



JUSTICE ROUNDTABLE

A Roadmap for Criminal Justice Reform

Executive and Legislative Recommendations from
the Justice Roundtable Working Groups

January, 2017

The Justice Roundtable is a broad-based coalition of more than 100 advocacy, service, faith, and research organizations working to reform criminal justice laws and policies. As a convener of experts and stakeholders from across the nation, we serve as a resource to the President and Executive Branch officials and to Members of Congress, providing background and policy recommendations to achieve a criminal justice system that is more effective, just, equitable, and humane for all.

Since 2002, the Justice Roundtable has been a hub for information-sharing and coordination of federal advocacy efforts of the Washington criminal justice community. The Roundtable advances crucial justice reforms within the executive, legislative, and judicial branches of government. Because our network is broad, we benefit from diverse perspectives, unique expertise, and the strength of our respective constituencies. The Roundtable seeks to influence public policy at the federal level to accomplish the following justice and public safety goals:

- reduce mass incarceration and over-reliance on harsh punishment;
- eliminate racial disparities and promote fairness and equity;
- provide effective alternatives to incarceration and new approaches to address crime and drug policy;
- emphasize prevention over punishment;
- reintegrate formerly incarcerated people into society; and
- bring domestic justice policies into conformity with international human rights norms.

Justice Roundtable members, partners, and allies span the political spectrum from left to right and everything in between. We reflect the voices of religious and other moral leaders in our society. We represent people whose daily work is within justice, education, and health and mental health systems. And we include the inspiration of people directly impacted by the criminal justice system and their families. For more information on the Justice Roundtable and its work and accomplishments, we encourage you to visit our website at www.justiceroundtable.org.

The urgency for significant reform of our justice system continues to build. There is no better time to provide these practical recommendations to the new Administration, Congress, and policymakers around the country. Now is the time to achieve a justice system that truly lives up to its promise of public safety, health, and justice for all.

Nkechi Taifa
Convener, Justice Roundtable

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INTRODUCTION

The new Administration and the 115th Congress have the opportunity to build a legacy of bipartisan leadership towards a more humane and just criminal justice system, one that supports true public safety, health, and justice for all.

Over the past four to five decades, U.S. criminal justice policies have driven an increase in incarceration rates that is unprecedented in this country and unmatched elsewhere in the world. Our country has 25 percent of the world's incarcerated individuals, despite having less than five percent of the world's population. According to the U.S. Justice Department's Bureau of Justice Statistics, an estimated 6,741,400 persons were supervised by adult correctional systems in the U.S. at the end of 2015; and 2,173,800 of them were incarcerated in state or federal prisons or in local jails. The most recent data available indicate that direct spending on corrections systems – prisons, jails, parole, and probation – is approximately \$81 billion per year, and this figure does not include the related costs of policing and court systems.

The dollar amounts are staggering; yet the toll on society of U.S. criminal justice policies goes far beyond the enormous number of dollars spent. The human costs – for individuals, their families, and their communities – are devastating, and the burden is not equally shared. At every stage of the criminal justice system, poor people and people of color are significantly overrepresented. African Americans make up 13 percent of the U.S. population, yet comprise 40 percent of those incarcerated. If current trends continue, one in three Black males born in 2001, and one in six Latino males born in that year, will go to prison at some point during his lifetime – compared to just one in 17 White males. The number of women in prison in the U.S. has increased at a rate 50% higher than men since 1980; LGBTQ individuals are dramatically overrepresented and face unique risks to their health and safety; and people with mental, physical,

and mental health disabilities often wind up in jail or prison by default, due to lack of adequate care in their communities.

These challenges – of huge taxpayer costs and economic waste, devastation to families and communities, and racial bias and disproportionate impact – arise out of our unique American culture and history. Yet we can be hopeful. At the state and local levels, policymakers across political, geographic, racial, and ethnic lines are reevaluating our criminal justice policies and adopting promising, commonsense reforms. In red, blue, and purple states alike, people are coming together seeking more effective ways to respond to public safety concerns. They are changing how they respond to drug use and misuse, finding ways to build community trust and support for law enforcement, improving reentry success rates, and better ensuring the fair functioning of the justice system.

The federal government, however, has been slower to act. Federal criminal laws have expanded far beyond crimes traditionally understood to be the purview of the federal government, and they rely heavily on extremely long and often mandatory prison sentences. Additionally, because federal policies and incentives set examples and drive decisions made at the state, local, and tribal levels, they affect not only those directly involved in the federal system, but also the millions more in states and local communities.

When considering the role and responsibility of the federal government, it is critical to recognize that the strategies and apparatus of the “drug war” have significantly fueled our criminal justice policies and their impact at every level. The astounding growth and reach of the criminal justice system over the recent decades cannot be adequately explained by rising crime rates or population growth. Instead, the increases in arrests, incarceration, and collateral consequences have been driven in large part by our nation's outdated and ineffective war on drugs. Drug war policies have justified increases in incarceration, furthered infringement on civil and human rights, clouded research and scientific

development of prevention and treatment options, and made the criminal justice system the first line of response for addressing almost any social or public health concern. We see the failures of the drug war playing out throughout our nation, from the largest urban centers to suburban neighborhoods to small rural towns – in families torn apart, rising overdose death rates, and so many more negative effects of inadequate and counterproductive policies. No family, no community, remains untouched.

This document draws upon the expertise of the working groups of the Justice Roundtable and others to provide policy recommendations to the new Administration and 115th Congress. It provides concrete proposals that, if adopted, would move us in the direction of a justice system that meets the public safety needs of our nation while respecting the dignity of all persons involved in the criminal justice system: victims of crimes, individuals charged with crimes, law enforcement, and the families and communities that surround them.

We urge the Administration to act swiftly to establish a criminal justice reform agenda that reflects the following overarching principles:

- reduce incarceration and overreliance on harsh punishment;
- protect and respect the human rights of all individuals involved in the criminal justice system, including victims, people charged or convicted of crimes, law enforcement, and their families and communities;

- achieve racial justice in all aspects of our justice systems;
- meet the needs of diverse and commonly overlooked constituencies that are impacted by the justice system including those of women, low income individuals, LGBTQ people, and people with disabilities; and
- build complete and reliable data to inform our policymaking and ensure fairness and effectiveness in all contexts.

The recommendations that follow do not address every aspect of reforming the criminal justice system. They do, however, offer policymakers concrete and specific ideas that reflect these overarching principles and that would improve our system so that it truly serves the interests of justice, public safety, and human rights.

The Justice Roundtable would like to thank all of its Working Group chairs and members for providing context and developing the policy recommendations in this document. Please find a list of contributors and collaborators in the acknowledgements section at the end of this report.*

* The individual recommendations herein are not necessarily the position of every contributor to or participant in the Roundtable, nor of the experts listed, and their involvement should not be construed as an endorsement of each recommendation. Instead, the Roundtable's Working Groups have developed general consensus around these recommendations, drawing on the input and expertise of many contributors.

I. LAW ENFORCEMENT

Overview

Over the past two years, fatal police shootings have generated national attention and dialogue around police-community relationships. Some police practices have led to a deep mistrust between law enforcement and the people they have sworn to serve and protect. Relationships are particularly troubled between police and communities of color, immigrants, LGBTQ people, religious minorities, people with disabilities, women, and youth.

The federal government has an important role to play in restoring public safety and trust between law enforcement and the communities they serve. As the 2016 Republican party platform notes, “the next president must restore the public’s trust in law enforcement.”¹ Policy at the federal level should promote systemic police reform that guarantees civil liberties and rights to everyone and ensures compliance with human rights obligations under international law and standards. In addition to providing policy guidance and oversight to states and localities, it is critical that the federal government and federal law enforcement serve as a positive example for state and local law enforcement. While the following recommendations focus primarily on ways that the federal government can support and guide state and local law enforcement as they serve their communities, many of the concepts are also directly applicable to the daily actions and work of federal law enforcement officers themselves.

I. Body Worn Cameras

Summary of the Issue

In recent years, there has been a call to mandate the use of body-worn cameras (BWCs) to promote

accountability and transparency in police-community interactions. Law enforcement agencies across the country continue to adopt BWCs at a rapid pace. Today, 16 of the country’s 20 largest police departments have begun to outfit their officers with cameras, and “one expert has estimated that between 4,000 and 6,000 of the country’s 18,000 plus law enforcement agencies are planning to adopt or have already adopted BWCs.”² With the right privacy and other civil rights and civil liberties protections in place, BWCs can benefit both communities and law enforcement.

Members of Congress also recognize the need to implement BWCs with civil rights and civil liberties in mind. Senator Tim Scott (R-SC) said “that there are multiple and complex questions surrounding the use of body cameras, including privacy concerns, data retention and disclosure issues, and the effect of recording on community relationships.”³ Similarly, Senator Charles Grassley (R-IA) stated that there are “practical questions” about “how the privacy of people’s homes” would be maintained in light of the widespread use of body cameras by law enforcement.⁴ The Police Executive Research Forum also shares the understanding that law enforcements’ deployment of BWCs will require “broad disclosure polic[ies]” in order to “promote transparency and accountability.”⁵

Background

The 2015 President’s Task Force on 21st Century Policing Report includes numerous recommendations related to BWCs.⁶ In 2015 and 2016, the Department of Justice (DOJ) awarded millions of dollars in funds to local departments for development of BWC programs. The Department created the “Body-Worn Toolkit” to serve as a resource for state and local law enforcement in the development of those policies.⁷

BWC legislation in the 114th Congress included the Police Creating Accountability by Making Effective Recording Available (Police CAMERA) Act, which would establish a pilot grant program to assist state and local law enforcement agencies in purchasing

body-worn cameras and require that certain policies be in place before those agencies implement cameras. Senator Tim Scott (R-SC) also introduced the Safer Officers and Safer Citizens Act to help provide state, local, and tribal police departments with resources to outfit officers with BWCs.

Executive Branch Proposals

- The Department of Justice should require federal body-worn cameras (BWCs) grant recipients to implement BWCs with effective policies to ensure camera programs are protecting the civil rights and privacy interests of communities.

Legislative Proposals

- Congress should enact legislation that ensures BWCs are implemented with effective policies that protect the civil rights and privacy interests of the communities where camera programs are in use.

Resources and Experts

- Matthew Feeney, CATO Institute
- Chuck Wexler, Police Executive Research Forum

II. Civil Asset Forfeiture

Summary of the Issue

Federal civil asset forfeiture policy gives law enforcement both the power and the incentive to take property away from someone who is merely suspected, but has not been convicted, of a crime.⁸ This property can be cash, cars, homes, small businesses, or anything else that a law enforcement officer believes is connected to a crime. Under this policy, even if the owner of the property is never

convicted, it can be difficult or impossible for them to get their property back.

This practice generates billions of dollars in revenue annually for law enforcement agencies at all levels, federal, state, and local, as most are permitted to keep the assets they seize, creating a perverse incentive for agencies to abuse their forfeiture authority. In 2014, federal forfeiture policies took in \$4.5 billion,⁹ some of it through the federal government's equitable sharing program, which allows state and local law enforcement to gain access to property or funds seized pursuant to provisions in federal law or through the work of joint task forces of federal as well as state or local law enforcement.¹⁰

Individuals pay a high price, not only financial but also personal and emotional, when their property is taken. Civil asset forfeiture is a significant threat to everyone's civil rights and civil liberties. It disproportionately impacts small business owners, those of modest means,¹¹ and people of color who may be discriminatorily profiled.¹²

Background

Congress last addressed federal civil asset forfeiture laws in the Civil Asset Forfeiture Reform Act (CAFRA) of 2000.¹³ CAFRA provided several procedural fixes to the federal forfeiture system but did not address the profit incentive driving forfeiture. In recent years, 18 states and the District of Columbia have adopted bipartisan forfeiture reforms that strengthen protections for property owners.¹⁴

There were also bipartisan efforts at the federal level in the 114th Congress, responding to the shortcomings of current federal forfeiture laws and policies. The Fifth Amendment Integrity Restoration (FAIR) Act, introduced by Representative Tim Walberg (R-MI) and Senator Rand Paul (R-KY) in the 114th Congress, offers procedural reforms, including increased burden of proof and access to counsel, and addresses the profit incentive.¹⁵ Procedural reforms are also provided by the

Deterring Undue Enforcement by Protecting Rights of Citizen from Excessive Searches and Seizures (DUE PROCESS) Act, which was introduced by Representative Jim Sensenbrenner (R-WI) and Representative John Conyers, Jr. (D-MI), and reported out of the House Judiciary Committee. DUE PROCESS was also introduced in the 114th Congress in the Senate by Judiciary Committee Chairman Chuck Grassley (R-IA) and then-Ranking Member Patrick Leahy (D-VT).

Executive Branch Proposals

- The Administration should support bipartisan efforts in Congress to enact civil asset forfeiture reform.
- The Department of Justice (DOJ) should collect and report data on civil asset forfeiture practices, respect state forfeiture laws, and eliminate the equitable sharing program.

Legislative Proposals

- Congress should pass comprehensive civil asset forfeiture reform legislation that addresses the procedural barriers to protection and relief for property owners in the federal forfeiture system and eliminates the profit incentive driving forfeiture.

Resources and Experts

- Brad Cates, Counselor at Law, Brad Cates, Esq.
- Darpana Sheth, Institute for Justice
- Louis Rulli, Practice Professor of Law and Clinical Director, The University of Pennsylvania Law School

III. Data Collection and Training

Summary of the Issue

Over the past few years, national attention has focused on the use of force by law enforcement in the United States. According to a study by The Guardian, people of color are disproportionately subjected to such force, with minorities constituting 47.2% of all persons killed by police in the U.S. in 2015.¹⁶ Unfortunately, this statistic cannot be compared to data kept by the federal government because official data are largely incomplete. Only 224 of 18,000 law enforcement agencies reported fatal police shootings to the Federal Bureau of Investigation (FBI) in 2014, though evidence suggests the actual number of fatal shootings is far greater.¹⁷ The 2013 FBI Uniform Crime Report indicates that there were 461 justifiable homicides by law enforcement that year.¹⁸

With The Guardian and The Washington Post now keeping track, however, we have reason to believe the annual number of people killed by police in the U.S. exceeds 1000.¹⁹ Data collection by media outlets was critical to understanding police-civilian encounters over the past year and a half, but such accounting should be the responsibility of the federal government. Accurate, reliable data will provide the best depiction of twenty-first century policing, allowing police leadership and policing experts to better shape law enforcement tactics and policies.

Background

Federal Bureau of Investigation Director James Comey called our government's lack of data on people killed by police "embarrassing and ridiculous."²⁰ He also said it's "unacceptable" that we have to rely on two newspapers — The Guardian and The Washington Post — to get national estimates for these statistics. Law enforcement agencies, such as the International Association of Chiefs of Police, believe that "data collection can play a role in reducing the incidence of biased

enforcement actions.”²¹ Members of Congress on both sides of the aisle agree, including Senator Tim Scott (R-SC), who said “[o]ur system for tracking police shootings, it’s not working for our nation,”²² recognizing that it is difficult to address a problem whose prevalence you are not measuring.

A few steps have been taken to house data collection and reporting on police-community encounters in the federal government. The Death In Custody Reporting Act (DICRA) was reauthorized in 2014 and requires that states receiving federal funding report all deaths in custody to the Department of Justice (DOJ).²³ In August 2016, DOJ provided an initial proposal on DICRA implementation; and another proposal and comment period on DICRA implementation is anticipated. In October 2016, The DOJ announced an FBI pilot program²⁴ to collect and report data on uses of force that do not result in death.²⁵

Several bipartisan data collection bills were introduced in the 114th Congress. The Law Enforcement Trust and Integrity Act would require federal, state, and local law enforcement to collect and report data on police-community encounters or lose federal funding for noncompliance.²⁶ The Walter Scott Notification Act, introduced by Senators Tim Scott (R-SC) and Charles Grassley (D-IA), would require states to collect and report data on the use of firearms by law enforcement that result in the death of a civilian, or lose a percentage of federal funding. The Police Reporting Information, Data, and Evidence (PRIDE) Act would provide grants to state and local law enforcement for data collection and reporting on fatal and nonfatal uses of force.²⁷

Executive Branch Proposals

- The Department of Justice (DOJ) should develop regulations on the implementation of the Death In Custody Reporting Act (DICRA) that (1) guide states in reporting on deaths in custody as required by DICRA; (2) do not rely exclusively on open-source information; (3) discuss federal law enforcement compliance; (4) define the term

“custody;” and (5) indicate penalties for noncompliance with DICRA.

- DOJ should require state and local law enforcement agencies that benefit from the DOJ’s federal grants and programs to collect and report data on incidents of police use of force and other police-community encounters. Solicited data should be disaggregated to reflect the number of police encounters with people of color, women, youth, and people with disabilities.

Legislative Proposals

- Congress should pass legislation that conditions federal funding to states and police departments on reporting fatal and nonfatal uses of force and other police-community encounters. This data should be disaggregated to reflect the number of police encounters with people of color, women, youth, and people with disabilities; and made publicly available.

Resources and Experts

- Phillip Atiba Goff, Professor, John Jay College of Criminology
- Laurie Robinson, Professor of Criminology, Law, and Society, George Mason University

IV. Militarization of the Police

Summary of the Issue

In the summer of 2014, in the immediate aftermath of the death of Michael Brown in Ferguson, Missouri, the nation saw a highly – and dangerously – militarized response by law enforcement.²⁸ Media reports indicated that the Ferguson Police Department, in conjunction with other state and local agencies, responded to protests and demonstrations with “armored vehicles, noise-based crowd-control devices, shotguns, M4 rifles

like those used by forces in Iraq and Afghanistan, rubber-coated pellets, and tear gas.”²⁹

Veterans from the Iraq and Afghanistan wars expressed horror and shock that they, while on active duty overseas, were less heavily armed and combative than were the local police in Ferguson responding to a domestic community.³⁰ Domestic and international media equated the images from Ferguson to familiar ones from combat zones in Iraq and Gaza. Members on both sides of the aisle expressed concerns about militarized policing. Senator Rand Paul (R-KY) described the need to differentiate between a “police response and a military response.”³¹ Representative Duncan Hunter (R-CA), a military veteran and member of the House Armed Services Committee said, “[t]he idea that state and local police departments need tactical vehicles and MRAPs with gun turrets is excessive. Certain resources are designed and manufactured for a military mission—and it should stay that way.”³²

Militarized policing, however, is not limited to situations like those in Ferguson or even emergency situations such as the hostage or active shooter situations that led to the creation of the original Special Weapons And Tactics (SWAT) teams in the late 1960s.³³ Rather, SWAT teams are now overwhelmingly used to serve search warrants in drug investigations. An ACLU report found 79 percent of the SWAT deployments reviewed involved the use of a SWAT team to search a person’s home; and over 60 percent of the cases involved searches for drugs.³⁴ Just as the war on drugs disproportionately impacts communities of color, at least 54% of those impacted by the SWAT deployments examined by the ACLU were minorities.³⁵

Background

In the 1990s, Congress created the Department of Defense (DOD) “1033 program” that allowed the DOD to equip federal, state, and local law enforcement agencies with military-grade equipment for “counterdrug activities” at no cost to

law enforcement.³⁶ The 1033 program has since been expanded to prioritize counterterrorism and border enforcement activities by law enforcement.³⁷ In addition to the 1033 program, the Department of Justice’s (DOJ) Byrne Justice Assistance Grant program and the Department of Homeland Security (DHS) grant programs allow for state and local law enforcement to purchase military weapons and equipment with those grant funds.

Policymakers across the political spectrum are questioning the appropriateness and effectiveness of these types of military-to-law-enforcement equipment-sharing programs. Bills introduced in the 114th Congress – such as the Stop Militarizing Law Enforcement Act, introduced by Senator Rand Paul (R-KY) in the Senate and supported by Justin Amash (R-MI-3) and Tom McClintock (R-CA-4) in the House, and the Protecting Communities and Police Act – prohibit certain types of military weapons and equipment from being transferred under the 1033 program or purchased using DOJ and DHS grants.

On January 16, 2015, President Barack Obama issued Executive Order 136883 that created the Law Enforcement Equipment Permanent Working Group (PWG).³⁸ A primary function of the PWG is to ensure regular communication between the various agencies providing military weapons and equipment to state and local law enforcement, including DOD, DOJ, and DHS. This regular communication is intended to better coordinate the use of federal resources in local communities; for example, if DOD is providing a police department with a Mine Resistant Ambush Protected (MRAP) vehicle at no cost, then DHS may not want to give that same police department a grant to purchase an MRAP. The PWG also regularly convenes advocates and law enforcement stakeholders to assess their policies.³⁹

Executive Branch Proposals

- The Administration should maintain the Law Enforcement Equipment Permanent Working Group (PWG) to ensure continued dialogue among federal agencies providing military

weapons and equipment to local law enforcement and engagement with advocate and law enforcement stakeholders.

Legislative Proposals

- Congress should provide oversight of the Department of Defense (DOD) 1033 program and all other federal programs that provide military weapons and equipment to law enforcement.

Resources and Experts

- Tom Nolan, Associate Professor, State University of New York (SUNY) at Plattsburgh
- Peter Kraska, Professor, University of Eastern Kentucky
- Radley Balko, Journalist, Washington Post

V. Racial Profiling and Biased Policing

Summary of the Issue

Racial and other biased profiling involves unwarranted screening by law enforcement of certain groups of people believed to be predisposed to criminal behavior. Racial profiling takes place in three main ways: street level profiling, profiling in the national security context, and profiling based on border security or integrity.⁴⁰ Studies have concluded that racial or discriminatory profiling results in the misallocation of law enforcement resources, a decrease in public safety, and a lack of trust between law enforcement and the communities they serve.⁴¹

Racial profiling casts entire communities as suspect simply because of their appearance, country of origin, or religion, and has led countless people to live in fear. Raids on immigrant workplaces in

cooperation with local law enforcement, coupled with anti-immigrant rhetoric, has led to a dramatic increase in hate crimes and racial profiling directed at Latino communities.⁴² Similarly, since September 11, 2001, airline personnel, federal law enforcement, and local police have profiled members of Muslim, Arab, and South Asian communities.⁴³

In addition, LGBTQ people and people living with HIV face discrimination based on gender, sexual orientation, and gender identify. Physical and sexual violence, unlawful searches, false arrests, and discriminatory targeting and profiling are pervasive, resulting in heightened fear, higher rates of criminal justice involvement, and threats to public health and safety.

Background

In June of 1999, former President Bill Clinton released an executive order requiring federal law enforcement officials to collect data on the race and gender of the people they stop to question or arrest. In 2003, former President George W. Bush announced that racial profiling is “wrong and we will end it in America.” The Department of Justice (DOJ) then issued the 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies and has been working to perfect that guidance ever since.⁴⁴ Unfortunately, the guidance left open loopholes allowing for profiling in the name of national or border security.

In the 114th Congress, the End Racial Profiling Act was reintroduced to create a federal prohibition on racial and other biased policing.

Executive Branch Proposals

- The Administration should support and expand efforts in federal agencies to eliminate racial profiling and other biased policing, and should work with Congress to create a codified federal prohibition on racial profiling and incentivizes anti-bias hiring and training practices.

Legislative Proposals

- Congress should pass legislation that creates a federal prohibition on racial profiling and other biased policing.
- Congress should pass legislation that provides financial incentives for police departments that implement implicit-association testing as part of their hiring practices.

Resources and Experts

- Deborah Ramirez, Professor of Law, Northeastern University School of Law
- David A. Harris, Professor of Law, University of Pittsburgh School of Law

VI. Training and Use of Force

Summary of the Issue

The Guardian counted 1,146 people killed by police in 2015.⁴⁵ The Washington Post found that nationwide, in 2015, police shot and killed 124 people who were experiencing a mental health or cognitive-related emotional crisis.⁴⁶

The incidence of fatal police shootings could be decreased with improved training. Of the 168 hours of training that police departments provide in weapons, de-escalation, and defensive training, only eight are devoted to de-escalation training.⁴⁷ Additionally, crisis intervention training is needed, and alternatives to law enforcement as first responders to mental health crises should be provided. For example, in Philadelphia, the police department employs a mental health coordinator and utilizes a de-escalation program where the police and a crisis intervention team (CIT) work together to respond to mental health crises.⁴⁸

Increased training on implicit racial and other biases could help to decrease the disproportionate use of force by law enforcement against people of color and others. Young Black men were nine times more likely than others to be killed by police officers in 2015. Additionally, studies have found that young women of color, lesbian women, low-income women, and transgender women and men alike, are particularly vulnerable to sexual misconduct by law enforcement; yet the vast majority of departments do not have policies or training in place to address this issue.

Background

The Department of Justice's (DOJ) Bureau of Justice Statistics defines excessive force as the "application of force beyond what is reasonably believed to be necessary to gain compliance from a subject in any given incident."⁴⁹ State statutes vary in their definitions of excessive force. The United Nations (UN) Basic Principles on the Use of Force and Firearms provide that if use of force is unavoidable, it must be no more than is necessary and proportionate to achieve the objective.⁵⁰ Furthermore, law enforcement must use it in a manner designed to minimize damage or injury, must respect and preserve human life, and must ensure medical aid is provided as soon as possible to those injured or affected.

In the 114th Congress, several bills addressed issues with law enforcement training. The Preventing Tragedies Between Police and Communities Act required state and local law enforcement receiving federal funds to receive de-escalation training. The Law Enforcement Trust and Integrity Act provided accreditation and training to law enforcement, and required data collection and reporting on police-community encounters.

Executive Branch Proposals

- The Department of Justice (DOJ) should implement the federal recommendations made by the 2015 President's Task Force on 21st Century Policing.

- DOJ should provide state and local law enforcement with federal resources to advance constitutional policing on a range of issues, including hiring practices, use of force, implicit bias, crisis intervention training, and misconduct investigations and prosecutions.
- DOJ should fund state and local law enforcement training on de-escalation and crisis intervention techniques.

Legislative Proposals

- Congress should support legislative efforts to facilitate de-escalation, crisis intervention, implicit bias, and other training techniques.

Resources and Experts

- Kami Chavis, Associate Dean, Wake Forest University School of Law
- Tracey Meares, Professor of Law, Yale Law School

VII. School Discipline and School Resource Officers

Summary of the Issue

Preserving school safety is critical to the well-being of our nation's communities and to the health and success of our students. Schools are among the safest places for youth. A generation ago, teachers, guidance counselors, and principals were responsible for addressing students' insolent behavior; in doing so, they built lasting relationships that created a safe, healthy and welcoming environment. Today, schools, school resource officers (SROs), school law enforcement officers (SLEOs), or School Safety Officers (SSOs) have supplanted the control of educators within schools. Too often, they are quick to criminalize minor

misbehavior and respond in inappropriate ways, such as handcuffing children as young as kindergarten, putting students in chokeholds, or shackling students with disabilities to desks.

The escalation from school-based behavior management and disciplinary processes to justice-system based responses is dramatically undermining student and school success. Furthermore, the national rise in school-based arrests for more minor forms of student misbehavior continues to disproportionately and unnecessarily involve Black and Latino students in the criminal and juvenile justice systems, resulting in significant harm to students' futures.

