about their eligibility.

Access to education is essential if individuals are to participate successfully in society and the economy. The ban on financial aid for individuals with certain drug convictions should be completely repealed to remove these barriers.

#### **Proposed Solutions:**

***Legislative Changes:*** Pass legislation to fully repeal the aid elimination penalty from the Higher Education Act.

- **Repeal 20 U.S.C. § 1091(r)**

#### **Jurisdiction:**

***Legislative Branch:*** House Education and Labor Committee and the Senate Health Education, Labor and Pensions Committee

#### **Background:**

**Legislative Branch:** Congress reauthorized the Higher Education Act in August 2008 but failed to fully repeal the aid elimination penalty for drug offenses in the bill. The bill did contain a provision that makes it slightly easier for students to get their aid back more quickly once they have lost it. Students can get aid back early by passing two unannounced drug tests administered by an approved rehabilitation program. Students will not necessarily have to complete a full, expensive treatment program as previously required. The new HEA bill also requires institutions of higher education to notify their students, upon enrollment, that the financial aid penalty exists for drug offenses. Moreover, schools must notify those students who lose their aid how they can go about getting it back.

### **Potential Allies, Potential Opposition and Public Opinion:**

#### ***Potential Allies:***

- Students for Sensible Drug Policy, Legal Action Center, Drug Policy Alliance, NAACP Legal Defense and Educational Fund, StoptheDrugWar.org, Center for Community Alternatives, International Community Corrections Association, Justice Policy Institute, Prison Legal News, International CURE, Virginia CURE, and American Bar Association
- Reps. Miller (D-CA), Scott (D-VA) and Sens. Kennedy (D-MA), Dodd (D-CT)
- Higher education organizations
- Re-entry-focused organizations

**Potential Opposition:** “Tough on crime” lawmakers who do not understand the intersection between education and reduced rates of recidivism.

**Public Opinion:** In 2006, Zogby International conducted a poll for the National Council on Crime and Delinquency, entitled *Public Attitudes toward Rehabilitation and Reentry*. According to that poll, 83% of Americans believe access to student loans is important to a person’s successful reintegration back into society after incarceration.

#### **Experts:**

- Tom Angell, Law Enforcement Against Prohibition
- Bill Piper, Drug Policy Alliance
- Kris Krane, Students for Sensible Drug Policy
- Jenny Collier, independent consultant (formerly at Legal Action Center)

#### **For Further Information:**

Visit the Students for Sensible Drug Policy website at: <http://ssdp.org/campaigns/hea/>.

## V. REMOVE UNFAIR BARRIERS TO HOUSING

**Summary of the Problem:** Individuals with criminal records face many challenges upon re-integrating back into society, but frequently their most immediate need is securing safe and affordable housing. While the lack of affordable housing is often a problem for individuals who lack financial resources, this problem is compounded for persons with conviction records. They 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.

Many of the policies that housing authorities or private landlords use to exclude people with conviction records are overly restrictive, effectively denying housing to people 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 is easier to reject all people with conviction records than to perform individualized analyses of their applications. These policies should be changed to increase access to urgently needed housing. Public housing authorities and private landlords should adopt policies that, rather than barring any applicants who have criminal records, and their families, instead individually assess each applicant based on the:

- Seriousness and nature of his or her conviction
- Relevance of that conviction to the tenancy
- Length of time that has passed since the conviction, and
- Evidence of rehabilitation.

Additionally, neither public agencies nor private landlords should base a decision on an arrest that never led to conviction.

### **Proposed Solutions:**

#### *Legislative Changes:*

1. Pass the No One Strike Eviction Act, H.R. 6785 from 110<sup>th</sup> Congress
  - **Amend 42 U.S.C. 1437d(k)**
2. Pass the Public Safety Ex-Offender Self Sufficiency Act, H.R. 6206 from 109<sup>th</sup> Congress
  - **Amend Subpart D of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1986**

### **Jurisdiction:**

*Legislative Branch:* Senate Committee on Financial Services and House Ways and Means

## **Background:**

**Legislative Branch:** In November 2005, Rep. John Conyers introduced H.R. 4202, the Reentry Enhancement Act, which contained a provision amending public housing restrictions for people with criminal records. The bill required consideration of mitigating circumstances and the impact of eviction or denial of tenancy on a person subject to a denial by a public housing agency because of a criminal conviction. Moreover, tenants could not be denied tenancy based solely upon the familial relationship of a tenant to a person convicted of a criminal offense and required intent or knowledge of a crime committed by a family member or guest before eviction or denial of public housing. In August 2008, Rep. Sheila Jackson Lee introduced this provision as a stand alone bill, H.R. 6785 - No One Strike Eviction Act of 2008. The bill has four cosponsors.

In previous Congresses Rep. Danny Davis also introduced legislation to expand supportive housing opportunities for people with criminal records. Last introduced in the 109<sup>th</sup> Congress, H.R. 6205 - Public Safety Ex-Offender Self-Sufficiency Act of 2006 “amends the Internal Revenue Code to allow a business related tax credit for investment in residential housing units for certain low-income individuals who were convicted of a crime punishable under state or federal law by a prison term of six months or longer [] and who participate in a program of support services, including job and entrepreneurial training, designed to make such ex-offenders self sufficient.” In the past the bill had bipartisan support, including Rep. Mark Souder (R-IN) and former Rep. and HUD Secretary Jack Kemp.

## **Potential Allies, Potential Opposition, and Public Opinion:**

### ***Potential Allies:***

- Justice reform organizations, including Legal Action Center, The Sentencing Project, Open Society Policy Center, Center for Community Alternatives, International Community Corrections Association, Justice Policy Institute, Prison Legal News, StoptheDrugWar.org, International CURE, Virginia CURE
- Reps. John Conyers (D- MI), Danny Davis (D-IL), Sheila Jackson Lee (D-TX)

**Potential Opposition:** “Tough on crime” lawmakers who do not understand the intersection between public assistance and reduce rates of recidivism.

**Public Opinion:** According to the Zogby poll conducted for the National Council on Crime and Delinquency, entitled *Public Attitudes toward Rehabilitation and Reentry*, 82% of Americans believe access to public housing is important (53% very important) to a person’s successful reintegration after incarceration.

## **Experts:**

- Legal Action Center
- Human Rights Watch

## **For Further Information:**

See Human Rights Watch's pages *Federal "One-Strike" Legislation*, <http://www.hrw.org/reports/2004/usa1104/5.htm> and *Screening People Out: "Felons Need Not Apply"* <http://www.hrw.org/reports/2004/usa1104/9.htm>.

## **VI. EXPAND EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH CRIMINAL RECORDS**

**Summary of the Problem:** More and more, employers are conducting criminal background checks on job applicants, which can make it much more difficult for the millions of Americans with criminal records to find employment and become productive, law-abiding members of society. Most states allow employers to refuse to hire people with criminal records; not only individuals who have been convicted – even if they have paid their debt to society and demonstrated their ability to work without risk to the public – but also those who were arrested and never convicted. Although no one questions the legitimate concerns of employers who do not want to hire someone with a conviction record who clearly demonstrates a threat to public safety or who otherwise has a conviction history directly related to a specific job, policies that encourage employers to adopt broad sweeping exclusions (i.e. not hiring or considering anyone with any type of criminal history) simply lock out and eliminate many qualified, rehabilitated individuals from the job market.

Criminal record policies that bar applicants with criminal histories from employment should be amended to not only include a requirement for individualized determinations but may include a graduated period of consideration of the criminal record based upon the severity of the individual's criminal record history. Consideration of a criminal record should not be permitted beyond 7 years. In the study, *Scarlet Letter and Recidivism: Does an Old Criminal Record Predict Future Offending* (2007), researchers note that their findings "suggest that after a given period of remaining crime free it may be prudent to wash away the brand of 'offender' and open up more legitimate opportunities to this population."

### **Proposed Solutions:**

***Executive:*** Change regulations and guidance from the Departments of Education and Labor to ensure that state and federal in-prison educational and training programs are tied to high growth labor markets and industries.

Job training programs should be developed and matched to promote skills for jobs that are available in the regional labor market and those that are in high growth sectors. Conducting labor market analysis that includes a review of statutory barriers is cost-effective and is an efficient use of job training resources. For example, a correctional facility may train people in horticulture despite the fact that the majority of the individuals may return to urban metropolitan

areas where there are a limited number of jobs available in floral design and landscaping. A facility may also train incarcerated individuals in barbering or cosmetology and the state's licensing law may prohibit someone with a felony from being licensed. Additionally, in some states, people in prison may be trained for work in industries that may be nonexistent in their region. Labor forecasting and legal barrier analysis is a cost effective and sensible practice to ensure incarcerated individuals are prepared to compete in the labor market, are employable, and are less likely to recidivate.

### ***Legislative Changes:***

1. Amend the Higher Education Act to restore Pell Grant eligibility to incarcerated people
  - Amend the Higher Education Act (most recently reauthorized in August 2008, now PL 110-315) to allow incarcerated persons to apply for Pell Grants. In 1994, Congress eliminated Pell Grant eligibility for people who are incarcerated. Most post-secondary higher education programs in prisons closed as a result. Education is one of the best deterrents to re-offending. In a study conducted for the U.S. Department of Education, researchers found that participation in state correctional education programs lowers the likelihood of re-incarceration by 29 percent. In addition, this study concluded that for every dollar spent on education, more than two dollars in reduced prison costs would be returned to taxpayers.
2. Codify Current EEOC Guidance on Hiring People with Criminal Records
  - Create a federal standard based on the Equal Employment Opportunity Commission (EEOC) policy guidance on the use of criminal background checks for employment purposes when screening for arrest and conviction. This guidance currently asks employers to consider the relationship between the offense and the job position, how long ago the offense occurred, the severity of the offense, and any evidence of rehabilitation.
  - Criminal record policies that bar applicants with criminal record histories from employment should be amended to not only include a requirement for individualized determinations but may include a graduated period of consideration of the criminal record based upon the severity of the individual's criminal history. Consideration of a criminal record should not be permitted beyond seven years.
3. Strengthen the Work Opportunity Tax Credit
  - Amend the Work Opportunity Tax Credit (WOTC), authorized by the Small Business Job Protection Act of 1996 (Public Law 104-188). Currently, under the WOTC program, employers who hire low-income individuals with criminal records can reduce their federal income tax liability by up to \$2,400 per qualified new worker. Congress should increase the WOTC tax credit for individuals with criminal records to match the tax credit available for

individuals who qualify as Long-term Family Assistance recipients. There is a \$6600 difference between the two credits.

4. Reauthorize the Workforce Investment Act
  - Any reauthorization of the Workforce Investment Act (Public Law 105-220) should include provisions for hard to serve populations, including those individuals with criminal histories, through the WIA one-stop system.
5. Pass the “Fairness & Accuracy in Employment Background Checks Act”
  - Approve the “Fairness & Accuracy in Employment Background Checks Act” bi-partisan legislation introduced in the House at the end of the 110<sup>th</sup> Congress (H.R. 7033); this legislation seeks to provide critical safeguards when the FBI conducts criminal background checks for employment purposes.

***Legislative Appropriations (Solutions w/ Funding Requests):*** Increase funding for WIA programming aimed at serving harder-to-serve individuals, including those with criminal records.

**Jurisdiction:**

***Executive Branch:*** Department of Labor (Employment and Training Administration), Department of Education

***Legislative Branch:*** House and Senate Judiciary Committees, House Education and Labor Committee, Senate Health, Education, Labor and Pensions (HELP) Committee

**Background:**

***Legislative Branch:*** During the 110<sup>th</sup> Congress, there was some significant discussion about the barriers to employment that people with criminal records face. The House Judiciary Subcommittee on Crime and Drugs held a hearing to examine practices related to FBI criminal background checks being used for employment purposes. During this hearing, Members heard witness testimony about the advent of background checks being used for employment purposes and the great number of inaccuracies and instances of incomplete records in the FBI database. In addition, Subcommittee Members heard testimony about the lack of guidance given to employers about how to consider criminal history in making employment decisions.

In addition, the House Government Oversight and Reform Subcommittee on the Federal Workforce held a hearing on employment policies and practices within the federal government for people with criminal records.

In the second half of the 110<sup>th</sup> Congress, a number of organizations, including the National Employment Law Project and the National HIRE Network, began working with Congressional staff to develop legislation aimed at requiring the FBI to clean up the criminal

history database. Democratic and Republican Members of the House have agreed to sign onto this legislation as original co-sponsors. Senate Democratic Members have also agreed to sponsor the legislation, but Republican Senate sponsorship has not yet been found.

**Potential Allies, Potential Opposition, and Public Opinion:** There are a number of organizations from various fields who support expanding employment opportunities for people with criminal records, including many of the organizations that participated in the Reentry Working Group which advocated for passage of the Second Chance Act.

***Potential Allies:***

- Legal Action Center
- National H.I.R.E. Network
- National Employment Law Project
- The Sentencing Project
- Open Society Policy Center
- International Community Corrections Association
- NAACP Legal Defense and Educational Fund
- American Bar Association
- Center for Community Alternatives
- Justice Policy Institute
- Prison Legal News
- International CURE
- Virginia CURE

***Public Opinion:*** In 2006, Zogby International conducted a poll for the National Council on Crime and Delinquency, entitled *Public Attitudes toward Rehabilitation and Reentry*. The poll found 80% of the American voting public believe job training is “very important” to a person’s successful reintegration into society after incarceration.

**Experts:**

- Roberta Meyers-Peebles, National H.I.R.E. Network
- Maurice Emsellem, National Employment Law Project

**For Further Information:**

National HIRE Network, [www.hirenetwork.org](http://www.hirenetwork.org)

## **VII. EXPAND ACCESS TO DRUG AND ALCOHOL TREATMENT**

**Summary of the Problem:** 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. There is a wide gap between the need for treatment services and the provision of them. Of the 22.3 million Americans with alcohol or drug problems in 2007, only 2.4 million—roughly one in ten—received treatment at a specialty treatment facility, leaving 21.1 million untreated.

Many individuals under the supervision of the criminal justice system need publicly-funded, community-based drug and alcohol treatment programs. Increasing support for the largest federal source of funding for these services, the Substance Abuse Prevention and Treatment (SAPT) Block Grant, administered by the Substance Abuse and Mental Health Services Administration (SAMHSA), would expand access to drug and alcohol treatment and prevention services nationwide. The SAPT Block Grant is funded now at approximately \$1.8 billion.

The Substance Abuse Prevention and Treatment (SAPT) Block Grant is the backbone of the publicly supported prevention and treatment system in the U.S. SAMHSA's most recent data indicate that the SAPT Block Grant serves nearly two million individuals every year and provides roughly half of all public funding for treatment services. Over 10,500 community-based organizations receive federal Block Grant funding, which is passed on to them by their state governments. States receiving SAPT Block Grant funds also are required to contribute state funding for treatment, and many local governments do the same.

### **Proposed Solutions:**

***Executive:*** Include a request for increased funding in the President's annual budget request.

***Legislative Appropriations (Solutions w/ Funding Requests):*** Increase funding for the federal Substance Abuse Prevention and Treatment Block Grant through the annual appropriations process.

### **Jurisdiction:**

***Executive Branch:*** Center for Substance Abuse Treatment at the Substance Abuse and Mental Health Services Administration (SAMHSA) within the Department of Health and Human Services

The White House Office of National Drug Control Policy (ONDCP)

***Legislative Branch:*** Committees of jurisdiction over the authorization of SAMHSA programming including the SAPT Block Grant: House Energy and Commerce Committee (Health Subcommittee), Senate Health, Education, Labor and Pensions (HELP) Committee

Committees of jurisdiction over appropriations for the SAPT Block Grant: House and Senate Appropriations Committees (Subcommittees with jurisdiction over funding in the Departments of Labor, Health and Human Services, and Education)

**Background:**

***Executive Branch:*** Over the past number of years, the Bush Administration has requested level funding or small increases for the SAPT Block Grant program. The Administration did support a Presidential initiative which focused on expanding access to addiction treatment and recovery support services, the Access to Recovery initiative, which was a key priority for SAMHSA. However, there is recognition within SAMHSA and the Department of Health and Human Services more broadly of the importance of the SAPT Block Grant program to ensuring that people with addiction histories receive the care they need.

***Legislative Branch:*** The SAPT Block Grant program received level funding or small funding increases from Congress over the past number of years. While there are a number of Members of the House and Senate Appropriations Committees who have championed this program [including Congressman Patrick Kennedy (D-RI) and Senator Arlen Specter (R-PA)], the Block Grant program is not even keeping up with the pace of inflation due to low budget requests and an increasingly challenging funding environment.

**Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:*** A broad cross-section of national groups supports increasing funding for the SAPT Block Grant.

- Organizations from the addiction prevention, treatment and recovery community (Legal Action Center, National Association of State Alcohol and Drug Abuse Directors, Community Anti Drug Coalitions of America, National Association of Drug Court Professionals, Faces & Voices of Recovery, International CURE, Virginia CURE)
- Healthcare and child welfare communities (AIDS Action, Alliance for Children and Families, American Counseling Association, American Psychiatric Association, Child Welfare League of America, National Alliance on Mental Illness, National Alliance to End Homelessness)
- Law enforcement, corrections and government groups (National Association of Counties, National Association of State Directors of Developmental Disabilities Services, National Association of State Mental Health Program Directors, National Narcotics Officers Associations' Coalition, American Jail Association, American Probation and Parole Association).
- Center for Community Alternatives, International Community Corrections Association, Justice Policy Institute, Prison Legal News

***Potential Opposition:*** Competing programs in the appropriations process

**Public Opinion:** In 2006, Zogby International conducted a poll for the National Council on Crime and Delinquency, entitled *Public Attitudes toward Rehabilitation and Reentry*. The poll found 80% of the American voting public believed drug treatment is “very important” to a person’s successful reintegration into society after incarceration.

