CHAPTER 10

IMPROVING THE PRISON SYSTEM

THE ISSUE

The United States imprisons a higher percentage of its population than any other country.[1] More than one in every 100 adults in the United States is behind bars.[2] If the approximately 2.3 million incarcerated people were a single city, it would be the fourth largest in the country.[3] In 2008, federal, state, and local governments spent approximately $62 billion on adult and juvenile corrections and were projected to need as much as $27 billion in additional operating and capital funds over the next five years to accommodate projected prison expansion and operation.[4]

In the face of the financial crisis, some states have begun to recognize the need for more cost-effective approaches to criminal justice policy. In Michigan, where government spending on corrections exceeds spending on universities,[5] the state cut its prison population by more than 10 percent in less than three years through sentencing and parole reforms.[6] Similarly, New York reformed its harsh drug laws and saw its prison population decline significantly.[7] In fact, 2009 saw prison populations drop in 26 states, causing the total number of inmates in state prisons to decline for the first time since 1972.[8] Much of this progress has been made by reducing the number of non-violent offenders incarcerated unnecessarily and at great cost to taxpayers.

Reforms to our prison system are long overdue. This section provides a comprehensive summary of practical policy options to bring about significant improvements to the world's largest prison system. Prison system reforms are especially needed to (i) end the high incidence of sexual assault and rape in our nation's correctional facilities; (ii) return the rule of law to U.S. prisons and jails; (iii) improve transparency in the world's largest prison system; (iv) reduce recidivism; and (v) end over-reliance on the use of solitary confinement and long-term isolation.

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[1] JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CENTER FOR ECONOMIC AND POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 1 (June 2010), *available at* http://www.cepr.net/documents/publications/incarceration-2010-06.pdf.
[2] PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (Feb. 2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.
[3] *See* TODD D. MINTON, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., PRISON INMATES AT MIDYEAR 2009 (June 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf; HEATHER C. WEST, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT , STATISTICAL TABLES (June 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf.
[4] AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SYSTEM IMPROVEMENTS 9 (Dec. 2008), *available at* http://www.abanet.org/poladv/transition/2008dec_crimjustice.pdf.
[5] NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 2009 (Fall 2010), *available at* http://nasbo.org/LinkClick.aspx?fileticket=%2bPqnI4oZw2I%3d&tabid=38.
[6] *See* Families Against Mandatory Minimums, FAMM's guide to Michigan sentencing reforms (2003), http://www.famm.org/Repository/Files/Guide%20to%20MI%20reforms.pdf (last visited Jan. 24, 2001); MICHIGAN TASK FORCE ON JAIL AND PRISON OVERCROWDING, FINAL REPORT (Mar. 2005), *available at* http://www.michigan.gov/documents/report_119595_7.pdf.
[7] DENISE E. O'DONNELL, N.Y. DIVISION OF CRIM. JUST. SERVICES, NEW YORK STATE FELONY DRUG ARREST, INDICTMENT, AND COMMITMENT TRENDS 1973 – 2008 (2009), *available at* http://criminaljustice.state.ny.us/pio/annualreport/baseline_trends_report.pdf.
[8] PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS (2010), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf?n=880.

HISTORY OF THE PROBLEM

The U.S. prison population does not reflect the demographics of America at large. Prisons and jails not only hold far too many people, they also hold a disproportionate number of people of color, as well as people with mental illness and addiction problems who require treatment—not incarceration—to reduce their likelihood of recidivism.

In 2009, African-American men were incarcerated at a rate of 4,749 per 100,000—or almost one out of 20. The comparable rate for Hispanic males was 1,822 per 100,000 and, for white males, 708 per 100,000.[9] Black males were six times more likely, and Hispanic males twice as likely, to be held in custody than white males.[10] Furthermore, 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates in the U.S. suffer from mental illness.[11] Between 60 and 80 percent of individuals under supervision of the criminal justice system in the U.S. were either under the influence of alcohol or other drugs when they committed an offense, committed the offense to support a drug addiction, were charged with a drug-related crime, or were using drugs or alcohol regularly.[12] Experts also estimate that people with developmental disabilities may constitute as much as 10 percent of the prison population.[13]

Grossly deficient medical and mental health care also plague prisons and jails across the country. In 2005, a federal court found that in California a prisoner dies a needless death due to inadequate medical care or malpractice every six to seven days.[14] Prisoners are also threatened daily by sexual violence, a frighteningly common occurrence in the nation's corrections systems.[15]

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[9] WEST, *supra* note 3, at 2.
[10] *Id.*
[11] DORIS J. JAMES & LAUREN E. GLAZE, U.S DEPT. OF JUST., BUREAU OF JUST. STAT., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf..
[12] Douglas B. Marlowe, *Integrating Substance Abuse Treatment and Criminal Justice Supervision*, 2(1) NIDA SCIENCE AND PRACTICE PERSPECTIVES (2003), *available at* http://www.drugabuse.gov/PDF/Perspectives/vol2no1/02Perspectives-Integrating.pdf (citing S. Belenko et al, *Substance abuse and the prison population: A three-year study by Columbia University reveals widespread substance abuse among the offender population*, 60(6) CORRECTIONS TODAY, 82-89, (1998)).
[13] Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, *available at* www.thearc.org/document.doc?&id=149 (citing JOAN PETERSILIA, CALIFORNIA RESEARCH CENTER, DOING JUSTICE? CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES (2000)).
[14] Plata v. Schwarzenegger, Slip Copy, 2005 WL 2932253 (N.D. Cal., October 2, 2005) as cited in JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 38 (June 2006).
[15] *See* ALLEN J. BECK, PAIGE M. HARRISON, ET AL, U.S. DEPT. OF JUST. BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008 – 2009 (August 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf.

1. Sexual Assault in Correctional Facilities

Sexual violence behind bars has reached crisis proportions. Based on a survey in prisons and jails nationwide, the Bureau of Justice Statistics estimated that 88,500 adult inmates were sexually abused in their current facility in the past year alone.[16] In a similar survey of youth in juvenile facilities, a shocking one in eight reported being sexually abused in the previous year.[17] In both types of facilities, staff-on-inmate abuse was more prevalent than abuse perpetrated by inmates.[18]

An important step in addressing this problem has already been taken. In 2003, Congress unanimously passed, and President George W. Bush signed into law, the Prison Rape Elimination Act (PREA).[19] Sponsored by Reps. Frank Wolf (R-VA), Bobby Scott (D-VA), and 30 other co-sponsors in the House,[20] and Senators Jeff Sessions (R-AL), Mike Dewine (R-OH), Dick Durbin (D-IL), Edward Kennedy (D-MA), and Dianne Feinstein (D-CA) in the Senate, PREA called for the development of binding national standards for the prevention, detection, response, and monitoring of sexual violence behind bars.[21] The bipartisan National Prison Rape Elimination Commission was established to develop these standards, and the Commission submitted its recommendations to Attorney General Eric Holder on June 20, 2009.[22] These standards include facility audits to certify compliance with a zero-tolerance policy for sexual abuse; specialized training of facility staff; heightened protection for identifiably vulnerable inmates; use of monitoring technology; uniform evidence-gathering protocol; and availability of independent, qualified forensic medical examiners to victims.[23]

Under PREA, Attorney General Holder had one year to publish a final rule adopting national standards, after giving due consideration to the standards recommended by the Commission.[24] Once promulgated, these standards will be binding on federal facilities immediately, while state and county systems will have one year to comply or risk losing five percent of their federal funding.[25] As of the release of this report, the Attorney General has yet to implement these standards.[26]