Background

The Violent Crime Control and Law Enforcement Act of 1994 created the Office of Community Oriented Policing Services that provided support and funding for SRO programs. The Gun Free Schools Act of 1994 also helped commission the use of SROs and school code of conduct enforcers of zero tolerance policies. Additionally, two federal grant programs promoted SRO programs: the COPS in Schools (CIS) program, which was funded until Fiscal Year 2005; and State Formula Grants under the Safe and Drug Free Schools and Communities Act (SDFSCA), funded until Fiscal Year 2009. These programs permitted use of funds for hiring additional SROs and school security personnel, among other things.

Research shows that involving students in the criminal justice system has a deleterious effect on their education: a high school student is twice as likely to drop out of school after a first arrest, and four times as likely to do so after a first court appearance.⁵¹ Court involvement also has serious consequences for students' ability to procure employment, gain college admission, receive scholarships, and live in public housing. Relying on SROs to address school disciplinary matters can create an atmosphere of alienation and distrust that inhibits the communication between students and

educators crucial for both school safety and learning.

Additionally, the overuse of law enforcement interventions in school discipline disproportionately impacts students of color. According to the Department of Education's (ED) 2009 Civil Rights Data Collection, over 70% of the public school students arrested or referred to law enforcement while on school grounds were Black or Latino.⁵² Recent data shows that while Black students represent 16 percent of student enrollment, they represent 27 percent of students referred to law enforcement and 31 percent of students subjected to a school-related arrest.⁵³ In comparison, White students represent 51 percent of enrollment, 41 percent of students referred to law enforcement, and 39 percent of those arrested.⁵⁴ Students with disabilities, served by the Individuals with Disabilities Education Act (IDEA), represent a quarter of students arrested and referred to law enforcement, even though they are only 12 percent of the overall student population.⁵⁵

The Department of Justice provides critical support to schools and school districts in assisting educators in conducting school security assessments and developing emergency management plans. These efforts should complement the preventative efforts of the ED and the Department of Health and Human Services (HHS) in providing funding for school counselors, establishing mental health and wellness supports for students and encouraging cross-system collaboration between schools and community resources.

Involvement of law enforcement officers in school-based incidents should be a last resort and limited only to those incidents that pose a serious and immediate threat to an individual within the school community. All other incidents should be handled by school administrators and counselors who, in turn, may not refer students to law enforcement under such circumstances. Law enforcement involvement is inappropriate and counterproductive in incidents such as disorderly conduct, disruptive or disrespectful behaviors,

tardiness, truancy or absenteeism, fighting, minor theft or property damage, consensual sexual activity, and minor drug and alcohol offenses.

Executive Branch Proposals

- The Department of Justice (DOJ) should commission a study on the impact of School Resource Officers (SROs) and School Law Enforcement Officers (SLEOs) in schools, examining the impact SROs have on students' academic achievement/outcomes, the effectiveness of SRO programs on reducing incident rates, and a comparative analysis on the effectiveness of SRO programs versus other approaches to improving school climate.
- The federal government should require any dollars for SRO programs, including money for new hires, to include a randomized control trial to evaluate the impact of such programs on student outcomes. For every dollar that goes to SRO programs and research out of the Comprehensive School Safety Initiative, there should be a matching dollar to fund school counselors, psychologists, or social workers, as well as an impact evaluation.
- The Administration should work with state offices of victims of crime to utilize the Victims of Crime Act (VOCA) grant dollars for trauma counselors in schools and other school-based therapeutic interventions for children who have been exposed to violence.
- No federal funds coming from DOJ should be used for the routine use of police in schools, and discretionary funding to place SROs, SELOs and safety officers in schools should be prohibited as an allowable use.
- DOJ should collect and publicly report data disaggregated by race/ethnicity, gender, disability status, and English learner status on the following: youth placed in discipline alternative settings or juvenile justice settings for discretionary (i.e. truancy, drugs, gang involvement and fighting) or mandatory (required by law) school discipline; academic achievement in correctional facilities and upon reentry to ensure accountability of student's educational attainment; first-time

offenders who are still in school by the punishment they received if coming from a school-based referral, arrests or charges stemming from school based behavior or incidents; and children who enter the juvenile justice system, their ultimate academic outcomes, and the effectiveness of a facilities' educational programs in promoting student educational achievement and degree or certificate completions.

- DOJ should require school districts and law enforcement agencies to maintain a record of every school-based incident resulting in police department involvement, including those that do not result in an arrest, summons, or citation. This data should be regularly monitored by federal, state, and local governments to ensure SROs, SLEOs, and SSOs are not engaged in persistent discriminatory conduct.
- The federal government should prohibit funding for the hiring or placement of SROs, SLEOs, or SSOs in schools; and should provide funding to train educators and existing SROs, SLEOs and SSOs in, but not limited to, conflict resolution, de-escalation, crisis management, effective strategies for asserting authority with teens, age-appropriate and developmentally appropriate responses, racial bias, culturally-responsive pedagogy, and the Individuals with Disabilities Education Act (IDEA).

Legislative Proposals

- Congress should eliminate all federal funding for SROs, SLEOs and SSOs.
- Congress should create an enforcement protection and advocacy program to fund the work that the state Protection and Advocacy Systems currently provide to youth with disabilities at risk of school removal and/or juvenile justice referral.
- Congress should require a blanket prohibition of SRO or law enforcement involvement in school discipline as a condition of federal funding.

VIII. Forensic Science Reform

Summary of the Issue

The misapplication of forensic science is the second most common contributor to wrongful convictions, found in almost half of exonerations based on DNA evidence. Reports by leading scientific organizations in 2009 and 2016 have brought national attention to the fragmented state of the forensic science system and, for many disciplines, the insufficient adherence to basic scientific principles of validity and reliability.

Law enforcement efforts are significantly hampered by these weaknesses in forensic science techniques. Significant progress during the previous Administration, led by the Department of Justice (DOJ), the National Institute of Standards and Technology (NIST), and other White House and agency officials, has begun the shift towards comprehensive forensic science reform. More is needed to ensure the strongest and most reliable forensic science tools for law enforcement investigation and criminal justice system use, and it is critical that progress continue on issues affecting the underlying science of forensic science, quality assurance practices, and the application of science in the courts.

Background

Unlike DNA testing, many forensic disciplines – particularly those that deal with comparing impression marks and objects like hair and fiber – were developed solely to solve crime. These disciplines have evolved primarily through their use in individual cases. Without the benefit of sufficient foundational research or adequate financial resources, applied research has also been minimal. In fact, many forensic testing methods have been applied with little or no scientific validation and with inadequate assessments of their robustness or reliability. Furthermore, they often lack scientifically

acceptable standards for quality assurance and quality control before their use in cases.

President Barack Obama's Administration took a critical first step towards scientific validation of forensic science techniques several years ago when it announced the creation of the National Commission on Forensic Science (NCFS) and its partner organization, the Organization of Scientific Area Committees (OSAC). The NCFS, a joint project of DOJ and NIST, is an important policy guidance group that includes State and local systems experts as well as leading scientific experts and is charged with advising the Attorney General on policies that improve the validity, reliability, and application of forensic science. The OSAC, operated by NIST, is responsible for identifying and developing technically sound forensic science standards.

Executive Branch Proposals

- The Administration should support the continuation of the National Commission on Forensic Science through the joint leadership of the Department of Justice (DOJ) and the National Institute of Standards and Technology (NIST), and support the continuation of the OSAC through NIST.
- NIST should assume the central role in evaluating the foundational validity of forensic sciences, standardizing the requirements for forensic methods, and providing publicly available information on the validity and the limitations of specific methods.
- The Administration should support ongoing funding for the development and implementation of an interagency forensic science research agenda, led by the Office of Science and Technology Policy within the White House.
- The Administration should support funding for education, training, and technical assistance for judges as they assume their gatekeeper role in considering the admissibility of forensic science evidence.

Legislative Proposals

- Congress should allocate funding for DOJ, NIST, and other agencies to support the critical work to improve forensic science and propel forensic science toward greater accuracy and reliability. This includes funding for the NCFS and the Organization of Scientific Area Committees (OSAC), for the development of a comprehensive research agenda, and for conducting basic and applied forensic science research.
- Congress should allocate funding for forensic science training for the judicial branch, both federal and non-federal courts, through the Judicial Conference of the U.S., the Federal Judicial Center, and other grant and training programs.

Resources and Experts

- Peter Neufeld, Co-Founder, Innocence Project
- Joe S. Cecil, Senior Research Associate and Project Director in the Division of Research at the Federal Judicial Center
- Anne-Marie Mazza, Senior Director, Committee on Science, Technology, and Law, National Academies of Science

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II. PUBLIC DEFENSE: ENSURING THE CONSTITUTIONAL RIGHT TO COUNSEL

Overview

It is axiomatic that “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”¹ Further, as Senators Jeff Sessions (R-AL) and Chris Coons (D-DE) observed in an August 2013 letter to the Executive Director of the Executive Committee of the Judicial Conference of the United States, “[q]uality [defense] representation not only promotes the rule of law and safeguards constitutional rights, it also saves money by reducing pre-trial and post-trial incarceration costs.”

In the landmark case *Gideon v. Wainwright*, the U.S. Supreme Court acknowledged the “obvious truth” that “lawyers in criminal courts are necessities, not luxuries” given that “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.”² Yet, almost 50 years later, the promise of *Gideon* remains unfulfilled.

Currently, thousands of people of insufficient means are incarcerated every day in state and municipal courts without ever speaking to an attorney. For those that do get an attorney, the indigent accused may receive a lawyer beholden to the judge presiding over their case to secure future work, or an attorney for whom a cap on the payment available for the case provides a financial incentive to dispose of the case quickly rather than effectively.³ If a public defender is appointed, the accused may fare no better: public defenders’ offices throughout the nation are understaffed,

underfunded, undertrained, and overworked, and often lack the oversight necessary to ensure constitutionally adequate representation for indigent defendants.

In May 2015, at a Senate Judiciary Committee hearing on Sixth Amendment violations involving misdemeanor defendants, Chairman Charles Grassley (R-IA) summarized the national right to counsel crisis: “[T]he Supreme Court’s Sixth Amendment decisions regarding misdemeanor defendants are violated thousands of times every day. No Supreme Court decisions in our history have been violated so widely, so frequently, and for so long.”

When the government accuses, convicts, and incarcerates its citizens without providing them adequate counsel, it disrupts the basic structure of our adversarial system, endangering both the constitutional rights of the people and the nation’s rule of law. Charged with “giving voice” to the vast majority of the people charged with a crime in the U.S.,⁴ the publicly funded defender stands between the accused and the full authority of the government to take property, liberty – and in some cases, even life.

Without proper representation, many individuals are sentenced to inappropriately lengthy prison terms, unnecessarily driving up taxpayer costs. Improper representation contributes dramatically to the conviction of innocent people. And our criminal justice system cannot ensure fair treatment, protect against bias, or effectively implement new reforms meant to reign in abuse without effective public defense.

The new administration and the members of the 115th Congress have an important opportunity to address the current crisis in public defense, and to bring to full fruition the promise of the Sixth Amendment right to counsel. Reforms should be adopted to improve funding, staffing, and training; increase transparency, oversight and accountability in indigent defense; create accountability for inadequate provision of representation to state

indigent defendants; and increase independence of the defense function. Each of these reforms is both constitutionally required and long overdue.

I. Lack of Funding, Staffing, and Training

Summary of the Issue

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

Background

In our adversarial legal system, the truth is expected to emerge through the process of a confrontation between two well-prepared, opposing sides, each of which has the ability to present its arguments, evidence, and witnesses with full knowledge of the rules of engagement.

In some places in the U.S., however, there is a complete breakdown of the adversarial process, as people accused of crimes face potential conviction without meaningful – or perhaps not any – access to counsel. This can occur because a defendant is not adequately informed of the right to counsel, or because of coercive pressure to waive that right.⁵ Some jurisdictions require misdemeanor defendants to speak to prosecutors before meeting with a defense attorney or even being informed of their right to counsel, leading many to plead guilty without ever consulting a lawyer.⁶ For instance, in Florida, 80 percent of unrepresented misdemeanor

defendants pleaded either guilty or no contest at arraignment.⁷ Indigent defendants also often face significant disincentives to exercise their right to counsel. Some jurisdictions require application fees, sometimes as high as several hundred dollars, to be assigned a public defender.⁸ Defendants can also face the possibility of lengthy incarceration while waiting for counsel, as opposed to same-day disposition of their cases if they waive their rights and plead guilty.⁹ In the real world, the result of these and other factors is widespread deprivation of the right to counsel. According to a 2000 Bureau of Justice Statistics (BJS) report, 28.3 percent of incarcerated individuals held in local jails on misdemeanor charges had no lawyer.¹⁰

In jurisdictions that do ensure that an indigent accused person has a lawyer, the resources available to the defender are often extremely limited, and far lower than those available to the district attorney or prosecutor. This undermines defenders' ability to provide a strong and robust defense to their clients, and creates an extremely uneven playing field. For example, defenders, whose salaries often depend upon the very government they are opposing in court frequently lack the time or funding to pay for necessary expert witnesses, thorough investigation, and other basic components of defense preparation.¹¹

Across the country, the proliferation of criminal penalties, especially misdemeanors, that carry the possibility of imprisonment is a significant driver of the denial of the right to effective assistance of counsel for indigent defendants. The number of cases requiring the appointment of counsel has increased dramatically, as states have criminalized offenses that were previously punishable by civil penalties.¹² For example, the volume of misdemeanor cases doubled between 1972 and 2006, increasing from about five million to 10.5 million per year.¹³ Public defense funding has not kept up with this increase. Public defense in the states may be supported by the state, the county, or a combination of both; and, in small increments and limited circumstances, by federal grant programs administered by the Bureau

of Justice Assistance (BJA) within the Department of Justice (DOJ).¹⁴ Because many states rely exclusively on county funding or state funding to support the right to counsel,¹⁵ per capita expenditures for public defense vary greatly nationwide.¹⁶ For example, Massachusetts has a public defense cost per capita of \$28.73;¹⁷ while Missouri, a state with a similarly-sized population, has a public defense cost per capita of \$5.85.¹⁸ While some regional differences can account for this disparity, low public defense spending per capita is a strong indicator of the need for improvement in the public defense system.

Irrespective of the source of funding, the inevitable consequence of increasing caseloads without an increase in resources is insufficient staffing of defenders' offices. Many public defenders have caseloads so large that they risk violating the oaths they took as members of the bar to provide adequate attention to each client; and also violate, by a large margin, the American Bar Association's (ABA) guidelines for attorney caseloads.¹⁹ Numbers vary by state, but BJS reported that in 2007, 73 percent of county-based public defender offices exceeded the maximum caseload per attorney.²⁰ Similarly, state public defender offices had a median 67 percent of the attorneys necessary to comply with caseload limits.²¹ The Constitution Project National Right to Counsel Committee reported in 2009 that the average caseloads for Miami public defenders had reached nearly 500 felonies and 2,225 misdemeanors; caseloads were increasing by 8 percent per year in Kentucky; and the Knox County, Tennessee, public defender's office asked the court for permission to refuse misdemeanor cases because of unmanageable caseloads.²² A federal district court recently observed that in Washington State, public defenders have caseloads in excess of 1,000 per year.²³

With respect to the federal government's influence on state criminal justice systems, in 2016 Congress passed the Justice for All Reauthorization Act of 2016 (JFAA), which reinstated a requirement that states develop a strategic plan detailing how federal criminal justice grants to the state will be

used, and that public defenders be consulted in the designing of this plan. This requirement may better ensure that the needs and interests of indigent defendants are considered by states, and may also educate the public defense community about this opportunity to seek grant funding. In addition, JFAA now requires the Attorney General to provide technical assistance to states and local governments requesting support in meeting their Sixth Amendment obligations and authorizes \$5 million for the Attorney General to carry out the technical assistance.

Despite this positive development, overall the federal government currently exacerbates existing resource imbalances between the prosecution and defense within states by furnishing funding for state prosecution and law enforcement functions, as well as for training and technical assistance for prosecutors and law enforcement agencies, but providing almost no analogous support for state-based public defense services. The previous Administration proposed \$4.7 billion in federal funding for state, local, and tribal law enforcement assistance programs for FY 2017, an increase of \$1.2 billion from its FY 2016 budget request.²⁴ Yet of that \$4.7 billion in federal funding, it proposed that just over \$16 million be directed specifically to improving public defense.²⁵ Under that formulation, less than one percent of the federal funding for state criminal justice programs would be specifically directed to supporting the Sixth Amendment right to counsel.

There are many examples of this imbalance. For instance, law enforcement and state prosecutors receive millions of dollars each year in direct federal funding through the Edward Byrne Memorial Justice Assistance Grant program (Byrne JAG), while states consistently spend either none or only a fraction of Byrne JAG grant money for public defense programs. In 2014, spending on public defense initiatives accounted for one percent of all state Byrne JAG spending.²⁶ In 2013-2014, just 12 states used any Byrne JAG funding at all to invest in public defense programs.²⁷

Prosecutors also often have ready access to federally funded crime labs, while too often public defense attorneys are denied access or provided inadequate funding for essential testing. The resource imbalance makes it extremely difficult for publicly funded defense counsel to assess the reliability of the prosecution's evidence and to test their own evidence. The end result is that juries and judges are deprived of critical information necessary to ensuring accurate verdicts and fair sentences.

Notably, with the passage of the JFAA, Congress eased the requirement that the Capital Case Litigation grants be allocated evenly among prosecution and defense. "Upon a showing of good cause, and at the discretion of the Attorney General, the State may determine a fair allocation of funds across" the two grant programs; this change could help to alleviate some of the disparity between prosecution and public defense resources in capital cases.²⁸ JFAA, however, also dramatically reduced the funding authorized for capital representation (for capital prosecution and defense) from \$75 million to \$2.5 million in 2017, with an annual escalation in authorization to a maximum of only \$22.5 million in 2021.²⁹

While the federal defender program is largely regarded as a national model on the effective provision of the right to counsel, the federal budget "sequester" caused devastating cuts to federal defenders' offices budgets in the fall of 2013.³⁰ The effects of these cuts were exacerbated by simultaneous reductions in the rates paid by federal courts to the attorneys who take cases that the federal defenders cannot due to conflicts or other reasons. As Senators Sessions (R-AL) and Coons (D-DE) stated in their August 2013 letter to the Executive Director of the Executive Committee of the Judicial Conference of the United States, the sequester would have decimated the federal defender program, causing "furloughs or layoffs, increased strain on the human resources that remain, and delay." The senators reminded the Judicial Conference that "[t]he Federal Defender is central to the government's obligations under the Sixth Amendment." Through the concerted efforts

of many federal defenders, private attorneys, and a broad coalition of advocacy organizations, members of the judiciary and Congress were educated about the need for adequately funded public defense. In January 2014, Congress adopted a spending bill that spared federal defenders from further cuts; and that February, the Judicial Conference's Executive Committee restored the rates for panel attorneys. While the spending bill did not make the defenders' offices whole again, it was an improvement over the 20-30 percent reductions that the federal defender program faced under sequester.³¹

Congress has also appropriated funding to support case investigation and post-conviction representation, provided by the Wrongful Conviction Review Program of DOJ's Bureau of Justice Assistance, as well as post-conviction DNA testing supported by the Kirk Bloodsworth Post-Conviction DNA Testing Program of DOJ's National Institute of Justice. Since 1989, there have been over 1,900 wrongfully convicted individuals exonerated in the U.S., with over 300 of those exonerations based primarily on DNA. The true perpetrator was identified in almost half of these DNA exoneration cases. Unfortunately, many of these real perpetrators went on to commit additional crimes while an innocent person was convicted and incarcerated in their place. Data from the National Registry of Exonerations show a significant increase in the number of exonerations since implementation of these two federal innocence programs in 2008 and 2009.³² The Bloodsworth Program has resulted in the exonerations of 31 wrongfully convicted persons in 11 states. During the 114th Congress, the Wrongful Conviction Review Program contributed to the exoneration of 21 innocent individuals.

Finally, the John R. Justice (JRJ) program improves public safety by assisting prosecutor and defender offices in their ability to hire and retain high-quality lawyers.³³ The law authorizes up to \$10,000 per year in education debt assistance for prosecutors and defenders who agree to maintain that employment for three years.³⁴ However, JRJ total funding amounts have significantly declined from a height of

\$10 million during the FY 2010 appropriation cycle, to just \$2 million in FY 2015.³⁵

Executive Branch Proposals

- The Bureau of Justice Assistance should continue and expand the use of discretionary funding to provide federal technical assistance and training for state, local, and territorial public defense systems, and the attorneys who participate in them.³⁶
- The FY 2018 budget should support \$10 million to carry out the Justice for All Reauthorization Act of 2016 (JFAA) Section 14 (b)(1) and (2) to support technical assistance to protect the right to counsel.
- The FY 2018 budget should support \$7.5 million for the Capital Case Representation program.
- The FY 2018 budget should support \$10 million for the John R. Justice Program.
- The FY 2018 budget should support full funding of the Kirk Bloodsworth Post-Conviction DNA Testing Program.

Legislative Proposals

- Congress should provide funding for states to establish criminal justice coordinating committees to consider reclassification of certain non-violent crimes to civil infractions, thereby alleviating some of the burden currently placed on public defense systems.³⁷ Federal funding could also be conditioned on the attainment of specific defender caseload reduction goals. Jurisdictions could receive rewards or incentives for attaining such goals. Funding should address the drivers of high caseloads, which reduce access to counsel.³⁸ Reclassification of offenses as civil infractions, diversion of low-level individuals (court and law enforcement initiated), and increased use of summonses instead of arrests are other approaches that would reduce defender caseloads and facilitate broader access to counsel.
- Congress should provide sufficient financial support to states, local governments, and territories for the provision of public defense

services comparable to federal support for prosecution. Congress should also permit states to use grants under the Capital Case Representation program to hire counsel to represent capital defendants.

- Although public defense is currently a permitted expenditure of Edward Byrne Memorial Justice Assistance Grant program (Byrne JAG) funds, states may be unaware of this because it is not explicit in the statute.³⁹ Congress should amend the Byrne JAG authorizing legislation, adding public defense to the list of seven specific program categories identified in the statute. This will clarify for the Department of Justice and state personnel that support for public defense services is one of the central purposes of Byrne JAG programs.⁴⁰
- Congress should establish and fund a National Center for Public Defense Services to serve as an independent, national oversight authority that would strengthen state public defense services by conducting and hosting public defense training programs, and administering federal funds for state public defense programs.⁴¹
- Congress should appropriate \$10 million to carry out JFAA Sec. 14 (b)(1) and (2) to support technical assistance to protect the right to counsel in the states.
- Congress should appropriate \$7.5 million for the Capital Case Representation Program.
- Congress should appropriate \$10 million to support the John R. Justice Program.
- Congress should fully fund the Kirk Bloodsworth Post-Conviction DNA Testing Program.

II. Transparency, Oversight, and Accountability in Public Defense

Summary of the Issue

Currently, there is no mechanism for the collection, analysis, and dissemination of nationwide public defense data, making it extremely difficult to identify quantitatively measurable deficiencies in specific jurisdictions and to hold accountable those responsible for violations of the right to counsel.

Despite statutory and regulatory reporting requirements,⁴² many states do not fully account for the manner in which they spend federal grant money for criminal justice initiatives. Without such data, decision-makers are left to form policy based on anecdotal information, speculation, intuition, presumption, and even bias. Furthermore, the federal government lacks a sufficiently strong mechanism for holding state and local governments accountable for violations of the Sixth Amendment right to effective assistance of counsel. The collection, analysis, and public presentation of this data would provide the transparency necessary for proper oversight.

Background

The executive branch has a special responsibility to enforce the federal mandate announced in *Gideon v. Wainwright* and is uniquely situated to pursue public defense reform. The Department of Justice (DOJ) directly assists state and local public defense systems with federal grant funding. Within DOJ, the Office of Justice Programs administers the Edward Byrne Memorial Justice Assistance Grant program (Byrne JAG) grant program. This program is the largest single federal grant program for funding of state law enforcement, court, prosecution, public defense, and related programs. While Byrne JAG grants can be used by states to fund public defense services, its formulation for awarding grants neither conditions federal funding on the establishment of statewide public defense systems, nor does it require any percentage of the federal grant go toward public defense programs.⁴³

If “[m]easuring the wrong practices strengthens the wrong practices,”⁴⁴ then the near-total lack of evaluation of public defense systems in federal grant recipients’ jurisdictions is a foreboding sign. Federal grant reporting and evaluation requirements send signals to recipients of desired outcomes.⁴⁵ Desired outcomes must include all recipients’ adherence to the constitutional right to counsel. A primary path to improving states’ adherence to the Sixth Amendment is to cue grant

recipients to collect data on the assignment of counsel.

Transparency regarding government support of public defenders is also necessary for the effective representation of indigent defendants. Without transparency in the manner in which federal, state, and local governments allocate funds and resources for public defense, it is nearly impossible to accurately assess the disparity in spending between public defense and prosecutors and law enforcement, fix deficiencies in systems, or hold any person or entity accountable for infringing upon the constitutional rights of indigent defendants.

The current system does not provide the requisite transparency. There is little data available for either misdemeanor representation or felony representation in smaller districts. Moreover, when the Bureau of Justice Assistance accepts grant applications from state and local criminal justice entities, it does not require reporting on public defense. Thus, the data necessary to evaluate public defense in a specific district simply does not exist. As Erica Hashimoto, Associate Professor of Law at the University of Georgia Law observed, “we have no idea how many defendants are represented by the public defense systems in the country, how many misdemeanor defendants have a right to counsel, or how what percentage of defendants who are entitled to court-appointed representation go unrepresented.”⁴⁶

Accordingly, federal criminal justice grant reporting should require submission of critical information concerning a jurisdiction’s provision of counsel. There is a broad range of data that will assist jurisdictions in assessing the breadth of constitutional concerns, and resulting financial impact, arising from their current provision of public defense. These include data on timing of appointment of counsel, pretrial release conditions, and ultimate case dispositions. At present, however, basic data on counsel appointment for the indigent accused is a predicate to any reform to improve access to counsel for the indigent.

Further, even if this data were available and violations of the constitutional right to counsel were detectable, it would be very difficult to hold state governments accountable should they abrogate the constitutional right to counsel. Over the last several years, the Office for Access to Justice (ATJ), housed within DOJ, has worked “within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers.”⁴⁷ ATJ and of the Office of Civil Rights have filed a series of “Statements of Interest” and amicus briefs related to access to justice issues.⁴⁸ However, DOJ currently does not have the authority to hold state and local governments accountable for failing to meet their constitutional obligations, even if these jurisdictions use DOJ funding for their criminal justice systems.

As a result, the responsibility for monitoring local governments and identifying constitutional violations falls to the defendants themselves—the very individuals who lack adequate legal counsel and access to knowledge of the law.