Additionally, 2004 poll conducted for Faces and Voices of Recovery by Peter Hart & Associates found that in examining a number of approaches that society could take to address the problem of addiction to alcohol and other drugs, the highest percentage of survey respondents (91 percent) answered that making more addiction treatment and recovery support services available so people who decide they need help can get the care they need was an important way to address addiction. (70 percent of respondents said it was very important and 21 percent said it was fairly important.)

75 percent of those surveyed said they would be more likely to vote for a candidate for Congress who supported an increase in federal government funding for programs to prevent and treat addiction and support recovery, as well as fund scientific research on the causes of addiction (44 percent they would be much more likely and 31 percent said they would be somewhat more likely to vote for a candidate supporting that position.)

81 percent of those surveyed said they would be more likely to vote for a candidate for Congress who supported reallocating dollars to place a greater emphasis on drug prevention, education, treatment and recovery support programming (48 percent they would be much more likely and 33 percent said they would be somewhat more likely to vote for a candidate supporting that position.)

**Experts:**

- Jenny Collier, independent consultant and an advocate and policy expert on this program
- Rob Morrison, National Association of State Alcohol and Drug Abuse Directors (NASADAD) - the organization whose members administer the SAPT Block Grant
- Sue Thau, Community Anti-Drug Coalitions of America
- Paul Samuels, Legal Action Center

**For Further Information:**

- Legal Action Center, “Stopping the Revolving Prison Door: How Addiction Treatment Can Prevent Drug Use and Crime, Promote Successful Reentry into Society and Save Lives,” [www.lac.org/nida](http://www.lac.org/nida)
- Robert Wood Johnson Report, “Substance Abuse: The Nation’s Number One Health Problem,” <http://www.rwjf.org/files/publications/other/SubstanceAbuseChartbook.pdf>
- Substance Abuse and Mental Health Services Administration, [www.samhsa.gov](http://www.samhsa.gov)

- National Institute on Drug Abuse, [www.nida.nih.gov](http://www.nida.nih.gov)
- American Bar Association, Commission on Effective Criminal Sanctions, “Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies,” [www.abanet.org/cecs](http://www.abanet.org/cecs).

## CHAPTER ELEVEN

### PUBLIC DEFENSE REFORMS

#### **Make Our Communities Safer by Supporting Quality Public Defense Systems**

The Constitution of the United States of America affords people charged with crimes the presumption of innocence and equal access to a fair day in court. These core values define the beliefs we as Americans hold in common—whether we are conservative or liberal, white or black, rich or poor, from a Blue state or Red state.

Celebrated in the closing refrain of our Pledge of Allegiance, this guiding notion of “justice for all” is the cornerstone of the American social contract and our democratic system. We entrust our government with the administration of a judicial system that guarantees equal justice before the law—assuring victims, the accused, and the general public that resulting verdicts are fair, correct, swift and final. To the Court, the fact that “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime” makes it an “obvious truth” that “lawyers in criminal courts are necessities, not luxuries.” Justice Black’s words are from the case of *Gideon v. Wainwright* in which the United States Supreme Court ruled that states have a constitutional obligation under the Sixth and Fourteenth Amendments to provide counsel to indigent defendants in felony cases. The right to counsel has been consistently extended to any case that may result in a person’s potential loss of liberty.<sup>1</sup>

Despite the desire of the American people to preserve our core values and ensure a meaningful level of justice for people of insufficient means, there is ample and growing evidence that many states have simply failed to deliver on the promise of *Gideon*. More than forty years after the U.S. Supreme Court proclaimed the right to appointed counsel as the law of the land, many states have inadequately structured indigent defense systems that fail to protect our basic right to equal access to justice. A cursory review of reports, speeches, and media since the start of the 21<sup>st</sup> Century reflects the existence of a serious need to rethink our system of justice.

Well-respected organizations have declared a state of emergency with regard to justice for all in America. Throughout 2003, the American Bar Association (ABA) held hearings across the United States to honor *Gideon*’s fortieth anniversary. The resulting report, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*, concluded that “indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.”<sup>2</sup>

The systems that appoint counsel to indigent defendants are plagued by myriad problems that often result in defendants receiving wholly inadequate representation. These systems defy both the letter and the spirit of the right to counsel guaranteed by the Constitution. Without question, the core of this fundamental constitutional right is not fulfilled by providing a warm

body in a chair, but that appointed counsel would provide ethical, competent, and zealous representation on behalf of the indigent accused.

The new administration and Congress have an opportunity to correct many of the problems that have plagued criminal justice systems around the country that totally fail to provide adequate representation for the poor. These problems range from the appointment of ineffective and ill-prepared counsel to a failure of governing bodies to provide the public defense resources necessary for competent defense services and to ensure reliable and fair criminal justice systems, thus imperiling public safety.

There are several solutions that are available to improve public defense systems. These solutions range from increasing the funding support to state and local governments to adopting recommendations made by well-respected national organizations that study public defense systems and ways to improve these vital criminal justice agencies that help to ensure justice in our communities. In some instances, the solutions are as simple as providing appropriate training and technical assistance and creating parity between defense and prosecution resources. What is key is securing the support of the administration so that the proposals that have been studied and formulated by experts in the field can become a reality.

This administration has the opportunity to secure an effective and viable system of justice that ensures individuals who cannot afford representation in criminal matters of the same protections as those who can ably pay for counsel. This effort should begin with a focus on the following top three priorities:

1. Funding for John R. Justice Prosecutors and Defenders Act of 2008
2. Congressional authorization for and funding of National Center for Public Defense Services
3. Congressional authorization for a study to determine whether failures by states to provide constitutionally adequate public defense systems contribute to racial disparities within the criminal justice systems.

This memorandum should serve as the foundation for continued strengthening of our country's state public defense systems and for a more cohesive partnership between the administration and the advocates who work daily to secure an effective and viable system of justice for those in our communities who are accused of committing crimes and who cannot afford to hire counsel.

**Summary of the Problem:** The nation has failed to honor the guarantee of *Gideon v. Wainwright*. Although the Supreme Court ruled that the U.S. Constitution requires the appointment of counsel for people facing criminal charges who are unable to afford private counsel, in practice the lawyers made available by states and counties commonly lack the experience, training, time, and resources necessary to provide an effective defense, and some

states and localities fail to provide counsel at all to many who are constitutionally required to receive it.

The crisis in federally mandated public defense services has been repeatedly and vividly documented, including, most recently, in the ABA's comprehensive study, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*.<sup>3</sup> The failure to provide adequate counsel for the criminally accused who cannot afford to hire an attorney calls into question the integrity of the criminal justice system as it undermines the legitimacy of criminal convictions—innocent people go to jail, wrongdoers escape responsibility, money is wasted, people are harmed and existing racial disparities present in the system are exacerbated.<sup>4</sup> Nonetheless, today, the federal government is neither monitoring nor encouraging or enforcing compliance with *Gideon's* requirement.

In fact, 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. Thus, for example, state prosecutors receive millions of dollars each year in direct federal funding through the Justice Assistance Grants program, while defense attorneys, who represent accused persons, many of whom are innocent of the charges alleged, receive virtually no federal funding. Likewise, prosecutors often have ready access to federally funded crime labs, while too often defense attorneys are denied access or provided inadequate or no 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<sup>5</sup> while the federal government provides no funding for public defense professionals. These resource imbalances make it 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.

The next administration should work to ensure that *Gideon's* federal mandates are implemented by state and local<sup>6</sup> criminal justice systems and that these systems operate fairly and accurately. The federal government should monitor state and local compliance with *Gideon* and ensure that publicly funded defense counsel receive the resources, training, and other assistance needed to appropriately assess and challenge prosecution cases.

### **Proposed Solutions:**

#### ***Legislative Changes:***

- Congress should fund the John R. Justice Prosecutors and Defenders Incentive Act of 2008, which authorizes student loan repayment assistance for prosecutors and public defenders in order to improve public safety by assisting prosecutor and defender offices in their ability to hire and retain high-quality lawyers. P.L. 110-315, Title IX, Part E, Sections 951, 952.

- Congress should provide sufficient financial support as applicable to the states, local government, and territories for the provision of public defense services in state criminal and juvenile delinquency proceedings comparable to the federal government's support for the prosecution function.<sup>7</sup>
- Congress should provide federal technical assistance and training for state, local, and territorial public defense systems, and the attorneys who participate in them, comparable to the federal government's support for the prosecution function.
  - The Bureau of Justice Assistance of the U.S. Department of Justice should use some of its discretionary funding for these functions, as it did under the administration of Attorney General Reno.
  - Congress should adopt the recommendation of the American Bar Association that it 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 by administering federal funds for state public defense programs.<sup>8</sup>
- In order to ensure that state criminal justice systems meet constitutional requirements, each should be required, as a condition of receiving federal criminal justice funding, to (1) promulgate and adhere to public defense standards that are consistent with the ABA's *Ten Principles of a Public Defense Delivery System*; the National Juvenile Defender Center/National Legal Aid & Defender Association's *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*; and NLADA's *Performance Guidelines for Criminal Defense Representation*; and (2) include public defense systems in state and local justice planning.
- 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 criminal justice systems. This study should be conducted by an entity that is independent of government, such as a university or impartial research foundation.

**Jurisdiction:**

***Executive Branch:*** DOJ Office of Justice Programs (Bureau of Justice Assistance, Bureau of Justice Statistics)

***Legislative Branch:*** House and Senate Judiciary and Appropriations Committees

***Judicial Branch:*** Federal Judicial Conference, Administrative Office of the United States Courts

## **Background:**

***Executive Branch:*** The Executive Branch has a special responsibility to enforce the federal mandate announced in *Gideon v. Wainwright*, and is uniquely situated to support public defense reform. In 1997 then-Attorney General Janet Reno and officials from the U.S. Department of Justice's Office of Justice Programs and the Bureau of Justice Assistance convened a group of criminal defense leaders from around the country. The group identified areas in which the Department of Justice could play an effective role, including publicizing the poor quality of our nation's public defense services, promoting independence in public defense structures, overseeing a more equitable allocation of funds among public defense and other criminal justice system components, and promoting standards for public defense. Attorney General Janet Reno convened national symposiums that brought together members of our nation's criminal justice communities to further explore these topics in 1999 and 2000.<sup>9</sup>

The Bureau of Justice Assistance, in partnership with Harvard University's Program in Criminal Justice Policy and Management, the Harvard Law School, the Vera Institute of Justice, and the Spangenberg Group convened "The Executive Session on Public Defense." From 1991 to 2001, session members—including state public defense leaders, assigned counsel managers, a prosecutor, a legislator, a social worker, a journalist, and criminal justice experts—worked to identify the challenges facing the field of public defense, and explored new ways of serving clients and society.<sup>10</sup>

*The Compendium of Standards for Indigent Defense Systems* is a Bureau of Justice Assistance publication that contains national, state, and local standards and guidelines relating to five functions of public defense: Standards for Administration of Defense Services (Volume I), Attorney performance (Volume II), Capital case representation (Volume III), Appellate representation (Volume IV), and Juvenile justice defense (Volume V).<sup>11</sup>

In 1999, the Bureau of Justice Statistics within the Department of Justice sponsored a data collection effort that gathered information on public defense services among the nation's 100 largest counties based on population. The survey examined the methods by which public defense is delivered, as well as operating expenditures, staffing, and case loads of the different types of public defense services.<sup>12</sup> In an effort to update its 1999 work, the Bureau of Justice Statistics is currently funding the 2007 Census of Public Defender Offices. The survey is collecting data on publicly funded defender offices (approximately 1,400 offices nation wide). The survey's purpose, as described by the Bureau of Justice Statistics, is to "identify the most pressing challenges confronting the justice system and to provide state-of-the-art knowledge and information in support of innovative strategies and approaches for dealing with these challenges."<sup>13</sup>

The Office of Justice Programs administers the Justice Assistance Grant program (JAG). This program is the largest single federal grant program allowing for funding of state law enforcement, court, prosecution, and related programs. While JAG grants can be used by states to fund public 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 public defense programs.<sup>14</sup> Historically, states have allocated either none of their JAG funding or only a

miniscule portion to public defense programs, directing a vastly greater share to law enforcement and prosecutorial programs. For example, in FY99, of the almost \$500 million in formula grants awarded to states under the Byrne Grant program, the JAG program's predecessor, only 1.4 percent of the funds were granted to defender programs.<sup>15</sup> In 32 states, public defense programs received no such funding at all. A 2006 study that examined allocations of JAG funds in five states found that only one state awarded any money to public defense programs in the most recent year studied. That state awarded less than 4 percent of its JAG grant money to public defense programs, and nearly 80 percent for prosecution and law enforcement purposes.<sup>16</sup> In FY08 Congress cut JAG funding to \$170 million from the \$520 million available in FY07.<sup>17</sup>

**Legislative Branch:** 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.” 18 U.S.C. § 3006A. 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.<sup>18</sup>

The Innocence Protection Act sponsored by Senator Patrick Leahy in the Senate, and Representatives Bill Delahunt and Ray LaHood in the House, and with key support from Representative James Sensenbrenner and Senator Orrin Hatch, was passed by Congress in 2004.<sup>19</sup> The Act was intended to help reduce the risk of wrongful convictions and executions in capital cases. The Act 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.<sup>20</sup> 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.<sup>21</sup> The Innocence Protection Act is scheduled to be reauthorized in 2009.

The John R. Justice Prosecutors and Defenders Incentive Act of 2008 authorizes a program for student loan repayment for prosecutors and public defenders. P.L. 110-315, Title IX, Part E, Sections 951,952. To date, the act has not been funded.

**Judicial Branch:** Federal defenders and Criminal Justice Act panel attorneys are compensated and overseen by the Administrative Office of the United States Courts and each jurisdiction’s respective appellate circuit court. The Administrative Office organizes and supports training for the federal defenders and CJA panel attorneys, and recently produced a training video for federal judges focusing on issues related to the court’s responsibility in managing expenditures in high-cost criminal cases where the defendant is represented by a CJA panel attorney.

**Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** American Bar Association, American Civil Liberties Union, American Council of Chief Defenders, Brennan Center for Justice, Constitution Project, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, NAACP

Legal Defense and Educational Fund, National Alliance on Mental Illness, National Council of State Churches, National Juvenile Defender Center, National Juvenile Justice Network, U.S. Conference of Catholic Bishops, Center for Community Alternatives, Justice Policy Institute, Prison Legal News, International CURE, Virginia CURE

***Potential Congressional Allies:***<sup>22</sup>

House – Rep. Michael A. Arcuri, Rep. Spencer Bachus, Rep. Tammy Baldwin, Rep. Xavier Becerra, Rep. Howard L. Berman, Rep. Sanford D. Bishop, Jr., Rep. Dan Boren, Rep. Bruce L. Braley, Rep. G. K. Butterfield, Rep. Michael E. Capuano, Rep. Ben Chandler, Rep. Steve Cohen, Rep. John Conyers, Jr., Rep. Jim Cooper, Rep. Elijah E. Cummings, Rep. Artur Davis, Rep. Danny K. Davis, Rep. Lincoln Davis, Rep. Nathan Deal, Rep. Diana DeGette, Rep. William D. Delahunt, Rep. Rosa L. DeLauro, Rep. Lincoln Diaz-Balart, Rep. Keith Ellison, Rep. Rahm Emanuel, Rep. Bob Etheridge, Rep. Chaka Fattah, Rep. Mike Ferguson, Rep. Bob Filner, Rep. Elton Gallegly, Rep. Bart Gordon, Rep. Raul M. Grijalva, Rep. Luis V. Gutierrez, Rep. Mazie Hirono, Rep. Kenny C. Hulshof, Rep. Steve Israel, Rep. Sheila Jackson-Lee, Rep. Patrick J. Kennedy, Rep. Ron Kind, Rep. Dennis J. Kucinich, Rep. Tom Lantos, Rep. Barbara Lee, Rep. John Lewis, Rep. Nita M. Lowey, Rep. Stephen F. Lynch, Rep. Edward J. Markey, Rep. Thaddeus G. McCotter, Rep. Kendrick B. Meek, Rep. Michael H. Michaud, Rep. Dennis Moore, Rep. Jerrold Nadler, Rep. Donald M. Payne, Rep. Ted Poe, Rep. Charles B. Rangel, Rep. Steven R. Rothman, Rep. Linda T. Sanchez, Rep. Janice D. Schakowsky, Rep. Adam B. Schiff, Rep. Robert C. "Bobby" Scott, Rep. Hilda L. Solis, Rep. Mark Udall, Rep. Zach Wamp, Rep. Debbie Wasserman Schultz, Rep. Melvin L. Watt, Rep. Lynn C. Woolsey, and Rep. C.W. "Bill" Young

Senate – Sen. Daniel K. Akaka, Sen. Max Baucus, Sen. Joseph R. Biden, Jr., Sen. Barbara Boxer, Sen. Sherrod Brown, Sen. Maria Cantwell, Sen. Robert P. Casey, Jr., Sen. Hillary Rodham Clinton, Sen. Thad Cochran, Sen. Norm Coleman, Sen. Susan M. Collins, Sen. Pete V. Domenici, Sen. Russell D. Feingold, Sen. Dianne Feinstein, Sen. Tom Harkin, Sen. Daniel K. Inouye, Sen. Tim Johnson, Sen. Edward M. Kennedy, Sen. John F. Kerry, Sen. Herb Kohl, Sen. Mary L. Landrieu, Sen. Frank R. Lautenberg, Sen. Patrick J. Leahy, Sen. Carl Levin, Sen. Joseph I. Lieberman, Sen. Mel Martinez, Sen. Claire McCaskill, Sen. Robert Menendez, Sen. Patty Murray, Sen. Bill Nelson, Sen. Barack Obama, Sen. Mark L. Pryor, Sen. Ken Salazar, Sen. Bernard Sanders, Sen. Charles E. Schumer, Sen. Gordon H. Smith, Sen. Olympia J. Snowe, Sen. Arlen Specter, Sen. Sheldon Whitehouse, and Sen. Ron Wyden

***Public Opinion:*** In 2002 the National Legal Aid and Defender Association published a first-of-its-kind report on public opinion about due process and the role of lawyers who represent indigent criminal defendants available at [http://www.nlada.org/Defender/Defender\\_Awareness/Defender\\_Awareness\\_Indigent](http://www.nlada.org/Defender/Defender_Awareness/Defender_Awareness_Indigent).