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[16] *Id* at 5.
[17] ALLEN J. BECK, PAIGE M. HARRISON & PAUL GUERINO, U.S. DEPT. OF JUST. BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-2009 (January 2010).
[18] BECK, *supra* note 15; BECK, *supra* note 17.
[19] 42 U.S.C. § 15601 *et seq.*
[20] For a full list of co-sponsors, see: Bill Summary & Status 108th Congress, H.R. 1707, http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01707: (last visited Jan 24, 2010).
[21] 42 U.S.C. § 15606(c).
[22] NAT'L PRISON RAPE ELIMINATION COMMISSION, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS (June 20, 2009), *available at* http://www.sheriffs.org/userfiles/file/5.1_MasterAdultPrison_andJail_andImmigrationStandardsClean.pdf.
[23] *Id.*
[24] 42 U.S.C. § 15607(a)(1).
[25] 42 U.S.C. § 15607(b), (c).
[26] *See*, *Disgraceful Delays*, WASH. POST, Dec. 12, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121203345.html.

Moreover, the appropriations for PREA have been cut drastically every year since its passage, making the prospects of assisting states and monitoring their compliance with the standards even more challenging.[27]

2. **Failures of the Prison Litigation Reform Act**

Congress passed the Prison Litigation Reform Act (PLRA) in 1996.[28] PLRA was originally intended to stem frivolous prisoner lawsuits, but in practice it often denies justice to victims of rape, assault, religious restrictions, and other rights violations. PLRA's "physical injury" and exhaustion requirements have severely limited prisoner's ability to address violations of their rights and other serious abuses. If prisoners fail to file the right paperwork when pursuing a claim, or if their injuries are not deemed sufficiently "physical," their claims may be dismissed—even if the claim involves a constitutional violation. Prior to PLRA's passage, its chief sponsor, Senator Orrin Hatch (R-UT), assured Congress that he did not "want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."[29] Unfortunately, it is now clear that PLRA prevents prisoners—including juveniles—who experience severe violations of their rights from seeking justice and protection from the courts.

Over a decade of experience has shown that PLRA's preliminary screening requirement is sufficient to fulfill the legislation's purpose. By requiring courts to summarily dismiss prisoner cases that are frivolous, malicious, or fail to state a legal claim, this provision has greatly reduced the burden on courts posed by prisoner cases that are not meritorious. However, certain other provisions of PLRA must be amended or repealed in order to restore meaningful access to the courts for incarcerated adults and youth.

Congress needs to fix provisions of PLRA that have created unintended consequences. Amongst these provisions is the "physical injury requirement" which prevents federal courts from reviewing serious constitutional claims. Under PLRA, prisoners can be sexually assaulted and not have access to the range of remedies available to most civil rights plaintiffs because some courts say they've suffered no "physical injury."[30] Claims such as disgusting, unsanitary conditions and degrading treatment also do not meet the "physical injury" requirement under PLRA.[31] Further, any constitutional violations that do not result in physical injuries are barred under PLRA. As a result of

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[27] STOP PRISON RAPE, PRISON RAPE ELIMINATION ACT UPDATE 7 (2007), *available at* http://www.justdetention.org/pdf/SPR_PREA_update_3-29.pdf.
[28] H.R. 3019, 104th Cong. (1996) (enacted).
[29] 141 Cong. Rec. S14626 – 14627 (September 29, 1995), *available at* http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=jBJ8Jo/0/1/0&WAISaction=retrieve.
[30] *See* Hancock v. Payne, 2006 WL 21751 at 1, 3 (S.D. Miss. 2006) (holding that prisoners' allegations that a staff member "sexually abused them by sodomy" did not qualify as a physical injury); Moya v. City of Albuquerque, No. 96-1257 DJS/RLP, Mem. Op. and Order (D.N.M. Nov. 17, 1997) (holding that male officers' strip-searches of women prisoners did not result in physical injuries, even where one woman allegedly attempted suicide due to the trauma of the search).
[31] *See, e.g.* Harper v. Showers, 174 F.3d 716 (5th Cir. 1999).

PLRA's "physical injury" requirement, courts deny prisoners remedies for violations of their religious rights, [32] free speech rights[33] and due process rights.[34]

The Exhaustion Requirement of PLRA has also created disastrous consequences for prisoners' ability to protect themselves from abuse and harm. PLRA's exhaustion provisions require prisoners to exhaust their facilities' often lengthy administrative grievance process no matter how meritorious the claims, and no matter how legitimate the reasons for failing to follow grievance procedures might be.[35] Prison and jail grievance systems have created a baffling maze in which a barely literate, mentally ill, physically incapacitated, or juvenile prisoner's procedural misstep in a facility's informal grievance system forever bars even the most meritorious constitutional claims. Moreover, grievance deadlines are often a matter of days, with no exceptions for prisoners who are ill, hospitalized, traumatized, or otherwise incapacitated.[36]

Finally, PLRA also undermines protections for incarcerated youth. The original justification for PLRA was to weed out frivolous lawsuits. But even if some adult prisoners filed frivolous lawsuits, supporters of PLRA did not claim that incarcerated *youth* filed such litigation.[37] This is not surprising because most prisoner lawsuits are filed *pro se*,[38] and youth rarely file lawsuits over their conditions of confinement. Many youth in the juvenile justice system are unable to adequately read and write, and few if any have sufficient understanding of the court system to file *pro se* litigation. Youth are even more vulnerable than adult prisoners to sexual abuse and other victimization, and many either do not know of or do not understand the grievance systems in their facilities, and many more fear retaliation for filing grievances.[39] As a result, the exhaustion provision effectively bars many incarcerated youths from addressing serious problems with their conditions of confinement. Additionally, the physical injury requirement works against protection of youths' rights to rehabilitation in custody. The provision undermines the rights of incarcerated youth to protect their religious rights, free speech rights, and due process rights, and jeopardizes the right to education, counseling, and other rehabilitative programming that forms the core of the juvenile justice system. These are all rights that should be protected even though they do not involve physical injury.

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[32] *See* SAVE Coalition, Top 10 Harmful Effects on Religious Freedom, *available at* http://www.savecoalition.org/pdfs/top10_religion.pdf.
[33] *See, e.g.,* Royal v. Kautzky, 375 F.3d 720, 722-23 (8th Cir. 2004).
[34] *See, e.g.,* Thompson v. Carter, 284 F.3d 411, 416-17 (2d Cir. 2002).
[35] 42 U.S.C. § 1997e(a) (2007).
[36] *See* Woodford v. Ngo, 548 U.S. 81, 118 (Stevens, J., dissenting) (noting that grievance filing deadlines "are generally no more than 15 days, and … in nine States, are between 2 and 5 days").
[37] *Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses?: Hearing on H.R.1889 before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 1-2 (2007) (statement of Jessica Feierman, Juvenile Law Center).
[38] Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOKLYN L. REV. 519 (1996).
[39] Statement of Jessica Feierman, *supra* note 37.