Executive Branch Proposals

- The Department of Justice (DOJ) should annually collect and publish data pertaining to (1) public defense expenditures and funding sources, (2) caseloads by provider and case type, (3) methods of providing counsel, (4) number of persons under age 18 tried in adult courts, (5) indigency rates and criteria, (6) race and ethnicity demographics of defendants and victims, (7) staffing of public defense agencies, and (8) salaries and compensation rates for attorneys providing public defense services.⁴⁹
- DOJ should strengthen reporting requirements on the above issues for states and localities in receipt of federal criminal justice grant funding.
- If granted authority by Congress, DOJ should pursue causes of action against states violating the Sixth Amendment.
- DOJ should continue to support current private litigation efforts through the filing of amicus briefs

and Statements of Interest in support of cases that seek redress from states and localities that violate the Sixth Amendment.⁵⁰

- The White House, Attorney General, and other officials speaking on behalf of the Administration should demand strong public defense as a part of any effort to reform the criminal justice system when communicating with the public, the media, policymakers and other criminal justice stakeholders. This should include the importance of providing counsel at the defendant’s first appearance. Defenders should always be included in policy discussions and decision-making concerning any aspect of the criminal justice system.

Legislative Proposals

- Congress should pass legislation authorizing DOJ with a cause of action to bring suit against those state or local governments that fail to protect the individual liberty of persons within their jurisdictions by providing inadequate counsel or no counsel to indigent defendants.⁵¹
- Congress should require states in receipt of federal grant funding for criminal justice purposes, including formula grant recipients, to certify state compliance with the Sixth Amendment and to collect and submit accurate data, at minimum, on representation for all criminal and juvenile delinquency cases during the grant period. States should report the number of cases in which defendants retained private counsel, received appointed counsel, or went pro se (unrepresented). These cases should be classified by top charge (felony, misdemeanor, delinquency) at the time of arraignment. Congress should empower DOJ to withhold or redirect a portion of a state’s formula grant for failure to meet the reporting requirements.
- Congress should permit private litigants to file federal suits to enforce the right to counsel.⁵²
- Congress should coordinate and fund a study to determine whether failure by states to provide constitutionally adequate public defense systems contributes to increases the incarceration rate in jails and prisons and racial disparities within the

criminal justice system. Due to the dearth of data on public defense, it is almost impossible to measure the impact of inadequate public defense systems on the criminal justice system. Such studies should be conducted by an entity that is independent of government, such as a university or impartial research foundation.

III. Lack of Independence of the Defense Function

Summary of the Issue

By design, public defense is necessarily provided by the same government that is accusing a defendant in a criminal case. As a result, conflicts of interest can easily arise in public defense systems. This is especially true in jurisdictions where politicians or judges appoint public defenders, pushing a defender's economic interest in a different—and sometimes opposite—direction from the interests of his or her client. Attorneys representing indigent defendants but beholden to the prosecuting party or the judiciary for funding or employment may focus not on their client's best interest, but rather on reducing backlogs of cases at the court, appearing "tough" on crime, or just keeping their jobs.⁵³

Background

When a defender's budget is dependent on the approval of judges, elected local boards, or others to whom they may be politically or professionally accountable, they will often come under pressure to shape defense strategies not according to the interests of their clients, but rather according to the political interests of those who control their budget.⁵⁴ Achieving systemic improvements may require an autonomous and permanent office with greater resources and authority at its disposal. For the past 30 years, the American Bar Association (ABA) has supported the establishment of an independent federal Center for Defense Services to serve this function. In addition, the concept was endorsed in the 2009 report issued by The

Constitution Project National Right to Counsel Committee.⁵⁵

The Committee to Review the Criminal Justice Act (CJA) Program, an ad hoc committee of the Judicial Conference of the United States, is tasked with providing a thorough evaluation of the CJA program. There have been three comprehensive reviews undertaken by the Committee concerning the provision of legal representation and other defense services to criminal defendants in the federal courts. In addition, the most recent comprehensive review of the federal CJA program in 1993 endorsed measures to increase the independence of defense services in the federal criminal system. That same year, the Judicial Conference took up the bulk of the Committee's recommendations, but rejected the recommendation to create within the Judicial Branch an independent Center for Federal Criminal Defense Services.

Legislative Proposals

- Congress should establish an independent, non-partisan federal agency for federal defense that possesses funding and oversight responsibilities. Alternatively, Congress could make local federal defender organizations, or the Defender Services Division of the Administrative Office of U.S. Courts (for those districts without federal defender organizations), responsible for the appointments and budgets of federal defenders. If the judiciary remains responsible for appointing federal defenders, Congress should require federal courts to accept (absent good cause to the contrary) recommendations for counsel made by federal public defenders, federal defender community organizations, the Capital Habeas Unit, or the Administrative Office. These organizations, each of which has a role in providing federal public defense services, are better positioned to offer independent, expert recommendations for the appointment of counsel, as compared with judges, who are meant to be the impartial arbiters between federal prosecutors and defense attorneys.

Resources and Experts

- Ezekiel Edwards, Director, American Civil Liberties Union (ACLU) Law Reform Project
- Nicole Austin-Hillery, DC Office Director and Counsel, Brennan Center for Justice
- Jenny Collier, Collier Collective, LLC; Federal Policy Advisor to the Innocence Project
- Sarah Turberville, Director of Justice Programs, The Constitution Project
- Rebecca Brown, Policy Director, Innocence Project
- Kyle O'Dowd, Policy Director, National Association of Criminal Defense Lawyers

¹ United States v. Cronin, 466 U.S. 648 (1984).

² *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

³ Such conflicts of interest typically arise in jurisdictions that contract with private firms or individual attorneys to represent indigent defendants or a particular class of indigent defendants for a fixed fee, or in jurisdictions in which the court assigns counsel to indigent defendants on a case-by-case basis.

⁴ Jon Rapping, What about those who speak for the voiceless? National Assoc. for Pub. Def. Blog (Jul. 12, 2016), http://www.publicdefenders.us/blog_home.asp?display=91.

⁵ See Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing before the S. Committee on the Judiciary, 114th Cong. 8 (2015) (statement of Professor Erica J. Hashimoto).

⁶ *Id.* at 9; Nat'l Ass'n of Criminal Def. Lawyers, "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts" (2009) at 16-17b [hereinafter *Minor Crimes, Massive Waste*].

⁷ Alisa Smith & Sean Madden, Nat'l Ass'n of Criminal Def. Lawyers, Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts 15 (2011), 23 tbl.9, available at <https://www.nacdl.org/News.aspx?id=23653&terms=three+%20minute+justice>.

⁸ *Minor Crimes, Massive Waste*, supra note 20, at 19.

⁹ *Id.* at 18-19; Hashimoto, supra note 19, at 9.

¹⁰ Catherine Wolf Harlowe, "Defense Counsel in Criminal Cases." BJS Special Report NCJ 179023 (November 2000), 6-7.

¹¹ National Right to Counsel Committee, Justice Denied, The Constitution PROJECT, 95-97 available at <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

¹² *Id.* at 4.

¹³ *Minor Crimes, Massive Waste*, supra note 20 at 11.

¹⁴ *Id.* at 53-60.

¹⁵ See *Gideon* at 50, In Your State – State Funding Level, available at <http://gideonat50.org/in-your-state/#state-funding-level> (last visited Oct. 26, 2016) (revealing that Pennsylvania and Utah, as of 2014, relied exclusively on county funds and that several states rely exclusively on state funding to provide public defense).

¹⁶ *Gideon* at 50, See In Your State, Cost Per Capita Spending, <http://gideonat50.org/in-your-state/#per-capita-spending> (last visited Oct. 27, 2016).

¹⁷ *Gideon* at 50, Cost Per Capita Spending, Massachusetts, <http://gideonat50.org/in-your-state/massachusetts/#per-capita-spending> (last visited Oct. 27, 2016).

¹⁸ *Gideon* at 50, Cost Per Capita Spending, Missouri, <http://gideonat50.org/in-your-state/missouri/#per-capita-spending> (last visited Oct. 27, 2016).

¹⁹ American Bar Association. *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, (2004) available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

²⁰ Bureau of Justice Statistics, Census of Public Defender Offices, 2007: County-based and Local Public Defender Offices, U.S. Dep't of Justice at 8 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf>.

²¹ For FY2011, the Department of Justice requested \$2.5 million and 10 positions for the Access to Justice Initiative. *Id.* at 13.

²² Justice Denied, supra note 25 at 68.

²³ *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013).

²⁴ FY 2017 Budget Request: Assist State, Local, and Tribal Law Enforcement, U.S. Dept. of Justice (2016) available at <https://www.justice.gov/jmd/file/820816/download>.

²⁵ *Id.*

²⁶ National Criminal Justice Association, Byrne JAG: Cornerstone for Justice, <http://www.ncja.org/sites/default/files/documents/Byrne%20JAG%20one%20pager%20-%20final.pdf> (last visited October 18, 2016).

²⁷ National Criminal Justice Association, Support for State and Local Public Defense, <http://www.ncjp.org/sites/default/files/Content/Images/Support%20for%20State%20and%20Local%20Public%20Defense%20FINAL.pdf> (last visited October 18, 2016).

²⁸ See Justice For All Reauthorization Act of 2016, § 10, 42 U.S.C. 14163 et seq.

²⁹ The 2016 Justice For All Reauthorization Act authorizes an escalating amount of funding for each of the fiscal years 2017 through 2021, commencing with an authorization of \$2.5 million in FY 2017, \$7.5 million in FY 2018, \$12.5 million in FY 2019, \$17.5 million in FY 2020, and \$22.5 million in FY 2021. *Id.* Notably, Congress never appropriated more than \$2.8 million per year in the years preceding passage of the Justice for all Act of 2004 for capital case representation, despite the annual authorization for \$75 million. See, e.g., Program Description of the Capital Case Litigation Initiative and the Wrongful Conviction Review Program, Office of Justice Programs, at [https://ojp.gov/about/pdfs/BJA_Capital%20Case%20Litigation%20Initiative%20\(CCLI\)%20Prog%20Summary_For%20FY%202017%20PresBud.pdf](https://ojp.gov/about/pdfs/BJA_Capital%20Case%20Litigation%20Initiative%20(CCLI)%20Prog%20Summary_For%20FY%202017%20PresBud.pdf) (last visited Jan. 9, 2017).

³⁰ At the federal level funding for public defense is authorized by the Criminal Justice Act of 1964. 18 U.S.C. § 3006A. In some jurisdictions, a federal defender is appointed to a four-year term by the court of appeals for the district in which he or she serves, and the staff in his or her office are federal employees. See United States Courts, The Defender Services Program, <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx> (last visited Dec. 10, 2010). Other jurisdictions undertake a community defender system, which is a non-profit entity incorporated under state law operate with grants from the federal judiciary and are supervised by a board of directors or a local legal services organization. *Id.*

³¹ Presently, the Ad Hoc Committee to Review the Criminal Justice Act (CJA) Program, comprised of members appointed by Chief Justice John G. Roberts, Jr., is undertaking a comprehensive review of the federal public defense program and its report is slated for release in April 2017. A list of topics under consideration by the Committee can be found at <https://cjastudy.fd.org/> (last visited Nov. 1, 2016).

³² National Registry of Exonerations, Map of Exonerations by State and Year, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Nov. 2, 2016).

³³ 42 U.S.C. § 3797cc-21. In 2007, the Congressional Budget Office estimated that the John R. Justice loan repayment assistance program, if fully funded, would cost \$83 million over the 2008 – 2012 period. H.R. 4137: Higher Education Amendments of 2007, Congressional Budget Office, available at: <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/costestimate/hr41371.pdf>.

³⁴ *Id.* at § 3797cc-21(d)(3).

³⁵ See FY DOJ 2016 Request – State, Local and Tribal Law Enforcement Assistance, U.S. Dep’t of Justice, available at https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/3_2016_state_and_local_chart.pdf (last visited Oct. 27, 2016).

³⁶ See, Bureau of Justice Assistance, National Training and Technical Assistance Center, available at <http://www.bjatrain.org> (last visited Jan. 18, 2011).

³⁷ For more information on the potential benefits of civil infraction reform, see Committee for Public Counsel Services of the Commonwealth of Massachusetts, 2009 Report to the Legislature, available at http://www.publiccounsel.net/report_to_the_legislature.html.

³⁸ For example, a jurisdiction that presently criminalizes “driving without a license” could reduce defender caseloads through a program that supports driver relicensing in lieu of imposition of a criminal sentence. If a defendant does not face incarceration for driving without a license and similar offenses, defender caseloads may be reduced substantially to ethical levels.

³⁹ 42 U.S.C. § 3751.

⁴⁰ Violence Against Women and Department of Justice Reauthorization Act of 2005 §1111, Pub. L. 109-162, merged the Byrne Grant program with the Law Enforcement Block Grant program to create the Edward Byrne Memorial Justice Assistance Grant Program, 42 U.S.C. § 3751 et. seq. Previously, the authorizing legislation for these grant programs (Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C § 3711) listed public defense as an authorized use of grant funds. However, the streamlined language of the 2005 reauthorization did not explicitly list public defense and instead stated that a Byrne JAG grant “may be use for any purpose for which a grant was authorized to be used” in the previous legislation. 42 U.S.C. § 3751(a)(2). Thus, Byrne JAG funds are authorized for public defense expenditures, but this is not explicit in the DOJ grant solicitation given to states, which includes only the streamlined language from the 2005 reauthorization.

⁴¹ In the 114th Congress, Representative Ted Deutch introduced the National Center for the Right to Counsel Act (H.R. 2063), which would establish a national center to provide financial and substantive support to improve the delivery of the right to counsel to indigent defendants.

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

⁴³ See e.g., Hearing before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations, 111th Cong. (2010) (statement of Virginia E. Sloan, President, The Constitution Project), available at <http://www.constitutionproject.org/pdf/389.pdf>; National Legal Aid and Defender Association, *Make Our Justice System Fair and Our Communities Safer by Supporting Quality Public Defense Systems* (2008), available at <http://www.nlada.org/DMS/Documents/1232143408.49/NLADA%20DOJ%20Transition%202-pager.pdf>.

⁴⁴ Nicole Fortier and Inimai Chettiar, *Success-Oriented Funding: Reforming Federal Criminal Justice Grants*, Brennan Center for Justice, 2014 at 3.

⁴⁵ *Id.*

⁴⁶ Erica Hashimoto, *Assessing the Indigent Defense System*, Am. Const. Society, Sept. 2010, at 9 available at <https://www.acslaw.org/files/Hashimoto%20Indigent%20Defense.pdf>.

⁴⁷ See Department of Justice, *Access to Justice, "About the Office,"* at <https://www.justice.gov/atj/about-office> (last visited Oct. 26, 2016).

⁴⁸ For example, in 2014, ATJ and CRT filed a SOI in *Hurrell-Harring v. State of New York*, a class action lawsuit in the Supreme Court of New York alleging systemic failures that denied indigent criminal defendants the right to effective counsel. In its statement, the Department asserted that under-resourcing public defense systems may impede the ability of otherwise capable public defenders from effectively representing their clients. Following the filing of the SOI, the case settled. All SOIs and amicus briefs can be found at <https://www.justice.gov/atj/court-filings-support-access-justice> (last visited Oct. 26, 2016). ATJ has also seeks to improve the administration of federal justice grant programs by, for example, including language promoting the input of all system stakeholders, including public defense providers, in the Byrne JAG.

⁴⁹ In the 114th Congress, Representative Ted Deutch introduced the Status of the 6th Amendment Act (H.R. 4606), which would require all states in receipt of federal criminal justice grant funding to annually submit a report to the DOJ cataloguing the timing of appointment, type of counsel assigned, and case outcomes for all criminal offenses and juvenile delinquency proceedings in the previous year.

⁵⁰ Relatedly, the 2016 bill to reauthorize the Justice for All Act, S.2577 (Cornyn, R-TX; Leahy, D-TX) would require the Attorney General to provide technical assistance to states and local governments requesting support to meet their Sixth Amendment obligations and authorizes \$5 million in funding for this purpose.

⁵¹ In the 113th Congress, Senator Patrick Leahy (D-VT) introduced the Gideon's Promise Act (S.597), which would have authorized the Department of Justice to institute a civil action to obtain appropriate equitable and declaratory relief to eliminate the pattern or practice of violations of the Sixth Amendment.

⁵² Representative Sean Patrick Maloney and Senator Cory Booker introduced the Equal Justice Under Law Act (H.R. 5124; S. 3144) in July 2016, which would confer on federal courts the jurisdiction to provide declaratory and injunctive relief against systemic violations of the Sixth Amendment.

⁵³ Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, *Cato Inst.*, 7 (Sept. 2010).

⁵⁴ For specific examples of the political pressure facing public defenders, see *Justice Denied*, *supra* note 25, at 80-84.

⁵⁵ *Id.* at 200.

III. SENTENCING REFORM

Overview

With slightly less than five percent of the world's population, the U.S. is responsible for approximately 25 percent of the world's prisoners; in 2014 alone, 2.2 million adults were incarcerated in federal and state prisons.¹ Over two-thirds of those in prison are Black or Latino.² The U.S. has the highest rate of incarceration of any country in the world, and federal spending on incarceration in 2010 was estimated at \$80 billion.³ The cost of the federal Bureau of Prisons (BOP) accounts for nearly a one-third of the Department of Justice's (DOJ) discretionary budget. Federal incarceration has become one of our nation's largest federal justice expenditures, swallowing the budget of federal law enforcement.⁴ It costs more than \$30,000 a year to house just one federal prisoner, almost four times the average annual cost of tuition at a public university.⁵

While the federal prison population declined from over 219,000 people in 2013 to less than 192,000 in 2016, thousands of people are still in federal prisons for low-level, non-violent drug offenses.⁶ Currently, 46 percent of the people in BOP custody are incarcerated for drug offenses; and, according to the U.S. Sentencing Commission, 48 percent of those individuals were sentenced to "mandatory minimum" terms that could not be altered by the sentencing judge regardless of individual circumstances or extenuations. According to the 2016 Charles Colson Task Force Report on Federal Corrections (Colson Task Force), nearly 80 percent of all individuals in federal prison for drug crimes had no serious history of violence before their current offenses. More than half had no violent history at all, and 22 percent more had only minor histories of violence, such as simple assault or other crimes that typically do not lead to serious injury.

Additionally, most people incarcerated for drug crimes were not convicted of playing a leadership or violent role in drug trafficking conspiracies.

The extraordinary federal incarceration levels in the U.S. are driven largely by our harsh sentencing policies, which favor incarceration over community-based alternatives or rehabilitative responses. These incarceration rates are not grounded in sound principle or policy; we are now long past the point of any diminishing returns in the cost-effectiveness of the vastly expanded prison system.

Our criminal justice policies have resulted in large numbers of people locked up for excessively long sentences, without evidence that such practices rehabilitate individuals or make our communities safer. As described below, changes to sentencing policies on the front-end, and to release policies on the back-end, should be adopted in order to address this costly and counterproductive situation. For example, changes to mandatory minimum sentencing laws that remove all judicial sentencing discretion could shorten onerously long sentences by allowing trial judges to weigh a variety of factors and apply a fair sentence. Similarly, changes to federal drug conspiracy laws could reduce disproportionate punishment for those who unwittingly, unknowingly, or peripherally are caught in the web of drug-related activity. Revisions to these policies could stem the flow of people with inappropriately long sentences into the BOP. On the back-end, in a system with an aging prison population, strengthening the capacity and functioning of compassionate release could serve as a mechanism to safely decrease the federal prison population. The creation of a judicial second look to systematically review lengthy sentences, as recommended by the bipartisan Colson Task Force, could also aid in diminishing the federal prison population. And the continuation of the DOJ's Clemency Initiative and enhancement of the program by expanding the number of people eligible to petition for clemency could serve to lower the cost and pressure on the federal incarceration system safely.

I. Mandatory Minimums

Summary of the Issue

Mandatory minimum penalties are criminal penalties requiring the imposition of a specified minimum term of imprisonment upon conviction of a particular statutory crime. Nearly two-thirds of all federal drug sentences are subject to mandatory minimums, and most federal cases with mandatory minimum sentencing involve drugs, guns, or both. Mandatory minimums undermine appropriate and equitable sentencing by taking discretion away from trial judges who would otherwise weigh a variety of factors about the severity of the crime, the defendant's background, and similarly situated cases in order to apply a fair sentence. Instead, sentencing authority is transferred almost entirely to federal prosecutors by virtue of their control over charging decisions. Not only does this place extraordinary power in the hands of one party to the adversarial system, but federal prosecutors also routinely used the threat of these lengthy sentences to incentivize plea bargains and frustrate defendants' assertion of the constitutional right to trial. This practice disproportionately impacts Black men and women charged with federal drug crimes.

Background

For nearly 25 years, crack and powder cocaine laws were among the most draconian of federal mandatory minimums. Crack and powder cocaine triggered mandatory minimum sentences at very different levels – a ratio of 100:1 (i.e., the possession of just five grams of crack cocaine resulted in the same sentence as 500 grams of powder cocaine). The scientifically unjustifiable 100:1 ratio meant that people faced dramatically longer sentences for offenses involving crack cocaine than for offenses involving the same amount of powder cocaine. This difference had significant racial implications, as Black people were charged with crack-related offenses much more often than White people.

The Fair Sentencing Act (FSA) of 2010 reduced the sentencing disparity between offenses for crack and powder cocaine from 100:1 to 18:1. While the FSA represents a decade-long bipartisan effort to reduce racial disparities caused by crack cocaine sentencing laws and to restore confidence in the criminal justice system, particularly in communities of color, it was not applied retroactively. Congress should enact legislation to allow people sentenced under the harsh and discriminatory 100:1 ratio to be resentenced under the 2010 law. Additionally, while it was a step toward fairness, the 18:1 ratio still reflects outdated and discredited assumptions about crack cocaine. Given that crack and powder cocaine are two forms of the same drug, there should not be any disparity in sentencing between crack and powder cocaine offenses.

Other laws exacerbate the impact of mandatory sentencing, tying the hands of judges and significantly increasing sentence lengths for what are often small or unrelated offenses. For example, a "safety valve" exception to mandatory minimum sentencing laws allows a judge to sentence a person below the mandatory minimum term if certain conditions are met, but the use of safety valves is highly constrained. Safety valves can be broad or narrow, applying to many or few crimes (e.g., drug crimes only) or types of persons (e.g., those convicted of nonviolent offenses). Judges should have more discretion to use safety valves in cases where a person's criminal history score over represents the severity of the offenses, or where circumstances make it unlikely that they will commit new crimes.

Available enhancements have contributed to huge increases in mandatory sentence lengths, which also drive sentence lengths longer. For example, if a person has prior drug felony convictions, 21 U.S.C. § 851(a) permits prosecutors to file a motion in a drug case that could result in a mandatory minimum sentence's enhancement from five years to 10, or from 10 years to 20, or to a mandatory life sentence – even when the current drug offense is extremely minor and perhaps related to personal addiction. Similarly, 18 U.S.C. § 924(c) allows for "stacking,"

the imposition of consecutive sentences for gun charges stemming from a single incident during a drug crime or crime of violence. For example, a twenty-four-year-old aspiring music producer named Weldon Angelos sold \$1,000 worth of marijuana to federal agents three times over the course of a weekend, during which he happened to have a gun in his possession. He was convicted of three counts of selling drugs while in possession of a firearm, receiving a five-year mandatory minimum for the first count, a 25-year mandatory minimum for the second count, and another 25-year mandatory minimum for the third count – a total mandatory sentence of 55 years. Although Angelos was fortunate enough to be released in 2016 after serving 12 years of his 55-year sentence, many in federal prison continue to serve long and unjust sentences because of this law.

Legislative Proposals

- Congress should abolish mandatory minimum sentencing in current law and avoid establishing new mandatory minimums.
- Congress should pass legislation allowing people sentenced under the harsh and discriminatory 100:1 crack to powder cocaine ratio to be retroactively resentenced under the 2010 law.
- Congress should pass legislation eliminating sentencing disparities for crack and powder cocaine offenses and should apply these changes retroactively.
- Congress should introduce legislation reducing mandatory life, 20, and 10-year sentences for prior drug felonies as outlined in 21 U.S.C. § 851(a), and apply these changes retroactively.
- Congress should pass legislation requiring a prior gun conviction to be final before a person can be subject to an enhanced sentence for a firearm offense, as currently allowed under 18 U.S.C. § 924(c), and apply this change retroactively.
- Congress should enact legislation that would expand eligibility for the existing safety valve under 18 U.S.C. § 3553(f), and create a new safety valve that gives judges the discretion to reduce a 10-year mandatory minimum sentence.

Resources and Experts

- Jesselyn McCurdy, Deputy Director, American Civil Liberties Union, Washington Office
- Kevin Ring, President, Families Against Mandatory Minimums
- Sakira Cook, Senior Policy Counsel, The Leadership Conference on Civil and Human Rights
- Nkechi Taifa, Advocacy Director for Criminal Justice, The Open Society Policy Center
- Marc Mauer, Executive Director, The Sentencing Project

II. Federal Drug Conspiracy Laws

Summary of the Issue

Overbroad drug conspiracy laws ensnare people that commit low-level crimes with long harsh prison sentences, even though they are not involved in crimes beyond their associations. Sections 21 U.S.C. § 841 and 21 U.S.C. § 846 state that anyone who conspires to commit a drug offense will be subject to the same penalties as prescribed for the actual offense itself. Under this provision, someone who simply lived in the same house as a drug dealer could potentially face up to 20 years in prison, despite never participating in a drug deal.

Background

Too often, federal drug conspiracy laws disproportionately punish those who unwittingly or unknowingly find themselves caught in the web of drug-related activity, even in a peripheral role. Conspiracy laws can require long sentences for people who are minimally involved in drug dealing, particularly impacting women who are in relationships with people involved in drug activity or who have an involved family member. Some of these relationships are abusive or coercive in nature,

leaving women vulnerable and with few options. Low-income women of color are particularly subject to prosecution based on their associations rather than their personal conduct. Drug conspiracy provisions contributed to the recent explosion of drug convictions and incarceration rates for women.

Executive Branch Proposals

- The Attorney General should adopt Department of Justice guidance instructing U.S. attorneys to charge people who play a peripheral role in a drug conspiracy with aiding and abetting, not as a co-conspirator.

Legislative Proposals

- Congress should pass legislation that establishes additional elements for drug conspiracy crimes. This legislation should focus on adding elements such as requiring (1) that the defendant and co-conspirator explicitly agree to commit an unlawful act; and (2) that there be a knowingly committed, overt act with specific intent to commit the conspiracy's objectives. A person convicted of a drug conspiracy should only be held responsible for the amount of drugs he or she unlawfully agreed to distribute, manufacture, import, or export.

III. Sentence Reduction for Compelling Reasons (Compassionate Release)

Summary of the Issue

Compassionate release is one of the few existing mechanisms that the federal Bureau of Prisons (BOP) could use to decrease the federal prison population. Pursuant to 18 U.S.C. § 3582(c)(1)(A), sentencing judges may reduce sentences for extraordinary and compelling circumstances, but only after receiving a motion from BOP.

Unfortunately, despite high and growing numbers of elderly people in BOP custody, the agency's low level of activity has limited the program's efficacy.

BOP should make its compassionate release program more effective by evaluating petitions in a timely fashion; adopting the U.S. Sentencing Commission's (USSC) compassionate release guidelines; implementing the tracking system proposed by BOP in its 2015 program statement; and approving changes that will allow BOP to better evaluate whether one still presents a threat to public safety. Additionally, 18 U.S.C. § 3582(c)(1)(A) should be amended to expand individuals' ability to apply for compassionate release to the sentencing court.