The report's main findings are that a majority of Americans support a strong system of public defense and believe that competent representation should be provided to people who need and cannot afford it.

**For Further Information:**

*See DOJ Compendium of Standards for Indigent Defense Systems; ABA Standards for Criminal Justice; NLADA Performance Guidelines for Criminal Defense Representation, ABA Ten Principles of a Public Defense Delivery System, NLADA Five Problems Facing Public Defense on the 40<sup>th</sup> Anniversary of Gideon v. Wainwright.*

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

<sup>2</sup> *Criminal Justice in Crisis*, American Bar Association (1988). The Criminal Justice Section's Special Committee on Criminal Justice in a Free Society prepared this report, which was based upon public hearings conducted in locations throughout the U.S. It observed that "defense representation is too often inadequate" because "we, as a society, [are] depriving the system of the funds necessary to ensure adequate defense services;" Professor Norman Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing*, American Bar Association (1982). This report, on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants, was based upon site visits and a review of empirical evaluations of nearly 40 jurisdictions in which state and local indigent defense programs had been studied. The report contains this assessment: "Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons who have a constitutional right to counsel...are denied effective legal representation;" *Gideon Undone: The Crisis in Indigent Defense Funding*, American Bar Association (1982), a report based upon a hearing conducted by the ABA Standing Committee on Legal Aid and Indigent Defendants—held in cooperation with the National Legal Aid and Defender Association and the General Practice Section of the ABA. Among problems cited by witnesses were public defenders with too many cases; lack of adequate support staff; insufficient compensation

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for assigned counsel; defendants often not advised of their right to counsel in misdemeanor cases; and waivers of counsel that failed to meet constitutional standards.

<sup>3</sup> This 2004 report, based on a series of hearings held around the country, is available online at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

<sup>4</sup> See e.g., *Assembly Line Justice: Mississippi Indigent Defense Crisis*, NAACP Legal Defense Fund and Educational Fund, Inc. (2003), available at [http://www.naacpldf.org/content/pdf/indigent/Assembly\\_Line\\_Justice.pdf](http://www.naacpldf.org/content/pdf/indigent/Assembly_Line_Justice.pdf).

<sup>5</sup> For a description of the Hollings National Advocacy Center see [http://www.ndaa.org/education/nac\\_index.html](http://www.ndaa.org/education/nac_index.html).

<sup>6</sup> Although *Gideon*'s mandate is directed at the states, in practice, many states delegate the delivery of public defense services to localities.

<sup>7</sup> See ABA, Report with Recommendation to the ABA House of Delegates 107 (Aug. 2005) (urging, among other things, substantial federal funding for public defense), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf>.

<sup>8</sup> The ABA, the largest organization of lawyers in America, has twice endorsed the creation of a National Center for Defense Services, first in 1979 and then again in 2005 in its report, *Gideon's Broken Promise* at 41-43. See also American Bar Association Report with Recommendation to the ABA House of Delegates 121 (Feb. 1979) (urging the creation of a federal Center for Defense Services), available at <http://www.abanet.org/legalservices/downloads/sclaid/121.pdf>.

<sup>9</sup> See *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations: Report of the National Symposium on Indigent Defense* (1999), and *National Symposium on Indigent Defense 2000: Redefining Leadership for Equal Justice* (2000).

<sup>10</sup> For a list of publications arising out of the Executive Session see [http://www.hks.harvard.edu/criminaljustice/executive\\_sessions/esp.html](http://www.hks.harvard.edu/criminaljustice/executive_sessions/esp.html).

<sup>11</sup> Compendium available at [http://www.nlada.org/Defender/Defender\\_Standards/Defender\\_Standards\\_Comp](http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp).

<sup>12</sup> See *Indigent Defense Services in Large Counties*, 1999, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf>.

<sup>13</sup> See <http://www.ojp.usdoj.gov/bjs/pub/html/cpdo07sol.html>.

<sup>14</sup> See e.g., ABA, Report with Recommendation to the ABA House of Delegates 103 (Feb. 1991) (urging inclusion of public defense programs in federal grant funding), available at <http://www.abanet.org/legalservices/downloads/sclaid/103.pdf>.

<sup>15</sup> See National Legal Aid & Defender Association report, "Federal Assistance to State and Local Indigent Defense Programs, FY 1998 and 1999," available for download at <http://www.nlada.org/DMS/Documents/1013119600.02/Federal%20Assistance%20Report%20FY98-99.pdf>.

<sup>16</sup> See Covington & Burling memo for The Constitution Project regarding JAG Program Funding Disparities (August 1, 2006).

<sup>17</sup> See CRS Report to Congress, "Department of Justice (DOJ) Appropriations for FY 2008 and 2009" (June 10, 2008), available for download at <http://www.fas.org/sgp/crs/misc/RL34530.pdf>.

<sup>18</sup> See *An Analysis of the Performance of Federal Indigent Defense Counsel*, Radha Iyengar, National Bureau of Economic Research (2007) (comparing performance of salaried federal defenders and panel attorneys), available at [http://people.rwj.harvard.edu/~riyengar/indigent\\_defense.pdf](http://people.rwj.harvard.edu/~riyengar/indigent_defense.pdf).

<sup>19</sup> Justice for All Act of 2004, Pub. L. No. 108-405, (codified in scattered sections of 18, 28 and 42 U.S.C.), Title IV—Innocence Protect Act of 2004.

<sup>20</sup> "Capital Representation Improvement Grants," 42 U.S.C. § 14163 (2004).

<sup>21</sup> "Authorization of Appropriations" 42 U.S.C. § 14163e (2004), restricts the use of funds to ensure equal allocation between "Capital Representation Improvement Grants" and "Capital Prosecution Improvement Grants." Notably, other than the Innocence Protection Act provision, no equivalent parity requirement exists with respect to the distribution of federal funds. Thus, the substantial funding provided for state prosecution and

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law enforcement purposes through JAG and other federal grant programs are not matched by funds for state public defense systems.

<sup>22</sup> Sponsors of the John R. Justice Act.

## **CHAPTER TWELVE**

### **DEATH PENALTY/HABEAS CORPUS REFORM**

In a landmark study of capital cases from 1973 through 1995, 7 out of every 10 cases (68%) that were fully reviewed by the courts had serious, reversible error.<sup>1</sup> Although state courts threw out 47% of the capital convictions due to such errors, 40% of the *remaining* death sentences were found also to have serious error upon federal review.<sup>2</sup> The most common errors prompting reversal of death sentences were “egregiously incompetent defense lawyers” and suppression of exculpatory evidence by prosecutors or the police.<sup>3</sup> At the same time, 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.<sup>4</sup> The utter failure to provide capital defendants with adequate legal representation and a fair trial, as well as the alarming racial disparities pervading death sentences, leads to an incontrovertible truth: the death penalty is a “broken system.”<sup>5</sup>

Despite these grave concerns about the reliability of capital convictions, federal legislation, most prominently the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and U.S. Supreme Court decisions interpreting AEDPA have significantly limited access to 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. The constraints on the federal courts to serve as a final check on state capital convictions are particularly damning for prisoners asserting claims of actual innocence when we know with certainty that defendants have been, and will be, wrongfully convicted of capital crimes. In fact, as of August of this year, 130 death-row inmates from 26 states have been officially exonerated upon proof of innocence and released from custody after serving years (often decades) on death row.<sup>6</sup> The conviction and execution of innocent defendants is not only a moral travesty, but also a disservice to the community’s need for justice and public safety.

The death penalty is one aspect of the criminal justice system that society cannot afford to have broken. There is simply no remedy for the execution of defendants who were not afforded all of their constitutional rights or, even worse, are innocent of the crimes charged. Just this past year, Justice Kennedy opined that “[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”<sup>7</sup> Because “death is different,” there is an even greater urgency for the federal government to implement the following reform proposals in order 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. While all of these recommended

proposals are essential for a fair and equitable death penalty system, there are three in particular that should be a priority for Congress and the new administration in the immediate future:

- Stay all federal executions and place a moratorium on federal capital charges pending a thorough data collection and analysis of racial disparities, the adequacy of legal representation, and other inequities in the death penalty system;
- Create and increase funding for defender organizations that provide post-conviction representation and are independent of the judiciary; and
- Amend the habeas-related provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the USA PATRIOT Improvement and Reauthorization Act of 2005 (PIRA), so that federal courts are more accessible to prisoners asserting claims of constitutional violations with less deference to prior decisions.

## **I. REFORM THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA)**

**Summary of the Problem:** Since AEDPA’s enactment in 1996, state and federal prisoners have been forced to navigate a labyrinth of complex procedural rules and stringent deadlines in order to assert claims of serious constitutional violations in post-conviction proceedings. State prisoners particularly have been burdened by AEDPA, which requires greater deference to state court decisions and, thus, constrains federal review of federal 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.” 28 U.S.C. § 2254(d). Interpretations of these limitations by the U.S. Supreme Court and lower federal courts have created an unduly high burden for petitioners to obtain federal habeas relief. Moreover, a one-year statute of limitations and prohibitions against successive habeas petitions serve as an absolute bar to federal habeas review. As a result, federal courts are unable to grant relief despite meritorious substantive claims, including, *inter alia*, claims of racial bias in jury selection, ineffective assistance of counsel, and prosecutorial misconduct, due to substantial deference to state court proceedings or mere technical reasons.

Barring access to the federal courts undermines confidence in criminal convictions as thousands of prisoners are left with no recourse for constitutional violations that deprived them of a fair trial. This is especially alarming for prisoners facing death sentences, where there should be no margin of error. With the knowledge that prejudicial error will occur in an unacceptable number of criminal proceedings, including capital cases, it is imperative that we ensure access to federal post-conviction proceedings in order to protect the fairness, accuracy, and integrity of the criminal justice system.

## Proposed Solutions:

*Executive:* Supporting role

### *Legislative Changes:*

1. Repeal or extend the one-year statute of limitations and eliminate the rule that a violation of the statute of limitations is an absolute bar to federal habeas review.  
➤ **Repeal/Amend 28 U.S.C. §§ 2244(d), 2255(f)**
2. Suspend the statute of limitations for states with no automatic right to appointed post-conviction counsel in capital cases or with a prerequisite for petitioner to make a *pro se* filing before appointment of post-conviction counsel.  
➤ **Amend 28 U.S.C. § 2244(d)**
3. Amend the statute of limitations to mirror applicable state statutes of limitations and to begin running from the date a timely-filed state habeas petition has been denied.  
➤ **Amend 28 U.S.C. § 2244(d)**
4. Amend the statute of limitations so that habeas cases can be reopened based on new rules recognized by the U.S. Supreme Court, irrespective of *Dodd v. United States*, 545 U.S. 353 (2005).  
➤ **Amend 28 U.S.C. §§ 2244(d), 2255(f)**
5. Require the state 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*, 547 U.S. 198 (2006).  
➤ **Amend 28 U.S.C. §§ 2244(d), 2255(f)**
6. Toll the statute of limitations while a state petition is pending even if the state petition is ultimately dismissed as time-barred and improperly filed, or require a determination that the state procedural rule dismissing the petition is an adequate state rule, irrespective of *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).  
➤ **Amend 28 U.S.C. § 2244(d)**
7. Make clear that a state petition dismissed by an inadequate state procedural rule does not render that petition improperly filed, irrespective of *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).  
➤ **Amend 28 U.S.C. §§ 2244(d)**
8. In a mixed petition with both exhausted and unexhausted claims, 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, irrespective of *Pliler v. Ford*, 542 U.S. 225 (2004).

➤ **Amend 28 U.S.C. §§ 2244(d), 2255(f)**

9. Toll the statute of limitations for any attorney error and make ineffective assistance by state post-conviction counsel a cause to excuse a procedural default.  
➤ **Amend 28 U.S.C. §§ 2244(d), 2255(f)**
10. Ensure that states truly provide effective post-conviction counsel consistent with the U.S. Constitution.  
➤ **Amend 28 U.S.C. §§ 2254, 2255, 2261**
11. Permit claims of innocence or racial bias to overcome any statute of limitations or other procedural bar.  
➤ **Amend 28 U.S.C. §§ 2244(d), 2255(f)**
12. Eliminate or amend the restrictions on habeas corpus relief for only 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.”  
➤ **Repeal/Amend 28 U.S.C. § 2254(d)**  
➤ **Create a committee with substantive input from members of the criminal defense bar to draft amending language.**  
➤ **Include decisions of the U.S. Courts of Appeals as part of “clearly established Federal law.”**  
➤ **Make this provision applicable only to decisions from state jurisdictions qualified to opt-in to the expedited habeas procedures under Chapter 154 (if applicable, see below).**
13. Permit successive habeas corpus petitions.  
➤ **Amend 28 U.S.C. §§ 2244, 2255**
14. Repeal or amend the Chapter 154 Special Habeas Corpus “Opt-In” Procedures that expedite federal post-conviction proceedings.  
➤ **Repeal/Amend 28 U.S.C. §§ 2261-66**  
➤ **Repeal provisions from the USA PATRIOT Improvement and Reauthorization Act of 2005 (PIRA), which grants authority to the U.S. Attorney General to determine state qualification for “opt-in” procedures and makes that determination retroactive.**  
➤ **Reverse the “opt-in” procedures so that petitioners get full review in federal court or a suspension of the statute of limitations if a state fails to meet its Sixth and Eighth Amendment obligations.**  
➤ **Allow courts to extend deadlines for good cause.**  
➤ **Repeal or extend the statute of limitations and the time limits for federal courts to process the cases.**

15. Make all amendments to AEDPA and PIRA retroactively applicable.
  - Amend 28 U.S.C. §§ 2254, 2255

**Jurisdiction:**

*Executive Branch:* Supporting role

*Legislative Branch:* Senate and House Judiciary Committees

**Background:**

*Executive Branch:* Early in his administration, President Clinton announced his support for habeas corpus reform that would limit the number of appeals and minimize judicial delay. After AEDPA passed in both houses, President Clinton signed the legislation into law on April 24, 1996, indicating in his signing statement that “For too long . . . endless death row appeals have stood in the way of justice being served,” but that he was also confident that “the Federal courts will interpret these [habeas] provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary.” (Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=52713>.)

*Legislative Branch:* In 1995, the 104th Congress passed AEDPA (P.L. 104-132), which limited petitioners’ access to federal courts through a one-year statute of limitations, state exhaustion requirements, limits on successive petitions, and increased deference to state court determinations. Sponsors of the underlying Senate bill (S. 735) who are still in office include Sens. Dianne Feinstein (D-CA), Orrin Hatch (R-UT), and Jon Kyl (R-AZ). Sponsors of the House bill (H.R. 729) currently in office include Reps. Phil English (R-PA) and Jerry Weller (R-IL). In 2005, the Streamlined Procedures Act was introduced by Rep. Daniel Lungren in the House as H.R. 3035 and by Sen. Jon Kyl in the Senate as S. 1088, with provisions that would have further limited federal review of habeas petitions and completely precluded capital defendants from petitioning for federal habeas relief. Additional co-sponsors of S. 1088 were Sens. Saxby Chambliss (R-GA), John Cornyn (R-TX), Charles Grassley (R-IA), and Orrin Hatch (R-UT). Hearings on this bill were held by the House Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security on June 30, 2005 and November 10, 2005, and by the Senate Judiciary Committee on July 13, 2005 and November 16, 2005. The bills never left the committees, however, and the Streamlined Procedures Act of 2005 died in both houses.

AEDPA also provided “opt-in” procedures, codified in Chapter 154 of the Judiciary Code, which would expedite habeas proceedings for death-sentenced petitioners convicted in certain qualifying states. The USA PATRIOT Improvement and Reauthorization Act (PIRA), passed by the 109th Congress and signed into law by President Bush in March 2006, included

amendments to the opt-in provisions that authorize the U.S. Attorney General, rather than federal courts of appeals, to determine which states had met the opt-in qualifications.

**Judicial Branch:** In 1988, Chief Justice Rehnquist convened an ad hoc committee, chaired by Justice Lewis Powell, to make recommendations to reform federal habeas corpus procedures in capital cases. This committee, known as the Powell Committee, issued a report noting, *inter alia*, that federal habeas practice was marked by ineffective counsel for indigent prisoners and unnecessary delay. (*Federal Habeas Corpus Relief: Background, Legislation, and Issues*, Cong. Res. Serv. Report 3 (Feb. 1, 2006), available at [http://openers.com/rpts/RL33259\\_20060201.pdf](http://openers.com/rpts/RL33259_20060201.pdf).)