3. **Lack of Transparency in Correctional Facilities**

Despite the massive expenditure of taxes and the profound effect that prison has on the individual, the community, and public safety, there is very little oversight of prisons, jails, and juvenile detention facilities, or public accountability for what takes place behind bars. While the federal courts provide some oversight, courts are unable to proactively address many systemic problems, particularly before they rise to the level of a constitutional violation. Prisons are, by their nature, closed institutions in which the State, through the prison administration and staff, has extraordinary power over every aspect of prisoners' lives. The potential for abuse of that power is always present. As noted above, the majority of sexual abuse in detention is perpetrated by corrections staff. Conditions within a prison can deteriorate to an extent which imperils the lives and human rights of those held there without anyone on the outside aware of what is happening. Prisons need effective forms of oversight to prevent abuse, encourage public officials to meet their legal obligation, and ensure constitutional conditions of confinement.

Currently, there are no national standards for the treatment of prisoners and no systemic national oversight to ensure that the constitutional rights of prisoners are protected. Traditionally, the federal courts have provided some oversight through litigation. Indeed, through the oversight provided by the federal courts in the 1970's and 1980's, the country's prisons were transformed from virtual dungeons to modern correctional institutions.[40] Since the enactment of PLRA in 1996, however, the power of the federal courts to provide oversight has been drastically undercut. Moreover, the courts are unable to proactively address many systemic and managerial problems, particularly before they rise to the level of a constitutional violation, and the courts can only act on those cases brought before them. As a result, it is essential that the government implement alternative forms of oversight.

Fortunately, Congress has taken action in the past to improve oversight. In 2000, Congress enacted the Deaths in Custody Reporting Act (DICRA)[41], sponsored by Reps. Robert Scott (D-VA), James Forbes (R-VA), and Sheila Jackson-Lee (D-TX), which required local jails and state prisons to report to the federal government any deaths in their custody. DICRA expired in December 2006 and has not yet been reauthorized.[42] Additionally, as discussed above, PREA, which was passed in 2003, requires the development of binding national standards to address prison rape.

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[40] *See Prison Abuse Remedies Act of 2007:Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Caroline Frederickson, American Civil Liberties Union, and Elizabeth Alexander, ACLU Prison Project) (citing Hutto v. Finney, 437 U.S. 678 (1979); Lightfoot v. Walker, 486 F. Supp. 504 (S.D. Ill. 1980); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980); Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977)), *available at* http://www.savecoalition.org/pdfs/NPPTestimonyFINAL.pdf.

[41] H.R. 3971, 106th Cong. (2000).

[42] H.R. 738 was introduced by Rep. Scott in the 110th Congress and passed the house with a vote of 407-1, but the bill was never considered by the Senate Judiciary Committee. H.R. 738, 110th Cong. (2009).

Further, the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA) establishes certain core requirements for the appropriate treatment of juveniles in states that receive federal funding for the juvenile justice systems.[43] The authorizations for JJDPA expired in 2007, but Congress has yet to reauthorize it, though the Senate Judiciary Committee approved legislation in 2010.[44]. Efforts have been made to include in the reauthorization oversight of conditions of confinement in juvenile facilities and to ensure that youth charged as adults are kept out of adult jails pre-trial with the ultimate goals of providing safe and humane conditions of confinement for youth in both juvenile and adult facilities and keeping youth out of adult jails and prisons completely.[45]

4. **Recidivism in America's Criminal Justice Population**

An estimated two-thirds of the 650,000 people returning home from prison will be re-arrested for a felony or serious misdemeanor within three years.[46] Approximately 70 to 80% of people coming home from prison or jail have histories of drug or alcohol dependence.[47] Research shows that young people who are kept in the juvenile justice system are less likely to re-offend than young people who are transferred into the adult system. According to the Centers for Disease Control and Prevention, youth transferred from the juvenile court system to the adult criminal system are approximately 34% more likely than youth retained in the juvenile court system to be re-arrested for violent or other crime.[48] The Department of Justice's Office of Juvenile Justice and Delinquency Prevention has also concluded that transfer laws substantially increase recidivism, particularly for first time violent offenders, and that laws to make it easier to transfer youth to the adult criminal court system do not prevent youth from engaging in criminal behavior.[49]

Maintaining family ties is also incredibly important in reducing recidivism and increasing public safety. Yet too often, families are destroyed because a parent or child is in prison. Nearly two million children have at least one parent in prison.[50] These children are six times more likely to be incarcerated than other youth, according to some public health studies.[51] The vast majority of correctional institutions and systems do not foster family ties for the prisoners in their care. In fact

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[43] 42 U.S.C. § 5601.
[44] S. 678, 111th Cong. (2010).
[45] *See Juvenile Justice*, SMART ON CRIME (2011).
[46] Christy A. Visher and Jeremy Travis, The Urban Institute Justice Policy Center, *Transitions from Prison to Community: Understanding Individual Pathways* 29 ANN. REV. SOCIOLOGY 89-113 (2003).
[47] CHRISTOPHER MUMOLA, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., SUBSTANCE ABUSE AND TREATMENT OF STATE AND FEDERAL PRISONERS (1999), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/satsfp97.pdf.
[48] Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, MORBIDITY AND MORTALITY WEEKLY REPORT (November 30, 2007).
[49] RICHARD E. REDDING, U.S. DEPT. OF JUST., OFFICE OF JUV. JUST. AND DELINQUENCY. PREVENTION, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? (2010), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf.
[50] LAUREN E. GLAZE AND LAURA M. MARUSCHAK, U.S. DEPT. OF JUST., BUREAU OF JUST. STAT., PARENTS IN PRISON AND THEIR CHILDREN (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf.
[51] *See, e. g.,* S. REP. NO. 106-404, at 56 (2000).

many policies, such as limited visitation hours or restrictions on prisoners hugging their children, exacerbate the difficulties prisoners and their families face in maintaining family bonds.[52]

5. **Lack of Effective Rehabilitation and Reentry**

Good time credit is important in providing incentives for prisoner rehabilitation, as well as reducing prison costs. The Federal Bureau of Prisons (BOP), however, has adopted a method of calculating the good time credit to which most prisoners are entitled that results in only a 12.8% reduction in prisoner sentences instead of the 15% Congress intended for good behavior.[53] BOP's convoluted calculation method has been upheld by the Supreme Court.[54] But this difference in calculation means that each prisoner loses a full week of good time credit for each year of their sentence. The Federal Defenders estimate that BOP's method of calculation has resulted in approximately 36,000 years of over-incarceration.[55] Given the estimated $25,894 per year costs for non-capital incarceration expenditures within BOP, this over-incarceration amounts to over $951 million in taxpayer money that Congress never intended to authorize for federal prisoners.[56] In addition to these cost over-runs, BOP's method of calculating good time takes up sorely needed bed space within BOP facilities, particularly in higher security facilities that house prisoners with longer sentences, and adds significantly to the dangerous population pressures on a system already at 149% of capacity. A bill was introduced in the 111th Congress to fix this problem (H.R. 1475).

Additionally, BOP has failed to provide the congressionally-mandated, one-year sentence reduction incentive for thousands of drug addicted offenders who seek to participate in BOP's Residential Drug Abuse Program (RDAP). It has done this in two ways: (i) by implementing rules that disqualify statutorily eligible prisoners who successfully complete in-prison substance abuse treatment; and (ii) by administering the program in a way that deprives even those it deems eligible of the full year of credit that Congress intended. For example, in violation of the statutory mandate that all prisoners receive appropriate drug treatment, the BOP disqualifies statutorily-eligible prisoners based solely on stale convictions involving violence.[57] The BOP prevents any prisoner with

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[52] Creasie Finny Hairston, *Prisoners and Families: Parenting Issues During Incarceration*, FROM PRISON TO HOME: THE EFFECT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (2001), *available at* http://aspe.hhs.gov/hsp/prison2home02/Hairston.htm.