Background

Those 50 or older represent the fastest growing and most expensive population in the U.S. federal prison system. Compassionate release could lead to the release of people who have aged while incarcerated and do not pose a threat to public safety, or who have compelling reasons that warrant such a reduction. Continuing to incarcerate people who are ill or infirm imposes unnecessary costs on society as well as on incarcerated individuals and their families.

Under 18 U.S.C. § 3582(c)(1)(A), sentencing courts have the discretion to reduce an individual's

Resources and Experts

- Jesselyn McCurdy, Deputy Director, American Civil Liberties Union, Washington Office
- Michael Collins, Deputy Director for National Affairs, The Drug Policy Alliance
- Kevin Ring, President, Families Against Mandatory Minimums
- Nkechi Taifa, Advocacy Director for Criminal Justice, The Open Society Policy Center
- Marc Mauer, Executive Director, The Sentencing Project

sentence if the court finds that “extraordinary and compelling reasons warrant such a reduction.” Before judges can consider a compassionate release request, however, they must wait for the BOP Director to file a Reduction in Sentence (RIS) motion. Until very recently, such motions were extraordinarily meager. From 2006 through 2011, BOP wardens and regional directors forwarded 211 incarcerated individual requests to the BOP Director, of which 142 (68 percent) were approved for an RIS motion.⁷ Since former Attorney General Eric Holder’s Smart on Crime Initiative expanded the compassionate release criteria from August 2013 through September 2014, BOP wardens and regional directors forwarded 320 incarcerated individual requests to the BOP Director, and 111 (35 percent) were approved for an RIS motion.⁸

In a 2016 report, “The Impact of an Aging Inmate Population on the Federal Bureau of Prisons,” the Department of Justice (DOJ) Office of the Inspector General recognized that “BOP policies limit the number of aging incarcerated individuals who can be considered for early release,” even though “aging inmates engage in fewer misconduct incidents while incarcerated and have a lower rate of re-arrest once released.”⁹ Also in his 2016 statement to the U.S. Sentencing Commission, DOJ Inspector General Michael Horowitz stated that “BOP’s compassionate release program had been poorly managed and implemented inconsistently, likely resulting in eligible incarcerated individuals not being aware of the program and not being considered for release, and terminally ill incarcerated individuals dying before their requests were decided.”¹⁰ These observations demonstrate that BOP must do more to ensure the effective use of compassionate release for sentence reduction.

In 2015, BOP released a program statement outlining new criteria for considering compassionate release petitions. These criteria create three compassionate release classifications: medical, elderly, and non-medical. The non-medical classification is further divided into two subcategories, “need to care for a child,” and “need to take care of spouse or domestic partner.”

Regardless of how a petitioner’s extraordinary and compelling circumstances are categorized, BOP will make a stringent public safety assessment when evaluating these petitions. The 2015 BOP program statement also calls for a RIS coordinator at each institution to track and monitor the disposition of all compassionate release requests. As a result of these changes, the BOP Director approved 106 requests for compassionate release in 2015, and 99 of them led to a reduction in sentence – a dramatic change from prior years. More recently, on June 6, 2016, BOP proposed amending its program statement to clarify which incarcerated individuals are eligible for early release, expand the number of personnel eligible to review requests, and adjust the language of the program statement to better align with the spirit of the statute.

Although the recent changes in criteria improved the process and resulted in a rise of approvals, the changes fail to resolve the primary deficiency in this mechanism for release: BOP retains the sole authority to bring a sentence reduction motion to the courts. Until Congress amends the statute expanding jurisdiction, trial court judges must continue to rely upon BOP to bring them applications, while meritorious applicants for compassionate release remain incarcerated.

Executive Branch Proposals

- The federal Bureau of Prisons (BOP) should adopt the standards that follow the non-binding guidelines adopted by the U.S. Sentencing Commission on April 15, 2016.
- BOP should implement the tracking system described in its recently issued program statement 5050.49. This tracking system would allow for oversight and accountability, encourage BOP to evaluate cases in a timely fashion, and ultimately create a more effective system.
- BOP should approve the proposed rule regarding the changes to 28 C.F.R. 571(G). The proposed changes will allow BOP to better evaluate whether an individual no longer poses a threat to public safety and should be released.

Legislative Proposals

- Congress should amend 18 U.S.C. § 3582(c)(1)(A) to allow incarcerated individuals to file motions directly with the sentencing court to reduce their sentences for extraordinary and compelling circumstances. This amendment restores the intent of the statute by allowing judicial officers to determine whether a reduction in sentence is warranted.

Resources and Experts

- Jesselyn McCurdy, Deputy Director, American Civil Liberties Union, Washington Office
- Michael Collins, Deputy Director National Affairs, The Drug Policy Alliance
- Mary Price, General Counsel, Families Against Mandatory Minimums
- Amy Baron-Evans, Resource Counsel, Federal Public and Community Defenders Sentencing
- Nkechi Taifa, Advocacy Director for Criminal Justice, The Open Society Policy Center
- Marc Mauer, Director, The Sentencing Project
- Margaret Colgate Love, Former U.S. Pardon Attorney

IV. Judicial Second Look

Summary of the Issue

Federal sentences in the U.S. tend to be significantly longer than those in other western nations.

With the abolition of parole in 1984 under the Sentencing Reform Act, there are extremely limited options for review of sentences, taking away opportunity for incarcerated individuals to demonstrate that they have reformed their lives. In

contrast, in 2013, the European Court of Human Rights ruled in a U.K. case that whole-life sentences without the possibility of review violate human rights standards and must include a parole review provision, even for those convicted of murder. This ruling is consistent with findings that show criminality sharply decreases after the age of 40. Yet as of January 2015, the average age of incarcerated people in the federal BOP was 40 years. One in five incarcerated individuals (19.4 percent) was 50 or older, and 5.6 percent of all people in prison were 60 or older. Not only do most of these individuals no longer pose a threat to public safety, any benefit of the sentence has taken effect long ago.

There must be a mechanism by which lengthy sentences can be systematically reviewed. The bipartisan 2016 Charles Colson Task Force Report on Federal Corrections adopted a Model Penal Code recommendation for the implementation of a judicial “Second Look” process, which would permit a judicial panel or other designated judicial decisionmaker to review an incarcerated individual’s sentence in light of current circumstances. Second Look seeks to ensure that sentences at the time of conviction actually remain the appropriate punishment throughout the sentence. The U.S. Sentencing Commission (USSC) should develop and adopt guidelines for judges conducting the Second Look inquiry.

Background

In 2013, approximately 49,000 people were serving life without parole in the U.S., compared to a total of 49 people serving a life sentence without the possibility of release in the U.K. Other countries show similar constraint in using very long sentences: Belgian law requires a parole review of life sentences after 10 years, Germany after 15 years, and the International Criminal Court after 25 years. Norway has a 21-year maximum prison sentence regardless of offense, with an average of eight months’ time served.

The concept of Judicial Second Look derives from Sentencing Section 305.6 of the American Law Institute’s Model Penal Code, released in 2011. That provision would authorize a judicial panel or other judicial decisionmaker to hear and rule on applications for modification of sentence from incarcerated individuals who have served 15 years of any sentence of imprisonment. If denied, an incarcerated individual could reapply for sentence modification at regular intervals not to exceed 10 years. The Model Penal Code provision would also instruct the USSC to recommend procedures for the retroactive application to incarcerated individuals who were sentenced before its effective date.

In recent years, compassionate release and clemency have been used as mechanisms for decreasing the federal prison population. The last Administration made progress by increasing commutations, with over 1,700 grants, more than the total of the 12 prior Administrations. In light of the out-of-control growth of the prison population, however, these measures alone cannot address the large systemic problems caused by overincarceration and overcriminalization. While they are steps forward, both of these programs rely on narrow criteria and thereby miss many opportunities where society will benefit more from the release of an individual than from that person’s continued incarceration. Additionally, given the slow processes for compassionate release and commutations, more can be done by restoring discretion to a judicial officer to reevaluate an individual’s case once a portion of the sentence has been served – the establishment of a judicial Second Look. A judicial Second Look process would align with the growing public support for less lengthy sentences in the U.S., a perspective supported by research about cost and effectiveness, and with sentencing practices of other developed countries.

Spending decades behind bars without review of sentence does not allow an individual to benefit from any personal growth they make while incarcerated, diminishing the incentive to accomplish those improvements. And unjustifiably

lengthy sentences not only affect the individual, but society at large. Caring for incarcerated individuals over long periods of time is costly, and costs increase as incarcerated individuals age. Money currently used to fund federal prisons could be used for initiatives that prevent incarceration, such as educational and “at-risk youth” programs.

Recent years have seen a shift in public opinion away from incarceration toward “smart on crime” measures. The American Civil Liberties Union conducted a national survey in 2015 surveying public opinion across age, political affiliation, and religion that found the public thinks they will be safer when the prison population is reduced and more treatment is implemented.¹¹

Executive Branch Proposals

- The Administration should urge the U.S. Sentencing Commission (USSC) to develop and adopt guidelines for judges responsible for conducting Second Look reviews and modifying sentences, and recommend procedures for the retroactive application. The USSC should implement a tracking and reporting system for Second Look requests.

Legislative Proposals

- Congress should establish a judicial Second Look process that would allow anyone who has served 10 years or more to apply for resentencing before a judicial decision-maker. If the request is denied, the incarcerated individual’s right to reapply for sentence modification shall recur at intervals not to exceed two years. Under such a provision, a judicial panel or other judicial decision-maker would be designated to hear petitions for review and have discretion to modify the sentence downward, including any element of the sentence. The court would not have an opportunity to increase the sentence, as such a provision could discourage meritorious applicants. In order to maintain judicial efficiency, Congress should create a separate judicial position to handle these requests, to ensure that Second

Look reviews do not overload the caseloads of current federal district court judges.

Resources and Experts

- Cynthia Roseberry, Member, Colson Task Force on Federal Corrections
- Nkechi Taifa, Advocacy Director for Criminal Justice, Open Society Policy Center
- Marc Mauer, Executive Director, The Sentencing Project
- Margret Colgate Love, Esq., Former U.S. Pardon Attorney

process to restore civil rights to those who already served their sentence was severely stymied.

President Trump should continue the clemency initiative, take additional steps to expand the number of individuals eligible for relief, and reinvigorate the pardon process to restore civil rights to those who have already completed their sentences and been released.

Background

“Clemency” is an umbrella term covering both commutations and pardons. A commutation shortens a sentence, resulting in earlier release from custody; and a pardon restores civil rights. The president’s pardon power derives from Article II, Section 2, Clause 1 of the U.S. Constitution, which states that the president “shall have Power to grant Reprieves and pardons for Offenses against the United States, except in cases of impeachment.”

On the first day of his first inauguration, President Obama, while riding with his predecessor President George W. Bush in a limousine to the inauguration ceremony, was advised by Bush to “announce a pardon policy early on, and stick to it.”

The experience of the previous Administration’s clemency initiative reveals the need for several areas of further improvement. That Administration’s use of clemency to remedy long-standing sentencing injustices should continue, but with a streamlined process to facilitate the expeditious processing of petitions. The criteria used to vet the requests for sentence commutation should be expanded. Lastly, the review and granting of requests should become regularized as part of the ordinary course of executive duties.

While a thorough review of clemency petitions is absolutely essential, the last Administration’s review process was slow and bureaucratic, requiring at least seven different reviews of each petition, only two of which involved the Office of the Pardon Attorney. That system began with a thorough analysis of a clemency petition by the Pardon

V. Clemency

Summary of the Issue

President Trump should signal his Administration’s clemency policy at the outset. The last Administration both revived and expanded the use of the executive clemency power with a clemency initiative that prioritized cases that met certain criteria. This clemency initiative generated interest from over 35,000 federally incarcerated individuals seeking possible relief.

Over 1,700 sentences were commuted pursuant to the last Administration’s clemency initiative model. Although this is more than the past six presidents combined, the grants did not come close to the 13,000 commutations granted by former President Gerald Ford using a Clemency Review Board to vet antiwar cases.

The last Administration’s clemency effort did not take into account existing bureaucratic limitations, including the potential conflict of interest inherent in the central role played by the Department of Justice. And additionally, as a result of the volume of potential commutation cases, the critical pardon

Attorney's staff, followed by a review by the Pardon Attorney. From there, the case moved to the Deputy Attorney's Office staff, then to the Deputy Attorney General (DAG). Next, the White House Counsel's staff looked over the case, followed by a review by the White House Counsel. Finally, the case was considered by the president. This maze crossed four federal buildings and came across the desks of people with other workloads and responsibilities; clemency is just one small part of the broad workloads of the DAG and White House Counsel. That meant that clemency cases stacked up when these generalists, or members of their staffs, were focused on other issues or were in transition. Additionally, having so many potential vetoes on a case meant that "negative decision bias," the inclination to make the safer choice of "no," was multiplied, and worthwhile cases were sidelined. This is a bad business model, both in terms of resource allocation and outcome.

Tellingly, no state uses this process or anything like it. Many states have used highly successful models that deliver justice more quickly and efficiently. Most rely on a board or commission with a full-time professional staff. Some of the most functional systems are in southern states, such as Alabama, Georgia, and South Carolina. They use independent boards to review petitions, as did former President Ford when he created the Presidential Clemency Board, which lasted just one year and led to the pardon of over 13,000 people for offenses related to the Vietnam War.

Additionally, the criteria for a grant of clemency was far too narrow and prescriptive. In order to be considered for clemency pursuant during the previous Administration, petitioners had to meet six criteria: (1) be a non-violent, low-level offender without significant ties to large-scale criminal organizations, gangs, or cartels; (2) have served at least 10 years of their sentence; (3) have no significant criminal history; (4) have demonstrated good conduct in prison; (5) have no history of violence; and (6) be currently serving a federal sentence substantially longer than the sentence if convicted of the same offense(s) today. These

criteria are unnecessarily narrow, and leave out thousands of worthy individuals.

While the new Administration should continue to review individual petitions, it should also grant clemency absent individualized review to nonviolent people in certain extremely low-risk categories. For example, the new Administration can give consideration to those who did not benefit from retroactivity under the 2010 Fair Sentencing Act. The U.S. Sentencing Commission staff could identify these people, and the DOJ could use prison placement (to a camp, or to a low or medium security facility) as a proxy for how an individual has behaved in prison. There is bipartisan agreement that pre-Fair Sentencing Act crack sentences are unjust, but to date no mechanism has addressed that injustice.

In addition, people who have received sentences in narcotics cases besides crack (the substance at issue in the Fair Sentencing Act), who through good behavior have worked their way down to placement in a camp, or to a low or medium security facility, could receive similar consideration. Special priority could also be given to veterans, older individuals, and other categories of likely deserving candidates.

Finally, the new Administration should reinvigorate the pardon process. As the result of the prioritization of commutation cases in the last Administration, grants of pardon have stalled significantly. A presidential pardon removes the successful applicant's civil disabilities, such as restrictions on the right to vote, hold state or local office, sit on a jury, or own firearms. A pardon may also be helpful in obtaining licenses, bonding, or employment. Pardons play an essential role in the rehabilitation process by removing certain barriers to reentry, and should be expanded in order to increase civic engagement and success during reentry and future life.

Both commutations and pardons can and must continue as a routine and frequent feature of the executive's constitutional authority.

Executive Branch Proposals

- The Administration should extend and expand the number of people eligible to petition for clemency.
- The Administration should create a review board or commission to streamline the clemency review process. The current clemency process is overly bureaucratic and cumbersome, encompassing seven sequential levels of review. A reformed system should include a flatter structure with a board of reviewers situated outside of the Department of Justice (DOJ) and reflecting diversity of background and ideology. Independence from DOJ would not mean that the Department would be barred from any voice in clemency; a commission or board could include a DOJ representative, and input from DOJ on individual cases could be part of the investigative process.
- The prior Administration's clemency initiative should be continued and made more robust.
- Commutation and pardon petitions should be reviewed and granted on a routine and frequent basis. A regularized approach as opposed to mass grants issued primarily on holidays or upon departure from office would shield meritorious commutations from media sensationalism and be an important step toward eliminating mass incarceration.

Legislative Proposals

- Any Congressional effort to limit the president's ability to use pardon or commutation authority should be opposed.

Resources and Experts

- Jesselyn McCurdy, Deputy Director, American Civil Liberties Union, Washington Office
- Amy Povah, Commutation Recipient and Founder, CAN-DO Foundation
- Cynthia Roseberry, Director, Clemency Project 2014
- Jason Hernandez, Commutation Recipient and Founder, Crack Open the Door
- Nkechi Taifa, Advocacy Director for Criminal Justice, Open Society Foundations
- Sam Morison, former Staff Attorney, Office of Pardon Attorney
- Norman Brown, Commutation Recipient and Deputy Director, Project New Opportunity
- Mark Osler Professor, University of St. Thomas School of Law and former prosecutor
- Margaret Colgate Love, private practice, Former U.S. Pardon Attorney

VI. Impact of Parental Incarceration on Children

Summary of the Issue

Over two million children in the U.S. are lost in a sea of draconian laws that have led to mass incarceration. Approximately 50 percent of incarcerated individuals in U.S. prisons are parents. The racial disparity within the prison system is reflected among the children of incarcerated parents, where Black children are eight times more likely than White children to experience parental incarceration. White children born in 1990 have a 1:25 rate of experiencing parental incarceration by age 14; for Black children born in the same year, the rate is 1:4. Indigenous and Latino children also experience alarming rates of parental incarceration that far exceeds the rates of their White counterparts.

The incarceration of so many parents has had devastating effects on their vulnerable children, increasing mental health and behavioral problems, contributing to child homelessness, and intensifying intergenerational inequalities. Recent research documenting the harmful impact that parental incarceration on children, as well as a growing interest from policymakers and practitioners to mitigate the long-term harms to children and their communities, suggests that the time is ripe for policy reform to offer appropriate alternatives to incarceration for parents of young children, and/or early release from prison for parents of young children.

Background

Academic experts have focused on the impact paternal incarceration has on children's well-being. The National Academy of Science's report, "The Growth of Incarceration in the United States: Exploring Causes and Consequences,"¹² reviewed the most reliable research and concluded that the most consistent findings are that paternal imprisonment results in higher rates of both behavioral problems and delinquency.

The American Bar Association (ABA) Foundation found that the U.S. college graduation rate among youth – a rate of 40 percent overall – drops to two percent among children of incarcerated mothers and approximately 15 percent for those with imprisoned fathers. Even more startling is the impact that incarceration is likely to have on other children who do not have a personal experience of parental incarceration. Even when children have no direct experience with parental incarceration, the mere fact they may attend a school where 10 to 20 percent of other children have parents who are imprisoned, the college graduation rate drops by half.

In 2010, Washington State passed the Parenting Sentencing Alternative, which has two components that allow parents of minor children to either avoid a prison term, or to transfer early from prison onto electronic monitoring at home to parent. These

creative solutions are available, and should be pursued at the federal level.

Executive Branch Proposals

- The federal government should adopt a more modern and comprehensive definition of parent eligibility. "'Custodial and non-custodial parent' may be an expectant parent, a biological parent, an adoptive parent, a stepparent, or a person who is acknowledged as a parent figure (for example, grandparent or foster parent) of a dependent child or young adult child up to 24 years of age. Parents can also be custodial or non-custodial mothers/fathers, married or unmarried, cohabiting mothers/fathers, or non-resident mothers/fathers."¹³

Legislative Proposals

- Congress should introduce legislation to mitigate the impact on children of parental incarceration while maintaining public safety. This legislation should require that sentencing guidelines be amended to provide judges authority to depart from the recommended guideline to address the needs of the children that would be adversely affected by incarceration of their mother or father. This legislation should also require guidelines be amended to enable a judge to sentence a parent to an alternative to a prison term.
- Congress should introduce legislation that would allow the Bureau of Prisons to permit people to serve the last 12 months of their sentence at home on electronic monitoring in order to maintain relationships with their children.
- Congress should introduce legislation to give greater jurisdiction and discretion to judges to consider placing or transferring incarcerated parents to prisons closer to where their children and families live in order to facilitate the maintenance of the parent-child bond.
- Congress should require impact statements for sentencing and prison related bills that will have a direct effect on the children of incarcerated individuals.

Resources and Experts

- John Hagan, Research Professor, American Bar Foundation
- Andrea James, Founder, Families for Justice as Healing
- Patricia Allard, Senior Research and Policy Analyst, Justice Strategies
- Glenn Martin, Founder, JustLeadership USA
- Sara Wakefield, Associate Professor, Rutgers School of Criminal Justice
- Ebony Underwood, Soros Justice Fellow, adult child of an incarcerated parent
- Lillian Hewko, Incarcerated Parents Project Attorney, Washington Defender Association
- Susie Leavell, Program Administrator, Washington State Department of Corrections

- ¹ Sean Gorman, Webb Says U.S. Has 5 Percent of World's Population, 25 percent of its "known" Prisoners, Politifact, (December 15, 2014, 1:00pm), <http://www.politifact.com/virginia/statements/2014/dec/15/jim-webb/webb-says-us-has-5-percent-worlds-population-25-pe/>.
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- ³ See Tracey Kyckelhahn, Bureau of Justice Statistics, Justice Expenditure and Employment Extracts, 2012 — Preliminary tbl. 1 (2015), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239> (showing FY 2012 state and federal corrections expenditure was \$80,791,046,000).
- ⁴ Nancy LaVigne & Julie Samuels, The Urban Institute, The Growth and Increasing Cost of the Federal Prison System: Drivers and Potential Solutions 1-2 (Dec. 2012) [Herein after LaVigne Urban Institute Report], available at <http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf>.
- ⁵ "Annual Determination of Average Cost of Incarceration", 80 Fed. Reg. 12,523 (March 9 2015), available at <http://docs.regulations.justia.com/entries/2015-03-09/2015-05437.pdf> (showing FY 2014 average annual cost of incarceration for federal inmates was \$30,619.85).
- ⁶ Federal Bureau of Prisons. https://www.bop.gov/about/statistics/population_statistics.jsp.
- ⁷ The Federal Bureau of Prisons' Compassionate Release Program, pg. 72, (April 2013) Department of Justice, Office of Inspector General. Available at <https://oig.justice.gov/reports/2013/e1306.pdf>.
- ⁸ Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 12,523 (March 9, 2015). Available at <http://docs.regulations.justia.com/entries/2015-03-09/2015-05437.pdf> (showing FY 2014 average annual cost of incarceration for federal inmates was \$30,619.85).
- ⁹ The Impact of an Aging Inmate Population on the Federal Bureau of Prisons (May 2015) Office of the Inspector General, U.S. Department of Justice, available at <https://oig.justice.gov/reports/2015/e1505.pdf>.
- ¹⁰ Compassionate Release and the Conditions of Supervision (Feb. 2016) Office of the Inspector General, available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/IG.pdf>.
- ¹¹ ACLU Nationwide Poll on Criminal Justice Reform. (2015) American Civil Liberties Union. Available at https://www.aclu.org/sites/default/files/field_document/aclu_polling_cjreform_2015.pdf.
- ¹² The Growth of Incarceration in United States: Exploring Causes and Consequences. (2014) The National Academies Press. The National Academies of Sciences, Engineering, Medicine.
- ¹³ Responsible Fatherhood Opportunities for Reentry and Mobility Grant. (Jul. 2015) Federal Administration for Children and Families. Available at https://ami.grantsolutions.gov/files/HHS-2015-ACF-OFA-FO-0992_0.htm.

IV. PRISON CONDITIONS

Overview

The U.S. incarcerates a higher percentage of its population than any other country in the world: one in every 100 adults is behind bars. Approximately 192,000 of the more than 2.3 million people in prisons and jails in our country are in the custody of the Federal Bureau of Prisons (BOP). Often, conditions during confinement pose grave risks to the health and safety of incarcerated individuals. Overcrowding, violence, sexual abuse, and dangerously restrictive environments are only a few of the issues that many people face routinely during incarceration. All of these have implications not only for the people who are incarcerated, but for the health and safety of correctional staff, the families of both staff and incarcerated people, and the broader community.

Particularly in light of the increase in incarceration rates for women, it is important to address the needs of women in preventing, responding to, and providing recovery from violence in prisons and jails. Once imprisoned, women experience significant levels of abuse, sexual exploitation, and physical and psychological violence.¹ Similarly, incarcerated LGBTQ individuals are among those at highest risk for abuse and harassment.

BOP has the opportunity and tools to ensure that conditions of confinement are more humane and effective at protecting and rehabilitating people while they are in prison. Improving general conditions and increasing oversight and transparency are essential to creating and maintaining safe correctional facilities. BOP facilities must be held accountable for the statutory obligations of the Prison Rape Elimination Act (PREA) to ensure that people in prison are not victims of sexual violence. BOP must implement strong policy statements to reduce the use of

solitary confinement in federal prisons. By working to strengthen their own policies and practices, federal actors will not only improve conditions in federal facilities, but can also establish standards of performance and care that will drive improvements in facilities and systems at every level of government.

I. Human Rights in Confinement

Summary of the Issue

In May 2015, the United Nations (UN) adopted the “Nelson Mandela Rules,” a revised minimum standard on the treatment of incarcerated individuals. Named after the late South African president who spent 27 years in prison in his fight against apartheid, the Mandela Rules call for UN member states to recognize the inherent dignity of people in confinement. For example, the Rules call for the provision of the same standard of health care for people in confinement as is available in the community, and prohibit indefinite or prolonged solitary confinement (beyond 15 consecutive days). The UN urges all member states to implement these minimum standards in their own domestic law.

Executive Branch Proposals

- The President should issue an executive order that directs all federal agencies that confine people, either directly or through a contract or intergovernmental agreement, to adopt and abide by the Mandela Rules.

Legislative Proposals

- Congress should pass legislation to reform the use of solitary confinement and other forms of restrictive housing for all people confined in the BOP and other federal confinement facilities.

Resources and Experts

- Juan Mendez, United Nations Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment
- Alison Leal Parker, Director, US Program, Human Rights Watch
- Amy Fettig, Deputy Director, National Prison Project, The American Civil Liberties Union
- Laura Downton, Director of US Prisons Policy and Program, National Religious Campaign Against Torture

to conditions of confinement. Moreover, the courts are unable to address many systemic and managerial problems before they give rise to constitutional violations. As a result, alternative forms of oversight are essential.

Executive Branch Proposals

- The federal Bureau of Prisons (BOP) should disclose contracts, operating procedures, operating records, monitoring documents, and any other similar documents related to private facilities pursuant to Freedom of Information Act (FOIA) Exemption 4, which is intended to protect trade secrets.

Legislative Proposals

- Congress should establish an Office of Civil Rights and Civil Liberties (OCRCL) within BOP to (1) receive and investigate civil rights complaints from incarcerated individuals; (2) recommend policies enhancing the dignity and safety of incarcerated individuals; and (3) advise the BOP Director on the civil rights and civil liberties of incarcerated individuals. The Chief Officer of the OCRCL should be appointed by the Attorney General and report directly to the BOP Director.
- Congress should enact legislation to clarify the BOP's obligation to disclose documents and other information, pursuant to FOIA requests, from companies that contract with BOP and the U.S.