The U.S. Supreme Court has also issued the following court opinions that construe AEDPA's habeas-related provisions:

- ***Bell v. Cone***, 535 U.S. 685, (2002) (state court finding that counsel was effective during penalty phase, despite failure to present mitigating evidence and waiver of closing argument, was not an unreasonable application of clearly established federal law);
- ***Day v. McDonough***, 547 U.S. 198 (2006) (court may dismiss habeas petition *sua sponte* for statute of limitations violation even if state forfeited the defense);
- ***Dodd v. United States***, 545 U.S. 353 (2005) (statute of limitations runs from date new rule is recognized by U.S. Supreme Court, not when the rule is made retroactive);
- ***Lindh v. Murphy***, 521 U.S. 320 (1997) (general provisions of AEDPA do not apply retroactively to cases already filed in federal district court before act was passed);
- ***Mitchell v. Esparza***, 540 U.S. 12 (2003) (federal court barred from granting habeas relief because decision to apply harmless error review to trial court's failure to comply with state sentencing procedures did not result in decision that was "contrary to" or an "unreasonable application of clearly established federal law");
- ***Pace v. DiGuglielmo***, 544 U.S. 408 (2005) (state petition that is dismissed as time-barred was not properly filed and, thus, cannot toll statute of limitations for federal habeas petition);
- ***Pliler v. Ford***, 542 U.S. 225 (2004) (court not required to advise petitioner of consequences of declining stay-and-abeyance procedure);
- ***Rhines v. Weber***, 544 U.S. 269 (2005) (federal court may stay a section 2254 habeas petition when necessary to permit petitioner to exhaust claims in state court without violating AEDPA's one-year statute of limitations);
- ***Stewart v. Martinez-Villareal***, 523 U.S. 637 (1998) (petitioner's second claim of incompetence, which would bar execution, was not precluded as a second or successive petition under AEDPA when first claim was dismissed as premature);

- *Williams (Michael) v. Taylor*, 529 U.S.420 (2000) (AEDPA does not bar evidentiary hearings in federal court unless defendant or defense counsel is faulted for lack of diligence or some greater fault that led to failure to develop claim’s factual basis); and
- *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000) (federal court may grant habeas relief pursuant to AEDPA’s “contrary to” clause when state court decision is either opposite to a conclusion reached by a U.S. Supreme Court case on a question of law or is different from a U.S. Supreme Court decision on a set of materially indistinguishable facts; relief may be granted under the “unreasonable application” clause if state court identified correct legal rule but unreasonably applied rule to facts of instant case).

**Potential Allies, Potential Opposition, and Public Opinion:**

*Potential Allies:*

- **American Bar Association**
- **American Civil Liberties Union**
- **The Constitution Project**
- **Amnesty International**
- **Death Penalty Information Center**
- **Equal Justice Initiative of Alabama**
- **Human Rights Watch**
- **NAACP Legal Defense & Educational Fund, Inc.**
- **National Association of Criminal Defense Lawyers**
- **National Coalition to Abolish the Death Penalty**
- **National Legal Aid & Defender Association**
- **Southern Center for Human Rights**
- **Center for Community Alternatives**

*Public Opinion:* Support for the death penalty has decreased from an all-time high of 80% in 1994 to 64% in 2007. When asked whether the death penalty or life imprisonment is a better penalty for murder, more respondents chose life imprisonment over the death penalty for the first time in Gallup’s most recent polling of this question in 2006. Moreover, from 2003 to 2005, 59-73% believed that an innocent person had been wrongfully executed within the past five years. More information on the Gallup Poll of the death penalty is available at <http://www.gallup.com/poll/1606/Death-Penalty.aspx>.

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## II. PROVIDE ADEQUATE LEGAL COUNSEL FOR ALL CAPITAL DEFENDANTS

**Summary of the Problem:** The integrity of the criminal justice system turns on the fairness of criminal trials, which is concomitantly dependent on the adequacy of defense counsel's representation. Yet, the promise of effective assistance of counsel, embodied in the Sixth Amendment, has often been broken for defendants across the country facing the death penalty. Capital defendants are predominately poor and must rely upon a broken indigent defense system that is overworked, underpaid, inexperienced, or non-existent. With such inadequate resources, capital defendants are, by default, disadvantaged from the start, resulting in death sentences that are both 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. The initial success of federally funded capital defender organizations, which have been defunded since 1996, demonstrates how proper training and support for competent death penalty counsel can be cost-effective and dramatically increase the quality of capital representation in state and federal post-conviction proceedings, as well as direct representation of capital defendants. Federal support for capital representation is as important now as ever before in order to ensure that every capital defendant receives a fair and just trial.

### **Proposed Solutions:**

#### ***Executive:***

1. Create an Office of the Defender General, comparable to the U.S. Department of Justice, to operate independently from the judiciary and select and monitor counsel representing state and federal capital defendants in federal proceedings.
2. Support a National Capital Bar of qualified and experienced attorneys to represent capital defendants.

#### ***Legislative Changes:***

1. Transfer the defense function from the federal courts to a new Office of the Defender General.
  - **Amend 18 U.S.C. § 3006A**
2. 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.
  - **Amend 18 U.S.C. § 3006A, 28 U.S.C. § 2254(h)**

3. Regarding counsel for prisoners seeking federal habeas review, require federal judges to appoint the legal team nominated by Capital Habeas Unit attorneys or the resource counsel from the Administrative Office of the Courts unless compelling reasons deem otherwise.
  - Amend 18 U.S.C. § 3006A, 28 U.S.C. §§ 2254(h), 2255(g)
4. Establish a right to counsel for capital defendants at all stages of the legal process through post-conviction proceedings and ensure appropriate funding, including funds for attorney’s fees, investigative expenses, and expert witnesses.
  - Amend 18 U.S.C. § 3006A, 28 U.S.C. §§ 2254(h), 2255(g)

***Legislative Appropriations (Solutions w/ Funding Requests):***

1. Fund an Office of the Defender General.
2. Create and fund defender organizations providing post-conviction representation in every applicable jurisdiction in order to ensure adequate representation for all death-row inmates.
3. Support a National Capital Bar of qualified and experienced attorneys to represent capital defendants.

**Jurisdiction:**

***Executive Branch:*** Office of the Defender General (newly created executive agency)

***Legislative Branch:*** Senate and House Judiciary and Appropriations Committees

**Background:**

***Legislative Branch:*** The Innocence Protection Act (IPA) was signed by President Bush on October 30, 2004, as part of the larger Justice for All Act. The House of Representatives passed the IPA by an overwhelming majority vote of 393 to 14, and the Senate passed it by voice vote three days later. Part of the IPA addresses capital representation by authorizing \$75 million in state grants each year for five years to improve standards for prosecutors and defense counsel appointed to state capital cases. The IPA is scheduled for reauthorization in 2009. (For more information, see [http://www.thejusticeproject.org/national/ipa/.](http://www.thejusticeproject.org/national/ipa/))

On April 8, 2008, the Subcommittee on the Constitution of the Senate Judiciary Committee held a hearing on “The Adequacy of Representation in Capital Cases.” Witnesses included Michael Greco, former President of the American Bar Association (discussing ABA study finding grave concerns in capital representation); Bryan Stevenson, Executive Director of the Equal Justice Initiative (providing examples of inadequate counsel and insufficient resources); Honorable Carolyn Engle Temin, Senior Judge of the Court of Common Pleas of the

First Judicial District of Pennsylvania (discussing personal experiences as trial judge witnessing inadequate defense counsel in capital cases); and Donald Verrilli, Partner at Jenner & Block (post-conviction counsel to petitioner in *Wiggins v. Smith*, explaining need for sufficient resources to conduct necessary defense investigation). Sens. Patrick Leahy (D-VT) and Russ Feingold (D-WI) also spoke about the need for adequate counsel in capital cases. Transcripts and the webcast of this hearing are available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3253>.

**Judicial Branch:** While the U.S. Supreme Court has recognized a defendant's Sixth Amendment right to counsel in criminal cases, *see Gideon v. Wainwright*, 372 U.S. 355 (1963), it has not recognized that right in post-conviction proceedings, *see Murray v. Giarratano*, 492 U.S. 1 (1989). Claims of ineffective assistance of counsel in violation of the Sixth Amendment are subject to a two-prong standard, set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that counsel performed deficiently and that the deficient performance prejudiced the defendant's case in order to find a constitutional violation. A factor in considering the effectiveness of counsel is the duty to investigate the defendant's case. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *see also Rompilla v. Beard*, 545 U.S. 374 (2005) (finding counsel ineffective for failure to examine defendant's prior convictions before capital sentencing phase of trial).

The Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services of the Judicial Conference of the United States released a report in May 1998, called "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation." In addition to findings with respect to the rising number and cost of capital cases, the report makes recommendations to improve capital defense representation in federal cases. The report is available at <http://www.uscourts.gov/dpenalty/1COVER.htm>.

### **Potential Allies, Potential Opposition and Public Opinion:**

#### ***Potential Allies:***

- **American Bar Association**
- **American Civil Liberties Union**
- **The Constitution Project**
- **Amnesty International**
- **Death Penalty Information Center**
- **Equal Justice Initiative of Alabama**
- **Human Rights Watch**
- **Justice Project**
- **NAACP Legal Defense & Educational Fund, Inc.**
- **National Association of Criminal Defense Lawyers**
- **National Coalition to Abolish the Death Penalty**

- **National Legal Aid & Defender Association**
- **Southern Center for Human Rights**
- **Center for Community Alternatives**
- **International CURE**
- **Virginia CURE**

**Public Opinion:** The National Legal Aid and Defender Association and the Open Society Institute commissioned a study on public opinion about due process and the representation of indigent criminal defendants. In September 2000 and October 2001, Beldon Russonello & Stewart, a national, independent public opinion research company, issued its findings from eight focus groups and a national survey. Two-thirds of Americans (64%) supported the use of tax dollars to provide counsel for criminal defendants who cannot afford an attorney. On the issue of indigent defense systems, 71% supported the establishment of public defender's offices with full-time professional staff, compared to just 21% who preferred a system of court-appointed private attorneys. Eighty-eight percent supported resources to be made equally available to prosecutors and defenders, and 64% strongly supported this proposition. Ninety-three percent believed competent legal representation is necessary to prevent wrongful convictions, and 89% believed that we must ensure competent legal representation in order for the legal system to function. Additional findings are available at [http://www.nlada.org/Defender/Defender\\_Awareness/Defender\\_Awareness\\_Indigent](http://www.nlada.org/Defender/Defender_Awareness/Defender_Awareness_Indigent).

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*Mandatory Justice: The Death Penalty Revisited*  
<http://constitutionproject.org/pdf/mandatoryjusticerevisited.pdf>

### III. REFORM THE FEDERAL DEATH PENALTY

**Summary of the Problem:** The death penalty was reintroduced to the federal criminal system in 1988 and has grown in application over the years, especially during the previous administration. The increase in federal capital prosecutions can partially be attributed to the Federal Death Penalty Act of 1994, which expanded the number of death-eligible offenses. However, another contributing factor has been the U.S. Attorney General's affirmative agenda to seek capital sentences, often in direct contravention of local U.S. Attorneys' own recommendations not to seek the death penalty. The mechanism by which this agenda was implemented during the past eight years is a complex bureaucratic system, initiated by regulation in 1995, USAM 9-10.010 et seq., that requires 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 them, regardless of the recommendation of the local U.S. Attorneys. This overcentralization of the federal death penalty's decision-making process has proved cumbersome, slow, and extremely costly and has resulted in more frequent federal capital prosecutions in jurisdictions that have abolished the death penalty under state law. Removing the requirement that *all* capital cases be reviewed by the U.S. Attorney General would restore capital-case procedure to the more streamlined, efficient, and less intrusive system that prevailed prior to 1995, when only affirmative requests to seek the death penalty required approval by the U.S. Attorney General.

Moreover, increasing federal capital prosecutions, without remedying the extreme racial disparities, further exacerbates the preexisting inequities in the death penalty system. Since 1988, approximately 73% of all approved capital prosecutions have been against defendants of color, and white federal defendants are almost twice as likely as defendants of color to have the death penalty reduced to life sentences through plea bargains. The U.S. Department of Justice's own study reveals that over 40% of all requests for capital prosecutions came from only 5 of the 94 federal districts. The failure to address this pervasively unequal application of the death penalty sends an unacceptable message that the value of a defendant's life falls along racial lines.

## **Proposed Solutions:**

### ***Executive:***

1. Collect and regularly review all data concerning factors relevant to the imposition of the death penalty.
2. Stay all federal executions and place a moratorium on federal capital charges pending an independent study of the death penalty system that examines racial disparities, prejudicial errors, adequacy of legal representation, and other inequities in capital prosecutions.
3. Decentralize the decision to seek capital sentences by removing the requirements in the U.S. Attorneys' Manual that Main Justice review all cases eligible for the death penalty, except where the U.S. Attorney requests permission to seek the death penalty, thereby eliminating situations in which local prosecutors' decisions *not* to seek capital punishment are overruled by Main Justice.
4. Exempt people with mental illness and/or developmental disabilities from capital prosecutions.
5. Reform the process for presidential pardons to create greater transparency, reduce the backlog, and ensure equal access regardless of wealth or political influence.
6. Monitor compliance with provisions prohibiting imposition of the death penalty based on race, ethnicity, or national origin, based on, *inter alia*, statistical evidence.

### ***Legislative Changes:***

1. Expressly prohibit imposition of the death penalty based on race, ethnicity, or national origin.
  - **Amend Title 28 of U.S. Code**
2. Establish an inference that race, ethnicity, or national origin was the basis of the death sentence through evidence that race, ethnicity, or national origin was a statistically significant factor in decisions to impose the sentence.
  - **Amend Title 28 of the U.S. Code**
3. Bar the government from rebutting an inference that race, ethnicity, or national origin was the basis of the death sentence 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.

- **Amend Title 28 of the U.S. Code**
- 4. Require public officials to collect data on all factors relevant to the imposition of the death penalty and to make that data publicly available.
  - **Amend Title 28 of the U.S. Code**
- 5. Eliminate the increased number of peremptory challenges given to federal prosecutors in capital cases, which has created a perverse incentive to seek death sentences when they are not warranted.
  - **Amend Fed. R. Crim. P. 24(b)**
- 6. Exempt people with mental illness and/or developmental disabilities from capital sentences.
  - **Amend 18 U.S.C. § 3596**

***Legislative Appropriations (Solutions w/ Funding Requests):*** Fund an independent study of the federal death penalty system that examines racial disparities, prejudicial errors, adequacy of counsel, and other inequities in capital prosecutions to make recommendations for legislative reform.

**Jurisdiction:**

***Executive Branch:*** U.S. Department of Justice

***Legislative Branch:*** Senate and House Judiciary Committees

**Background:**

***Executive Branch:*** President Clinton requested the U.S. Department of Justice to conduct a study of the federal death penalty, which was released on September 12, 2000. This study, called “The Federal Death Penalty System: A Statistical Survey (1988-2000),” demonstrated pervasive racial disparities. For example, from 1995 to 2000, the defendants in 80% of the cases submitted by federal prosecutors for death penalty approval were people of color. During that same time period, over 40% of the cases seeking death penalty approval came from only 5 of the 94 federal districts. On June 6, 2001, the U.S. Department of Justice issued a supplement to its September 2000 report, called “The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review.” This report has been criticized for its conclusions of racial fairness in the federal death penalty system despite substantial statistical evidence showing otherwise. Both reports are available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html> and <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>.

**Legislative Branch:** The federal death penalty was reinstated in the Drug Kingpin Act of 1988. In 1994, Congress passed the Federal Death Penalty Act as part of the Violent Crime Control and Enforcement Act of 1994 (“omnibus crime legislation”), which significantly expanded the number of federal capital offenses and established a system for imposing, reviewing, and implementing the sentence of death. Rep. John Conyers, Jr. (D-MI) drafted the Racial Justice Act to also be a part of the 1994 omnibus crime legislation as a congressional response to the U.S. Supreme Court’s decision in *McClesky v. Kemp*, 481 U.S. 279 (1987) (*see infra*). The Racial Justice Act prohibited executions imposed on the basis of race under state or federal law and established an inference that race was the basis of a capital sentence through evidence that it was a statistically significant factor in decisions to seek or impose the death penalty. Although the measure passed in the House, it died in the Senate by a 58-41 vote.

**Judicial Branch:** In *McClesky v. Kemp*, 481 U.S. 279 (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 because it did not demonstrate intentional race discrimination in a specific defendant’s trial. The Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services of the Judicial Conference of the United States released a report in May 1998, called “Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation.” This study found that the number of federal capital prosecutions more than doubled after passage of the Federal Death Penalty Act of 1994, and that the cost of defending capital cases was almost quadruple the cost of defending non-capital cases. This report is available at <http://www.uscourts.gov/library/dpenalty/1COVER.htm>.

### **Potential Allies, Potential Opposition, and Public Opinion:**

#### ***Potential Allies:***

- **American Bar Association**
- **American Civil Liberties Union**
- **The Constitution Project**
- **Amnesty International**
- **Charles Hamilton Houston Institute for Race and Justice**
- **Death Penalty Information Center**
- **Equal Justice Initiative of Alabama**
- **Human Rights Watch**
- **NAACP Legal Defense & Educational Fund, Inc.**
- **National Association of Criminal Defense Lawyers**
- **National Coalition to Abolish the Death Penalty**
- **National Legal Aid & Defender Association**

- **Sentencing Project**
- **Southern Center for Human Rights**
- **Center for Community Alternatives**
- **International CURE**
- **Virginia CURE**

**Public Opinion:** Since passage of the Federal Death Penalty Act in 1994, support for the death penalty has decreased from an all-time high of 80% in 1994 to 64% in 2007. When asked whether the death penalty or life imprisonment is a better penalty for murder, more respondents chose life imprisonment over the death penalty for the first time in Gallup's most recent polling of this question in 2006. Moreover, an overwhelming majority of respondents do not believe the death penalty should be imposed on people with mental illness or mental retardation: in a 2002 poll, 75% opposed executing people with mental illness and 82% opposed executing people with mental retardation. More information on the Gallup Poll of the death penalty is available at <http://www.gallup.com/poll/1606/Death-Penalty.aspx>.

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<sup>1</sup> James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000) at i (“Broken System”), *available at* [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at ii.

<sup>4</sup> Amnesty International, “United States of America: Death by Discrimination - the Continuing Role of Race in Capital Cases” (Apr. 24, 2003) at 5, *available at* <http://www.amnesty.org/en/library/info/AMR51/046/2003>.

<sup>5</sup> The authors of “A Broken System” concluded that “serious error—error substantially undermining the reliability of capital verdicts—had reached epidemic proportions throughout our death penalty system.” Broken System, *supra* note 1, at 1.