[53]. *See* Families Against Mandatory Minimums, Frequently Asked Questions About Federal Good Time Credit, 8 (2008) http://www.famm.org/Repository/Files/FINAL_Good_Time_FAQs_10.21.08%5B1%5D.pdf.

[54] Barber v. Thomas, 130 S. Ct. 2499 (2010).

[55] The 36,000 years figure was reached by the following calculations. 195,435 prisoners x 7 days a year x 9.8 average sentence that is more than a year and less than life, divided by 365 days in a year equals 36,731 years. *See* Families Against Mandatory Minimums, *supra* note 53, at 8; *see also* Stephen R. Sady & Lynn Deffebach, *The Sentencing Commission, The Bureau Of Prisons, And The Need For Full Implementation Of Existing Ameliorative Statutes To Address Unwarranted And Unauthorized Over-Incarceration*, UNITED STATES SENTENCING COMMISSION SYMPOSIUM ON ALTERNATIVES TO INCARCERATION 2- 9 (July 2008).

[56] Families Against Mandatory Minimums, *supra* note 53.

[57] *Federal Bureau of Prisons Oversight Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Stephen R. Sady, Federal Defender for the District of Oregon)), *available at* http://judiciary.house.gov/hearings/pdf/Sady090721.pdf.

a detainer from participation in the residential program, which eliminates the 26.6% of prisoners who are removable aliens within the BOP population.[58] The BOP also categorically denies participation to any eligible prisoner whose offense involved mere possession of a firearm, rather than an actual violent offense.[59]

Beyond categorically denying large portions of the federal population the benefit of RDAP's sentence reduction incentive, BOP fails to provide sufficient drug abuse education classes, which is exacerbated by delayed consideration of a prisoner's application to RDAP until the end of their sentence. As a result, even eligible prisoners are deprived of the full benefit of the one-year sentence reduction. BOP's administration of RDAP has led to an average sentence reduction of only 7.64 months, rather than the full year permitted by Congress, limit the potential savings in federal corrections costs.[60]

Furthermore, BOP has failed to implement the directive of the Second Chance Act to give prisoners 12 months of pre-release custody in a Community Corrections Facility (CCC), such as a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or residential reentry centers. BOP's policy is premised on two highly questionable arguments: (i) more than six months in a CCC is not beneficial for individual prisoners; and (ii) it is more expensive to house prisoners in CCCs than in secure facilities. There is no empirical support for the first proposition, nor does it take in to account the possibility of beginning the halfway house at twelve months and transitioning to home confinement once residence in the halfway house is no longer necessary. The second proposition is also hard to credit because incarceration in BOP costs about $2,076.83 per month (not including capital costs) compared to $1,905.92 for halfway house placement and, at least potentially, $301.80 for home confinement.[61]

BOP has also persisted in an unnecessarily restrictive interpretation of its authority to designate the place of a prisoners confinement under 18 U.S.C. § 3621(b) despite contrary rulings by at least four courts of appeal. Specifically, it has declined to return to its former practice of allowing short-sentenced prisoners to serve their sentences in community confinement upon

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[58] *Id.*

[59] 28 C.F.R. § 550.55.

[60] Beth Weinman, *Prison Programs Resulting in Reduced Sentences,* THE U.S. SENTENCING COMMISSION SYMPOSIUM ON ALTERNATIVES TO INCARCERATION 72 (July 2008), *available at* http://www.ussc.gov/Research/Research_Projects/Alternatives/20080714_Alternatives/05_FINAL_PrisonPrograms.pdf.

[61] Memorandum from Matthew Roland, Deputy Assistant Director, Administrative Office of the United States Courts, *Regarding Cost of Incarceration to Chief Probation and Pretrial Officers* (May 6, 2008). Currently, BOP utilizes its private halfway house contractors to supervise those who go to home detention through a halfway house, and they charge BOP the full cost of a halfway house placement for the entire term of home detention. BOP permits the halfway house operators to decide when a prisoner goes to home detention, and operators have a financial incentive to send people home sooner rather than later since they are paid the same for the duration of the community placement, and can fill the empty bed. Where home detainees are supervised by Federal Probation, the cost to the government is $301.80. As of this writing, the authors know of no reason why BOP could not ask Federal Probation to supervise all those in home detention at a much lower cost.

recommendation of the sentencing judge, notwithstanding affirmation by several courts of appeal of its authority to do so.[62] A policy memorandum issued by BOP on February 2, 2009, emphasizes that while prisoners may be eligible for community placements, such front-end placements are disfavored.[63]

Finally, BOP has drastically underutilized its second look resentencing authority under 18 U.S.C. § 3582(c)(1)(A)(i) to petition the sentencing court for reduction of a prisoner's term of imprisonment where there have been "extraordinary and compelling" changes in the prisoner's circumstances since the sentence was imposed. Even after the U.S. Sentencing Commission (USSC) promulgated a more expansive interpretation of that phrase, BOP issued regulations reiterating a very narrow "terminal illness/total disability" basis for seeking reduction of a prison term under this statute that is inconsistent with the USSC definition. BOP has openly stated its unwillingness to comply with USSC policy guidance authorizing reductions in a wider range of cases, even though Congress explicitly delegated the authority to define "extraordinary and compelling" to USSC, not BOP.[64] BOP has administered its far narrower test to return to court in fewer than thirty cases each year.

6. **Overuse of Solitary Confinement**

Long-term isolated confinement is often called "solitary confinement," "ad seg," "SHU," "SMU" "the hole," or "supermax" confinement. It is the practice of placing people alone in cells for 23 hours a day or more with little or no human interaction; reduced natural light; little access to recreation; strict regulation of access to property, such as radios, television, or commissary items; greater constraints on visitation rights; and the inability to participate in group or social activities, including eating with others. The length of this type of placement varies, but it can last for years or indefinitely. The American Bar Association uses the following definition:

> The term 'segregated housing' means housing of a prisoner in conditions characterized by substantial isolation from other prisoners, whether pursuant to disciplinary, administrative, or classification action. 'Segregated housing' includes restriction of a prisoner to the prisoner's assigned living quarters.[65]
> The term 'long-term segregated housing' means segregated housing that is expected to extend or does extend for a period of time exceeding 30 days.[66]

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[62] *See* Brief for Families Against Mandatory Minimums,, Munis v. Sabol 517 F.3d 29 (1st Cir. 2008).
[63] Memorandum from Joyce K. Conley, Assistant Director, Correctional Programs Division, U.S. Department of Justice Federal Bureau of Prisons, *Review of Inmates for Initial Designation to Residential Reentry Centers* (February 2, 2009), *available at* http://www.fd.org/pdf_lib/BOP.Front.end.CCCdesignationPolicy.2.11.09.pdf.
[64] 28 U.S.C. § 994(t); *See* Margaret Colgate Love, ABA Commission on Effective Criminal Sanctions, *Sentencing Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED. SENT'G REP. 3 (2009), *available at* http://www.pardonlaw.com/materials/12.FSR.21.3_211-226.pdf.
[65] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIM. JUST.: TREATMENT OF PRISONERS 23-1.0(r) (3d ed. 2010), *available at* http://www.abanet.org/crimjust/policy/midyear2010/102i.pdf.
[66] *Id.* at 23-1.0(o).