II. Oversight and Transparency

Summary of the Issue

By their nature, prisons are closed institutions in which the government, through the prison administration and staff, has exceptional power over every aspect of residents' lives. The lack of transparency in public and private prisons cultivates an environment where it is all too easy for conditions to deteriorate to an extent that endangers the lives of both staff and residents. In order to prevent abuse and neglect, prisons need effective forms of oversight so that public officials comply with their legal obligations to ensure that conditions in these facilities meet constitutional standards. The federal Freedom of Information Act (FOIA) has not been found to apply to private prison company records, creating an additional level of secrecy in these facilities.

Background

The 1996 enactment of the Prison Litigation Reform Act (PLRA) undercut the protection of incarcerated people's rights by the federal courts. This legislation significantly limited the power of the courts to provide review or relief in cases involving challenges

Resources and Experts

- Amy Fettig, Deputy Director, The American Civil Liberties Union, National Prison Project
- Lisa Rosenberg, Executive Director, OpenTheGovernment
- Paul Wright, Prison Legal News
- Sarah Geraghty, Managing Director, Impact Litigation Unit, Southern Center for Human Rights

Marshall Service to operate private jails and prisons.

III. Prison Rape Elimination Act (PREA)

Summary of the Issue

Sexual violence behind bars remains a national crisis. A 2010 Department of Justice (DOJ) study of prisons and jails estimated that 88,500 adult incarcerated individuals were sexually abused over the course of one year.² In a similar survey of youth in juvenile facilities, a shocking one in eight reported being sexually abused in the previous year. In both types of facilities, staff-on-incarcerated individual abuse was more prevalent than abuse perpetrated by incarcerated individuals.³

Background

In 2003, the Prison Rape Elimination Act (PREA) called for the development of binding national standards for the prevention, detection, response, and monitoring of sexual violence behind bars. The bipartisan National Prison Rape Elimination Commission developed standards and submitted its recommendations to the Attorney General, and in May 2012, former Attorney General Eric Holder released the final PREA standards. These standards were binding on federal facilities immediately, while state and county systems had one year to come into compliance or risk losing five percent of their federal funding.

Over the past four years, the federal Bureau of Prisons (BOP) and state facilities have initiated the audit processes required by PREA. However, not all states and jurisdictions are compliant, and questions remain about the quality of those audits. While paving the way for groundbreaking standards, PREA provides no mechanism for measuring and monitoring compliance overall. Such mechanisms must be created by DOJ in order to implement the standards effectively.

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

Executive Branch Proposals

- The Department of Justice (DOJ) leadership should ensure that federal Bureau of Prisons (BOP) fully implement Prison Rape Elimination Act (PREA) standards and continue to subject BOP facilities to rigorous independent audits as required by the standards.
- DOJ should establish meaningful guidelines for the monitoring of local compliance with PREA and should provide ongoing federal oversight to ensure accountability.
- DOJ should require all PREA audits to be filed in a centralized, public clearinghouse to promote transparency and accountability.

Resources and Experts

- Amy Fettig, Deputy Director, The American Civil Liberties Union, National Prison Project
- Marcy Mistrett, Director, Campaign for Youth Justice
- Michela Bowman, Co-Director at PREA Resource Center, Impact Justice
- Chris Daley, Deputy Executive Director, Just Detention International
- Brenda Smith, IC Cooperative Agreement on Addressing Prison Rape American University, Washington College of Law

IV. Solitary Confinement

Summary of the Issue

Solitary confinement, the practice of holding a person in a cell alone for 22 or more hours per day with little or no human interaction, inflicts lasting – and, in some cases, permanent – psychological harms after as few as 15 days. Mental health experts decry the use of extended isolation, particularly against vulnerable populations. Unfortunately, many of those held in solitary confinement are not violent criminals, but instead severely mentally ill incarcerated individuals who are difficult to manage in prison settings.

Background

National attention to the harms of solitary confinement led the previous Administration to request that the Department of Justice review solitary confinement practices in correctional facilities. In January 2016, the DOJ issued its “Report and Recommendations Concerning the Use of Restrictive Housing” including “Guiding Principles” for restrictive housing in any context, and a list of “Policy Recommendations” for specific federal entities.⁴ However, many of these reforms depend upon the availability of adequate funding to develop and implement them. One of the recommendations that was acted upon by President Obama is a ban on solitary confinement for youth; as well as severe restrictions on the use of solitary confinement for pregnant women, individuals with serious mental illness, LGBTQ individuals, and for protective custody purposes. The reforms also established time limits, restrictions on the use of solitary confinement for lower level disciplinary offenses, and robust data reporting. These reforms represent a significant step forward, but more must be done to assure full implementation and ongoing reform efforts.

Executive Branch Proposals

- The Bureau of Prisons (BOP) should fully implement the 2016 Presidential Memorandum Limiting the Use of Restrictive Housing by the Federal Government.
- BOP should rescind Program Statement 5214.04 on “Procedures for Handling of HIV Positive Inmates Who Pose Danger to Others.” Program Statement 5214.04 allows the BOP to house someone in solitary confinement indefinitely if they believe the person may engage in conduct that poses “a significant threat to transmit the virus to another person.”

Resources and Experts

- Amy Fetting, Deputy Director, American Civil Liberties Union (ACLU), National Prison Project
- Joss Woss, Legislative Associate for Domestic Policy, Friends Committee on National Legislation
- Alison Leal Parker, Director, US Program, Human Rights Watch
- Chris Daley, Deputy Executive Director, Just Detention International
- Laura Downton, Director of US Prisons Policy and Program, National Religious Campaign Against Torture
- Deb Golden, Project Director, DC Prisoners’ Project, Washington Lawyers Committee for Civil Rights and Urban Affairs
- Juan Mendez, United Nations Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment

V. Repurposing Prisons

Summary of the Issue

Over the past two decades, overincarceration has been exacerbated by financial incentives for states to impose overly harsh sentences, reduce opportunities for parole, and fund prison construction. There is now bipartisan recognition that these extreme policies have led to high costs in financial and human capital; yet reversing course in an area with such enormous economic and commercial investment is challenging. The federal government has an opportunity to incentivize more effective and humane policies and lower rates of incarceration by providing financial assistance to state and local communities to convert their prisons into other types of facilities.

Background

Driven by policies such as “three strikes” laws and “truth in sentencing” legislation, states incarcerate a much larger number of people in the U.S. than does the federal government. Yet the federal government has played an outsized role in driving overincarceration in the U.S., not only through severe federal criminal penalties, but also by creating financial incentives for states to adopt similarly punitive policies and impose longer sentences. The 1994 Violent Crime and Law Enforcement Act played a central role in this process, providing \$9.7 billion for prison construction in states that “got tough on crime.” These “federal financial incentives fueled the expansion of prisons, sustaining the explosive increase in incarceration....”⁵

In the years following the 1994 Crime Bill’s passage, new prisons were often placed in economically insecure communities. They were pitched to local citizens as a path to economic sustainability, jobs, and other financial benefits. Yet the costs of prisons have proven to be unsustainable in many places. The high financial cost of incarcerating massive numbers of Americans is a growing concern for state and local officials across the political spectrum.

In the words of former Texas Governor Rick Perry during the Conservative Political Action Conference in 2014, “You want to talk about real conservative governance? Shut prisons down. Save that money.”⁶

In recent years, prisons built during the construction boom have been closing nationwide: Michigan has closed 21 prison facilities, including prison camps; North Carolina has closed 57 prisons; and New York has closed 13 facilities in just the past five years. At least six states closed 20 correctional facilities, potentially reducing prison capacity by 11,370 beds, an estimated five-year cost savings of over \$229 million.⁷

Shuttered correctional facilities can instead be transformed into community resources that fuel economic activity and serve the people living in the surrounding areas. Much like cities and towns that rely on military bases as a source for economic activity, the communities that surround correctional facilities often view their closure with a degree of trepidation. Congress has often authorized economic development funding for communities with closing military bases in order to mitigate the economic impact of closure, as well as create an alternative source of jobs. For the same reasons, Congress should provide similar support to communities that have become economically dependent on prison facilities.

Various creative initiatives are already underway. For example, communities have chosen to convert closing prison facilities into classrooms for new community colleges or educational institutions that provide job training and services. Providing education for local communities is less costly than running a prison to house hundreds of incarcerated individuals, and the long-term benefits are also much greater. The nonprofit organization GrowingChange.org seeks to convert an abandoned prison in Wagram, North Carolina to an educational facility with a sustainable farm.⁸ A correctional facility in Florida was converted into a homeless shelter, and a Louisiana facility to a work center for formerly incarcerated people.⁹ New York’s

Governor Andrew Cuomo created a \$50 million Prison Transformation Fund available to communities with viable plans for repurposing closed correctional facilities, providing support while saving \$162 million in New York taxpayer dollars due to closed prison facilities.¹⁰

Repurposing prison facilities provides an opportunity to involve local communities in developing their own alternative use plans. The federal government should create new financial incentives, modeled in the style of the 1994 Crime Bill, to convert facilities into institutions that actually support local residents. Just as the federal government provided funding for prison construction to states that “got tough” with longer sentences and more time served, federal actors should now support the reversal of that misguided course by providing support for repurposing prison facilities to states that are acting to reduce their prison and jail populations.

Executive Branch Proposals

- The Administration, through agencies including the Departments of Justice, Homeland Security, and Housing and Urban Development, should create financial and other incentives and supports for state and local governments to shut down jails and prisons and work with communities to repurpose facilities for the benefit of local residents. The Administration should keep a database of transformed properties in order to evaluate effectiveness and facilitate sharing of best practices.

Legislative Proposals

- Congress should pass legislation that will support and fund the repurposing of correctional facilities for community use.

Resources and Experts

- Nicole D. Porter, Director of Advocacy, The Sentencing Project
- Tracy Huling, Soros Justice Fellow and Founder, Yes, In My Backyard

- ¹ Julia Bowling, *The Crime Bill's Legacy, Two Decades Later*. (Jul. 2014) Brennan Center for Justice. Available at <https://www.brennancenter.org/blog/crime-bills-legacy-two-decades-later>.
- ² *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09*. (2010) U.S. Department of Justice. Available at <https://www.bjs.gov/content/pub/pdf/svpjri0809.pdf>.
- ³ *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09*. (2010) U.S. Department of Justice. Available at <https://www.bjs.gov/content/pub/pdf/svjfry09.pdf>.
- ⁴ U.S. Department of Justice Report and Recommendations Concerning Use of Restrictive Housing (Jan. 2016) available at <https://www.justice.gov/archives/dag/file/815551/download>.
- ⁵ Julia Bowling, *The Crime Bill's Legacy, Two Decades Later*. (Jul. 2014) Brennan Center for Justice. Available at <https://www.brennancenter.org/blog/crime-bills-legacy-two-decades-later>.
- ⁶ Alysia Santo, *Converted Cellblocks: The Many Ways We Recycle Vacant Prisons*. (Jan. 29, 2015) The Marshall Project. <https://www.themarshallproject.org/2015/01/29/converted-cellblocks#.BMl46mgc3>.
- ⁷ *On the Chopping Block: State Prison Closings*. (2011) The Sentencing Project. Available at <http://www.sentencingproject.org/wp-content/uploads/2016/01/On-the-Chopping-Block-2011.pdf>.
- ⁸ *Growing Change: Our Mission is Transformation. Reclaim – Attain – Sustain*. Retrieved from <http://www.growingchange.org/reclaim-attain-sustain/>.
- ⁹ See supra note 3.
- ¹⁰ Tracy Huling, *Yes, In My Backyard* (2015) The Osborne Association. Available at <http://www.osborneny.org/post.cfm?postID=506>.

V. REENTRY

Overview

This year, an estimated 700,000 people will leave prison, and millions will enter and leave local jails. They will return to their communities, often lacking the basic tools for establishing their lives outside of incarceration: appropriate health care, support services for addiction and mental illness, job prospects, education services such as high school completion or career preparation, and affordable housing options. Most will have children depending on them for support. The true cost of incarceration – including costs to individuals, families, and communities – in the U.S. exceeds \$1 trillion, or six percent of gross domestic product, dwarfing the amount spent on corrections alone. Research indicates that more than half of those costs are borne by families, children, and community members who have committed no crime.

The criminal justice system has a disproportionate impact on individuals of color, especially Black men. Black males are incarcerated at rates 3.8 to 10.5 times greater than their White male counterparts, and one of every ten Black men of prime working age is in prison or jail on any given day. Upon release, the disparities continue: the combined effect of race and a criminal record can present major barriers to successful reentry, including barriers to employment and housing.

Reentry, the period following incarceration or conviction during which a person reintegrates into the community, is a time of paramount importance to ensuring public safety and the success of an individual's rehabilitative process. The Bureau of Justice Statistics estimates that over two-thirds of the individuals released from prison will be rearrested within three years.

Successful reentry requires that preparation begin long before the moment of release. Experiences during incarceration have an enormous impact on

the level of success of reentry. For example, the opportunity to maintain and strengthen family relationships while incarcerated increases the likelihood of successful reentry. Similarly, access to education, job training, and adequate healthcare – including mental health and substance abuse disorder services – while incarcerated are key to preparing for release. Connections with social service and reentry service providers in home communities ease reentry, and can make the difference between success and failure.

Released individuals face other challenges upon returning to their communities. Barriers to reentry include lack of access to nutrition assistance, food stamps, cash assistance, education, employment, eligibility and accreditation for skilled trades and professional careers, housing, and health care.

Broad bipartisan commitment to improving reentry has been evident over the last three federal Administrations. In order to ensure that individuals returning from incarceration can reach their full potential and end the cycle of reincarceration, the Administration and Congress should make a public commitment to reentry and criminal justice reform by advancing the recommendations outlined herein.

Overarching Reentry Proposals

- The President should, by Executive Order, create an Office for National Reentry Policy, and a corollary National Advisory Committee on Reentry pursuant to the Federal Advisory Committee Act.
- The Administration should ensure equity in reentry outcomes.
- Congress should reauthorize the Second Chance Act.

I. Conditions of Confinement: Family Engagement

Summary of the Issue

The federal Bureau of Prisons (BOP) and states should adopt policies that make maintaining family

relationships easier for incarcerated parents, particularly women with minor children. Building strong connections with family and friends while incarcerated acts as a powerful incentive for successful reentry and as a guard against recidivism, and helps to reduce the harm incarceration has on children.

Background

In 2016, the Charles Colson Task Force on Federal Corrections recognized that family engagement serves as an “important component of a rehabilitative environment.”¹ Similarly, former Attorney General Loretta Lynch’s “Roadmap to Reentry” reform plan included a guiding principle that “[w]hile incarcerated each inmate should be provided the resources and opportunity to build and maintain family relationships, strengthening the support system available to them upon release.”² Yet isolation from family, for both men and women, is a significant burden, and, by and large, women in prison receive fewer visits than men.

This principle of building and maintaining family relationships should serve as a guide for all correctional systems. The Administration should ensure that all federal facilities support family relationships in every way possible, and should encourage states to do the same.

Research indicates that “incarceration is associated with weaker family bonds and lower levels of child well-being.”³ When parents enter the criminal justice system, prosecutors and judges should give full consideration to channeling them into diversion programs or alternatives to incarceration, particularly if the offense is non-violent or the parent is a child’s primary caretaker. Long prison sentences take parents away from their children during their formative years, and can lead to the permanent removal of a child from home. Greater utilization of diversion programs and alternatives to incarceration for justice-involved parents can mitigate the risk to children.

Housing incarcerated people near their homes is another way to support the maintenance of family relationships. Particularly in the federal system, where people are sentenced to serve time in the national BOP, individuals may be housed in facilities that are hundreds to thousands of miles away from their families. About half of the people in BOP custody are housed over 250 miles from home, and more than a quarter are housed over 500 miles from home.⁴ Courts should have the ability to direct parents’ incarceration to the facilities closest to their homes, and the BOP should consider subsidized bus transportation for families.

As recommended by the Colson Task Force, the BOP should establish a “central family affairs and visitation office to oversee prison visitation procedures in the interest of facilitating family visits.”⁵ There are a number of ways in which the BOP can create and support greater opportunities for positive family interactions, increasing both the quality and quantity of direct contact with family members. For example, policies should maximize the length of visiting hours, expand the number of visiting days to include both Saturdays and Sundays as well as federal holidays, create child-friendly visiting spaces to reduce intimidation for children who visit, and encourage innovative special programs and activities such as “Family Days” especially at women’s facilities. States should be encouraged to follow the BOP example in all of these areas.

In addition to expanded availability of in-person visits, opportunities for cost-free or subsidized video visitation between incarcerated parents and their children should be increased to provide a wider range of times and frequencies. Affordable video visiting opportunities should be expanded to offer a less expensive and less time-consuming alternative to in-person visits. It is crucial, however, that video visits be a supplement to, and not a replacement for, in-person contact visitation.

Similarly, affordable options for phone calls, mail, and email to incarcerated family members should be easily available to all. Prison and jail phone calls

have been a financial burden for families of incarcerated people for years, due to oppressive pricing structures in prisons and jails. In 2015, the Federal Communications Commission (FCC) imposed price caps for interstate calls, leading to lower prices for some prison and jail phone calls. True price relief for people in prison and their families is elusive, however, as the prison telecommunications industry has successfully sought federal court stays of FCC action to find compromise on prison calling service rates. Prison phone rate reform should be supported and prices set at affordable rates for families to maintain positive relationships with their incarcerated loved ones. Similarly, mail, whether electronic or postal, should be facilitated as a means of supporting communication between incarcerated parents and their families. As part of this effort, correctional facilities should forward first class mail when a person is released or transferred.

One area of particular concern is the practice of removing newborn babies from their mothers soon after birth, stifling mother/baby attachment and bonding during a critical stage of child development. Despite the significant increase in the number of women serving time behind bars, only eight states operate prison nurseries. BOP operates the Mothers and Infants Nurturing Together (MINT) program at several community-based centers around the country, where some women are transferred during their last trimester of pregnancy; but the eligibility restrictions are narrow, and mothers are only allowed to stay with their infants for up to three months after birth.⁶

On the back end, opportunities to reduce prison sentences for parents should be expanded. Because parole is no longer part of the federal system, the federal BOP has few options to reduce sentence length except through the application of good time credits.⁷ However, the opportunities to earn good time credits are extremely limited: there is only one program in the federal system, the Residential Drug Abuse Program (RDAP), through which a person can qualify for a sentence reduction. More evidence-based risk-reduction programs should be available

so that all potential participants can earn good time credits, not just the narrow group with access to RDAP programming. Programs should especially be available to high- and medium-risk individuals who are the most positively impacted by targeted intervention.⁸

Finally, outstanding child support orders and interest can pile up to create a crippling level of debt upon the release of an incarcerated parent. When the economic challenge of finding adequate employment with a criminal record is added to this debt load, a formerly incarcerated parent can face a downward spiral, which can even lead to reincarceration due to nonpayment of child support. In cases in which a parent is unable to pay child support due to incarceration, both local and state systems should make available opportunities for a pause in child support obligations in order to avoid this insurmountable obstacle.

Executive Branch Proposals

- The Administration should take a family-focused approach to sentencing to reduce the trauma that children can experience as a result of their parent's arrest and incarceration.
- The Administration should encourage both the federal Bureau of Prisons (BOP) and the states to expand the use of good conduct time credits for individuals. This will incentivize good behavior and program participation, encouraging rehabilitation and shortening sentence lengths.
- BOP should house people close to their home communities, and stop building federal prisons in rural areas far from urban centers. BOP should contract with state facilities when no suitable federal facility is within reasonable proximity to a person's home.
- BOP should establish a family affairs and visitation office responsible for developing and implementing prison visitation procedures that facilitate family visits and connection.
- The Administration should increase opportunities for family contacts and visitation through multiple means—more time for contact visits and affordable video visitation, more availability and

affordability for phone calls, and options for mail and email.

- BOP should expand eligibility for participation and extend length of stay in nurseries in federal prisons, and the Administration should encourage states to open more prison nurseries.
- The Administration should encourage states to pause child support orders while the non-custodial parent is incarcerated, and eliminate judicial barriers to seeking modification of support orders.

Legislative Proposals

- Fiscal Year 2016 was the third consecutive year of prison population decreases after 34 years of increases. Congress should shift resources from building new federal prisons to expanding BOP programs and treatment opportunities.
- Congress should enact all recommendations of the Charles Colson Task Force on Federal Corrections.⁹

Resources and Experts

- Annelise Hafer, Citizens United for the Rehabilitation of Errants (CURE)

II. Conditions of Confinement: Adult Correctional Education

Summary of the Issue

Numerous research studies show that the incarcerated population is woefully behind the free population in terms of high school completion and skilled job training. Because many people in prison or jail dropped out of high school, incarcerated individuals are often reluctant to return to a formal school setting and many end up unemployed or underemployed in part-time, low-paying jobs.

Notwithstanding obstacles, a period of incarceration provides an opportunity to reengage adults in formal education and learning, building their skills and qualifications for success both before and after release. Investing in education behind bars drives economic and social savings. The RAND Corporation's 2014 education study "How Effective is Correctional Education and Where Do We Go From Here?"¹⁰ demonstrates that investing one dollar in education results in five dollars of future savings in criminal justice costs as a result of the significant drop in recidivism. Education is crucial to breaking the cycle of re-offending, and pays for itself several times over. It should be an integral part of correctional programming and an essential part of reentry.

Background

Planning for education, including remedial education and other support services, must start the moment a person enters the justice system. It takes months and even years for students to make up for their lack of basic academic education and marketable job skills. If individuals do not receive education while incarcerated, they may qualify only for the lowest paying jobs and lack the requisite soft skills to communicate, problem-solve, and understand social dynamics in the workplace.

While correctional education is similar in content, skills, and instructional goals to the education of students who complete high school as adolescents, teaching strategies for adults vary given maturation and experience. Many students will need English as a Second Language, career, technology, computer literacy, and employment preparation training. For those who complete high school while incarcerated, post-secondary academic and occupation courses should be available, as recidivism rates drop significantly for those who complete academic or career level college courses behind bars.¹¹ Because many adults have learning disabilities and motivational difficulties, remedial and special education instruction are important for the delivery of effective education.

Data Collection. Correctional facilities should collect data on the educational levels, goals, skills, assessments, completions, and certifications of those who are incarcerated, and share computerized records with reentry program providers as individuals progress through the system and into the community. Correctional facilities should counsel people on how to locate opportunities and funding streams for education by forging partnerships with higher education institutions, technical schools, workforce agencies, and local businesses. Close coordination during and after release and connections to employment and education helps maximize the likelihood that educational progress continues after release into the community.¹²

Expanded Resources. An amendment to the Higher Education Act (HEA) of 1994 stripped incarcerated students' eligibility to access Pell Grants. Since few states provide funds for post-secondary education, most incarcerated people are thus completely shut out of post-secondary education opportunities. Federal law prohibits individuals with certain offenses from accessing financial aid after release.

A bipartisan effort has been growing to rescind the prohibition of Pell grants in state and federal facilities. Building on the bipartisan progress made in previous iterations of HEA, Congress should overturn the prohibition of Pell grants for people in state and federal systems that were enacted over 20 years ago. The Departments of Education and Justice should continue to work together to provide technical assistance to colleges and their correctional partners implementing these college programs and evaluating techniques to overcome the challenge of providing high quality post-secondary education within the limitations of correctional environments.

The Workforce Innovation and Opportunity Act (WIOA) is a federal law that focuses primarily on the free community, but there are also significant resources available for job preparation behind bars.¹³ Under WIOA, the public workforce system aims to increase employment and economic

opportunity for priority populations facing barriers to employment, including adults with criminal records and out-of-school youth. State and federal correctional agencies should work closely with the state and local workforce development boards, which are required to collect and report data on these barriers.

When WIOA was passed in 2014, it included a provision to increase the maximum state grant set-aside for prison education programs from 10 percent to 20 percent. WIOA state set-aside funds aim to improve adult basic education programs; however, RAND Corporation research has illustrated the lack of state and federal funding at this level. Even if persons are eligible for Pell grants, many will be unable to apply as they don't meet the minimum qualifications for post-secondary education. In most states, more than half of the incarcerated population has not completed high school or obtained an equivalency degree.

In addition to the general lack of basic and high school education, incarcerated populations lack career training and job skills. The federal Perkins Act covers career and vocational education, and is currently up for reauthorization. Congress is taking steps to ensure greater support for access to postsecondary education and vocational services. On September 13, 2016, the U.S. House of Representatives passed the Strengthening Career and Technical Education for the 21st Century Act, a bill that would reauthorize Perkins Law. As with HEA and WIOA, the previous version of the Perkins Act restricted funding access for correctional populations: the basic state grant for vocational education was reduced to no more than one percent, and departments of correctional education were excluded from the state planning process. When reauthorizing the Perkins Act, Congress should lift the one percent restriction for vocational education, and should require inclusion of departments of corrections in the state planning boards for Perkins so they can inform the planning process and decisions on funding distribution.

While the Individuals with Disabilities Act (IDEA) has been authorized for several decades and applies to young people in prison, most young people incarcerated in adult facilities are not receiving mandated services. Legal activity to enforce the IDEA has focused primarily on juvenile systems to ensure that they provide legally mandated screening and educational services. Most adult systems however, have not implemented IDEA properly. Additionally, Congress passed legislation in the 1990s excluding the BOP from implementing IDEA, and limiting the screening of youth in state adult facilities. Youth not previously identified as special education students with an individual education plan before incarceration are not eligible for identification and services.

Federal reentry legislation needs to undo Perkins, WIOA, and IDEA restrictions, and encourage local and state systems to provide extensive educational services including vocational, career and technical education for all students with educational challenges or disabilities. Much of the time behind bars should be spent on education completion and job preparation. This is especially important for local jails. There are over 3,000 local jails across the U.S., and most do not provide special education screening and services to the estimated 700,000 people incarcerated on a daily basis. Few receive any funds from WIOA or Perkins. The intake and record collection process should begin in jail, as should the development of individual education and career plans for eventual release. Whether a person goes from jail to a prison setting, or spends an entire sentence in a jail and returns directly to the community, this is an opportune time to develop a reentry plan and enhance the likelihood of success.

Executive Branch Proposals

- The Administration should urge state agencies to perform educational assessments, identify educational needs of individuals entering the criminal justice system, and collect data.
- The federal Bureau of Prisons (BOP) should support the development of individual education

plans for each individual as an integral part of a rehabilitation plan. Data on a person's adolescent and adult education history, recent skill assessments, goals and a survey of a person's general interests should be collected and computerized as part of the overall intake and permanent record keeping system. The Administration should encourage state systems to do the same.

- The Administration should place a higher priority on educational programming in the BOP, strengthen incentives for prisoners to participate in educational programs, upgrade training for BOP educational staff, establish stronger accountability and reporting systems for educational programs, and increase and improve structured work opportunities for prisoner educational aides and tutors.
- BOP should build relationships with educational institutes and funding sources and continue to encourage foundation support of access to high quality post-secondary education in prisons. BOP should expand these efforts to other areas of correctional education, including basic skills instruction, high school completion opportunities, and career technical education.
- The Department of Justice should provide leadership to increase access to educational technology in U.S. prisons and jails by piloting and evaluating technology solutions in BOP and by supporting efforts in other correctional systems through grant funding and technical assistance.
- The Administration should abolish barriers for incarcerated adult students to access Pell grants.