<sup>6</sup> Death Penalty Information Center, *Innocence and the Death Penalty*, *available at* <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

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## **CHAPTER THIRTEEN**

### **JUVENILE JUSTICE REFORMS**

The juvenile justice system in the United States is in urgent need of reform. Riddled with racial and ethnic disparities, a lack of mental health and drug treatment services, harsh and abusive treatment in detention facilities, and disproportionate sanctions for minor and nonviolent adolescent misbehavior, 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.

Nationwide each year, police make 2.2 million juvenile arrests; 1.7 million cases are referred to juvenile courts; an estimated 400,000 youth cycle through juvenile detention centers; and nearly 100,000 youth are confined in juvenile jails, prisons, boot camps, and other residential facilities.<sup>1</sup> On any given night, almost 10,000 of these children are held in adult jails and prisons, where they are particularly vulnerable to victimization and abuse. The United States is the only nation in the world where juveniles are serving sentences of life without the possibility of parole.

On a brighter note, scientific research over the past 20 years has vastly increased our understanding of what works, and how to best approach juvenile delinquency and system reform. Promising reforms are expanding in many jurisdictions, and we have an increasingly clear route for moving juvenile justice away from counterproductive, dangerous, and wasteful practices toward a more effective and just approach to addressing adolescent crime. This new administration has the opportunity, and the obligation, to establish a meaningful system of justice for all of our youth, and should begin by focusing on the following top two priorities:

1. **Make Prevention and Intervention Priority for Effective Juvenile Justice Delinquency Crime Reduction Policy**
  - A. Restore support for and sharpen the focus of the Office of Juvenile Justice and Delinquency Prevention (OJJDP).
  - B. Strengthen and reauthorize the Juvenile Justice and Delinquency Prevention Act (JJPA or “the Act”).
  - C. Increase support for prevention, education, gang intervention, mentoring, job training, health, mental health, and substance abuse community and school-based programming for youth.
  
2. **Protect Youth in the Juvenile Justice System and Promotion of Developmentally-Appropriate Policies**
  - D. Promote age-appropriate treatment for youth in the justice system.
  - E. Screen youth for mental health and substance abuse disorders upon intake.
  - F. Reduce inappropriate penalties, and reform costly policies that subject more youth—particularly poor youth and youth of color—to federal prosecution and incarceration.

# **I. MAKE PREVENTION AND INTERVENTION PRIORITY FOR EFFECTIVE JUVENILE JUSTICE DELINQUENCY CRIME REDUCTION POLICY**

## **Support For OJJDP and JJDP A Reauthorization**

**Summary of the Problem:** The Office of Juvenile Justice and Delinquency Prevention is the federal “home” for juvenile justice and delinquency prevention issues, and is tasked with assisting state and local governments in addressing juvenile delinquency.<sup>2</sup> Over the past eight years, OJJDP has suffered a drastic depletion of funding and support, and the agency’s commitment to the most important issues confronting youth has steadily waned.<sup>3</sup> The Juvenile Justice and Delinquency Prevention Act, which establishes OJJDP, is overdue for reauthorization, and its core protections for youth must be strengthened. Funding must be restored to 2002 levels or higher in order to provide meaningful federal dollars to the states to engage them in reform. Corresponding administrative regulations to the JJDP A must be updated to reflect current priorities and research in the field. Very few states are in full compliance with the requirements of JJDP A.

### **Proposed Solutions:**

#### *Executive:*

#### **The President should:**

- Ensure that OJJDP and the states have the necessary resources to comply with the Act’s core requirements.
- Restore the role of OJJDP to serve as a comprehensive agency to (1) support state compliance with the JJDP A mandates and advancing juvenile justice reforms, and (2) provide a full range of services, including conducting research and gathering data, identifying and disseminating best practices and relevant information, leading demonstration projects, providing training and technical assistance, and promoting the expansion of effective practices in the field.
- Order the Department of Justice (DOJ) to work with Congress on legislative language to strengthen and reauthorize the JJDP A.<sup>4</sup>

#### **The Office of Juvenile Justice and Delinquency Prevention should:**

- Prioritize JJDP A implementation, promote state compliance with the Act, and provide technical assistance to states.
- Update JJDP A regulations to reflect current priorities and protections.
- Submit a timely, annual report to Congress and make all documents publicly available on OJJDP’s website.
- Increase agency accountability and transparency.

### ***Legislative Changes:***

#### **Congress should:**

- Strengthen and reauthorize the JJDP, and authorize and appropriate sufficient federal funding to enable state compliance with the Act.

#### **Jurisdiction:**

***Executive Branch:*** Department of Justice, Office of Juvenile Justice and Delinquency Prevention

***Legislative Branch:*** United States Senate Judiciary Committees  
United States House of Representatives Education and Labor Committee

**Background:** Three congressional hearings were held on the JJDP in the 110<sup>th</sup> Congress.<sup>5</sup> The U.S. Senate Committee on the Judiciary passed S. 3155, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008, and three strengthening amendments.<sup>6</sup> The JJDP was not introduced in the House in the 110<sup>th</sup> Congress, but is likely to be introduced in early 2009. The Juvenile Crime Reduction Act, H.R. 3411, which improves the treatment of juveniles with mental health or substance abuse disorders,<sup>7</sup> was introduced and referred to the House Subcommittee on Healthy Families and Communities.<sup>8</sup>

#### **Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:*** Over 300 international and national organizations have supported a statement of principles, urging Congress to adhere to key principles in strengthening and reauthorizing the JJDP.<sup>9</sup> The National Juvenile Justice and Delinquency Prevention Coalition, the National Alliance of Faith and Justice, and numerous national mental health organizations supported H.R. 3411. Other potential allies include the Academy of Criminal Justice Sciences, Center for Community Alternatives, Justice Policy Institute, National Association of School Psychologists, National Juvenile Justice Network, Office of Restorative Justice, International CURE, Virginia CURE

#### **Experts:**

- Shay Bilchik, Former Administrator of OJJDP (Georgetown Public Policy Institute)
- Nancy Gannon Hornberger (Coalition for Juvenile Justice)
- Liz Ryan (Campaign for Youth Justice)
- Mark Soler (Center for Children's Law and Policy)
- Kim Godfrey/Ned Loughran, Council of Juvenile Correctional Administrators

#### **For Further Information:**

Visit <http://www.act4jj.org/>

## **II. INCREASE SUPPORT FOR PREVENTION, EDUCATION, GANG INTERVENTION, MENTORING, JOB TRAINING, HEALTH AND MENTAL HEALTH SERVICES, AND COMMUNITY AND SCHOOL-BASED PROGRAMMING FOR YOUTH**

**Summary of the Problem:** 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 can in fact make our communities less safe.

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 in stemming violence, curtailing crime and delinquency, and discouraging gang affiliation than broadening prosecutorial powers or stiffening criminal penalties for young people accused of crimes.<sup>10</sup> Public opinion polling studies reveal that taxpayers overwhelmingly favor paying for prevention, education, and rehabilitation programs than prosecution and incarceration of youthful offenders.<sup>11</sup>

### **Proposed Solutions:**

#### ***Executive:***

#### **The President should:**

- Create a Federal Taskforce including the DOJ, the Department of Education, the Department of Labor, the Department of Housing and Urban Development, the Department of Defense, the Department of Health and Human Services, the Substance Abuse Mental Health Services Administration, and the private sector<sup>12</sup> to prioritize juvenile justice prevention, intervention, and aftercare programs for youth at the cabinet and sub-cabinet levels.
- Establish a coordinated interagency approach to ensure the provision of community-based mental health and addiction services and treatment; screening, assessment and data collection regarding mental health and substance abuse conditions for youth who come into contact with the juvenile justice system.<sup>13</sup>
- Express public opposition to legislation that will widen the net of youth in the juvenile and adult criminal justice systems, over-criminalize and increase federal penalties for minor and nonviolent adolescent misbehavior, exacerbate racial and ethnic disparities in the juvenile and criminal justice systems, and increase incarceration rates in the United States.

#### **The Office of Juvenile Justice and Delinquency Prevention should:**

- Work with Congress, states and localities to coordinate gang prevention and intervention programs, and ensure effective use of federal funds for evidence-based and promising programs to prevent and intervene in gang involvement.

- Work in conjunction with the Federal Coordinating Council on Juvenile Justice to improve reporting on the prevalence of mental health and substance abuse disorders in the juvenile justice system.
- Issue regulations governing mental health assessments and data collection for youth who come into contact with the juvenile justice system.
- Assist states in coordinating with mental health systems to ensure that youth in the custody of the juvenile justice system receive timely mental health care when needed.
- Provide research and data on effective practices regarding juveniles with disabilities, and provide technical assistance to states to address the needs and rights of juveniles with disabilities.
- Promote research and data on the growing prevalence of girls in and at-risk of involvement with the juvenile justice system, and promote support for state programming to address gender-specific needs.
- Promote collaboration between juvenile justice and other child-serving systems including education and mental health to reduce racial and ethnic disparities that affect all these systems.

**The Department of Education should:**

- Establish and strengthen programs to encourage and support school behavior management and mental health programs, and to reduce criminalization of school misconduct.
- Work with OJJDP to extend school-wide positive behavioral interventions and supports into the juvenile justice system to improve treatment and outcomes for incarcerated youth.

***Legislative Changes:***

**Congress Should:**

- Support and pass the Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education Act (Youth PROMISE Act), H.R. 3846,<sup>14</sup> and reject the Gang Abatement and Suppression Act, S. 456, and its companion legislation, H.R. 3547, when introduced in the 111<sup>th</sup> Congress.<sup>15</sup>
- Require local educational agency (LEA) grantees to minimize the referral of students from schools to the juvenile and criminal justice systems, eliminate the use of zero tolerance policies, and eliminate the use of corporal punishment.<sup>16</sup>  
Approach mental health and substance abuse through the lens of a public health model, including the availability of broad-based mental health screening, and pass legislation to provide greater availability of mental health and addiction services to students and youth at-risk for contact with the juvenile and criminal justice systems.<sup>17</sup>

**Jurisdiction:**

***Executive Branch:*** Department of Justice (OJJDP)  
Department of Education

**Legislative Branch:** House Education and Labor Committee  
House and Senate Judiciary Committees  
House Subcommittee on Crime, Terrorism and Homeland Security  
Senate Health, Education, Labor and Pensions Committee

**Background:** The Youth PROMISE Act, H.R. 3846, has 87 bipartisan co-sponsors in the House, and is likely to be introduced in the Senate in early 2009.

The Gang Abatement and Prevention Act, S. 456, passed the Senate by unanimous consent, but faces increasing opposition from national organizations and within the House of Representatives. The House companion legislation to S. 456 is H.R. 3547, which has 25 cosponsors. After expressing concern about the negative impact this legislation will have on youth and communities of color, eight members of the House of Representatives formally withdrew support for H.R. 3547.<sup>18</sup>

**Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** The Youth PROMISE Act has strong bipartisan support in Congress, and from national education, health, mental health, juvenile justice, civil rights, human rights, law enforcement, government and non-governmental organizations and coalitions. The Los Angeles City Council is considering a resolution in support of the Youth PROMISE Act, and several Mayors are considering resolutions in support of the legislation. National organizations and individuals throughout the criminal justice field have expressed support for community and school-based prevention and intervention programs,<sup>19</sup> and have expressed opposition to duplicative and costly penalties and approaches in S. 456, including the Heritage Foundation <http://www.heritage.org/Research/Crime/wm1619.cfm> the National Juvenile Justice and Delinquency Prevention Coalition, the National Alliance of Faith and Justice, Human Rights Watch, <http://hrw.org/english/docs/2008/04/07/usdom18461.htm>, Center for Community Alternatives, Citizen Schools, Justice Policy Institute, National Association of School Psychologists, National Juvenile Justice Network, Office of Restorative Justice, International CURE, Virginia CURE, and the Council for Juvenile Correctional Administrators. ATF has also raised concerns about the concept of a duplicative gang database proposed in S. 456. The Government Accountability Office has requested a study regarding the use of existing federal statutes (primarily RICO) in prosecuting gang-related offenses, lending support to the argument that federal gang penalties are duplicative and unnecessary.

The Chairman of the Crime Subcommittee, Rep. Bobby Scott (D-VA), held a crime summit on June 2007, which addressed the benefits of prevention and early intervention methods as effective crime prevention and reduction strategy.  
<http://www.house.gov/scott/pdf/crimesummit.pdf>

The Senate Judiciary Committee held a hearing on September 10, 2008, on “New Strategies for Combating Violent Crime: Drawing Lessons from Recent Experience” which also emphasized the importance of prevention and intervention.

<http://judiciary.senate.gov/hearings/hearing.cfm?id=3541>

**Experts:**

*Federal Gang Legislation*

- Dr. Charles Ogletree, Harvard Law School
- Carol Chodroff, Human Rights Watch
- Tara Andrews, Coalition for Juvenile Justice

*Comparative Policy Approaches and Juvenile Justice Reform*

- Professor Kristin Henning, Georgetown Law School
- Dr. Barry Krisberg, National Council of Crime and Delinquency
- Deborah Prothrow-Stith, Harvard School of Public Health
- Bobby Vassar, Chief Counsel to Congressman Bobby Scott (D-VA)

*Mental Health and Substance Abuse*

- Julio C. Abreu, Mental Health America (formerly NMHA)
- Micah Haskell-Hoehl, American Psychological Association
- Christine Leonard, Senior Counsel to Senator Edward Kennedy
- Alexa Eggleston, National Council for Community Behavioral Healthcare

*Economic Analysis of Prevention as Cost-Effective Crime Policy*

- Steve Aos, Washington State Institute for Public Policy
- John Roman, Urban Institute

**For Further Information:**

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

[http://www.house.gov/scott/hotissues\\_youthpromiseact.shtml](http://www.house.gov/scott/hotissues_youthpromiseact.shtml)

[http://hrw.org/english/docs/2008/04/07/usdom18461\\_txt.htm](http://hrw.org/english/docs/2008/04/07/usdom18461_txt.htm)

### III. PROTECT YOUTH IN THE JUVENILE JUSTICE SYSTEM

**Summary of the Problem:** Sanctions imposed for juvenile offenses should reflect a young person's age, level of development, and greater potential for rehabilitation,<sup>20</sup> and sentences should be proportionate. Children held in adult jails and prisons are particularly vulnerable to victimization, and all too often face dangerous and abusive conditions of confinement. There are 2,484 people in the United States currently sentenced to die in prison for an offense they committed when under the age of 18; not a single youth is serving this sentence anywhere else in the world. All youth in the juvenile justice system must have prompt access to qualified legal counsel. Youth who commit crimes must be held accountable, but no juvenile court disposition, regardless of the offense, should ever include abuse, mental health deterioration, or death in prison.

#### **Proposed Solutions:**

##### *Executive:*

##### **The President should:**

- Promote the enforcement of national standards for safe and humane conditions of confinement in juvenile facilities.
- Promote strategies to reduce over-reliance on incarceration for youth who are not a threat to public safety, especially for youth charged with technical violations of probation.<sup>21</sup>
- Order federal agencies to issue administrative regulations to protect vulnerable children and families.
- Order DOJ to work with Congress to abolish the sentence of life without parole for children convicted of federal crimes.

##### **OJJDP should:**

- Support states and provide technical assistance to improve conditions of confinement and the collection of data regarding restraint and isolation.
- Collect state and federal data regarding: (1) children who are held in adult jails and prisons, (2) children who are transferred into the adult criminal justice system, (3) the legal mechanism by which youth are transferred, and (4) the effects and collateral consequences of transfer.
- Maintain an ongoing and open dialogue with juvenile justice stakeholders to determine and address other data deficiencies for youth in the juvenile justice system, including violation and recidivism information.

##### **Congress should:**

- Include language in the JJDPA requiring states to prohibit use of dangerous practices, unreasonable restraint and unreasonable isolation of youth, and to ensure prompt access to qualified counsel for all youth in the juvenile justice system.

- Exempt juveniles from the Prison Litigation Reform Act. (see Chapter 8: Prison Reform).
- Promote the use of developmentally appropriate sanctions, remove children from adult jails and prisons, and eliminate the use of life without parole sentences for juvenile offenders.

**Jurisdiction:**

*Executive Branch:* Department of Justice (OJJDP)

*Legislative Branch:* Senate and House Judiciary Committees  
House Subcommittee on Crime, Terrorism and Homeland Security

**Background:** The House of Representatives Subcommittee on Crime, Terrorism and Homeland Security held a hearing on H.R. 4300 and the issue of juvenile life without parole on September 11, 2008. [http://judiciary.house.gov/hearings/hear\\_090911\\_2.html](http://judiciary.house.gov/hearings/hear_090911_2.html)

**Potential Allies, Potential Opposition, and Public Opinion:**

*Potential Allies:* Juvenile Justice and Delinquency Prevention Coalition, NAACP Legal Defense and Educational Fund, Center for Community Awareness, Justice Policy Institute, National Association of School Psychologists, National Juvenile Justice Network, Office of Restorative Justice, International CURE, Virginia CURE, and Equal Justice Initiative.

**Experts:**

- Liz Ryan, Campaign for Youth Justice
- Mark Soler/Dana Shoenberg, Center for Children’s Law and Policy
- Bryan Stevenson, Equal Justice Initiative
- Carol Chodroff, Human Rights Watch

**For Further Information:**

<http://www.campaign4youthjustice.org/>

[http://hrw.org/children/juvenile\\_justice.htm](http://hrw.org/children/juvenile_justice.htm)

NAACP Legal Defense and Educational Fund, *No Chance to Make It Right: Life Without Parole for Juvenile Offenders in Mississippi*, (May 2008), available at [http://naacpldf.org/content/pdf/No\\_Chance\\_to\\_Make\\_it\\_Right.pdf](http://naacpldf.org/content/pdf/No_Chance_to_Make_it_Right.pdf).