There is a general consensus among researchers that isolated confinement is psychologically harmful for people.[67] Some experts have also documented negative physiological responses to solitary confinement as well. The European Committee for the Prevention of Torture found that such conditions amount to "inhuman treatment."[68]

Historically, American researchers and people in the legal system recognized these harms and curbed the use of solitary confinement as a method of punishment. Since the 1980s, however, "tough on crime" rhetoric has fueled a resurgence in the use of long-term isolated confinement and the building of "supermax" facilities, all justified as the only means available to punish "the worst of the worst." Yet the vast majority of prisoners in isolation are not incorrigibly violent criminals. Instead, many are severely mentally ill or developmentally disabled prisoners who are difficult to manage in prison settings.[69] Many people subject to isolated confinement have not actually done anything violent, although they may have broken prison rules, such as those against possessing contraband.[70] Some prisoners have also been placed in isolated confinement or supermax institutions because they filed grievances against correctional officers or otherwise attempted to assert their rights.[71]

Despite its political popularity, there is no evidence that using isolated confinement or supermax institutions has reduced the levels of violence in prison or that such confinement acts as a deterrent.[72] In contrast, there is ample evidence that the use of long-term isolation is considerably more expensive than general population because facilities that provide for solitary confinement are considerably more costly to build and operate, sometimes costing two or three times as much as conventional facilities.[73] In recognition of the inherent problems of long-term isolation, the

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[67] *See e.g.*, Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450 (1983); R. Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8 (1988); S.L. Brodsky and F.R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); Craig Haney, *Mental Health Issues in Long-Term Solitary and ''Supermax'' Confinement*, 49 CRIME & DELINQ. 124 (2003); H. Miller and G. Young, *Prison Segregation: Administrative Detention Remedy of Mental Health Problem?* 7 CRIM. BEHAV. & MENTAL HEALTH 85 (1997); H. Toch, *Mosaic of Despair: Human Breakdown in Prison*, AM. PSYCH. ASS'N (1992).

[68] Leena Kurki and Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 415 (2001) (specifically, spending twenty two hours a day in a cell, without associating with other prisoners, with limited visits and activities for over a year is "inhuman treatment").

[69] Haney, *supra* note 67, at 127.

[70] Kurki and Morris, *supra* note 68, at, 411-12.

[71] Instances of retaliatory use of solitary confinement are far too numerous to list individually. *See, e.g.*, Adnan Pearson v. Welborn, 471 F.3d 732 (7th Cir. 2006) (finding a prison employee to have inflicted a year's confinement in a "supermax" facility on a prisoner in retaliation for his First Amendment-protected complaints about prison conditions); SAVE: COALITION TO STOP ABUSE AND VIOLENCE EVERYWHERE, REFORM THE PRISON LITIGATION REFORM ACT (PLRA) (2008), *available at* http://www.savecoalition.org/pdfs/save_final_report.pdf.

[72] Kurki and Morris, *supra* note 59, at 391.

[73] CAROLINE ISAACS AND MATTHEW LOWEN, BURIED ALIVE: SOLITARY CONFINEMENT IN ARIZONA'S PRISONS AND JAILS 4 (2007); Daniel P. Mears and Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUST. Q. 233, 260 (2006).

American Bar Association recently approved standards to reform the use of isolated confinement in this country.[74] The solutions presented in the Standards represent a consensus view of representatives of all segments of the criminal justice system who collaborated exhaustively in formulating the final ABA Standards.

7. Overreliance on Incarceration

In 1972, the nation's prison population was just over 300,000. Today, the nation's prison population is well over 2.3 million, and there are over 500,000 correctional officers.[75] While the U.S. contains roughly 5% of the world's population, almost 25% of all the world's prisoners are housed in U.S. prisons and jails.[76] The vast majority of these individuals are in prison for non-violent crimes, often related to drugs and drug addiction.

For decades, the ever-increasing number of inmates has proceeded unchecked and largely unexamined. "Tough on crime" political rhetoric and a purely punitive correctional purpose have fueled policy choices and financial and legal decisions. But public discourse is now changing, in part fueled by the current financial crisis. To seize this moment, a national consensus should be reached on evidence-based policies that will ensure public safety while at the same time ensuring rational, cost-effective policies that work to return prisoners to the community to be productive, law-abiding citizens.

RECOMMENDATIONS

1. Sexual Violence in Prisons

A. *The Prevalence of Sexual Assault in Correctional Facilities and Lack of Accountability for Sexual Abusers*

Sexual violence behind bars has reached crisis proportions. PREA called for the development of binding national standards for the prevention, detection, response, and monitoring of sexual violence behind bars, and for the Attorney General to publish a final rule adopting binding national standards within one year.[77] However, the Attorney General has yet to implement the standards, and appropriations for PREA have been drastically cut every year since its passage, making the prospects of assisting states and monitoring their compliance with the standards even more challenging.[78]

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[74] AMERICAN BAR ASSOCIATION, *supra* note 65, at 23-3.8 (3d ed. 2010).
[75] *See* MINTON, *supra* note 3; WEST, *supra* note 3.
[76] *See* SCHMITT ET AL *supra* note 1.
[77] 42 U.S.C. § 15606(c).
[78] STOP PRISON RAPE, PRISON RAPE ELIMINATION ACT UPDATE, *supra* note 27, at 7.

B. ***Fully Implement PREA***

Legislative

Congress should provide sufficient appropriations for PREA. When PREA was passed, Congress authorized $60 million per year in funding through 2010.[79] Since then, however, appropriations have dropped substantially—from an initial level of $35 million annually in fiscal years 2004 and 2005 to approximately $18 million annually in fiscal years 2006 through 2008. Because of the reduced funding, the state grants authorized by PREA have not been awarded since Fiscal Year 2006.[80] At a minimum, Congress should retain current funding levels for PREA, with money earmarked for state and county grants.

Additionally, Congress should hold oversight hearings with the Attorney General and relevant members of his staff to ensure that the Department of Justice is meeting its obligations under PREA. The Attorney General was obliged under PREA to ratify national standards by June 2010, but has failed to do so. Indeed, no new deadline for ratification of national standards has been set. As noted above, the Department has also failed to administer the state grants program or prioritize funding for it within its proposed budget. Congress must hold the Administration accountable for its obligations under the law.

Executive

The Attorney General should ratify national standards addressing sexual violence in detention. The National Prison Rape Elimination Commission spent more than five years holding public hearings, convening expert working groups, and consulting with the full range of stakeholders – including corrections officials, advocates, policymakers, and prison rape survivors – to come up with their proposed standards. These recommendations represent a compromise, balancing the fiscal and security concerns of officials with the rights of inmates to be free from sexual abuse. The Attorney General should defer to the expertise gathered by the Commission and the compromise it established by ratifying the basic provisions that it proposed.

The Department of Justice should establish meaningful compliance monitoring of PREA standards. For these standards to have an impact, the Department must monitor compliance and hold corrections agencies accountable for meeting these basic obligations. The Department of Justice should establish general guidelines for local compliance monitoring and then provide federal oversight to ensure sufficient accountability.

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[79] *See* 42 U.S.C. §§ 15603(e), 15604(c), 15605(g)(1).

[80] *National Prison Rape Elimination Report and Standards: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 5 (2009) (statement of Melissa Rothstein, Just Detention International).