Legislative Proposals

- Congress should remove barriers to higher education for individuals who are incarcerated by repealing the Pell Grant ban for incarcerated students and other legislative barriers.
- Congress should increase federal funding set-asides for incarcerated youth and adults for Pell Grants in the Higher Education Act, and remove the maximum set-asides for state adult correctional education programs in the Adult

Education Act in WIOA and in the Perkins Act for career and vocational education.

- Congress should amend the Individuals with Disabilities Education Act to include BOP, which is currently exempt from enforcement, and strengthen provisions pertaining to serving disabled students in adult corrections.

Resources and Experts

- John Linton, Senior Consultant
- Steve Seurer, Senior Reentry and Education Advisor, CURE
- Christopher Scott, Senior Policy Advisor, Open Society Policy Center

III. Conditions of Supervision

Summary of the Issue

Conditions of supervision are meant to reduce the risk that a person will commit another criminal act, not to serve as punishment for an offense. As such, conditions of supervision must be reasonably related to the underlying offense, and impose only those restrictions that will make recidivism less likely. Under federal law, sentencing judges are required to consider any discretionary condition imposed upon a supervisee, and to provide factual reasons for them. Judges are not permitted to excessively delegate their authority to supervision officers.

Background

The more than five million people on community supervision in the U.S. are required to abide by a set of supervision conditions imposed by the court or the supervision agency. In addition to meetings with a community supervision officer, conditions imposed may include drug testing (sometimes

multiple screenings per week), mental health treatment and assessments, avoiding locations or people, and drug counseling or treatment. Although the purpose and standards for conditions of supervision are clear, imposition of discretionary conditions that are not reasonably related to the underlying offense is commonplace.

Community supervision officers have discretion over enforcement of the conditions, and often set additional conditions. Some supervisees are given technical violations that can lead to re-incarceration even absent a subsequent violation of the law.

People on community supervision, most of whom do not have access to counsel, are often both unaware of the standards for conditions of supervision and unable to contest any imposed conditions. Some supervisees find these conditions untenable due to cost, and the time required to comply with these conditions may interfere with securing regular employment, housing, or education. Also worrisome and counterproductive is the recent trend of imposing conditions meant to publicly shame supervisees, such as requiring individuals to wear a shirt emblazoned with their offenses, or posting signs in their yards so that neighbors are aware of their criminal records.

Finally, as with all discretionary systems, the potential for discriminatory enforcement is high.

Executive Branch Proposals

- The U.S. Parole Commission, the Court Services and Offender Supervision Agency, and the Department of Justice (DOJ) should work together with advocates and those currently or previously on supervision to create a set of best practices for supervision agencies.
- DOJ should investigate supervision agencies that demonstrate a pattern or practice of discriminatory enforcement of conditions of supervision.

IV. Employment and Workforce Development

Summary of the Issue

Obtaining and retaining employment is one of the most important factors that contributes to successful reentry. Many formerly incarcerated people have difficulty obtaining employment, even if they have paid their dues, are qualified for the job, and are unlikely to reoffend. Research shows that serving time reduces one's annual earnings by 40 percent.¹⁴ Furthermore, family income is reduced by 22 percent while a father is incarcerated.¹⁵

Race plays a key role in shaping employment opportunities. For example, in one study, only 14 percent of Black job applicants without criminal records received callbacks, relative to 34 percent of Whites without a criminal record.¹⁶ Another study shows that job applicants with "Black-sounding" names are far less likely to get call backs than job applicants with "White-sounding" names.¹⁷

Hiring discrimination can begin at the first interaction an applicant has with a potential employer, as jobseekers who indicate a criminal record on applications are much less likely to get a call back. Efforts to "ban the box" – postponing asking applicants about criminal history only after they have moved into the final stages of a job application process – ensure a fairer chance at employment opportunities. While progress has been made in this area, federal efforts should be expanded.

Similarly, while access to higher education is a critical stepping stone towards full employment, many higher education institutions have policies that keep applicants with criminal records out of school. According to a 2006 study, a growing number of colleges and universities consider criminal record information and deny admissions for individuals with criminal histories, regardless of whether the records indicate that the applicant

poses an unreasonable risk or is unlikely to comply with institutional norms.

Background

There are a number of areas in which the Administration and Congress can act to increase the likelihood of success in the workforce for those who are reentering society from an incarcerated setting.

Post-release Education and Employment Options. As discussed above, an amendment to the Higher Education Act (HEA) in 1994 stripped incarcerated students of their eligibility to access Pell Grants. For many people who have been incarcerated, barriers to accessing federal financial assistance for higher education remain after release. In 1998, Congress amended HEA to prohibit anyone convicted of a drug offense from receiving federal student aid. In 2006, the prohibition was modified but it continues to bar access for those convicted of a drug offense while in school and receiving federal financial aid, even after they have completed their sentences. By continuing to cut off necessary financial assistance, the provision decreases college completion rates, diminishing access to well-paying, long-term employment.

People with a criminal record are also challenged in accessing certain types of jobs. Recent Equal Employment Opportunity Commission (EEOC) guidance on the appropriate use of criminal records in the employment setting is a step forward in allowing people with criminal records to compete in the job market on equal terms with other workers; however, a number of federal regulations still make it more difficult for them to obtain employment in certain professions, even if their work in that profession would not increase risks to the public. For example, 42 U.S.C. § 1320a-7(a) et seq. and 42 C.F.R. §1001.101 et seq. create onerous barriers to employment in the healthcare industry for individuals with misdemeanor or felony drug-related convictions. The implementing regulations promulgated by the Department of Health and Human Services (HHS) expand those exclusions,

and apply to positions that require no medical competency or fiduciary trust.

Federal Hiring Practices. Confusion about various federal agencies' hiring practices of applicants with criminal records may discourage qualified workers from applying. Under federal Office of Personnel Management (OPM) regulations 5 C.F.R. §731.202, federal agencies may rely on criminal records to evaluate an applicant's suitability for employment. The regulation encourages agencies to consider the factors identified by the EEOC for determining if a criminal record is "job related," but only as the "agency, in its sole discretion, deems any of them pertinent." Given the agencies' "sole discretion," it is unclear how the various federal agencies use criminal records for employment purposes. Transparent information about policies and practices of particular agencies would provide clarity for potential employees, and would create an opportunity for informed debate about potential improvements in federal employment practices.

OPM should report the number of individuals with criminal records who have applied for positions; the number of individuals approved or denied; the types of jobs they applied for or are working in; and, if they are denied a position, whether or not the denial was based on direct risk or questionable good moral character.

Support for Transitional Jobs Programs. The federal government should fund evidence-based employment solutions such as transitional jobs programs and enable them to scale to regional and national levels. Transitional job programs are an employment strategy that seeks to overcome employment barriers and to transition people with labor market barriers into work using wage-paid, short-term employment. Transitional job programs combine real work, skill development, and supportive services. This is among the most promising ways to help jobseekers facing significant barriers gain employment, and there is a robust evidence base for the model, especially as it relates to people with criminal records.¹⁸ Experimental research shows that transitional jobs programs can

significantly reduce recidivism among people returning home from incarceration, especially among those at highest risk of reincarceration.¹⁹ Transition jobs programs make communities safer and have been shown to yield a positive return on investment of nearly \$4 for every \$1, primarily as a result of reduced criminal justice system expenditures. These programs should be funded so that they can meet the level of need on a national scale.

Under the Workforce Innovation and Opportunity Act (WIOA), the public workforce system aims to increase employment and economic opportunity for priority populations who face barriers to employment, including adults with criminal records. Individuals seeking services through the WIOA system likely face multiple barriers to employment and fall into multiple priority populations. While local Workforce Development Boards are required to collect and report information about all of the qualifying barriers faced by each individual entering the system, these practices should be strengthened to ensure better data collections and coordination with state corrections systems.

Encouragement of Private Sector Employment. Currently, only two federal programs incentivize employers to hire individuals with criminal histories: the Work Opportunity Tax Credit (WOTC) and the Federal Bonding Program. 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. The Federal Bonding Program provides individual fidelity bonds of \$5,000 to employers at no cost for six months, insuring employers against employee dishonesty or theft for job applicants with criminal records.

New reentry legislation should prohibit discrimination and encourage private sector business and industry to hire people with criminal records. This arises in a number of licensing and certification contexts. For example, many formerly incarcerated people who obtain nationally-recognized Automotive Service Excellence

certifications are not hired because auto dealers are still reluctant to employ them. In a number of states, certain professional boards such as barbering and cosmetology refuse to certify people with criminal records even after they pass licensing exams.

Strengthened SNAP Employment and Training Options. The Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T) is a state-run, federally-supervised program that exists to help individuals exit SNAP by achieving economic self-sufficiency through gainful employment. In FY 2013, only about one-third of all SNAP E&T households earned income from employment. The 2014 Farm Bill directed the U.S. Department of Agriculture to work with states to develop and implement SNAP E&T programs, including partnering with third parties to deliver these employment services. SNAP E&T administrators should be encouraged more strongly to partner with third party organizations, including social enterprises. “Social enterprises” are double-bottom line businesses that sell quality goods and services and then reinvest their revenue so they can hire and support more people who face barriers to employment, including individuals returning home from incarceration. State and local SNAP administrators can contract with third party partners to deliver employment services, and then the partner organizations can seek reimbursement for up to 50 percent of the costs from the federal funding. Unfortunately, too few SNAP E&T administrators take advantage of this third party partner program to build relationships and deliver employment training services to SNAP E&T recipients.

Reentry Employment Opportunities (REO) and Justice-involved Youth and Adults. Housed within the Department of Labor’s Employment and Training Administration, the Reentry Employment Opportunities (REO) program provides funding, authorized as Research and Evaluation under Section 166 of WIOA, for justice-involved youth, young adults, and adults who were formerly incarcerated. The REO program offers grants to pilot promising reentry and employment models

and practices found in community and faith-based environments, and to test and evaluate those models for suitability in the broader public workforce system.

REO funding is essential for local communities as they work to develop employment models that are responsive to the needs of constituents with criminal records, as well as the local business community. While there are often commonalities, the specific barriers to employment for persons with criminal records vary from community to community, as do the hiring needs of local employers. The REO program provides local non-profit organizations with the opportunity to build reentry pathways unique to their municipality, thereby bridging the gap between employers and potential employees.

The annual federal funding for the REO program (\$88 million in FY 2016) is approximately .01 percent of the federal appropriations for prisons (\$7,478.5 million in FY 2016).²⁰ The federal investment in promising reentry and employment programs such as REO should be increased (and spending on incarceration decreased) in order to strike a better balance with the estimated \$80 billion spent nationally on incarceration, or the \$1 trillion in associated costs to incarcerated persons, families, children, and communities.

Full Access to Cash Assistance, Food Stamps, and Drivers’ Licenses. Federal law prohibits anyone convicted specifically of a drug-related felony from receiving cash assistance through both the federal Temporary Assistance for Needy Families (TANF) and SNAP E&T unless a state opts out of or modifies the ban. This law prohibits receipt of benefits even by those individuals who have completed their sentences, entered into recovery from a substance use disorder, gained employment but were subsequently laid off, or earned a certificate of rehabilitation or other form of clemency. Recent data show that six states continue to fully enforce the SNAP E&T ban and 26 others have a partial ban.²¹ At the same time, 13 states enforce the full TANF ban, while 23 others maintain a partial ban. By denying this group of returning

citizens access to food and financial assistance, this punitive policy creates barriers for individuals to meet their basic needs as they exit the criminal justice system and may, in turn, increase their risk of engaging in criminal activity in order to help support themselves.

In addition to limits on access to food and financial benefits, people with a drug conviction may be denied access to drivers' licenses, a true necessity in many communities. A federal provision passed as part of a 1992 highway law requires states to impose a mandatory six-month drivers' license suspension for drug law violations as a condition of receiving federal highway funds. Federal law permits states to opt-out of this requirement, and at least 34 states have done so; however, a 2014 report found that over 200,000 people in the remaining 16 states still have their licenses suspended every year for drug offenses that are unrelated to driving. The majority of these license suspensions is related to convictions for simple marijuana possession. An estimated 42 percent of people who lose their licenses because of this mandate subsequently lose their jobs. License suspensions disproportionately impact communities of color.

Contextualized adult learning and employment pilot programs. To support the education and workforce development needs of adults returning home from incarceration, and to continue to build the evidence base about what works to help returning citizens gain, keep, and advance in employment, we recommend piloting employment service programs blended with contextualized adult learning approaches. Contextualized adult learning is the development of literacy or numeracy skills in the context of a real-world situation that is relevant to the learner. This type of integrated education and training approach is especially beneficial for adults when coupled with employment and training strategies that provide opportunities to "earn and learn" – that is, when workforce preparation, education, and occupational skills training are blended with much-needed earned income. In particular, transitional jobs programs that offer

concurrent, contextualized adult basic education have shown promise in building jobseekers' literacy and numeracy skills while they also earn income and grow their work-based skills. Social enterprises settings may also be conducive to "earn and learn" strategies, as they provide paid work in a setting that has numerous learning opportunities related to the production, marketing, or delivery of goods and services. REO-funded pilot projects that use "earn and learn" employment strategies would meet a critical need for adults returning home from incarceration. In addition, these approaches can be tested for adaptability in the WIOA system, which supports innovative models that integrate adult education and literacy, workforce preparation activities, and workforce training concurrently.

Executive Branch Proposals

- The Administration should retain and expand "ban the box" provisions to ensure fair employment opportunities, and should test the use of "name blind" recruitment practices to build the federal workforce.
- The Administration should require the federal Office of Personnel Management to report its employment policies for people with criminal records to Congress annually.
- The Administration should encourage states to include state Secretaries of Corrections on Workforce Innovation and Opportunity Act (WIOA) workforce boards when developing state WIOA plans.
- The Administration should build partnerships with community-based organizations, including social enterprises and community colleges, to implement robust Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T) programs that meet needs of those returning from incarceration.
- The Department of Labor (DOL) should increase the amount for which the federal bonding program indemnifies employers who hire individuals with criminal records, or who otherwise qualify for bonding from its current level (ranging from \$5,000 to \$25,000 per bond) to \$25,000 for all bonds.

- DOL should issue guidance to states urging funding for transitional jobs programs and encouraging states to include provisions in future state WIOA plans that instruct local workforce development boards to fund local transitional jobs programs.
- DOL should issue a Training and Employment Guidance Letter urging data collection on all of the barriers to employment, including criminal history, in order to ensure that the WIOA system captures robust data on the number of adults and youth served who have criminal records. DOL should also offer technical assistance to local workforce development board staff, training them to collect criminal record information in a relational, transparent, and culturally competent manner.
- The U.S. Department of Agriculture (USDA) should continue to monitor state implementation and recommend best practices in employment, training, and support services for jobseekers receiving nutrition assistance under SNAP E&T.
- The Department of Health and Human Services and USDA should encourage states to (1) opt-out of the SNAP E&T and TANF bans; (2) modify the bans so that they do not apply to individuals convicted of simple possession or individuals who are participating in or have completed substance use disorder addiction treatment after the incident leading to their conviction; and/or (3) limit the duration of the bans.
- DOL should require Reentry Employment Opportunities (REO) grantees to “offer training and industry-recognized credentials that meet the needs of local, high-demand industries and to establish formal partnerships and job-placement services with industry employers.” DOL should also continue to provide intermediary grants for youth reentry programs and should use funding to support efforts in high-crime, high-poverty areas. Special attention should be given to communities that are seeking to address relevant impacts and root causes of civil unrest.

Legislative Proposals

- Congress should fund and support the expansion of evidence-based employment solutions such as transitional jobs, and should collect comprehensive data on how well the WIOA system is reaching formerly incarcerated individuals.
- Congress should significantly increase funding for the REO program in order to create more balance with the expenditures related to incarceration.
- Congress should support and create incentives for employers to hire qualified individuals with criminal histories, and increase Work Opportunity Tax Credits for individuals with criminal records to match the tax credits available for those who qualify as long-term family assistance recipients.
- Congress should pilot employment services blended with contextualized adult learning approaches.
- Congress should repeal the SNAP E&T and TANF benefits bans, and the requirement of drivers’ license suspension, for drug law violations.
- Congress should increase funding for the SNAP E&T 50/50 program that enables states to build partnerships with community based organizations to deliver employment training services to SNAP recipients and help them find and retain employment.

Resources and Experts

- Will Heaton, Director of Policy and Public Affairs, CEO Works
- Caitlin Schnur, Coordinator, National Initiatives on Poverty & Economic Opportunity, Heartland Alliance
- Melissa Young, Director, National Initiatives of Poverty & Economic Opportunity, Heartland Alliance

V. Housing and Homelessness

Summary of the Issue

Access to stable, safe, and affordable housing is crucial to ensure that individuals in reentry can get back on their feet and turn their lives around. Without affordable housing, justice-involved people fall into homelessness and often return to incarceration.

Studies have shown that formerly incarcerated individuals experience high rates of homelessness, and in some urban areas an estimated 30 to 50 percent of people on parole have no place to call home.²² Approximately one in ten individuals entering prison has experienced homelessness in the recent past; and of those leaving prison, one in ten will experience homelessness in the future.

Research has also shown that formerly incarcerated individuals who cannot find stable housing are more likely to recidivate than those who do. In one study, people with criminal records who lived on the street were shown to have been rearrested at double the rate of their counterparts who secured housing. Some people even remain incarcerated past their release date if they are unable to find housing. Barriers to housing prevent many from having a second chance after serving their time.

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, other tenants, or property. Policies are often based on a misunderstanding of federal law, or on landlords prioritizing ease of administration, believing it easier to reject all people with conviction records than to perform individualized assessments of their applications.

Exacerbating this problem is our country's growing rental affordability crisis that is making it ever harder for families to find and keep housing. The poorest among us face an overall shortage of 7.2 million

rental units that are both affordable and available to them.²³ Having a criminal record while competing for affordable housing puts low-income people with criminal records at a severe disadvantage.

Background

When any person is preparing to leave the custody of the federal Bureau of Prisons (BOP) or any BOP contractor, their safe and secure housing placement should be a central component of discharge and reentry planning. BOP should coordinate with local Continuums of Care, regional or local planning bodies that coordinate housing and services funding for homeless families and individuals, and the Social Security Administration in order to develop discharge plans to help people avoid homelessness.

The new Administration should build on past efforts to improve access to affordable housing for justice-involved people, including affirmatively ending the "one strike and you're out" policy that many housing authorities have relied upon since it was first introduced in the 1990's. These exclusions originally arose as a part of an effort to crack down on drug-related criminal activity in public housing, but they now go against the Department of Housing and Urban Development's (HUD) advice to housing providers to avoid blanket policies against people with criminal records. Because the misconception that HUD requires "one strike" policies in admissions, terminations, and evictions, is so strongly held by housing providers – as well as current and prospective residents – HUD must take a much clearer affirmative stance against "one strike" policies to truly end their practice.

Fair Housing Policies at HUD. In November 2015, HUD released Notices PIH 2015-19/H 2015-10, which state that an individual's arrest record alone cannot be used as evidence of committing a crime. In April of 2016, HUD's Office of General Counsel issued Fair Housing Guidance that applies Fair Housing Act (FHA) standards to the use of criminal records by both private and federally subsidized providers of housing and real estate transactions.

HUD should allocate additional resources to review written criminal records policies for admissions, evictions, and termination that fail to comport with the Notices. Additionally, HUD should further clarify that public housing authorities (PHAs) and project owners cannot automatically deny housing, evict residents, or terminate assistance on the basis of police reports. Like arrests, police reports do not by themselves offer definitive proof of criminal activity. Finally, HUD should stress that the Notices, in particular their reminder regarding the civil rights requirements, apply equally to PHAs that participate in the Moving-To-Work program as well as those that have converted housing units under the Rental Assistance Demonstration program.

HUD should incorporate the Fair Housing Guidance into relevant agency handbooks and notices, such as the Fair Housing and Equal Opportunity (FHEO) "Title VIII Complaint Intake, Investigation, and Conciliation Handbook,"²⁴ and "Occupancy Requirements of Subsidized Multifamily Housing."²⁵ HUD should provide legal guidance to protect particularly vulnerable groups, including individuals with disabilities and survivors of domestic violence and sexual assault. FHA and the Americans with Disabilities Act require housing providers to make reasonable accommodation where a person's criminal record arose from their disability. HUD should issue additional guidance for asserting an FHA claim to challenge criminal records policies that disproportionately impact people with disabilities.

Certain mitigating circumstances can offset a person's criminal history, such as the severity of the criminal activity, the time elapsed, evidence of rehabilitation, and the impact a negative decision would have on the person's family. HUD should require and provide guidance to housing providers on these mitigating circumstances across all the federally subsidized housing programs, and should advise housing providers on the necessity of educating applicants about their right to offer mitigating evidence at the pre-decision stage rather than only post-denial.

When evaluating housing applicants, many housing providers fail to define a "reasonable time" in their admissions policies. Given this lack of direction, written admissions policies often impose no time limit on inquiries into applicants' criminal records, or they simply impose blanket bans. Guidance from HUD that is more prescriptive in determining whether a time period is "reasonable," along with strict enforcement efforts against unreasonable look back periods when screening applications, would mitigate barriers to housing.

PHAs' discretionary authority should be curbed so that denials of admission are based only on criminal activity that bears on an applicant's ability to fulfill the obligations of their tenancy. HUD should warn housing providers against denying admission on the basis of overly broad categories of criminal activity (e.g., all felonies, "immoral conduct," etc.), and should confirm that non-criminal citations (such as traffic and municipal violations) are an improper basis for an adverse housing decision. Instead, PHAs and HUD-assisted housing providers should be equipped with minimum standards for the quality and nature of criminal background information that can be used to make housing decisions. HUD should also require tenant-screening companies that provide services to PHAs and assisted housing providers to register as "Qualified Tenant-Screening Companies" and prohibit use of unregistered screening companies. HUD should work with the Consumer Financial Protection Bureau to identify interagency solutions to tenant screening problems, likely under the Fair Credit Reporting Act.²⁶

Finally, HUD should withdraw due process determinations across all states and instead give all tenants the right to access the grievance process when faced with eviction for prohibited criminal activity. By issuing a due process determination to a state, HUD allows that state's PHAs to completely bypass the grievance process and head directly to court to evict tenants for violent and/or drug-related criminal activity. The grievance process is a valuable mechanism for PHAs and residents to resolve issues in these cases. Through the grievance process, a

resident has the opportunity in an informal setting to present notices regarding civil rights issues arising from the termination, to request reasonable accommodations for residents engaged in drug treatment, and to ask the PHA to examine the totality of the circumstances and exercise their discretion as HUD has instructed them to do. When PHAs go directly to court, on the other hand, they are often much less open to settlement – and consequently less likely to use their discretion to keep families in subsidized housing – since money has already been spent to bring the tenant to court.

Data Gathering. Currently, federally assisted housing providers are not required to collect detailed information on their screening practices for people with criminal records. Such information is important to improving assessment of policies' impact on protected classes and assisting HUD in its fair housing enforcement efforts. Useful disaggregated data would include the number of admission denials based on past criminal activity, specific types of criminal activity that form the basis of admission denials, denials for which an informal review is requested, denials overturned after an informal review, overturned denials where the applicant was represented by an attorney, denials sustained after an informal review, and sustained denials where the applicant was represented by an attorney. Additionally, admissions and continued occupancy policies should be available in person and on the internet.

Flexibility and Family Reunification Incentives. HUD should reconsider its position that allows PHAs to rescreen Housing Choice Voucher Program participants who are trying to port their voucher to another jurisdiction. Housing Choice Vouchers help low-income Americans find affordable housing in the private housing market by reimbursing the landlord for the difference between what a household can afford to pay in rent and the rent itself. HUD should also limit rescreening for other forms of rental assistance, including Tenant Protection Vouchers, Project-Based Vouchers, Enhanced Vouchers, and Family Unification Vouchers. If HUD chooses not to limit the right to

rescreen, it should at least take extra steps to ensure that the rescreening is equitable and transparent.

HUD should institute, expand, fund, and promote pilot programs that incentivize family reunification with the goal of expanding these as formal policies. Participating housing authorities would leverage available federal and community resources to provide wrap-around services to program participants. For all family reunification programs, HUD should adopt broad definitions of family that include relationships of both blood and affinity, and collect data on successful programs.

Collaborative Community Partnerships. HUD should incentivize participation in cross-sector partnerships established by data-driven, place-based programs such as the Byrne Criminal Justice Innovation Program, Promise Neighborhoods, Promise Zones, and Choice Neighborhoods. These programs adopt comprehensive strategies to decrease crime, revitalize neighborhoods, and provide economic and social opportunities for residents. Public housing agencies and owners should collaborate in cross-sector partnerships, involving community members in strategic decision-making and program implementation.

Fair Housing Policies in Other Agencies. Finally, all these considerations, clarifications, and policies should be adopted by other federal agencies that support housing programs. For example, the U.S. Department of Agriculture and Treasury Department should adopt protections for people with criminal records in the Rural Housing Service program and Low Income Housing Tax Credit program, respectively.

Executive Branch Proposals

- The federal Bureau of Prisons (BOP) reentry planning should include connection to housing placement for all leaving BOP custody.
- The Department of Housing and Urban Development (HUD) should affirmatively end the “one strike” policy, ending automatic admission

- denial or termination of subsidized housing assistance (e.g., subsidy terminations and evictions) based on any criminal record.
- HUD should ensure that public housing authorities (PHAs) and owners of HUD-assisted housing update their screening and eviction policies in compliance with recently released guidance.²⁷
 - HUD should incorporate the Fair Housing Guidance into relevant agency handbooks and notices, such as the Fair Housing and Equal Opportunity “Title VIII Complaint Intake, Investigation, and Conciliation Handbook”²⁸ and “Occupancy Requirements of Subsidized Multifamily Housing.”²⁹
 - HUD should modify 24 C.F.R. §§5.854(b), 960.204(a)(2), and 982.553(a)(1)(ii), so that PHAs and owners of federally-assisted housing are required to consider evidence of rehabilitation, including participation in or completion of treatment, when making admission or retention decisions.
 - The Administration should update 24 C.F.R. §5.855 to include a clear definition of “reasonable time;” or alternatively of the factors that HUD and housing providers can use to determine whether a time period is reasonable. PHAs and owners of federally-assisted housing should have discretion only to reduce “reasonable time” before admitting an individual to housing.
 - The Administration should modify 24 C.F.R. §960.203(c)(3) so that PHAs and owners of federally-assisted housing are prohibited from denying admission to an individual or family beyond the three-year bar created by 42 U.S.C. §13661(a).
 - The Administration should modify 24 C.F.R. §§5.861 and 982.310 so that an individual’s criminal activity is considered only upon a conviction; and should modify the definition of “parole violator” under 24 C.F.R. §§5.859 and 982.310 so that it does not include individuals with technical probation or parole violations, who are not the subject of arrest or bench warrants and who have not fled, and whose conduct would not form the basis for criminal prosecution absent their status as parolee or probationer.
 - HUD should require PHAs and HUD-assisted housing providers to comply with the Fair Credit Reporting Act in certification form, including Form HUD-50077, “PHA Certifications of Compliance with the PHA Plans and Related Regulations.”
 - The Administration should modify 24 C.F.R. §960.203(b) to eliminate the PHA assessment system incentive for PHAs that document their efforts to deny housing to certain individuals.
 - The Administration should create incentives for PHAs and owners to collaborate with place-based cross-sector partnerships that are using data-driven, evidence-based strategies to improve social and economic outcomes for neighborhoods.