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<sup>1</sup> Annie E. Casey Foundation's 2008 Kids Count Essay: A Road Map for Juvenile Justice Reform [http://www.kidscount.org/datacenter/db\\_essay.jsp](http://www.kidscount.org/datacenter/db_essay.jsp)

<sup>2</sup> For more information, please see: [http://www.act4jj.org/media/factsheets/factsheet\\_28.pdf](http://www.act4jj.org/media/factsheets/factsheet_28.pdf)

<sup>3</sup> For more information, please see testimony of Shay Bilchik, former OJJDP Administrator, before the US House of Representatives, Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security on September 18, 2008 at <http://judiciary.house.gov/hearings/pdf/Bilchik080918.pdf>.

<sup>4</sup> For more information, please see [http://www.act4jj.org/media/factsheets/factsheet\\_56.pdf](http://www.act4jj.org/media/factsheets/factsheet_56.pdf)

<sup>5</sup> Testimony and statements are available at the following link: [http://www.act4jj.org/hill\\_hearings.html](http://www.act4jj.org/hill_hearings.html)

<sup>6</sup> Amendments to increase mental and behavioral health and substance abuse services and to phase-out use of the valid court order exception both passed. <http://hrw.org/english/docs/2008/07/14/usdom19359.htm>

<sup>7</sup> For a summary of this legislation, see <http://hfaa.net/JCRA%20Section-by-SectionI.doc>.

<sup>8</sup> For more information, please see: [www.act4jj.org](http://www.act4jj.org)

<sup>9</sup> [http://www.act4jj.org/media/factsheets/factsheet\\_11.pdf](http://www.act4jj.org/media/factsheets/factsheet_11.pdf) Letters in support of the reauthorization are available at the following link: [http://www.act4jj.org/hill\\_letters.html](http://www.act4jj.org/hill_letters.html)

<sup>10</sup> In recent years, a wide range of reputable organizations have commissioned or conducted related research and reached similar conclusions. These include the American Psychological Association, the Washington State Institute for Public Policy, the Social Development Research Group of Seattle, Washington, and the U.S. Government's own Office of Juvenile Justice and Delinquency Prevention. For more information, see <http://chhi.podconsulting.com/assets/documents/publications/NO MORE CHILDREN LEFT BEHIND.pdf>

<sup>11</sup> Models for Change, Systems Reform In Juvenile Justice, Rehabilitation Versus Incarceration of Juvenile Offenders: Public Preferences in Four Models for Change States [www.modelsforchange.net/pdfs/WillingnesstoPayFINAL.pdf](http://www.modelsforchange.net/pdfs/WillingnesstoPayFINAL.pdf)

<sup>12</sup> See e.g., the John D. and Catherine T. MacArthur Foundation, *Models for Change*, [http://www.macfound.org/site/c.lkLXJ8MOKrH/b.943477/k.9538/Domestic\\_Grantmaking](http://www.macfound.org/site/c.lkLXJ8MOKrH/b.943477/k.9538/Domestic_Grantmaking)

*Juvenile Justice.htm* and the Youth Transition Funders Group – a network of grantmakers whose mission is to help all youth make a successful transition to adulthood by age 25. <http://www.ytfg.org/>

<sup>13</sup> For information and an example of interagency collaboration in the provision of mental health services in one state (California), see [http://www.calendow.org/chc/centerscene/pdfs/CHC\\_CenterSceneFA07\\_final.pdf](http://www.calendow.org/chc/centerscene/pdfs/CHC_CenterSceneFA07_final.pdf) and NCCD, *A Survey of Mental Health Care Delivery to Youth in the California Juvenile Justice System: Summary of Findings* [http://www.nccd-crc.org/nccd/pubs/calif\\_jj\\_survey\\_2003.pdf](http://www.nccd-crc.org/nccd/pubs/calif_jj_survey_2003.pdf)

For further analysis, see Thomas Grisso's *Adolescent Offenders with Mental Disorders*, *The Future of Children*, Vol. 18, No. 2, Fall 2008. [http://www.futureofchildren.org/usr\\_doc/Justice\\_08\\_02.pdf](http://www.futureofchildren.org/usr_doc/Justice_08_02.pdf)

<sup>14</sup> For more information about the Youth PROMISE Act, see [http://www.house.gov/scott/hotissues\\_youthpromiseact.shtml](http://www.house.gov/scott/hotissues_youthpromiseact.shtml)

<sup>15</sup> For more information contrasting these federal approaches to gang crime and violence, please see: [http://www.house.gov/scott/pdf/HRW\\_supportypa\\_opphr3547.pdf](http://www.house.gov/scott/pdf/HRW_supportypa_opphr3547.pdf)

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

<sup>16</sup> For more information about school referrals and zero tolerance policies, see the Children's Defense Fund Cradle to Prison Pipeline Campaign <http://www.childrensdefense.org/site/PageServer?pagename=c2pp>. For more information about the use of corporal punishment in schools, see Human Rights Watch, *A Violent Education: Corporal Punishment of Children in US Public Schools* <http://www.hrw.org/reports/2008/us0808/us0808web.pdf>

<sup>17</sup> One study cited in the Congressional findings of the All Healthy Children Act, HR 1688, revealed that when juvenile offenders arrested for minor offenses had access to intensive and coordinated mental health services, more than a third fewer were re-arrested the following year, compared to those who only had access to basic mental health services. Congressional findings for H.R. 1688, the All Healthy Children Act of 2007, finding # 15. <<http://www.govtrack.us/congress/bill.xpd?bill=h110-1688>> GovTrack.us. H.R. 1688--110th Congress (2007): All Healthy Children Act of 2007, *GovTrack.us (database of federal legislation)* (accessed Oct 30, 2008).

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<sup>18</sup> For a copy of the bill, please see: <http://www.govtrack.us/congress/bill.xpd?bill=h110-3547>. GovTrack.us. H.R. 3547--110th Congress (2007): Gang Prevention, Intervention, and Suppression Act, *GovTrack.us (database of federal legislation)* <<http://www.govtrack.us/congress/bill.xpd?bill=h110-3547>> (accessed Oct 30, 2008)

<sup>19</sup> For letters of support, please see: [http://www.house.gov/scott/hotissues\\_youthpromiseact.shtml](http://www.house.gov/scott/hotissues_youthpromiseact.shtml) [http://www.house.gov/scott/pdf/Promise\\_Act\\_support.pdf](http://www.house.gov/scott/pdf/Promise_Act_support.pdf) and [http://www.nami.org/Template.cfm?Section=Child\\_and\\_Adolescent\\_Action\\_Center&template=/ContentManagement/ContentDisplay.cfm&ContentID=23448](http://www.nami.org/Template.cfm?Section=Child_and_Adolescent_Action_Center&template=/ContentManagement/ContentDisplay.cfm&ContentID=23448)

<sup>20</sup> In *Roper v. Simmons*, 543 U.S. 551, 561 (2005), the US Supreme Court found that the differences between juveniles and adults render suspect any conclusion that a juvenile falls among the worst offenders.

<sup>21</sup> Holman, Barry and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, (Nov. 06), available at: [http://www.justicepolicy.org/images/upload/06-11\\_REP\\_DangersOfDetention\\_JJ.pdf](http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf)

## **CHAPTER FOURTEEN**

### **FIXING MEDELLIN: COMPLIANCE WITH INTERNATIONAL LAW AND PROTECTING CONSULAR ACCESS**

To the international community, the Executive branch is the voice of the United States. The events leading to three Supreme Court rulings, *Medellin v. Dretke* (2004), *Medellin v. Texas* (March 25, 2008), and *Medellin v. Texas* (August 5, 2008), demonstrate the need to ensure that the United States speaks clearly and consistently, both to protect the right of citizens detained in a foreign country and to honor and enforce the United States' promises to the international community. While the Supreme Court's *Medellin* conclusions stand, despite the legal counter-arguments demonstrated by *amici curiae* such as former United States diplomats, International Court of Justice experts, Government of the United Mexican States, foreign sovereigns, the American Bar Association, the European Union, and many others, the President and Congress still have a strong role to play going forward. (These amicus briefs are attached below under "For Further Information.")

The Vienna Convention on Consular Relations grants foreign citizens the right to access to their own consulate when they are arrested, detained, or imprisoned. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (*hereinafter* VCCR). Article 36 of the VCCR governs consular communication and contact with foreign nationals - including American citizens who are detained overseas. The United States ratified the VCCR without reservation in 1969, on the understanding that its provisions would be entirely self-executing and would prevail over any conflicting state laws. Although the treaty thus became part of the supreme law of the land, domestic compliance with Article 36 obligations has long been shockingly deficient - even in cases where foreign nationals would face the death penalty if convicted.

In 1969, the United States also unconditionally ratified the VCCR Optional Protocol concerning the Compulsory Settlement of Disputes, whereby disagreements over the interpretation or application of Article 36 fall under the compulsory jurisdiction of the International Court of Justice (ICJ). The ICJ is the principal judicial organ of the United Nations. Under Article 59 of the ICJ Statute, its decisions in such cases are binding on the parties to the dispute; under Article 94 (1) of the UN Charter, each member nation undertakes to comply with any ICJ decision to which it is a party. The United States was the first nation to bring a case under the VCCR Optional Protocol, in response to the seizure of U.S. diplomatic and consular personnel in Iran in 1979. The ICJ ruled in favor of the United States, whereupon the U.S. asserted the binding nature of that judgment and insisted that Iran comply with the decision.

The U.S. failure to comply with its consular notification obligations was brought to international attention when the International Court of Justice found that the United States had breached its responsibilities under the VCCR with respect to 51 Mexican nationals. *Case Concerning Avena and Other Mexican Nationals* (opinion attached). In *Avena*, the ICJ rejected Mexico's request that the convictions and death sentences of the Mexican nationals be

vacated. Instead, the court 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. 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 defaulted.

President George W. Bush issued a Memorandum to the Attorney General stating that the United States 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.

In 2005 the President withdrew the United States from the VCCR Optional Protocol, although it recognized the *Avena* ruling as binding.

When Texas refused to recognize the ICJ's decision, and continued its plans to execute Mexican national Jose Ernesto Medellin, the issue went to the Supreme Court. President Bush argued to the Supreme Court that there was no private right of action under the VCCR. 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. The Supreme Court also held that the President did not have the authority to implement *Avena* unilaterally. The Court unanimously agreed, however, that compliance with *Avena* is an international legal obligation of the United States and that Congress has the authority to implement that obligation.

As the scheduled execution date drew near, the State and Justice Departments asked Texas to halt the execution. When Mr. Medellin petitioned the Supreme Court for a stay of execution, however, the Department of Justice did not weigh in. In the absence of word from the Executive, Supreme Court Justice John Paul Stevens voted to wait to rule on the stay of execution until the President's position could be heard: "Balancing the honor of the Nation against the modest burden of a short delay to ensure that the breach is unavoidable convinces me that the application for a stay should be granted." *Medellin v. Texas*, 2008 U.S. LEXIS 5362, 4-5 (Aug. 5, 2008) (J. Stevens, dissenting). Nonetheless, the stay was denied.

In rejecting the stay, the Supreme Court noted that both the Congress and the Executive could have altered the outcome. The majority inferred from the fact that the Department of Justice did not seek intervention that "[i]ts silence is no surprise: The United States has not wavered in its position that petitioner was not prejudiced by his lack of consular access." 2008 U.S. LEXIS 5362, 2-3. It emphasized that Congress had had "ample" time to act, but had not. 2008 U.S. LEXIS 5362, 2.

Jose Ernesto Medellin was put to death at 10 p.m., August 5, 2008.

Although nothing can restore Mr. Medellin's rights, the next President can ameliorate the damage caused by the chain of events that led to the *Medellin* decisions. First, the President can rejoin the Optional Protocol concerning the Compulsory Settlement of Disputes of the Vienna

Convention on Consular Relations. Second, the President must work with Congress to pass legislation further protecting those rights and the rights the United States has promised in other international agreements. Third, President can require the Department of Justice to educate law enforcement about the right to consular access. Finally, the President can use the Presidential pulpit here and abroad to ensure that, in the future, the United States speaks with one voice.

**Summary of the Problem:** The United States has not been able to comply with a ruling of the International Court of Justice (ICJ) of the United Nations, and has withdrawn from the Optional Protocol concerning the Compulsory Settlement of Disputes of the Vienna Convention on Consular Relations.

The United States ratified the VCCR in 1969 without reservations, on the understanding that its provisions would be entirely self-executing and would prevail over any conflicting state laws. Article 36 of the VCCR governs consular communication and contact with foreign nationals - including American citizens who are detained overseas. 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. The article 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. These rights are entirely reciprocal in nature.

The ICJ found that the United States had breached its responsibilities under the VCCR with respect to 51 Mexican nationals. *Case Concerning Avena and Other Mexican Nationals*, (Mex. v. U.S.) 2004 I.C.J. 12 (Mar. 31).

President George W. Bush subsequently withdrew from the VCCR Optional Protocol concerning the Compulsory Settlement of Disputes in 2005, stripping foreign nationals, including United States citizens abroad, of a binding enforcement mechanism for their right to access to their consulate when detained or arrested outside of their country.

While President Bush pressed state courts to enforce the *Avena* decision under principles of comity, he argued to the Supreme Court that the VCCR was not privately enforceable. (United States Amicus brief attached).

The Supreme Court permitted Texas to execute one of the Mexican nationals, Mr. Jose Ernesto Medellin, despite the fact that the inquiry required by the ICJ had never been made. *Medellin v. Dretke* (2004) (*Medellin I*), *Medellin v. Texas* (Mar. 25, 2008) (*Medellin II*) and *Medellin v. Texas* (Aug. 5, 2008) (*Medellin III*).

As a result, the United States is not compliant with the ruling of the ICJ, 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 the same protections abroad.

### **Proposed Solutions:**

#### ***Executive:***

1. As soon as the Secretary of State is appointed, the President should rejoin the Optional Protocol to the VCCR, reversing the 2005 withdrawal from the Protocol by the Bush administration that occurred as a result of the *Avena* decision.
2. The President must work with Congress to pass legislation strengthening the United States' treaty commitments.
3. The Executive should instruct and train federal law enforcement agents to emphasize the importance of making foreign nationals aware of their rights under VCCR, and specifically their right to consular access, and should support similar training for state and local law enforcement agents.

**Legislative: Adopt proposed H.R. 6481:** Avena Case Implementation Act of 2008 or similar legislation. Because the Supreme Court concluded that the VCCR was not self-executing, Congress should enact stand-alone legislation to fulfill the United States' core obligations under the VCCR, including the International Court of Justice's decision in *Avena*. The text of a pending bill is presented in relevant part below:

***"JUDICIAL REMEDY.***

*(a) Civil Action- Any person whose rights are infringed by a violation by any nonforeign governmental authority of article 36 of the Vienna Convention on Consular Relations may in a civil action obtain appropriate relief.*

*(b) Nature of Relief- Appropriate relief for the purposes of this section means--*

*(1) any declaratory or equitable relief necessary to secure the rights; and*

*(2) in any case where the plaintiff is convicted of a criminal offense where the violation occurs during and in relation to the investigation or prosecution of that offense, any relief required to remedy the harm done by the violation, including the vitiation of the conviction or sentence where appropriate.*

*(c) Application- This Act applies with respect to violations occurring before, on, or after the date of the enactment of this Act."*

If no federal legislation can be enacted, each state legislature must be pressed to adopt consular notification legislation.

**Jurisdiction:**

***Executive Branch:*** U.S. Const. art. II, §§ , 3

**Legislative Branch:** U.S. Const. art. 1 § 1 and House and Senate Judiciary and Foreign Relations Committees

**Background:**

***Executive Branch:***

**VCCR.** Ratified by over 170 countries, the Vienna Convention on Consular Relations regulates the establishment and functions of consulates worldwide. The United States proposed the VCCR in 1963 and ratified it -- along with the rest of the Vienna Convention -- in 1969.

In 1969, the United States also unconditionally ratified the VCCR Optional Protocol concerning the Compulsory Settlement of Disputes, whereby disagreements over the interpretation or application of Article 36 fall under the compulsory jurisdiction of the ICJ. The United States was the first country to invoke the protocol before the ICJ, successfully suing Iran for the taking of 52 U.S. hostages in Tehran in 1979. Article 36 rights and obligations are entirely reciprocal in nature. As Secretary of State Madeleine Albright wrote in 1998, the ability of U.S. consulates:

.... to provide such assistance is heavily dependent . . . on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.

*Letter from Madeleine Albright, Secretary of State, to Victor Rodriguez, Chairman of the Texas Board of Pardons and Paroles, (Nov. 27, 1998) (as cited in Brief Amicus Curiae of Ambassador L. Bruce Laingen et al., attached).*

**The Avena Litigation.** In January 2003, Mexico brought a case before the ICJ on behalf of a group of Mexican nationals who had been sentenced to death without being advised of their consular rights. The ICJ is the principal judicial organ of the United Nations. Mexico asked the court to consider whether these Mexican nationals were entitled to a legal remedy for the violation of Article 36 of the VCCR. The United States participated fully in the case.<sup>1</sup>

In those proceedings, Mexico did not call into question either the heinous nature of the crimes that the defendants were convicted of, or the legitimacy of the death penalty. Rather, Mexico sought to ensure that each of its nationals received the protections to which he was entitled under domestic and international law.

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<sup>1</sup> In *Germany v. United States* (2001), 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.

On March 31, 2004, the ICJ held, by a vote of fourteen to one, that the United States had breached Article 36(1) in the cases of 51 of the 52 Mexican nationals it reviewed. *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31). The ICJ rejected Mexico's request that the convictions and death sentences of the Mexican nationals be vacated. Instead, the Court 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. 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 defaulted.

**Withdrawal from VCCR Optional Protocol concerning the Compulsory Settlement of Disputes.** In 2005, the Bush Administration withdrew from the VCCR Optional Protocol concerning the Compulsory Settlement of Disputes. Even after withdrawing from the Optional Protocol, however, the Executive Branch confirmed that it was bound to uphold the *Avena* Judgment and to provide review and reconsideration to the Mexican nationals named in that Judgment.