2. Failures of the Prison Litigation Reform Act (PLRA)

A. *The Prison Litigation Reform Act Impedes Prisoners' Access to Justice*

While PLRA was originally intended to stem frivolous prisoner lawsuits, in practice it often denies justice to victims of rape, assault, religious restrictions, and other rights violations. PLRA's "physical injury" and exhaustion requirements have severely limited prisoner's ability to address violations of their constitutional rights and other serious abuses. Certain provisions of PLRA must be amended or repealed in order to restore meaningful access to the courts for incarcerated adults and youth.

B. *Address the Problems Created by PLRA*

Legislative

To address the unintended consequences of PLRA, Congress should reintroduce and pass legislation similar to the Prison Abuse Remedies Act (PARA),[81] originally introduced in the 110th Congress, and the Prison Abuse Remedies Act of 2009 (PARA),[82] introduced in the 111th Congress.[83] The House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, held hearings on November 8, 2007 and April 22, 2008 regarding the problems with PLRA and the recommended reforms.[84] However, neither bill received a committee vote. Congress should pass legislation containing similar provisions to PARA's to address the over-reach of PLRA. The legislation should:

- Repeal the provision in 42 U.S.C. § 1997e(e) prohibiting prisoners from bringing lawsuits for mental or emotional injury without demonstrating a "physical injury."

- Amend the requirement in 42. U.S.C. § 1997e(a) for exhaustion of administrative remedies to instead require prisoners to present their claims to responsible prison officials before filing suit. Should prisoners fail to do so, the amendment should require courts to stay the case for up to 90 days and return those claims to prison officials to provide them the opportunity to resolve the complaint administratively.

- Repeal 18 U.S.C. § 3626(g), 28 U.S.C. §§ 1915(h), 1915A(c), and 42 U.S.C. § 1997e(h), which extend PLRA to juveniles confined in juvenile facilities.

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[81] H.R. 4109, 110th Cong. (2007).
[82] H.R.4335, 111th Cong. (2009).
[83] The only substantive difference between the two bills, which were both introduced by Rep. Robert C. Scott (D-VA), is that the earlier bill would have eliminated PLRA restrictions on awards of attorneys fees. The later bill would not.
[84] *H.R. 4109, the Prison Abuse Remedies Act of 2007 (PARA): Hearing Before the H. Subcomm. on Crime Terrorism and Homeland Sec.*, 100th Cong. (2008). For testimony from these hearings, see STOP ABUSE AND VIOLENCE EVERYWHERE COALITION, http://www.savecoalition.org/latestdev.html (last visited Jan. 18, 2011).

- Restoring judicial discretion to grant the same range of remedies in prisoners' civil rights actions that are available in all other civil rights cases by repealing 18 U.S.C. § 3626.

- Amend 28 U.S.C. §§ 1915(a), (b) to allow indigent prisoners whose cases are found to state a valid claim at the preliminary screening stage to pay a partial filing fee rather than the full filing fee (currently $350 in district courts and $450 in appellate courts).

- Amend the "three-strikes provision" in 28 U.S.C. §1915(g) (which requires indigent prisoners who have previously had three cases dismissed to pay the full filing fee up front, except in cases of imminent danger of serious physical harm) by limiting it to prisoners who have had three lawsuits or appeals dismissed as malicious within the past five years.

Executive

The Administration should support amending PLRA and commit to signing reforms to PLRA that Congress passes.

3. **Transparency and Oversight in Correctional Institutions**

A. ***Lack of Transparency and Accountability in Correctional Institutions***

Despite the massive expenditure of taxes and the profound effect that prison has on the individual, the community, and public safety, there is very little oversight of prisons, jails, and juvenile detention facilities, or public accountability for what takes place behind bars. Currently, there are no national standards for the treatment of prisoners and no systemic national oversight to ensure that the constitutional rights of prisoners are protected. Further, since the enactment of PLRA in 1996, the traditional power of the federal courts to provide oversight has been drastically undercut. As a result, it is essential that the government implement alternative forms of oversight.

B. ***Build Transparency and Accountability in Corrections***

Legislative

Congress should reauthorize DICRA. DICRA expired in 2006 and has not been reauthorized. Congress should reintroduce and pass this critical legislation.[85]

Congress should strengthen the JJPDA[86] to include oversight of conditions of confinement in juvenile facilities and to ensure that youth charged as adults are kept out of adult jails pre-trial. This would improve the likelihood of safe and humane conditions of confinement for youth in both juvenile and adult facilities, and keep youth out of adult jails and prisons completely. .

[85] 42 U.S.C. § 13701.
[86] 42 U.S.C. §§ 5601 *et seq.*

Congress should reintroduce the Private Prison Information Act.[87] The Act, introduced in the House in April of 2007 with 25 cosponsors, would require prisons and other detention facilities holding federal prisoners or detainees under a contract with the federal government to make the same information available to the public that federal prisons and detention facilities are required to do by law. Private prisons would be subject to the same Freedom of Information Act (FOIA)[88] provisions as the BOP in order to build transparency and accountability in the work of federal contractors. Currently, BOP is subject to FOIA as a bureau of the federal government.

Congressional committees in both the House and Senate should hold oversight hearings to investigate conditions at BOP facilities. The hearing could areas of concern including:

- Federal death row conditions;
- BOP's required reporting under the Second Chance Act regarding the shackling of pregnant women prisoners under its jurisdiction;
- Medical care at federal facilities, including staffing ratios;
- Discretion given to wardens to limit First Amendment rights through special administrative measures (SAMS);
- Regulation and oversight of Communication Management Units (CMUs);
- Treatment of prisoners with mental illness;
- Treatment of prisoners held in long-term isolation and policies to ensure humane treatment and the availability of meaningful due process for prisoners who may be subject to such conditions, as well as the availability of plans for prisoners to earn their way out of restrictive housing;[89] and
- BOP's response to the findings of Office of Inspector General (OIG) audits, investigations, special reviews and reports.

Finally, Congress should fund National Institute of Justice research to look into state and local independent oversight models to determine which are most successful.

[87] H.R. 1889, 100th Cong. (2007).
[88] 5 U.S.C. § 552.
[89] *See* Section VI *infra*.

Executive

The role of the OIG, which conducts independent investigations, inspections, special reviews, and audits of Department of Justice programs and personnel, including the BOP, should be expanded. The OIG should be fully funded and expanded to allow for greater and more effective oversight of BOP's facilities across the nation and the over 200,000 individuals incarcerated therein. The Attorney General should ensure that BOP is held accountable for both responding to the OIG's report findings and immediately taking steps to remedy any problems or areas of concern identified by the OIG.

The Special Litigation Section of the Department of Justice's Civil Rights Division should be fully funded and expanded to enable more robust enforcement of the Civil Rights for Institutionalized Persons Act (CRIPA),[90] a federal law that enables the Attorney General to conduct investigations and litigation regarding conditions of confinement in state and local institutions, including jails, prisons, and youth detention centers.

The President should sign the Optional Protocol to the Convention Against Torture (OPCAT)[91] to enhance oversight and accountability in U.S. prisons, jails, and youth detention centers. As a party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the United States is obligated to "take …measures to prevent acts of torture" and "keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for custody and treatment of persons subjected to any form of arrest, detention or imprisonment … with a view to preventing cases of torture."[92] Consistent with these obligations, parties to the CAT developed the OPCAT, which seeks to prevent torture and other forms of ill-treatment by establishing a system in which independent international and national bodies send inspectors on regular visits to places of detention.[93] The U.S. is not currently a party to OPCAT, although it is a party to CAT. The President should join the Protocol as a first step towards creating a national system of oversight and accountability for the nation's prisons, jails, and youth detention centers that focuses on preventing abuses.