Resources and Experts

- Grant Smith, Deputy Director, National Affairs, Drug Policy Alliance
- Elayne Weiss, Senior Policy Analyst, National Low Income Housing Coalition

VI. Access to Care for Physical and Mental Health and Substance Use Disorders

Summary of the Issue

Individuals in the criminal justice system are seven times more likely than the general population to experience substance use disorders (SUD), mental illness, infectious disease, and other chronic health conditions.³⁰ Between 60 and 80 percent of individuals under the 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. In the most recent year for which federal data are available, 56.2 percent, 44.8 percent, and 64.2 percent of the people in state prison, federal prison, and local jails, respectively, had a mental health problem.³¹ Access to federal disability and health benefits, as well as to medication and psychosocial intervention, is a critical component of successful reentry. Often the event leading to arrest is linked to both lack of income and an unmet need for services such as mental health and addiction treatment, or supports such as housing.

At every stage of the criminal justice system, from initial contact with the police through arrest, prosecution, and punishments, lack of treatment increases long-term costs and often irreparably harms individuals, their families, and communities. Because people leaving incarceration have high rates of addiction and mental illness, and lack sufficient access to physical health, mental health, and substance use disorder care, jail administrators and staff face unique challenges in developing treatment and reentry planning for individuals with serious mental illness and behavioral health problems. There is a wide gap between the need for and availability of treatment services and medications, and many individuals are prevented from obtaining treatment due to lack of either access or availability.

Background

Pre-arrest Prevention and Diversion. In many cases, people who come into contact with the criminal justice system can avoid a criminal conviction, or even an arrest record, if they are willing to participate in diversion programs that hold them accountable while also addressing their underlying health needs. People who come into contact with law enforcement officers for low-level criminal activity that can be connected to SUD and/ or a mental health disorder should be diverted into treatment and support services.

The federal government should encourage states and localities to engage justice-involved people in SUD and mental health care as early as possible, ideally before they are even arrested. They should be connected to crisis intervention centers, community-based SUD and mental health care, and other evidence-based services. Treatment for SUD should be the preferred method for addressing drug use, and correctional facilities reserved only for cases where treatment would not be sufficient to address the public safety concerns raised by a person's conduct. For those who receive a term of incarceration or community corrections, a full range of treatment options should be offered and promoted at every opportunity, including before arrest, at charging or booking, and upon a guilty plea or conviction.

Programs like the Jail Diversion Program grant, administered by the Center for Mental Health Services within the Substance Abuse and Mental Health Services Administration (SAMHSA), assists with diverting individuals with serious mental illness and co-occurring substance use disorders from jail to community-based treatment and support services.

Diversion programs should not widen the criminal justice net by imposing more severe penalties and sanctions on people who do not immediately succeed in treatment. Relapse is often part of recovery. Certain programs punish defendants who enter treatment and relapse with more stringent penalties than the conditions they would have received if they did not agree to treatment. A person's sense of autonomy and motivation, which is integral to progress in treatment, can be undermined if they feel they are sanctioned unfairly. Moreover, an incarceration sanction places a person struggling with drugs into a stressful, violent, and humiliating environment, one in which drugs are often available and clean syringes almost never are; where sexual violence is common, and condoms rare; where HIV, hepatitis C, tuberculosis, and other communicable diseases are prevalent, and medical care often substandard; and where drug treatment is largely nonexistent.

Access to Health Coverage. Prior to the Affordable Care Act (ACA), incarcerated individuals disproportionately lacked health coverage to treat mental health and substance use disorders. Most could not afford private health insurance, nor were they eligible for Medicaid or other public coverage. This landscape shifted under the ACA, especially in states that expanded Medicaid eligibility. In Medicaid expansion states, almost all individuals leaving jails and prisons or serving a term of parole or probation in the community are eligible to receive Medicaid benefits, or to purchase quality private health coverage that is subsidized based on their income.

This expanded insurance eligibility presents an unprecedented opportunity to provide life-saving and life-changing substance use and mental health treatment and other health services to a large population that has previously lacked access to such care. Access to substance use and mental health care will improve health and well-being of justice-involved people and their families and communities. Further, substance use is a risk factor for criminal behavior, and addressing individuals' substance use needs will reduce recidivism. While the research literature does not bear out mental illness as a significant risk factor for criminal behavior, mental illness has been shown to mediate the effectiveness of recidivism reduction programming. Therefore, systems must account for mental health needs in reentry planning and programming and meet those needs to decrease the chances of reoffending.

Health reform ensures that justice-involved people are able to obtain health coverage to overcome one of the primary obstacles to SUD treatment: a lack of affordable coverage options to pay for medications and services. While many more people have become eligible for affordable coverage, there remain a large number of eligible individuals who are not enrolled. All components of the criminal justice system – diversion programs, courts, prisons, jails, and probation and parole departments – should implement processes to ensure that people under their custody or supervision are enrolled.

Many states unnecessarily terminate enrollees' Medicaid coverage when they are incarcerated, requiring them to reapply upon release, which often results in long gaps in coverage. However, at least 12 states, including California, New York, North Carolina, and Texas, currently have laws or administrative policies to suspend, not terminate, Medicaid enrollment of incarcerated individuals. This allows for seamless or near-seamless transitions to coverage upon reentry. The federal government should work closely with state health and public safety agencies to support the development of systems that promote continuous health insurance enrollment and more seamless access to care.

Access to Mental Health and SUD Coverage. The federal Mental Health Parity and Addiction Equity Act should be fully implemented and enforced to ensure access to clinically appropriate mental health and SUD care. The Essential Health Benefit requirements of the ACA, which require coverage of mental health and SUD benefits, should be fully implemented and enforced.

Strong safety net funding, including for the Substance Abuse Prevention and Treatment (SAPT) Block Grant, is key to treatment and recovery success. Despite the progress of health care reform, even after full implementation of the ACA in 2019, millions of people will remain uninsured, and not everyone with insurance will have adequate SUD coverage. The new Administration should include in the annual budget increased funding for the SAPT Block Grant.

Information Sharing. Sharing information and records between justice systems and community-based physical, mental, and behavioral health providers is critical. When facility records are not available to community-based service providers, efforts to ensure seamless care can be hobbled. Federal grant programs focused on reentry (e.g., Bureau of Justice Assistance's Second Chance Act program, SAMHSA's offender reentry program) should further emphasize the importance of record sharing in their solicitations and performance metrics.

Access to Research-based Opioid Treatment. Scientific research has firmly established that Medication Assisted Therapy (MAT), or the treatment of opioid dependence with medications, reduces addiction and related criminal activity more effectively and at far less cost than incarceration. Despite the clear benefits of MAT, many parts of the criminal justice system prohibit its use to treat opioid dependence, even when prescribed by a treating physician. The recently signed 2015 Comprehensive Addiction and Recovery Act would expand community-based opioid addiction treatment and intervention programs, and support the expansion of MAT in jails and prisons.

Continuity of Health, Mental Health, and SUD Care. Courts and corrections should work with government agencies and community-based treatment providers to meet the health needs of people in transition without unnecessarily disrupting or delaying care. Prisons and jails should provide every person with a reentry plan that includes initial appointments and contact information for substance use and mental health treatment services. Corrections personnel should work with community-based providers to arrange point-to-point transportation from the facility to the location of appointments and services.

Crisis Intervention Training. The Department of Justice included a \$7.5 million request for a new National Training Center on Police-Based Responses to Individuals with Mental Illness in its original FY2017 budget. Law enforcement officers with Crisis Intervention Training or other special training can keep individuals experiencing mental illness out of the criminal justice system. This helps maintain the continuity of mental health care by avoiding the handing off of services between agencies as individuals move between jail, prison, and the community.

Trauma-Informed Systems and Mental Health. Individuals entering jail or prison have experienced traumatic stress and victimization at rates higher than those among the general population, and many experience traumatic stress or victimization.³²

These experiences and backgrounds necessitate an approach to rehabilitation and reentry to the community that accounts for past trauma. Because of this, criminal and juvenile justice should include trauma-informed services in order to be most impactful and effective, including trauma-informed reentry services.

Sub-Serious Mental Illness (Sub-SMI) Mental Health Needs. The needs of individuals with mental health problems that do not rise to the level of serious mental illness or mental health disability also need to be addressed. Some of the more common diagnoses falling into this category include persistent depressive disorder, general anxiety disorder, and attention-deficit hyperactivity disorder. People with less severe mental health needs still require a solid clinical floor underneath them as they reenter society, including access to both evidence-based psychosocial treatment and medication.

Executive Branch Proposals

- The Administration should implement and enforce the White House Office of National Drug Control Policy's plan to prohibit drug courts that receive federal dollars from forcing Medically Assisted Therapy (MAT) recipients to stop taking their medications. The Administration should support the enforcement guidance implemented by the Substance Abuse and Mental Health Services Administration. Guidance should be issued to ensure that judges, probation or parole officers, and other law enforcement officials cannot prevent people under their supervision from receiving appropriate addiction treatment, including MAT, as recommended by a medical professional.
- The Centers for Medicare and Medicaid Services (CMS) should permit the use of state pilot programs that allow federal dollars to fund in-reach services before an individual is released to the community from incarceration.
- The Department of Transportation should amend its policy that prevents individuals who are taking methadone and stabilized in treatment from

obtaining commercial drivers' licenses. Such individuals should qualify for the prescription drug exception the same way as those receiving any other type of medication-assisted healthcare.

- The federal Mental Health Parity and Addiction Equity Act should be fully implemented and enforced to ensure access to clinically appropriate mental health and Substance Abuse Disorder (SUD) care. The Essential Health Benefit requirements of the Affordable Care Act (ACA), which require coverage of mental health and SUD benefits, should be fully implemented and enforced.
- The Administration should increase funding for grants that assist with diversion, treatment, and transition services for individuals with mental illness who come in contact with law enforcement, such as the Justice and Mental Health Collaboration Program, administered by the Department of Justice (DOJ).
- The Administration should continue to request funds for special law enforcement training on managing individuals experiencing mental health crises.
- The Administration should increase funding for the Jail Diversion Program, authorized by the Children's Health Act.
- The Department for Health and Human Services and CMS should create a pilot program to demonstrate the effectiveness of enrolling eligible individuals in Medicaid or other health insurance before they are released from incarceration, regardless of their enrollment status at the time.
- DOJ should ensure universal trauma screening for people in the federal system, provide trauma-informed services across the reentry process, and secure reentry placements that do not cause re-traumatization for returning citizens.
- DOJ should work with state and local governments, including Second Chance Act grantees, to ensure that people in state and local facilities receive the same close attention related to traumatic stress.
- DOJ should address the needs of individuals with mental health problems that do not rise to the level of serious mental illness or mental health disability. The federal Bureau of Prisons should

provide seamless access to these treatment modalities, and other DOJ entities, particularly Bureau of Justice Assistance and the National Institute of Corrections, and should provide programmatic support and training and technical assistance for state and local systems to provide this same seamless access.

Legislative Proposals

- Congress should fully fund the authorizations in The Comprehensive Addiction and Recovery Act of 2015.
- Congress should fund DOJ's request for a new "National Training Center on Police-Based Responses to Individuals with Mental Illness."
- Congress should fund training of law enforcement and corrections officials on the effectiveness of MAT for SUD.

Resources and Experts

- Micah Haskell-Hoehl, Senior Policy Associate, American Psychological Association
- Gabrielle de la Gueronniere, Director of Policy, Legal Action Center

VII. People with Disabilities

Summary of the Issue

As with the general population, individuals with every type of disability are found within prison populations: those who experience sensory (sight, hearing), physical, or intellectual/ developmental disabilities; traumatic brain injury; complex medical needs; and other types of disability. In addition, individuals may have more than one disability and/ or may also have a co-occurring substance use disorder requiring treatment. The vast majority of these individuals will be released into the

community. People with disabilities experience the same barriers that others do upon release, but often in an amplified manner. They may also encounter unique barriers that people without disabilities do not face at all.

Background

As discussed above, all reentering people need to locate stable accessible housing, employment and/or income, and health care. Meeting these needs is particularly important – and may be particularly difficult to achieve – for people with disabilities, both prior to and after release.

People with disabilities may need to locate specialized housing, which is scarce; they are often placed on a waitlist, and some halfway houses and release programs do not provide accessible housing as an option at all. They may need to obtain job accommodations or apply for public benefits from government agencies that do not readily provide accommodations in the application process, causing the process to be longer and more complicated. People with disabilities may require accommodations to meet parole requirements, causing a revolving door into and out of prison when those accommodations are not adequately available.

Without proper planning and pre-release preparation, unique barriers can also impact post-release housing, employment, public benefits, and other necessities. For example, people who use assistive technology (AT) often lose their AT devices while incarcerated, or they are incarcerated without proper maintenance and upgrades for so long that their devices become unusable. AT devices include items such as power wheelchairs, hearing aids, handheld computer devices, crutches, and canes. People with disabilities often write grievances complaining that their devices are improperly repaired or maintained and do not work upon release. If a person with a disability has to apply for Medicaid after release and wait to be found eligible, they may experience a delay before an expensive – or even an inexpensive – repair can be

completed or before simple needs – such as batteries or adult diapers – can be met. This process can be especially challenging to individuals with executive function or communication needs.

People with disabilities may have an inconsistent work history, a lack of diploma, or a career in sheltered employment. Similarly, a lack of accommodations may have prevented them from completing the prison programming and treatment needed for a smooth transition. They may need to live with family for support, but be prevented from doing so upon release due to housing restrictions in rental or public housing.

Reentry Planning for People with Mental Health Needs. It is important that the federal BOP, state departments of corrections, and local jail administrators have well-defined discharge planning processes for people diagnosed with mental illness. This includes people with serious mental illness as well as those diagnosed with, and under treatment for, a non-psychotic mental illness.

Many correctional systems have attempted to reduce recidivism among mentally ill people by implementing discharge planning programs. These include, but are not limited to, mental health treatment and the means to pay for it, housing or shelter, employment, access to public assistance, and reunification with friends and family.

Studies show that discharge planning reduces recidivism.³³ It is widely accepted that without adequate discharge planning, mentally ill people have a high likelihood of becoming actively psychotic or symptomatic with other debilitating mental health problems after release from jail or prison. Adequate and effective discharge planning can also reduce the number of recently released mentally ill who become homeless.³⁴ Among the seriously mentally ill, discharge planning (including linkage to community-based services) helps ensure continuity of care in terms of medication adherence and psychotherapy.

People with recent histories of serious mental illness or of a mental health diagnosis requiring medication management or psychotherapy who are released without adequate discharge planning are at higher risk for returning to jail, prison, or psychiatric hospitalization.

People who have had frequent periods of placement in disciplinary or administrative segregation need particular attention in discharge planning. Frequent, prolonged segregation can produce psychiatric trauma and lead to significant mental health symptoms.³⁵ It is important that, immediately prior to a person's return to the community, mental health professionals complete a psychiatric assessment for those with histories of frequent or prolonged periods of isolation. This is especially true for individuals who have been in segregated housing due to their serious mental illness. Additionally, there have been documented instances where individuals have been released to the community directly from solitary confinement.³⁶ Such practices must be immediately prohibited for all returnees, regardless of mental health status; but releasing individuals with mental illness directly from isolation to the community is particularly concerning.

Executive Branch Proposals

- The Administration should enforce the Americans with Disabilities Act Title II provisions, including enforcement in private prisons and privately contracted programs, to ensure that prisoners with disabilities have complete access to vocational, mental health, and substance use programming that will support their successful reentry.
- The Administration should ensure that all federal prisoners have access to necessary medical and mental health care.
- The Administration should limit the use of solitary confinement, which particularly impacts successful reentry for prisoners with disabilities.
- The Administration should increase diversion programming in the federal system in order to limit the number of prisoners with disabilities who

are incarcerated for reasons related to their disabilities.

- The Administration should increase grant funds for the above programs so that they are also available for state diversion, incarceration period, and reentry programming

Legislative Proposals

- Congress should increase funding for federal prison programs that address the needs of reentering prisoners with disabilities. Specific and effective programs currently exist, but access to them is very limited. These should be made available for state diversion, during periods of incarceration, and as part of reentry programming.
- Congress should remove barriers related to incarceration history in housing, transportation, public benefits, and employment for re-entering prisoners to help ensure successful reentry.

Resources and Experts

- Dara Baldwin, Senior Public Policy Analyst, National Disability Rights Network
- Elizabeth Prialx, Senior Disability Legal Specialist, National Disability Rights Network
- Diane Smith-Howard, Senior Staff Attorney, National Disability Rights Network

VIII. LGBTQ and People Living with AIDS

Summary of the Issue

LGBTQ people and people living with HIV/AIDS (PLHIV), especially LGBTQ people and PLHIV who are people of color, are significantly overrepresented in all aspects of the penal system, from policing and adjudication to incarceration and community supervision. According to a recent

national study, a startling 73 percent of all LGBTQ people and PLHIV surveyed have had face-to-face contact with police during the last five years.³⁷ A disproportionate number of those respondents also report having spent time in jail or prison. Yet their experiences are often overlooked, and little headway has been made in dismantling the cycles of criminalization that perpetuate poor life outcomes and push already vulnerable populations to the margins of society.

Background

LGBTQ people and PLHIV have distinct needs throughout the reentry process. Reentry programming and preparation in prisons and jails varies widely by facility, but in almost all instances lack information about issues specific to the LGBTQ community. The federal BOP has a unique role in empowering incarcerated people to break free of the cycle of incarceration, release, and re-incarceration. BOP provides education, training, resources, and life skills to people who are currently incarcerated to prepare them to return to their communities and to reduce the incidence of recidivism. BOP also has oversight, through contract evaluation measures, over residential reentry centers located in communities nationwide. However, placements in community corrections facilities are rarely done with concerns about sexual orientation, gender identity, or related services in mind. Similarly, community corrections facilities generally lack specific programming for members of the LGBTQ community or the cultural competency to integrate LGBTQ concerns into their existing service models.

As an example, transgender people often lack identification that is consistent with their gender identity. Efforts to secure employment are frequently stymied because of a lack of consistent identification. Similarly, in states where sexual orientation and gender identity are not protected classes for the purposes of employment discrimination or housing, LGBTQ people may need particular assistance in finding a job placement or a place to live. These concerns arise in the context of

community corrections centers, but are also common in the context of community supervision.

Community supervision officers may not be aware of the services LGBTQ supervisees need. If reentry planning, community supervision, and reentry programs are informed by the particular needs of clients who are most vulnerable, services and supports for all impacted people will improve. The following recommendations are just a few of the concrete ways that the new administration can improve services for LGBTQ people who are returning to their communities after incarceration.

Executive Branch Proposals

- The federal Bureau of Prisons (BOP) should work with LGBTQ advocates to build and update its Community Resource Database and other national reentry resource tools. As a part of that process, BOP and advocates should determine how best to signal whether a resource is safe and affirming to LGBTQ people, and how to identify resources that are tailored to meet the needs of LGBTQ people. BOP must also ensure that all contracts with Community Corrections facilities include protection from discrimination on the basis of sexual orientation, gender identity, and gender expression.
- Because LGBTQ people are disproportionately likely to spend time in protective custody while incarcerated, often for their own safety, BOP should ensure that people in protective custody are able to participate in reentry programs.
- The Department of Justice (DOJ) and the PREA Resource Center should collaborate to ensure that the Prison Rape Elimination Act (PREA) is being effectively implemented in Community Corrections facilities, and that all other relevant statutory and regulatory provisions are being followed. This should include conducting a convening with community corrections facility directors, clients, and advocates to discuss challenges faced by LGBTQ people in reentry; issuing LGBTQ-inclusive compliance guidance to all community corrections facilities; and instituting a pilot project to create LGBTQ and PLHIV-

specific reentry services in one to three communities with a high need for directed services.

- As part of its effort to improve access to identification documents for people returning to their communities, DOJ should explicitly include provisions that permit transgender people to access identification documents that match their gender.

Resources and Experts

- Andrea Ritchie, Researcher in Residence, Social Justice Institute, Barnard Center on Research on Women
- Kiefer Paterson, Syringe Access Policy Organizer, AIDS United
- Sharita Gruberg, Senior Policy Analyst, Center for American Progress
- Chris Daley, Deputy Executive Director, Just Detention International
- Christina Gilbert, Staff Attorney and Policy Counsel, National Juvenile Defenders Center
- Meghan Maury, Senior Policy Counsel and Criminal and Economic Justice Project Director, Reentry and Housing Coalition

IX. Youth Reentry

Summary of the Issue

Thousands of young people under age 18 leave secure juvenile facilities and return to their communities each year. Upon their release, many young people return to neighborhoods with high crime rates, poverty, poor performing schools, and few youth-serving programs. Frequently, the justice system fails to provide young people with the comprehensive reentry planning that would help them to succeed upon their return to the community. The Departments of Education (ED) and

Justice (DOJ) have recommended that juvenile justice settings create individualized pre-release plans for young people immediately upon their entry into a facility to improve reentry preparation and success.³⁸ Reentry success and sometimes even public safety are compromised when young people returning from out-of-home placements are not provided with the necessary planning and supportive services needed for successful reentry back into the community.

Background

Reentry planning should begin prior to release, and reentry services should seamlessly transition a young person's return to the community. Reentry policy and practice should adhere to evidence-based practices and involve collaboration among federal and state agencies and decision makers, local stakeholders, youth justice experts, justice system reform advocates, and youth leaders who have experienced reentry themselves. Through integration into school and/or job training, mastery of independent life skills, and access to medical and behavioral health care and secure housing, young people build positive behaviors that help protect them from harm and avoid further justice system involvement.

School attendance is a strong protective factor against delinquency: young people who are engaged in school are much less likely to commit crime.³⁹ More than half of those within secure placement have not completed the eighth grade, and as many as two-thirds of those leaving formal custody do not return to school. Emphasis on returning to school upon exit from out-of-home placement should be a high priority for any reentry initiative, given the strong connection between school engagement and delinquency. Youth exiting detention often face barriers to reenrollment in school. Some states have enacted laws that create clear obstacles such as skills testing; enrollment in alternative schooling for a probationary period; prohibition on admission back into school without a full complement of educational records; and full

payment of fines, tickets, and restitution for youth attempting to re-enroll in high school upon reentry.

Many youth in the justice system have serious physical and behavioral health needs. Prior to their incarceration, many access health services through Medicaid or the Children's Health Insurance Program (CHIP), but this coverage often is terminated upon entering a secure detention or correctional facility. Reapplying for benefits upon release may take up to 90 days to complete. This delay seriously threatens successful reentry and often results in long delays in obtaining vital treatment, medication, and services at a time when they are most needed. Gaps in services significantly increase the risk of youth reoffending and experiencing recommitment to an institution.

Passage of the bipartisan Every Student Succeeds Act (ESSA) in late 2015 reauthorized the Elementary and Secondary Education Act, a landmark civil rights law that provides funding and program parameters for K-12 education. ESSA codified several important new protections for youth involved in or reentering from the juvenile justice system.

Given that youth enter and exit the juvenile justice system year-round and the legal process is not tied to the standard school year calendar, additional resources and coordination between school and juvenile justice systems is an essential component of youth reentry. Facility teachers often receive little or no advance notice of a student's education history, but must be prepared nonetheless to receive new students and share information with community schools and families. Given the continuous movement of students, facility teachers should receive, review, and analyze each student's records immediately upon entry. This would allow staff to develop education plans for each student quickly, identifying educational and behavioral needs and assigning students to appropriate courses. Any delay in the exchange of student records disrupts the academic success of students in secure care facilities.

Additionally, specialized programming and recognized models of service for educational and transitional needs of students with disabilities should be in place, and must comply with the civil rights requirements of the Individuals with Disabilities Education Act and Section 504 Title II of the Americans with Disabilities Act.

On average, young people stay in juvenile justice settings for less than a year, and many young people are released within six months. To help ensure successful reentry, young people should have access to academic and other courses that promote skills development and help facilitate enrollment in school upon release. Additionally, youth should be fully apprised of their individualized reentry plan and their legal responsibilities upon release, such as those found in probation orders. Pre-release and reentry programming should also help young people develop social skills in a range of areas, such as negotiation, situational decision-making, questioning, anger management, self-regulation and control, good citizenship, and interpersonal relationships.

To ensure that youth receive appropriate education at the correct grade level while in custody, ESSA requires states accepting funding to describe the procedures they will use to assess students' educational needs. However, the Act vaguely states they must do so upon entry to a correctional facility "to the extent practicable." ED should issue regulations to clarify when conducting an education assessment upon entry into the institution is "practicable." This assessment may illuminate special needs of students, such as a referral for a special education evaluation.

ESSA allows for young people involved in the juvenile justice system to transition back into alternative education programs upon reentry. However, some jurisdictions have implemented policies requiring all youth to return to an alternative school as opposed to the educational program that best meets individual educational needs. This practice creates a type of dumping

ground in alternative schools for reentering students, and many drop out. Appropriate school and educational programs should be selected or tailored for the individual needs of the young person. Factors to consider should include the student's education history prior to and during placement, as well as educational assessments and achievements.

Re-enrollment should occur immediately, or at most no later than three business days, after the local educational agency receives notice of the student's discharge from a correctional facility. ED should clarify that re-enrollment includes enrollment of young people into new schools or into educational programs that they have not yet attended but that best meet their needs. Finally, the local educational agency should be prohibited from preventing enrollment or re-enrollment of students because of administrative issues beyond a young person's control, such as lack of a proper mailing address.

ESSA also requires that states receiving funding establish "opportunities for students to participate in credit-bearing coursework while in secondary school, postsecondary education, or career and technical education." While career and technical education is important to build skills towards living wage careers, youth in the justice system should have equal access to traditional coursework that leads to recognized academic credit. Secondary schools, justice system educational programs, and community-based programs must align with a state's academic curriculum standards as set forth in state statute, regulations, and/or guidance.

Many youth with disciplinary, arrest, and conviction history records feel deterred from applying to college on account of application questions regarding disciplinary, arrest, and conviction history. Young people worry they will be denied admission if they disclose this information, and often are unsure of what exact disclosure is required. The Center for Community Alternatives found a 62.5 percent median application attrition rate among State University of New York applicants who checked the felony conviction box, a rate three times higher than

the general median rate for applicants and attributable at least in part to having to check the box. Such criminal or disciplinary history information is unrelated to an individual's ability to succeed academically, and has no demonstrated relationship to issues of campus safety. Though many colleges use this information during admissions evaluations, most do not have procedures or properly trained staff to consider the discipline, arrest, and conviction history information disclosed by applicants through the admissions process.