***Legislative Branch:***

**Proposed Legislation.** On July 14, 2008, H.R. 6481, the "Avena Case Implementation Act of 2008," was introduced into the House by Rep. Howard Berman (D-CA), Rep. John Conyers (D-MI), Rep. William Delahunt (D-MA), and Rep. Zoe Lofgren (D-CA). On July 14, 2008, it was referred to the House Committee on the Judiciary.

**Committees.** The Judiciary Committees for the House and Senate and the Foreign Relations Committees for the House and Senate should be engaged on this issue. It should be noted that the Senate Foreign Relations Committee in particular has taken a recent interest in ratifying a number of treaties.

***Judicial Branch:***

**Medellin I.** In 2004, in the case of *Medellin v. Dretke*, the U.S. Supreme Court agreed to consider whether the *Avena* Judgment should be enforced by domestic courts. Before the Court heard oral argument in the case, however, the President issued a memorandum addressed to the U.S. Attorney General stating:

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States of America, that the United States will discharge its international obligations under [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

White House Press Release, Feb. 28, 2004 (attached).

The Supreme Court decided not to rule on the merits of the case and instead found that Mr. Medellin's newly filed state habeas petition based on *Avena* and the Presidential

memorandum should first be considered by the Texas courts. *Medellin v. Dretke*, 544 U.S. 660 (2005).

**Medellin II.** After the Texas Court of Criminal Appeals declined to give Mr. Medellin the review he sought pursuant to the ICJ's judgment and President Bush's determination, the Supreme Court again agreed to review Mr. Medellin's case.

The Supreme Court issued its decision on March 25, 2008. *Medellin v. Texas*, 128 S.Ct. 1346 (U.S. Mar. 25, 2008). The Court held 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, which did not exist. The Court concluded that state law is not pre-empted under the Supremacy Clause. The Supreme Court also held that the President did not have the authority to implement *Avena* unilaterally and that Congress had not acquiesced in the exercise of that authority. Independent of the United States' treaty obligations, the Memorandum was not a valid exercise of the President's foreign affairs authority to resolve disputes with foreign nations.

While the majority, concurring and dissenting opinions differed widely in their approaches to the legal questions presented, there was unanimous agreement that compliance with *Avena* is an international legal obligation of the United States and that Congress has the authority to implement that obligation. The majority opinion cites examples of other forms of binding international arbitration given domestic effect by Congressional implementation. The Court was also unanimous in recognizing the importance of securing compliance with *Avena*. In the words of the concurrence:

On the other hand, the costs of refusing to respect the ICJ's judgment are significant. The entire Court and the President agree that breach will jeopardize the United States' "plainly compelling" interests in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law."

*Medellin v. Texas*, 128 S. Ct. 1346, 1375 (U.S. Mar. 25, 2008) (J. Stevens).

**Medellin III.** Finally, Mr. Medellin sought a stay of execution from the Supreme Court. *Medellin v. Texas*, 2008 U.S. LEXIS 5362 (U.S. Aug. 5, 2008), arguing that Texas should wait until either Congress or the state legislature spoke to whether the ICJ's decision should be given effect. With four dissents, the *per curiam* opinion denied the stay on the basis that "these possibilities are too remote to justify an order from this Court staying the sentence imposed by the Texas courts. And neither the President nor the Governor of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action." *Id.* at 1. As the Court noted, the Department of Justice did not intervene. The state of Texas executed Mr. Medellin on August 5, 2008.

### **Potential Allies, Potential Opposition, and Public Opinion:**

**Potential Allies:** Potential supporters of the United States' rejoining of the VCCR, implementing the VCCR through legislation, and strengthening the enforcement of the VCCR include stakeholders (1) who want to protect the right to consular access for United States citizens abroad, (2) who oppose the death penalty and believe that consular access and the related legal representation it usually provides will result in fewer execution sentences, and (3) who believe that the failure to comply with treaty commitments weakens the Executive's international influence and discredits the United States in the eyes of the international community. It is likely, though not confirmed, that many groups who supported Mr. Medellin in the litigation will also support the measures advocated in this memo. Particular potential allies include:

Rep. Howard Berman (D-CA), Rep. John Conyers (D-MI), Rep. William Delahunt (D-MA), and Rep. Zoe Lofgren (D-CA), who sponsored the "Avena Case Implementation Act of 2008," the language of which is advocated here. (H.R. 6481, full text attached).

- The National Lawyers Guild sent a letter to Congress in support of H.R. 6481, at <http://nlg.org/news/statements/SenatorLtr.pdf>.
- The American Society for International Law sent a letter to Congress in support of H.R. 6481, at <http://www.asil.org/pdfs/presidentsletter.pdf>.
- The Center for Constitutional Rights sent a letter in support of H.R. 6481, at [http://salsa.democracyinaction.org/o/383/t/6374/campaign.jsp?campaign\\_KEY=25299](http://salsa.democracyinaction.org/o/383/t/6374/campaign.jsp?campaign_KEY=25299).
- The Constitution Project
- Ambassador L. Bruce Laingen (amicus curiae to Supreme Court) and hostage in Iran from November 4, 1970 to January 20, 1981. Holds the Award for Valor from the Department of State and the Distinguished Public Service Medal from the Department of Defense.
- The Executive Branch (Solicitor General, State Department, White House Counsel). Although President Bush interpreted the VCCR not to encompass a private right of action, Congressional support of Presidential commitments will increase the Executive's credibility and ability to use the ICJ on the United States' behalf.
- National Association of Criminal Defense Lawyers (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).
- Amnesty International (Press release, <http://www.amnesty.org/en/news-and-updates/news/mexican-national-executed-in-texas-20080807>), (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).
- Association of the Bar of the City of New York (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).
- Hispanic National Bar Association (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).
- Human Rights First (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).
- Human Rights Watch (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).
- League of United Latin American Citizens (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).
- Mexican American Bar Association (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).
- Mexican American Legal Defense and Education Fund (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).

- Minnesota Advocates for Human Rights (an Amici Curiae to Fifth Circuit Court of Appeals case, attached).
- American Citizens Abroad (Amicus Curiae to the Supreme Court, through founder William D. Rogers on Laingen brief, attached).
- Federation of American Women's Clubs Overseas (Amicus Curiae to the Supreme Court on brief of Ambassador L. Bruce Laingen, attached).
- Possible pool of support and mobilization: groups sensitive to what may happen to United States citizens abroad.
- Possible pool of support and mobilization: groups concerned that the failure to enforce the President's own promise discredits the White House in the eyes of the international community.
- Possible pool of support and mobilization: organizations that oppose the death penalty.

**Potential Opposition:** Opposition to this legislation is likely to stem from (1) concern that it represents a softening toward crime, and especially that it may serve as a stepping stone to abolishing the death penalty, or (2) antipathy toward the principle that international tribunals, especially the United Nations, can have any binding effect on proceedings within the United States, as evidenced by the long history of disputes over U.N. dues.

Some state governors or legislators

- Legislators opposed to the United Nations
- Defenders of the state's right to inflict the death penalty.

**Response to Opposition:** It should be made clear that the VCCR does not actually affect the status of the death penalty. It should be made clear that access to consul does not mean that foreign citizens who commit crimes avoid the legal consequences. The value of reciprocal protections for American citizens abroad should be emphasized. Finally, because the Supreme Court ruled that the VCCR is not self-executing, it should be made clear to those distrustful of international organizations that the American Congress and President would be voluntarily committing to adopt this treaty and legislation.

### **Experts:**

Sandra Babcock, Northwestern University School of Law

Richard Burr, Burr & Welch (Houston, Texas)

Jeffrey Davidow, University of California

Harold Koh, Yale Law School

Oona Hathaway, Yale Law School

Ambassador L. Bruce Laingen (see above)

Richard Atkins, lawyer. Specializes in assisting American citizens detained in foreign countries and authored a guide to prisoner transfer treaties for the United Nations) (Amicus Curiae to the Supreme Court in Laingen brief, attached)

**For Further Information:**

Supreme Court Medellin I, *Medellin v. Dretke*, 544 U.S. 660 (U.S. 2005)

Supreme Court Medellin II, *Medellin v. Texas*, 128 S.Ct. 1346 (March 25, 2008)

Supreme Court Medellin III, *Medellin v. Texas*, 2008 U.S. LEXIS 5362 (August 5, 2008)

*Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31)

Text of Proposed House Bill, H.R. 6481.

*Medellin* Amicus Briefs:

- Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner
- Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner
- Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioner
- Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellin
- Brief of Foreign Sovereigns as Amici Curiae in Support of Petitioner José Ernesto Medellin
- Brief of the American Bar Association as Amicus Curiae in Support of Petitioner
- Brief Amicus Curiae of the United States in Support of Respondent
- Recommendations for Federal Criminal Sentencing in a Post-Booker World  
<http://constitutionproject.org/sentencing/article.cfm?messageID=245&categoryId=7>
- Principles for the Design and Reform Of Sentencing Systems: A Background Report, available at:  
<http://constitutionproject.org/sentencing/article.cfm?messageID=148&categoryId=7>
- *Mandatory Justice: The Death Penalty Revisited*  
<http://constitutionproject.org/pdf/mandatoryjusticerevisited.pdf>

## **CHAPTER FIFTEEN**

### **RESTORATIVE JUSTICE: MEETING THE NEEDS OF VICTIMS AND OFFENDERS**

A basic premise of the paradigm known as “restorative justice” is that a just society calls for each individual to be treated with dignity and respect. It includes protecting the due process rights of the accused and insisting upon the dignified treatment of people who admit to or are found responsible for harm, as well as those who have suffered harm. This section contains some specific recommendations which fit within the restorative framework. It does not propose to create or enhance any existing state or federal statutory or constitutional rights of victims or the accused.

It is critical to understand that restorative justice is not “a program.” It is a “smart on crime” philosophy which acknowledges the reality that the punitive paradigm has resulted in a downward spiral of recidivism and further victimization. Restorative justice focuses on repairing the harm caused or revealed by criminal behavior, rather than on the imposition of punishment.

Restorative values include the recognition that the sum of each human being is much more than one experience. People who experience harm are not only, nor forever, “victims” – they are capable of healing and reconciliation. . People who cause harm are not only “offenders” – they are capable of acknowledging and repairing the harm they caused and transforming themselves as well. Some people suffer victimization and trauma which may lead them to harming themselves, their loved ones and others. Some who have offended later become victims in prison.

The set of principles and values that are the foundation of the restorative justice paradigm can be summed up in the following “markers.” We are working toward restorative justice when both policies and practices:

- Focus on the harm of wrongdoing more than the rules that have been broken.
- Show concern and commitment to victims and offenders, involving both in the process of justice.
- Work toward restoration of victims, empowering them to identify their own needs, and take responsibility as a community to help meet those needs.
- 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 must be achievable.
- Provide opportunities for dialogue, direct or indirect, between victims and offenders as appropriate.
- Involve and empower the affected community and increase its capacity to recognize, acknowledge and respond to community bases of crime.
- Encourage collaboration and reintegration rather than coercion and isolation.
- Give attention to the unintended consequences of our actions and programs.
- Show respect to all parties including victims, offenders and justice colleagues.

*(Adapted from the work of Howard Zehr and Harry Mika, 1997)*

# I. FUND STUDIES ON EFFECTIVENESS OF RESTORATIVE JUSTICE AND DIRECT SENTENCING COMMISSION TO INCORPORATE RESTORATIVE JUSTICE PRACTICES INTO SENTENCING GUIDELINES

**Summary of the Problem:** Punitive approaches to responding to crime are not working, as evidenced by the incarceration rate alone. However, restorative justice practices are responses to crime which enhance victim healing and promote healthier communities while holding offenders accountable in ways that build their competency to repair the harm they caused and improve their chances of positive reintegration. They offer means of creating more meaningful and less punitive outcomes.

These restorative processes generally involve *voluntary* participation of some combination of victim, offender, and/or community representatives, usually with the help of trained facilitators, virtually always “outside the courtroom,” both literally and figuratively. In many thousands of cases throughout the U.S., restorative processes have been used as diversion from juvenile and criminal courts. Fulfilling agreements reached in restorative conferences have also been the basis for dismissal of cases or as the full sentence.

Other restorative practices, such as victim-offender dialogues in or outside of prisons, victim impact panels and victim awareness classes, prisoners’ fund-raising walks for scholarships for victims, and re-entry circles of support and accountability, are all intended to increase reparation, public safety, accountability, and community strengths. They meet victim needs for validation and empowerment through direct participation in non-judicial activities.

Government responsibility includes providing funds and mechanisms for victim assistance, for restorative processes that allow the affected parties to determine the harm and repair, and for providing services to help individuals develop the competency necessary to repair the harm and to reintegrate effectively, such as substance abuse treatment, job skills, and literacy training.

Research comparing conventional criminal justice (CJ) practices to restorative justice approaches in the UK, the US, and Australia found that restorative justice:

- reduced recidivism *more than* imprisonment (adults) or *as well as* imprisonment (youths)
- substantially reduced repeat offending for some offenders;
- doubled (or more) the offences brought to justice as diversion from CJ;
- reduced crime victims’ post-traumatic stress symptoms and related costs;
- provided both victims and offenders with more satisfaction with justice than CJ;
- reduced crime victims’ desire for violent revenge against their offenders;
- reduced the costs of criminal justice, when used as diversion from CJ

(See [http://www.smith-institute.org.uk/pdfs/RJ\\_full\\_report.pdf](http://www.smith-institute.org.uk/pdfs/RJ_full_report.pdf) )

Communities have already found restorative practices to be helpful to victims and to the improvement of offender accountability and behavior change, but providers are losing funding because services are not mandated.

Given the successful adoption of the restorative approach in other countries, such as Australia, New Zealand and the U.K., as demonstrated by reduced incarceration rates, lower

recidivism, cost savings, and an increase in the well-being of victims and community involvement, it is time for the US to explore systemic change and to promote evidence-based practices.

**Proposed Solutions:** A national effort to examine restorative justice is needed to determine the prerequisites for broad acceptance of the paradigm and implementation of its practices.

***Executive:*** Create a Task Force on Restorative Justice within the Office of Justice Programs to oversee the conduct and outcomes of actions 2, 3 and 4 below.

***Legislative Changes:***

1. Direct the U.S. Sentencing Commission to incorporate restorative justice options into the sentencing guidelines.
2. Fund a national study to examine the restorative justice paradigm, exploring its effectiveness in serving the needs of victims and communities, supporting offender accountability and competency, while ensuring the protection of constitutional rights. Because other countries have had greater experience in the wide use of restorative justice and systemic change, their research and lessons learned should be incorporated.
3. Direct the Department of Justice to develop a research agenda and to explore the creation of a national strategy and action plan directed at supporting and expanding the use of restorative approaches and systemic change on the local, state and federal levels.
4. Dedicate a portion of DOJ funding to pilot projects on systemic change and targeted research efforts to test effectiveness of restorative justice for victims of different types of crimes, and for different racial and ethnic groups and cultures.

***Legislative Appropriations (Solutions w/ Funding Requests):***

1. Appropriate funds for studies (over 4 years, approx \$4.0 M) and for long-term pilot projects (over 5 years, approx \$3.0 M)

**Jurisdiction:**

***Executive Branch:*** USDOJ, the Office of Justice Programs ,

***Legislative Branch:*** Senate and House Judiciary Committees  
and Appropriations Committees

**Background:**

***Executive Branch:*** For about a decade, the Department of Justice was supportive of the growth and development of restorative justice programming. The Office for Juvenile Justice and Delinquency Prevention funded training and technical assistance and research efforts, and their formula grants could be used for local programs. The National Institute of Corrections outlined

the values and principles of restorative justice and also created curricula and provided technical assistance in the adult system. The current Administration has moved away from such support.

While these efforts helped some local communities begin to explore the effectiveness of restorative processes, there has been no effort to fund a national research agenda to test that effectiveness and to implement evidence-based practices. More importantly, the federal government has failed to explore the value and implementation of systemic change toward restorative justice, as other countries have done and to cut costs and produce positive results for victims and communities.

### ***Legislative Branch:***

- During the 1990s, conservative Representative Bill McCollum advocated for restorative justice on the floor of the House.
- Support for victims, community participation, and the development of offender competency to become more accountable and more able to repair the harm have all had some bipartisan draw.

### **Potential Allies, Potential Opposition and Public Opinion:**

#### ***Potential Allies:***

- Murder Victims' Families for Reconciliation
- Murder Victims' Families for Human Rights
- International Community Corrections Association
- American Probation and Parole Association
- Victim Offender Mediation Association
- Mennonite Central Committee Washington Office
- Presbyterian Church USA
- The United Methodist Church - General Board of Church and Society
- Association for Conflict Resolution – Restorative Justice Committee
- University of Minnesota, School of Social Work - Center for Restorative Justice & Peacemaking
- Marquette University Law School Restorative Justice Initiative
- Fresno Pacific University Center for Peacemaking and Conflict Studies
- Florida Atlantic University - Community Justice Institute
- Penal Reform International, Washington Office
- Pennsylvania Prison Society
- Justice Fellowship
- International CURE
- Virginia League of Women Voters
- National Association for Community Mediation
- Both Democrats and Republicans who have supported victim rights

#### ***Potential Opposition:***

- Some victim advocates/organizations have not been supportive of restorative justice

**Public Opinion:** Public opinion has been very supportive of restorative justice. Most participants interviewed have been mildly to extremely positive, and very few made any negative comments.