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[90] 42 U.S.C. § 1997a *et seq*.

[91] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, June 22, 2006, UN Doc. A/RES/57/199 (2003).

[92] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 2, 11, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987 and ratified by the U.S. October 14, 1991).

[93] Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (December 18, 2002).

4. The Need for Effective Rehabilitation and Reentry

A. *High Rates of Recidivism*

An estimated two-thirds of the 650,000 people returning home from prison will be re-arrested for a felony or serious misdemeanor within three years.[94] Basic services can and should be provided to incarcerated individuals to reduce their chances of reoffending. Alternatives to incarceration should be offered for those who do not pose a real risk to the public. In addition, merit-based programs to encourage good behavior and rehabilitation during periods of incarceration, and programs fostering family ties during incarceration are essential in the effort to reduce juvenile recidivism.

Failure to fully to provide sufficient rehabilitation to prisoners is particularly disappointing given that U.S. voters favor rehabilitation for prisoners over a punishment-only system by a margin of eight to one.[95] In fact, 80% of voters feel that job training, medical care, affordable housing, and student loans are important elements of crime prevention.[96] These measures are supported by the public, can save millions in corrections costs, and reduce recidivism.

B. *Reduce Recidivism and Increase Effective Rehabilitation*

Legislative

Congress should pass legislation similar to the Federal Prison Work Incentive Act of 2008[97] to reform federal "good time" calculation. This legislation should ensure that Congress original intent was met by making certain that prisoners receive the full 15% "good time" credit for maintaining good behavior while incarcerated.. The legislation should also apply to federal policies those policies now prevalent in the states and in the Model Penal Code, which provide for both presumptive good time (15%) and some amount of additional time off for participation in certain rehabilitation programming (15%) in order to encourage rehabilitation and lower recidivism rates.

Congress should draft and introduce a "reentry behind bars" bill that would provide grants to states to provide programs to better prepare prisoners for reentry following the completion of their prison sentence. A poll of both Democrats and Republicans revealed that 71% thought *more* tax dollars should be invested in job training, education and drug treatment for prisoners as an

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[94] Christy A. Visher and Jeremy Travis, The Urban Institute Justice Policy Center, *Transitions from Prison to Community: Understanding Individual Pathways* 29 ANN. REV. SOCIOLOGY 89-113 (2003).
[95] BARRY KRISBERG & SUSAN MARCHIONNA, NAT'L COUNCIL ON CRIME & DELINQ., FOCUS, ATTITUDES OF U.S. VOTERS TOWARD PRISONER REHABILITATION AND REENTRY POLICIES (Apr. 2006), *available at* http://www.nccd-crc.org/nccd/pubs/2006april_focus_zogby.pdf.
[96] *Id*.
[97] H.R. 7089, 100th Cong. (2008).

effective means of reducing recidivism.[98] A majority thought that social services and rehabilitation were an essential element of corrections.[99] This bill should provide grants to states to provide programs that better prepare prisoners for successful reentry to the community, including:

- Drug treatment programs in prison for all drug offenders, as well as funding for the Residential Substance Abuse Treatment (RSAT) program provided that they do not impose additional penalties on participants, such as loss of good time for non-completion of a program;
- Coordination between prison programs and community providers;
- Government-issued ID cards upon release;
- Enrollment in Medicaid prior to release (so that it is available upon release);
- Alternatives to incarceration for non-violent offenders;
- Merit-based reductions in sentences for non-violent offenders;
- SSA prerelease agreements for those eligible for disability assistance;
- Requirement that individuals under 18 shall not be housed in adult facilities;
- Restoration of Pell Grant eligibility to prisoners;
- Access to clean needles and condoms in order to reduce the incidence of HIV/AIDS, Hepatitis, and other illnesses;
- Access to educational programs/job training for every prisoner;
- Access to religious services;
- Transportation to prisons for prisoners' families;
- Alternatives to incarceration for pregnant women and mothers;
- Family-friendly visitation policies and family strengthening programs to promote healthy family ties between prisoners and their families; and
- Regulating the cost of collect calls from prisons to help maintain family ties.

[98] Third Way, Third Way Crime Poll Highlights (2007) http://content.thirdway.org/publications/101/Third_Way_Polling_-_Third_Way_Crime_Poll.pdf (last visited Jan. 26, 2011).
[99] *Id*.

Congress should introduce legislation to evaluate the effectiveness of reentry by tracking of the ability of former BOP prisoners to find employment and housing, pursue education, and avoid recidivism. This would be consistent with the recommendations of the Commission on Safety and Abuse in America's Prisons.[100]

Congress should fully fund the Elderly Prisoners program under the Second Chance Act. This program would allow prisoners 65 years old or older who have served at least ten years of their sentence the opportunity to serve the remainder of their sentence in home detention. This program would only be available for non-violent offenders who are not serving a life sentence. Given the enormous cost of eldercare in the prison system, this program would maintain public safety, while reducing prison costs.[101]

Congressional committees in both the House and Senate should conduct oversight hearings of BOP's administration of the programs described in the section below to ensure that BOP is complying with its obligations under the law, and if it is not, identifying the tools and policies necessary to ensure that BOP can and will meet those obligations.

Executive

To ensure lawful operation of government programs, cost-savings and efficient use of tax-payer funds, effective programming to reduce recidivism, humane treatment of prisoners, and increased safety in BOP facilities, the Attorney General and the Director of BOP should immediately review BOP's administration of the programs described below and take immediate steps to ensure that BOP is complying with its obligations under the law and fulfilling its designated role in each program area.

i. ***Drug Treatment***

BOP has failed to provide the congressionally-mandated, one-year sentence reduction incentive for thousands of drug addicted offenders who seek to participate in BOP's RDAP. BOP should immediately change its administration of the program to permit timely participation which would allow for an immediate savings of millions of dollars.

A 2002 poll found that two-thirds of Americans agree that drug abuse is a medical problem that should be handled through counseling and treatment rather than prison sentences.[102] A

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[100] *See* GIBBONS & KATZENBACH, *supra* note 14.
[101] *See* NATIONAL INSTITUTE OF CORRECTION, DEPT. OF JUST., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES (2004).
[102] OPEN SOCIETY INSTITUTE, CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM, SUMMARY OF FINDINGS (Feb. 2002), *available at* http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf.

plurality of Americans think "tough on crime" strategies aren't working and that an approach that focuses on the effectiveness of programs, like RDAP, is a more sensible approach to crime reduction.[103] Utilizing these programs will increase public safety, save money by reducing recidivism, and garner the support of the general public.

ii. ***Community Corrections Facilities***

BOP should implement its mandate, as permitted under the Second Chance Act. BOP has consistently underutilized its authority under 18 USC § 3621(b) and § 3624(c) to permit prisoners to serve some or all of their sentences in CCCs and home detention as opposed to prison. On April 9, 2008, the President signed the Second Chance Act, which provides the BOP with an opportunity to substantially increase utilization of community corrections.[104] Unfortunately, BOP has failed to implement its new mandate, undermining the intent of Congress and opening the way for yet more litigation.

iii. ***Compassionate Release and Second Look Resentencing***

BOP has drastically underutilized its authority under 18 U.S.C. § 3582(c)(1)(A)(i) to petition the sentencing court for reduction of a prisoner's term of imprisonment where there have been "extraordinary and compelling" changes in the prisoner's circumstances since the sentence was imposed. The BOP should more often provide sentencing judges with opportunities for second look resentencing. These sentence reductions would save the BOP resource by reducing the prison population, generally, and sparing it the particularly costly need to provide medical care costs for seriously ill prisoners whose prolonged incarceration does not further the goal of increased public safety.[105]

iv. ***Clemency Recommendations***

For at least 16 years BOP has declined to take a position on the merits of clemency applications, abdicating its historical role to assist the Pardon Attorney in identifying appropriate cases to recommend to the President for early release.[106] In fact, the Pardon Attorney has at this point stopped asking BOP for a recommendation on the merits of a clemency case.[107] Engaging in the process of evaluating the merits of clemency petitions would allow BOP to help identify those prisoners in the system most capable of taking full advantage of clemency and successfully reentering their communities.