**Experts:**

- Professors Lawrence Sherman (University of Pennsylvania), Mark Umbreit (University of Minnesota), Howard Zehr (Eastern Mennonite University), and Gordon Bazemore (Florida Atlantic University)
- Anne Seymour, internationally-recognized victim advocate and trainer
- Phyllis Lawrence, victim and Consultant in Restorative Justice and Victim Issues

**For Further Information:**

<http://www.realjustice.org/library/jerryleeresearch.html>

<http://www.realjustice.org/library/angel.html>

<http://www.ojp.usdoj.gov/ovc/assist/nvaa2002/chapter4.html>

## **II. CHANGE VOCA GUIDELINES TO CLARIFY AND BROADEN ACCESS TO RESTORATIVE JUSTICE SERVICES AND TO PERMIT FUNDING FOR INCARCERATED VICTIMS**

**Summary of the Problem:** The state agencies responsible for managing their use and allocation of Victims of Crime Act (VOCA) Victim Assistance funds operate under the 1996 *Guidelines on Victim Assistance* (“*Guidelines*”) from the Office for Victims of Crime (OVC) of the US DOJ.

**Ensure Guideline language does not limit support of restorative justice practices**

Guideline Section IV.C.1.h., on Restorative Justice, contains the following prohibition: “VOCA assistance funds cannot be used for victim-offender meetings which *serve to replace criminal justice proceedings.*”

Over the past twenty-plus years, many thousands of crime victims in the U.S. have found great satisfaction in participating in a restorative conference -- a facilitated victim-offender meeting which may also involve their supporters and/or community members -- in lieu of criminal justice proceedings, even in cases involving some degree of violent harm. Around the country, both the rates of victim satisfaction with the restorative processes and the rates of compliance by the offender with conference-produced agreements for reparations are typically over 90%. Courts typically do not measure victim satisfaction with the traditional process, and often do not track compliance with court orders.

Yet, due to the proscription against using VOCA funds when restorative justice services would replace court proceedings, VOCA-funded service providers are unable to help make local restorative justice efforts as victim-sensitive as possible and to serve their clients who wish to

participate.

In addition, the Guidelines contain confusing and restrictive language about the allowable use of VOCA funds for restorative justice services. One section describes corrections-based restorative practices, such as victim-offender dialogue and victim impact panels as permissible, but elsewhere states that VOCA funds “cannot support services to incarcerated individuals...” [Guidelines Section IVC-1-h]. 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 activity’s benefits to prisoners as well as to victims is a natural byproduct.

### **Allow VOCA funds for services to victimized incarcerated persons**

Efforts to update the Guidelines have been underway over the past several years, and we hope that the new OVC Director will move quickly to complete the revisions. Broadening the guidelines to allow funds to be used on the state level to provide victim assistance to prisoners who have been victims of violent crime has been raised. This is particularly timely, as the work of the Commission formed under the Prison Rape Elimination Act of 2003 (PREA, P.L. 108-79, 45 USC 15601) to develop standards is moving toward completion.

PREA mentions findings that over the past 20 years, more than 1,000,000 prisoners may have been sexually assaulted. This number includes women, adolescent boys and girls, and individuals with mental illness housed in prisons, jails and juvenile institutions.

The estimated 200,000 currently incarcerated persons who statistically have been or will become victims of prison rape, have limited or no access to appropriately-trained staff. Yet, as cited in the findings of PREA, the victims of prison rape suffer severe physical and psychological effects that hinder their ability to function in the institution and to integrate into the community, making them more likely to commit new crimes, to be unable to maintain stable employment, to become homeless and/or to require government assistance. However, PREA, at least currently, does not provide any funds for direct services to these incarcerated victims.

To avoid potential confusion in the Guidelines about allowable uses of VOCA money in prisons and jails, and to encourage states to serve incarcerated persons who are also victims, the sentence in the Guidelines prohibiting services to incarcerated persons should be eliminated. States and local programs still would have the discretion to decide whether to use funds for these services.

### **Proposed Solutions:**

#### ***Executive:***

- 1.** Require OVC to revise its Guidelines for Victim Assistance by removing the sentence: “VOCA funds cannot support services to incarcerated individuals, even when the service pertains to the victimization of that individual.” (Section IV.E.3.b.)
- 2.** Require OVC to clarify that VOCA funds may be used for victim services to incarcerated individuals who have been or will become victims of violent crime.

3. Require OVC to revise its Guidelines for Victim Assistance by removing the sentence: “VOCA assistance funds cannot be used for victim-offender meetings which *serve to replace criminal justice proceedings*.” (Section IV.C.1.h.)

***Legislative Changes:***

1. Fully fund the Prison Rape Elimination Act (PREA), implement PREA standards (assuming they are very similar to current draft standards), and provide funds for victim services **and/or** increase the cap on VOCA funds to make available new funds for services to incarcerated persons who are or will become victims of violent crime.
2. Add any necessary language to authorizations to permit VOCA funds be used for assisting victims in restorative justice practices in place of conventional court proceedings and in corrections-based victim services from which offenders may also benefit.

***Legislative Appropriations (Solutions w/ Funding Requests):*** Increase the VOCA Cap beyond the amount requested in the item herein about returning the cap to 2006 levels (estimates of increased funding needs for supporting restorative justice as diversion and to serve inmates would have to come from VOCA administrator).

**Jurisdiction:**

***Executive Branch:*** USDOJ, the Office of Justice Programs, Office for Victims of Crime

***Legislative Branch:*** Senate and House Judiciary Committees and Appropriations CJS subcommittees

**Background:**

***Legislative Branch:***

- PREA demonstrates Congress’ awareness of at least victimization experienced by incarcerated persons through sexual assault, but nothing has been done to provide services to those victims.
- Support for victims, the development of offender competency and accountability, , and participation by community have bipartisan attraction..

**Potential Allies, Potential Opposition, and Public Opinion:**

***Potential Allies:***

- Victim Offender Mediation Association
- Mennonite Central Committee Washington Office

- Presbyterian Church USA
- The United Methodist Church - General Board of Church and Society
- Association for Conflict Resolution – Restorative Justice Committee
- University of Minnesota, School of Social Work - Center for Restorative Justice & Peacemaking
- Marquette University Law School Restorative Justice Initiative
- Fresno Pacific Center for Peacemaking and Conflict Studies
- Florida Atlantic University - Community Justice Institute
- Penal Reform International, Washington Office
- Pennsylvania Prison Society
- Justice Fellowship
- International CURE and State CURE chapters
- National Association for Community Mediation

***Potential Opposition:***

- Some victim advocates/organizations

***Public Opinion:***

- There is a general assumption that many prisoners are going to be victims of sexual assault. Unclear whether there is any concern about the victims.
- Public opinion has been very supportive of restorative justice.
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**For Further Information:**

Phyllis Lawrence, Sentencing and Restorative Justice Consultant

<http://www.ovc.gov/welcovc/scad/guides/vaguide.htm> for Final Program Guidelines, Victims of Crime Act Victim Assistance Grant Program

<http://www.justdetention.org/pdf/PREA.pdf> -pdf version of PREA, Public Law 108-79-Sept.4, 2003

### **III. FUNDS PRODUCED BY FORFEITURE SHOULD GO TO VICTIMS FOR RESTITUTION BEFORE GOING TO LAW ENFORCEMENT**

**Summary of the Problem:** Currently, items retrieved in forfeiture actions and the proceeds of their sale are kept by law enforcement. Judges should be made aware of the property's value and use that information in calculating appropriate restitution. The money should first be used to satisfy victim restitution orders for the identifiable individual or multiple victims of that defendant. If there are no identifiable victims in an individual case, or if the monetary value of the property is greater than the restitution order for the identifiable victims, the remainder should still go to serve victims' needs.

## **Proposed Solutions:**

**Legislative:** Congress could require that all proceeds from the sale of property forfeited under federal law be deposited in the Victims of Crimes Act Fund, or, preferably, in a separate Restitution 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 undue pecuniary incentive that law enforcement now has to feather its own nest by seeking forfeitures that are unjust or excessive.<sup>1</sup>

An alternative, which may abate law enforcement opposition, would be to set a cap on how much law enforcement could retrieve annually from forfeiture actions, possibly using a baseline from an average of the past three years. An amount collected over that cap would go into a fund to be paid directly to victims who have not been able to collect restitution and/or to the Crime Victims Fund.

Congress could also make clear 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, 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.

## **Jurisdiction:**

**Executive Branch:** No jurisdiction; supporting role

**Legislative Branch:** Senate and House Judiciary Committees and/or Appropriations Committees

## **Background:**

**Executive Branch:** See above discussion

## **Potential Allies, Potential Opposition, and Public Opinion:**

### ***Potential Allies:***

- University of Minnesota, School of Social Work - Center for Restorative Justice & Peacemaking
- Marquette University Law School Restorative Justice Initiative
- Florida Atlantic University - Community Justice Institute
- National Association of Criminal Defense Lawyers
- National Legal Aid and Defenders Association

**Potential Opposition:** Law enforcement

**Public Opinion:** May not draw considerable attention, but if so, it may be split between support for law enforcement's position and ours.

**For Further Information:**

Bruce Nicholson at the ABA Washington DC office

Phyllis Lawrence, Sentencing and Restorative Justice Consultant

#### **IV. IMPROVING LIKELIHOOD OF VICTIM RESTITUTION**

**Summary of the Problem:** In the Victim and Witness Protection Act of 1982 ("the VWPA"), Congress authorized courts to routinely impose restitution as part of any sentence. In determining the amount of restitution to impose, the 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 her dependents. Courts may not order restitution to a victim who has already received or will receive compensation for her loss; however, courts may order restitution to any third party who has compensated a victim for her loss.

Congress enacted the Mandatory Victims Restitution Act of 1996 ("the MVRA"), making restitution mandatory for crimes of violence and most property crimes, regardless of the defendant's ability to pay. Since enactment of the MVRA, the amount of uncollected federal criminal restitution debt has risen from \$6 billion in 1996 to more than \$50 billion by the end of fiscal year 2007. Legislation introduced in the 110<sup>th</sup> Congress would have extended mandatory restitution to all federal crimes, but there is strong opposition.

The growth in unpaid criminal restitution debts has resulted in a misleading figure under MVRA that is largely due to the reality that roughly 85% of federal defendants are indigent, and therefore much of federal restitution is uncollectible.

The 110th Congress's proposed mandatory requirement for restitution under H.R. 845 would have denied virtually all discretion for judges in fashioning equitable and case-specific sentences involving restitution.

Courts' *acknowledgement* at sentencing of the full amount of financial losses provides validation to victims of their financial losses and affords defendants the opportunity to understand the impact of the crime. However, 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 when their expectations cannot be met and for the system professionals responsible for enforcement. The gap between amounts ordered

and amounts collected signal's a government failure to the public. Defendants faced with unreasonable and unachievable orders are overwhelmed and discouraged.

Currently, victims are not permitted to propose or accept a partial settlement or to modify the manner of payment. However, in many cases, it is in the victim's interest to receive a reduced amount in a lump sum payment rather than wait for piecemeal payments or attempt to enforce an order.

Victims should be allowed to ask the court and/or to negotiate with the defendant the amount and manner of restitution payments and be permitted, at their discretion and without coercion, to agree to a lesser amount or a different manner of payment. Either party should have the right to ask in a hearing that the criminal restitution judgment become a civil judgment. This would create another vehicle of enforcement for victims and an opportunity for the defendant to get relief from court supervision.

Undeliverable restitution payments should not be absorbed by the courts or correctional system, but should be transferred to a "Restitution Fund." 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.

Where there are multiple victims who cannot be identified or where the cost of locating them 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.

### **Proposed Solutions:**

#### ***Legislative Changes:***

1. Hold hearings regarding the appropriate use of restitution and alternative means of addressing compensation of crime victims within the federal system.
2. Pass legislation which accomplishes the following goals:
  - a. Create a separate "Restitution Fund" to receive any restitution payments which cannot be delivered to or received by the actual victims, to avoid co-mingling with the VOCA funds, withdrawals from which are capped by Congress. Protect the position that all funds collected from federal defendants under restitution orders be used **exclusively** to meet the needs of current or future victims of crime, either individually or collectively (*e.g.*, this might be the case in white collar crime or where funding of crime prevention programs is more appropriate).
  - b. Remove the requirement of "mandatory restitution" and allow judges to acknowledge the actual damages in open court and in the case file. Such legislation should also give judges the discretion to order a reasonable amount and payment schedule based on 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 have “a place in line” ahead of requirements to pay fines or court-ordered services and court- or system-imposed costs.

- c. Change the current federal law, which states that mandatory restitution orders may not be “settled” to permit victims and defendants to, voluntarily and without coercion, reach a settlement regarding the amount or manner of payment. The settlement process could be overseen by, or require the approval of, a federal magistrate.
- d. Create or change the policy so that court orders for restitution that are not completed within the probation or parole period due to the defendant’s limited ability or inability to pay cannot be used to extend probation or parole, although could continue to be a condition if probation or parole is extended for other reasons.

**Jurisdiction:**

*Legislative Branch:* House and Senate Judiciary Committees

**Background:**

*Legislative Branch:* During the 110<sup>th</sup> Congress, Senator Byron Dorgan (D-ND) introduced S.973, and Representative Steve Chabot (R-OH) introduced H.R.845, bills to extend mandatory restitution to all federal crimes. The Senate passed S.973 on October 16, 2007, as a “midnight amendment” to the fiscal 2008 Commerce-Justice-Science (C-J-S) appropriations measure, though there had been no hearing or other consideration of the bill by the Senate Judiciary Committee. House Judiciary Committee Chair John Conyers Jr. objected to the inclusion of the Dorgan bill in the final appropriations bill, and it was dropped from the final legislation. The House Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing on April 3, 2008, on S. 973 and H.R. 845.

**Potential Allies, Potential Opposition and Public Opinion:**

*Potential Allies:*

- National Association of Criminal Defense Lawyers
- National Legal Aid and Defenders Association
- Federal Defenders
- Association for Conflict Resolution – Restorative Justice Committee
- University of Minnesota, School of Social Work - Center for Restorative Justice & Peacemaking
- Marquette University Law School Restorative Justice Initiative
- Florida Atlantic University - Community Justice Institute

*Potential Opposition:*

- Some victims groups
- The agencies that have been keeping undeliverable restitution payments
- Judges

**Public Opinion:** Unlikely to get much attention, but if so, the public will likely want to know that restitution is being paid to victims or for victims and in an amount that is fair to victims, but with reasonable expectations.

**Experts:**

- Kyle O’Dowd, NADCL
- James Felman, Kynes Markman & Felman
- Barry Boss

**For Further Information:**

Bruce Nicholson at the ABA Washington DC office

Phyllis Lawrence, Sentencing and Restorative Justice Consultant

## **V. RESTORE VOCA CAP LIMIT TO 2006 LEVEL**

**Summary of the Problem:** In 1984 as part of the Victims of Crime Act, Congress created the Victims of Crime Fund (VOCA). The VOCA fund provides money for victim assistance programs and victim compensation programs and is made up entirely of money collected from penalties, fees and fines that have been paid by federal criminals. The VOCA fund contains no taxpayer dollars. Money in the fund supports prevention and treatment of child abuse, provides assistance to victims involved in federal criminal investigations, prosecutions and crimes, and provides for grants to states to support victim services and victim compensation.

Both the VOCA state victim assistance grant and the VOCA compensation grant are provided to all 50 states and the District of Columbia. The VOCA state victim assistance grant supports direct victim services including rape crisis centers, domestic violence shelters, counseling programs, support groups, advocacy, and case management services.

The VOCA compensation grant provides financial reimbursement to victims of violent crimes for out-of-pocket medical expenses and mental health counseling. Between 1984 and 2007, a total of \$9 billion dollars was deposited into the VOCA fund. However, because the fund is comprised of money collected from penalties, fees and fines, money in the fund fluctuates from year to year.

In 2000, Congress limited (“capped”) the amount of money that could be removed each year from the fund in order to ensure that money would be available for victims in the future. Today, the fund is estimated to have a balance of \$1.7 billion.

The caps proposed and enacted by Congress in past years have resulted in the reduction of services to victims. Every year the victim advocacy community has had to fight the imposition of new caps and sometimes even elimination of the fund or diversion of collected monies to the general funds.

Victims groups do believe a cap is appropriate for the local programs which receive the assistance funds to maintain some stability and have some ability to plan year to year. But for exactly that reason, the cap should be reasonable – not a reduction from previous years when there is so much of a reserve. Victim groups are asking for an increase to the 2006 levels.

The last year in which there was sufficient funding to avoid cutbacks was 2006. The cap should be raised beyond that figure in order to avoid cuts, cover increased costs due to the economy, allowable services to incarcerated persons who are victimized, and additional services to victims for restorative justice.

### **Proposed Solutions:**

*Executive:* Set up advisory committee to OVC for responding to Congressional proposals for VOCA caps and to advise OVC and Congress on appropriate cap levels

*Legislative Changes:* CJS Appropriations subcommittees need to raise the caps

### **Jurisdiction:**

*Executive Branch:* DOJ, Office of Justice Programs, Office for Victims of Crime

*Legislative Branch:* House and Senate Appropriations Committees, CJS subcommittees – they set the cap each year.

### **Background:**

*Executive Branch:* OVC to support expanded use of VOCA funds, as described in earlier section.

### **Potential Allies, Potential Opposition, and Public Opinion:**

#### *Potential Allies:*

- Association for Conflict Resolution – Restorative Justice Committee
- University of Minnesota, School of Social Work - Center for Restorative Justice & Peacemaking
- Marquette University Law School Restorative Justice Initiative
- Florida Atlantic University - Community Justice Institute

### **Experts:**

- Steve Derene, Executive Director of the National Association of Victim Assistance Administrators
- Dan Eddy, Executive Director of the National Association of Victim Compensation Administrators

- Anne Seymour, Justice Solutions
- Mary Lou Leary, Executive Director of the National Center for Victims of Crime

**For Further Information:**

Phyllis Lawrence, Sentencing and Restorative Justice Consultant

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<sup>1</sup> Of particular concern is the system by which forfeited property is “shared” with state and local police agencies, which directly benefit from the forfeitures their officers assist in effectuating. The millions of dollars flowing to these state and local police agencies can be used for any ostensible law enforcement purpose, thus creating an unappropriated slush fund.