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[103] *Id.*
[104] Pub. L. No. 110-199.
[105] *See Federal Sentencing Reform*, SMART ON CRIME (2011).
[106] For a history of the role of the Bureau of Prisons in clemency petitions, see Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons, Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000), *available at* http://www.pardonlaw.com/materials/collarbuttons.pdf.
[107] *See Pardon Power and Executive Clemency*, SMART ON CRIME (2011).

5. Over-reliance on the Use of Harmful Long-Term Isolated Confinement

A. *Isolated Confinement is Overused and Harmful*

The monetary cost of using isolated confinement, coupled with the human cost of increased physiological and psychological suffering, far outweighs any purported benefits. In order to build a fair, effective and humane criminal justice system, we must work to curb the use and misuse of isolated confinement.

B. *Reduce the Use of Long-term Isolation and Design Effective Alternatives*

Legislative

Congress should introduce a bill limiting the use of long-term isolated confinement in BOP facilities. That bill should incorporate by reference Chapter 23 of the ABA Treatment of Prisoners Standards related to long-term isolated confinement, and require compliance with these standards. The bill should also require re-socialization for prisoners subject to such isolated confinement before they are released back into the community. This will protect public safety and assist individuals subject to isolation in reintegrating successfully into society. Such "de-briefings" should take place in phases, starting at least six months before the end of their sentence. All prisoners held in isolated confinement-like housing should be included in this re-socialization process. De-briefing programs should include clinical staff, social workers, and education staff to provide counseling and life skills to prepare prisoners for release to the community.

Executive

The Government Accountability Office should conduct a study of the effectiveness and availability of mental health care for prisoners in long-term isolated confinement. The study should specifically evaluate the numbers of mentally ill prisoners confined in segregated housing as defined by ABA Treatment of Prisoners Standard 23-1.0(o); the clinical treatment being provided to those mentally ill prisoners; whether or not there are policies and protocols in place and being used to ensure that the mentally ill in BOP are not housed in segregation housing; and the length of stay for mentally ill prisoners in segregated housing.

BOP should adopt policies and practices for its use of long-term isolation consistent with the standards established by the ABA's Treatment of Prison Standards, including:

- Adopting procedures to evaluate whether segregation is warranted prior to placing or retaining a prisoner in isolated confinement;[108]

[108] ABA STANDARDS FOR CRIM. JUST., TREATMENT OF PRISONERS, *supra* note 65, at 23-2.9.

- Placing limits on disciplinary segregation. In general stays should be brief and should rarely exceed one year. Longer-term segregation should be imposed only if the prisoner poses a continuing and serious threat. Segregation for protective reasons should take place in the least restrictive setting possible;[109]

- Decreasing extreme isolation by allowing for in-cell programming, supervised out-of-cell exercise time, face-to-face interaction with staff, access to television or radio, phone calls, correspondence, and reading material;[110]

- Decreasing sensory deprivation by limiting the use of auditory isolation, deprivation of light and reasonable darkness, and punitive diets;[111]

- Allowing prisoners to gradually gain more privileges and be subjected to fewer restrictions, even if they continue to require physical separation;[112]

- Refraining from placing prisoners with serious mental illness in what is an anti-therapeutic environment. Instead maintain appropriate secure mental-health housing for such prisoners;[113] and

- Monitoring prisoners in segregation for mental-health deterioration and dealing with deterioration appropriately if it occurs;[114]

6. Misuse of the Prison System and Over-incarceration

A. *Over-Use of Incarceration in America*

In 2008 alone, state and the federal governments spent $68 billion on corrections. Corrections expenses were the fastest growing segment of state budgets. Over the last two decades, public spending on corrections rose over 300 percent, eclipsing funding for every other essential government service but Medicaid. There is now a sense that we must find a different way. To seize this moment, policymakers should adopt evidence-based improvement that will ensure public safety while at the same time ensuring rational, cost-effective policies that work to return prisoners to the community to be productive, law-abiding citizens.

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[109] *Id*. at 23-2.6, 23-5.5.
[110] *Id.* at 23-3.7, 23-3.8.
[111] *Id.*
[112] *Id.* at 23-2.9.
[113] *Id*. at 23-2.8, 23-6.11.
[114] *Id*. at 23-6.11.

B. ***Design an Evidence-Based Approach to Criminal Justice***

Legislative

Congress should introduce and pass legislation similar to the National Criminal Justice Commission Act of 2009, introduced in the Senate by Senator Jim Webb (D-VA).[115] The bill received widespread bipartisan support and had 39 cosponsors in the Senate, including Chairman of the Senate Judiciary Committee Senator Patrick Leahy (D-VT), former Chairman of the Subcommittee on Crime and Drugs Senator Arlen Specter (D-PA), former Judiciary Committee Chair Senator Orrin G Hatch (R-UT), and Republican Judiciary Committee member Senator Lindsey Graham (R-SC). A companion bill introduced by Rep. Delahunt (D-MA) passed the House on July 27, 2010.[116]

Congress should also appropriate funding for the bipartisan commission established by the National Criminal Justice Commission Act to examine appropriate, humane, and cost-effective use of the prison system.

Executive

The President, the Attorney General, and the Department of Justice should support re-examination of current criminal justice practices and goals, and work to implement the recommendations of the Criminal Justice Commission regarding the appropriate use of incarceration and alternative forms of punishment.

[115] S. 714, 111th Cong. (2009); *See also System Change*, SMART ON CRIME (2011).
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APPENDICES

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Sexual Violence in Prisons

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Amending the Prison Litigation Reform Act

Elizabeth Alexander, Law Offices of Elizabeth Alexander (http://www.fedcure.org/bios/alexander.shtml)

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Transparency and Oversight in Correctional Institutions

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Drug policies and reentry

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Jay Rorty, ACLU Drug Law Reform Project (http://www.aclu.org/drug-law-reform/about-aclu-drug-law-reform-project)

Eric Sterling, Criminal Justice Policy Foundation (http://www.cjpf.org/about/ericbio.html)

Jasmine Tyler, Drug Policy Alliance (http://www.drugpolicy.org/about/keystaff/jasminetyler/)

Youth in adult facilities and reentry

Liz Ryan, Campaign for Youth Justice (http://www.campaignforyouthjustice.org/contact-us.html)

Over-reliance on solitary confinement

Laura Rovner, University of Denver, School of Law (http://law.du.edu/index.php/profile/laura-rovner)

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Bruce Western, Harvard University (http://www.wjh.harvard.edu/soc/faculty/western/)

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Sexual Violence in Prisons

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