Paying for college is another challenge for justice-involved youth. Youth reentering from the juvenile and criminal justice systems and youth with criminal records often need financial support and other resources to support their work to obtain post-secondary education. The federal government should provide this support, as well as remove relevant statutory and other barriers to higher education that are collateral consequences of justice system involvement.

Youth with juvenile records face major barriers to obtaining housing, education, employment, and other necessities. While many believe that juvenile delinquency records are confidential and automatically destroyed when a youth turns 18, this is often not true, and there are extensive exceptions to confidentiality. Widespread and unregulated access to juvenile records undermines the confidential underpinnings of the juvenile court system and the ability of youth to work to move forward from their past mistakes. Confidentiality statutes and regulations vary widely across states, with a general trend of relaxing restrictions on access to information and of confusing procedures to seal or expunge a prior record.⁴⁰

To continue to build the evidence base about what works to reduce young people's involvement in the justice system and to promote their success in employment, the federal government should pilot and test innovative approaches. For example, Chicago's One Summer Plus program offered eight weeks of subsidized, part-time summer employment and an adult job mentor to youth

facing barriers to employment and living in high-violence neighborhoods. A subset of participants also received Social Emotional Learning programming based on the principles of Cognitive Behavioral Therapy and designed to help youth manage thoughts, emotions, and behavior related to workplace success. An experimental study evaluating One Summer Plus found that over a 16-month follow-up period, violent crime arrests among youth who were offered summer jobs decreased by 43 percent compared to youth who were not offered summer jobs. The jobs and the jobs plus social-emotional learning were equally effective in reducing violent crime arrests. These impressive results suggest that employment interventions for youth facing barriers, coupled with therapeutic techniques, can go a long way toward reducing young people's risk-taking behavior, improving personal and public safety, and decreasing youth justice system involvement.

Executive Branch Proposals

- The Department of Health and Human Services (HHS) should create a pilot program to measure effectiveness of enrolling youth in Medicaid or other health insurance before they are released from incarceration, regardless of their enrollment status at the time of incarceration, so that they will have improved access to health, including behavioral health, services.
- The Administration should work with HHS; the Departments of Justice, Labor, and Education; and the states to promote comprehensive services on a year-round basis for reentering youth. For example, courses for incarcerated youth should be accredited, and similar or identical to courses students will study at school upon release and reentry. This will help ensure that students receive credit for their studies while incarcerated, and will help young people continue to matriculate on time.
- The Administration should incentivize innovative pilot programs and develop best practices for access to education upon reentry that could be shared and scaled to regional and state levels.

Legislative Proposals

- Congress should mandate suspension rather than termination of public insurance coverage for young people in the justice system to promote continuity of care.
- Congress should remove statutory and other barriers to higher education for young people reentering from the justice system as well as for those who have juvenile and/or criminal justice system records.
- Congress should develop a federal demonstration program to provide financial resources (in addition to tuition assistance) and other support to young people reentering from the justice system and to young people with disciplinary, arrest, or conviction records so that they can obtain post-secondary education.
- Congress should provide robust sealing and expungement protections for youth with juvenile and adult criminal records.
- Congress should pilot subsidized employment and transitional jobs approaches, coupled with therapeutic techniques such as Cognitive Behavioral Therapy or Motivational Interviewing, for justice-involved youth.

Resources and Experts

- Jenny Collier, Collier Collective, LLC
- Kate Burdick, Staff Attorney, Juvenile Law Center
- Riya Shah, Staff, Juvenile Law Center
- Christopher Scott, Senior Policy Advisor for Education and Youth Justice, Open Society Policy Center

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VI. DRUG POLICY REFORM

Overview

Many currently illegal drugs, such as marijuana, opium, coca, and psychedelics, have been used for thousands of years for both medical and spiritual purposes. Yet today in the United States and around the world, some drugs are legal and others are illegal. This is not based on the scientific assessment of the relative risks of these drugs, or on evidence-based ways of reducing potential harms associated with them. Instead, legal status of drugs relates more to societal fears of, and desires to control, particular groups of people. The first anti-opium laws in the 1870s, for example, were directed at Chinese immigrants. The first anti-cocaine laws, in the South in the early 1900s, were directed at Black men. The first anti-marijuana laws, in the Midwest and the Southwest in the 1910s and 1920s, were directed at Mexican migrants and Mexican Americans.

More recent history continues to bear this out. In June 1971, former President Richard Nixon declared a war on drugs, dramatically increasing the size and presence of federal drug control agencies, and implementing measures such as mandatory sentencing and no-knock warrants. Ronald Reagan's presidency marked the start of a long period of skyrocketing rates of incarceration, as the number of people behind bars for non-violent drug law offenses increased from 50,000 in 1980 to over 400,000 by 1997.

Former President Bill Clinton promoted treatment over incarceration during his 1992 presidential campaign. After his first few months in the White House, however, he reverted to the drug war strategies of his Republican predecessors by continuing to escalate the drug war. While former President George W. Bush arrived to the White

House as the drug war rhetoric was slowing, he nevertheless allocated more funding than ever to it.

Former President Barack Obama's Administration tried to move away from the harsh rhetoric and racially disparate impact of the drug war, advocating for treatment and sentencing reform over incarceration. Yet 700,000 individuals are still arrested for marijuana offenses each year, and almost 500,000 people remain behind bars for nothing more than a drug law violation. And Black and Latino communities remain subject to extremely disproportionate drug enforcement and sentencing practices.

Public opinion has shifted dramatically in favor of sensible reforms that expand health-based approaches while reducing the role of criminalization in drug policy. Progress is inevitably slow, but there is unprecedented momentum behind drug policy reform right now. As the new Administration and Congress develop priorities, they have the opportunity to reduce the economic waste, health dangers, and racial disparities associated with drugs and drug policies.

I. Prevention

Summary of the Issue

For decades, drug prevention strategies in the U.S. have focused on an abstinence-only approach, relying on fear-based rhetoric rather than research-based, health-protective measures. Significant investment to research best strategies, as well as tools and information that will guide young people, parents, educators, and health professionals is needed to empower individuals to refrain from drug use that harms themselves or others. These should be culturally-competent and evidence-based, and should not be undermined by punishing those who seek information or by relying on counterproductive law enforcement strategies in schools and communities.

Background

Objective, evidence-based, age-appropriate education that prioritizes the reduction of harm is critical in the U.S. prevention strategy. Popular preventative measures, often based on “just say no” rhetoric, have done little to empower and educate youth, despite generously funded public relations campaigns. Abstinence-only education is not a sufficient response to youth drug use, as some youth will nonetheless choose to use drugs; for their safety, drug education should increase health and reduce drug harms. Providing access to factual information about all drugs creates a culture of safety and responsibility, recognizes the unique cultural and social climates of youth, and empowers young people. Drug education and intervention must meet the needs of all young people, from those who are at low-risk of drug use or misuse to those who are high-risk, as well as those already using substances problematically.

There is a significant lack of resources available to parents who seek to have honest and accurate conversations with their children about drugs and drug use. Drug education programs for youth should be implemented with supplemental resources for parents. Encouraging young people to make healthy choices and providing alternatives to drug use is crucial to reducing substance abuse problems. Scare tactics and zero-tolerance policies, however, often impede prevention efforts. For example, policymakers can prevent youth methamphetamine abuse by increasing funding for after-school programs, supporting the development of drug education tools that foster trust and emphasize factual information, and strengthening access to health and mental health services.

Along with improved prevention paradigms, it is necessary to update and improve treatment strategies to meet the unique needs of youth as more young people are entering Substance Use Disorder (SUD) treatment. Resources aimed at screening and brief intervention within schools – an evidence-based approach that motivates individuals to reduce or give up their substance use by helping

them understand how it puts them at risk – should be developed and promoted. These tools shift away from punishments, such as suspension from school, that can increase the likelihood of negative outcomes; and instead move toward harm reduction, education, and support that decrease negative outcomes.

Executive Branch Proposals

- The Department of Health and Human Services should increase opportunities to empower and teach parents to talk with their children about drug and alcohol use to guide any experimentation to reduce dangers.
- The federal government should not fund prevention groups that do not embrace harm reduction, or that promote abstinence as the only approach to drugs.
- The National Institute of Health (NIH) and National Institute of Justice (NIJ) should study the impact of the 21-year-old drinking age and its enforcement on laws regarding intoxication, including drug laws, as liquor law violations are a major area of police activity. The role that young adult drinking restrictions have on consumption patterns and on the attitudes of adults and adolescents should be examined.
- NIH and NIJ should continue to assure that credible social disapproval for tobacco use and alcohol use are a part of comprehensive substance abuse prevention messages.

Legislative Proposals

- Congress should allocate funding for NIH to research effectiveness of social disapproval for use of other intoxicants. The White House Office of National Drug Control Policy (ONDCP) should act upon this research when distributing grants, such as the Drug Free Communities program.
- Congress and ONDCP should eliminate funding to any drug reduction programs that are not demonstrated to be effective, including abstinence-only anti-drug campaigns.

Resources and Experts

- At The Crossroads
- Drug Policy Alliance (DPA)
- Harm Reduction Coalition
- Students for Sensible Drug Policy (SSDP)

II. Treatment

Summary of the Issue

Treatment for Substance Use Disorders (SUD) in the United States is grossly outdated and severely underfunded. The Substance Abuse and Mental Health Services Administration's Center for Substance Abuse Treatment has been promoting integrated treatment of co-occurring substance use and mental health disorders for over a decade,¹ yet individuals continue to lack access to effective treatment that will address all of their specific needs simultaneously. Any comprehensive healthcare delivery system should include treatment for SUD. This includes trauma-based care in particular, because the trauma of violence is rarely treated despite being a key factor in self-medication through the use of illicit substances.

Furthermore, it is critical for experts in the treatment field to publicly acknowledge the fact that not all individuals who use drugs require drug treatment; some may only need drug education about possible negative health effects, even as others require outpatient treatment services and counseling, more intensive services, or even a residential treatment setting. Diagnostic evaluations must be conducted by trained medical personnel, a critical component to determining appropriate services. And in light of the major public health crisis involving opiates and methamphetamine, strategies emphasizing harm reduction, treatment, and decriminalization – which have been demonstrated most successful at preventing opioid overdose and other risks

associated with opioid and methamphetamine use – must be scaled up to address their impact.

Although access to substance abuse treatment is critically important, it should never be required, especially as a condition of freedom. There are many factors in a person's life that determine treatment adherence, including treatment modality and life circumstances. Forced or coerced treatment, often including drug courts, has a narrow idea of success which is influenced by class and race and ignores the reality of participant's lives. Negative experiences of treatment can push people away from supportive services, thereby leading to higher rates of recidivism and reduced health outcomes. Conversely, on-demand voluntary treatment supports people's substance abuse recovery process and reduces their involvement in the criminal justice system.

Background

Opioids

We face an opioid use crisis that has led to the deaths of thousands of individuals from preventable overdose and the contraction of blood-borne diseases like HIV and hepatitis C. Overdose deaths have surpassed car fatalities as the number-one cause of accidental death in the United States. Since 2000, the number of people dying from accidental overdoses increased by 137 percent, including a 200 percent increase in the rate of overdose deaths involving pharmaceutical opioids and heroin.² In 2014, there were 47,055 drug overdose deaths in the U.S., and 61 percent of these deaths involved some kind of opioid.³ Non-Hispanic White men aged 25-54 have been at greatest risk of overdose death since 1999. However, other demographic groups are also seeing dangerous increases: overdose deaths among women, non-Hispanic Blacks, American Indians, and people aged 55-64 have been rapidly rising in recent years. Military veterans are also at elevated risk of experiencing a drug overdose due to the widespread use of opioid analgesics for the treatment of service-related injuries.

While prevention and SUD treatment services must be strengthened, life-saving overdose reversal agents must also be more widely available. Naloxone (also known by the trade name Narcan) is an inexpensive, generic medication that works to reverse an opioid overdose in unconscious overdose victims in as little as two minutes. The drug is easy to use, and a person with no medical training – a family member or friend – can be trained in just five minutes how to safely administer it to an overdose victim. A family member or friend is often the first person at the scene of an overdose, arriving long before emergency medical services. The quicker a bystander reverses an opioid overdose with naloxone, the greater the odds that the victim will not sustain serious health complications from a prolonged overdose.⁴ A growing number of drug treatment facilities, homeless shelters, syringe exchange programs, health clinics, and other community-based providers that work with high risk populations are equipping potential bystanders with naloxone and training on its use. Since 2010, approximately 140 providers in 30 states have reported more than 16,000 naloxone reversals to the Centers for Disease Control and Prevention (CDC).⁵ Many of these reports came from family members or friends who had been provided with naloxone and used it to rescue a loved one.

In 2015, Congress appropriated funding to equip first responders with naloxone; and more recently, passed legislation known as the Comprehensive Addiction and Recovery Act (CARA) that authorizes federal funding for the distribution of naloxone by community programs. Despite these steps, a major federal investment in community-based naloxone distribution has not yet materialized. Anyone who enters treatment for an opioid use disorder, and anyone who presents as using opioids regardless of whether or not they desire to engage in treatment, should receive information about naloxone: what it does, where to access it, and how to use it. Naloxone should be affordable and easily accessible in its various forms in all pharmacies and medical facilities.

Similarly, in addition to reducing preventable overdose fatalities, policymakers should support proven ways to reduce the spread of HIV and hepatitis C among drug users. The Republican majority in Congress recently championed partially repealing the federal funding ban on syringe services programs, after reinstating it in 2011. Syringe services programs have been proven to reduce the spread of HIV and hepatitis C without increasing drug use,⁶ and to serve as a bridge between the most marginalized drug using populations and services that help protect public health.⁷ Although many large U.S. cities have invested in syringe exchange,⁸ rural areas dealing with increasing opioid and heroin rates often do not have, or even legally permit, the provision of syringe exchange.

Finally, most communities in the U.S. lack infrastructure to meet the demand for drug treatment, particularly the Medication Assisted Treatment (MAT) proven to be effective for opioid dependency. The vast majority of treatment services do not include MAT programs such as methadone or buprenorphine treatment.⁹ Methadone has long been hard to access because of extensive restrictions and red tape,¹⁰ despite the fact that it is considered to be the most effective treatment for heroin addiction.¹¹ Similarly, although a federal cap on the number of patients that a physician can treat with buprenorphine was recently increased; many health practitioners still will not treat buprenorphine patients.¹² And within corrections and drug court systems, most people who are under court-ordered supervision or are incarcerated do not have access to evidence-based MAT, as the federal Bureau of Prisons has long prohibited MAT for incarcerated individuals¹³ despite evidence that MAT is the optimal therapy and may also help reduce recidivism.¹⁴

MAT intake offices should be convenient to public transportation and open for long hours, with multiple intake centers. Intake centers should be located in areas not known for substance abuse problems as well as those with a recognized problem, to minimize potential stigma and to

maximize convenience. Prescribers should be authorized to ensure greater access to these effective interventions. MAT should be included as a legitimate treatment option and made accessible to all who enter treatment for SUD. Alternative treatment strategies, including research and development of new and alternative medications and supplements such as Kratom, should be supported for the treatment of opioid use disorder.

Stimulants

The history of the use of methamphetamine is intertwined with the history of its chemical cousin, amphetamine. Their chemical structures are similar, although the effect of methamphetamine on the central nervous system is more pronounced. Amphetamine was first synthesized in 1887, and methamphetamine was discovered in 1919. By 1943, both drugs were widely available to treat a range of disorders, including narcolepsy, depression, obesity, alcoholism, and the behavioral syndrome called minimal brain dysfunction, known today as attention deficit hyperactivity disorder (ADHD). Following World War II, during which amphetamine was widely used to keep combat duty soldiers alert, both amphetamine (Adderall, Benzedrine, Dexidrine) and methamphetamine (Methedrine, Desoxyn) became more available to the public.

In 1971, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which classified amphetamine and methamphetamine as Schedule II drugs, the most restricted category for prescription drugs. In response to an ever-increasing demand for black market stimulants, their illegal production, especially that of methamphetamine, increased dramatically.

It is critical that we reduce demand for these drugs. The quickest, cheapest, and most effective way to undermine drug markets and reduce drug use is to make quality substance abuse treatment more widely available through public spending, tax credits, and other measures. Policymakers should expand access to treatment and mental health services, divert methamphetamine offenders to

treatment instead of jail, and promote family unity. More funding should be provided for longer, more intensive methamphetamine treatment for those who need it, especially in rural areas, with a focus on reducing the significant barriers to treatment that exist.

There should also be a greater investment in pharmacotherapy research, including stimulant replacement therapy. Policymakers should take every step possible to advance the development of a substitution treatment for methamphetamine use, akin to methadone and buprenorphine for opioid addiction. For other stimulants, such as cocaine, the U.S. should also introduce a pilot program to determine if prescribing oral stimulants can help people struggling with addiction to cocaine, methamphetamine and other stimulants.

As with opioids, investing in harm reduction programs will minimize the public health threats associated with methamphetamine abuse and will reduce healthcare expenditures. Methamphetamine use is closely associated with high-risk sexual behavior, which can contribute to the spread of HIV/AIDS and other sexually transmitted diseases. The sharing of syringes among people who use methamphetamine intravenously is also a factor in the spread of HIV/AIDS, as well as hepatitis C and other infectious diseases. Policymakers should ensure that free condoms and sterile syringes are widely available and increase funding for safe-injection and safe-sex education programs. The federal government should fully repeal the ban on using federal HIV/AIDS prevention money on syringe exchange programs, and begin exploring safer drug consumption spaces.

Finally, in addition to harm reduction and treatment services, a comprehensive national methamphetamine reduction strategy must include effective prevention and policing. Adult methamphetamine abuse can be reduced by increasing employment and educational opportunities, strengthening families, and promoting economic growth. For policing, Congress should set clear statutory goals for the

disruption of major methamphetamine operations, and federal agencies should be required to report on their progress toward these goals, including information about any costs associated with arresting and prosecuting low-level non-violent offenders.

Executive Branch Proposals

- Federal health and social service providers and supports should facilitate the integration and coordination of substance use disorder treatment with other health and social services.
- The Department of Health and Human Services (HHS) should ensure even distribution of treatment and harm reduction resources throughout hard-hit urban centers and rural communities.
- HHS should remove regulatory barriers and restrictions to increase the ease of drug treatment intake, including methadone or buprenorphine.
- The Substance Abuse and Mental Health Services Administration (SAMHSA) should examine and expand office-based methadone treatment.
- HHS should support training for primary care providers to identify drug use among patients, provide treatment including methadone and buprenorphine, and refer to appropriate specialists.
- The Administration should remove barriers to collaboration between service providers in various sectors, including public schools, courts, family services, employment services, housing agencies, recreation, and mental health services, among others.
- The Bureau of Prisons (BOP) should expand access to evidence-based treatment, particularly Medication Assisted Treatment (MAT).
- The Administration should ensure that the President's budget includes full funding for the Comprehensive Addiction and Recovery Act (CARA).
- The Administration should invest in pharmacotherapy research, including replacement therapy. HHS should take every step possible to advance the development of a substitution treatment for stimulant use, akin to methadone

and buprenorphine for opioid addiction; and introduce a pilot program to determine if prescribing oral stimulants can help people struggling with addiction to cocaine, methamphetamine, and other stimulants.

- The federal government should request major new federal investments in community-based sterile syringe and naloxone access programs, as well as evidence-based Medication Assisted Treatment (MAT) from Congress.
- BOP should eliminate the prohibition on the availability of MAT for incarcerated individuals. Regulations limiting access to methadone and other forms of MAT should be eliminated.
- HHS should negotiate lower prices for community-based naloxone availability.

Legislative Proposals

- Congress should pass legislation such as the Opioid Use Disorder Treatment Expansion and Modernization Act (H.R. 4981, S. 524) to include MAT as a treatment option that is easily accessible to all.
- Congress should support full funding for CARA.

Resources and Experts

- Carl Hart, Professor of Psychology and Department Chair, Psychology Department, Columbia University
- Daniel Raymond, Harm Reduction Coalition
- Grant Smith, Deputy Director, National Affairs, Drug Policy Alliance
- Mel Wilson, National Association of Social Workers

III. Drug Courts

Summary of the Issue

Drug treatment courts, also called “drug courts,” are meant to offer court-supervised treatment for drug dependence to people who would otherwise go to prison for a drug-related offense. In spite of good intentions, these courts do not represent reform if they continue to undermine health and human rights, if they put health decisions in the hands of judges and prosecutors who reject clinically-indicated treatment, or if they impose punishment for relapses that are a normal part of drug dependence and the road to recovery.

Background

Drug treatment courts began as a mechanism for providing substance abuse treatment to, and reducing the incarceration rates of criminal law offenders addicted to drugs in the 1980's, and have expanded dramatically across the nation. Despite political popularity, independent evaluations, including research by the U.S. Government Accountability Office and a growing number of scholarly articles and books, lay bare serious systemic shortcomings, procedural and substantive, of many U.S. drug courts, and raise disturbing questions about their transparency, ethics, and efficacy. Many drug courts fail to offer evidence-based, non-punitive substance abuse treatment tailored to the individual needs of participants. Many drug court participants serve more time being incarcerated as a result of their participation in drug court than if they had not participated in drug court at all.

Many drug courts refuse to work with high-needs persons with substantial criminal histories, despite purporting to target that very population, even though their participation in drug courts would yield the greatest improvements to public safety, reductions in recidivism, and cost-savings to tax payers. Most community-based substance use disorder treatment programs cost just between

\$3,000 and \$5,000 per patient¹⁵, while drug courts cost almost \$7000 a year and incarceration can cost tens of thousands of dollars.

Additional criticisms involve the post-plea posture required for participation, which undermines the attorney client privilege enjoyed with a defense attorney. There is also no guarantee that a licensed medical professional will be fully involved in the evaluation and diagnosis of a person diverted for drug court, which means the recommended treatment program is not always based on appropriate medical expertise. In the drug court system, the health professional must work within the strictures of the drug court, meaning they are not putting the patient's health needs first, but rather the demands of the drug court.

Executive Branch Proposals

- The Department of Justice (DOJ) should require drug courts that receive federal government funding to meet accepted standards of data collection and reporting, and the provision of substance abuse services.
- DOJ should provide proven, evidence-based treatment tailored to the needs of each participant.
- DOJ should ensure professional medical screening for and access to opioid substitution and maintenance treatments such as methadone and buprenorphine for all opioid-dependent participants who might benefit from such treatment.
- DOJ should eliminate jail sanctions for participants who suffer simple drug relapse.
- DOJ and the Department of Health and Human Services should provide all participants with overdose prevention education and training, as well as access to naloxone.
- DOJ should adopt pre-plea rather than post-conviction procedures for participant eligibility.
- DOJ and HHS should remove restrictions on current BJA and SAMSHA grants (and any other federal grants for drug courts) requiring that only non-violent offenders be diverted to treatment courts, allowing courts to take ‘high-risk, high-

need’ individuals based on medical best practice and diagnosis, not legal criteria.

Legislative Proposals

- Congress should enact and support legislation that ensures individual, evidence-based treatment and requires professional medical screenings for participants, as well as providing guidance on overdose prevention.

Resources and Experts

- Denise Tomasini, Open Society Foundations
- Rebecca Tiger, Associate Professor of Sociology, Middlebury College
- Dan Abrahamson, Drug Policy Alliance
- Christine Mehta, Physicians for Human Rights
- John Collins, Executive Director, IDEAS Program, London School of Economics

IV. Diversion

Summary of the Issue

Law Enforcement Assisted Diversion (LEAD) is a pre-booking, pre-arrest diversion program that allows law enforcement officers to redirect low-level offenders engaged in drug activity to community-based services instead of jail and prosecution. Based on a commitment to “a harm reduction framework for all service provision,”¹⁶ LEAD aims to reduce the harm a person who uses drugs causes themselves, as well as harm they are causing to their surrounding community.

Background

LEAD allows law enforcement to focus on serious crime while playing a key role in linking people to services instead of funneling them into the justice

system.¹⁷ In July 2015, the White House held a national convening to discuss and promote LEAD, with the participation of representatives from over 30 cities, counties and states.¹⁸

According to its 2015 evaluation report, LEAD participants were nearly 60 percent less likely to reoffend than a control group of non-LEAD participants.¹⁹ LEAD participants showed significant cost reductions, while non-LEAD controls showed cost increases. These cost decreases result from substantial reductions in time spent in jail, jail bookings per year, and probability of incarceration or felony charges among LEAD participants compared to “system-as-usual” controls.²⁰

Executive Branch Proposals

- Include funding in the president’s budget, building on President Barack Obama’s propositions in the President’s Task Force on 21st Century Policing, including support for expanding local and state diversion programs.

Legislative Proposals

- Congress should support grant funding for \$5,000,000 for additional programs to administer the Law Enforcement Assisted Diversion (LEAD) model throughout the country.

Resources and Experts

- Lisa Dugaard, Public Defenders Association
- Emily Kaltenbach, Drug Policy Alliance
- Jerome Sanchez, Santa Fe Police Captain

V. Marijuana

Summary of the Issue

At the state level, marijuana reform has gained unprecedented momentum throughout the Americas. In 1996, California became the first state to legalize marijuana for medicinal purposes.²¹ Since then, 28 other states, Washington, D.C., and the territory of Guam have legalized medical marijuana. Seven states (Colorado, Washington, Oregon, Alaska, California, Nevada, and Massachusetts) and Washington, D.C. have legalized specific marijuana-related activities for adults.²² In 2013, the Department of Justice (DOJ) issued a memo indicating a “states’ rights approach” to states that had legalized marijuana, deprioritizing marijuana law enforcement for activities authorized under state law; and maintaining higher problem areas for federal enforcement.

Background

Studies evaluating the association between state medical marijuana laws and crime rates have repeatedly found that legalization of marijuana for medical purposes “is not predictive of higher crime rates and may be related to reductions in rates of homicide and assault.”²³

In recent years, public support for the legalization for marijuana has increased. For the 2016 election, nine states included legalizing marijuana for recreational or medicinal purposes on their ballots. According to a 2014 Pew Research Center poll, 75 percent of Americans consider marijuana legalization inevitable,²⁴ and 63 percent of Republican millennials favored marijuana legalization.²⁵ Forty-one percent of participants at the 2015 Conservative Political Action Conference supported marijuana legalization.²⁶ Recent polls show that 81 percent of the American public support medical marijuana.²⁷

In May 2014, Federal Bureau of Investigations (FBI) Director James Comey stated that if the FBI hopes to continue to keep pace with cyber criminals, the organization may have to loosen up its zero-tolerance policy for hiring individuals who use marijuana.²⁸ Then-Secretary of the Department of Defense (DOD) Ash Carter similarly said that the DOD needed to be flexible when hiring people who have used marijuana.²⁹

Congress has supported medical marijuana through appropriations votes on several occasions, and the Rohrabacher-Farr Amendment, which prohibits the DOJ from prosecuting those acting in accordance with their state medical marijuana laws, has been included in the past two final appropriations bills.³⁰

Executive Branch Proposals

- DOJ should continue its states’ rights approach, affirming that states may set their own marijuana policies.
- HHS and DOJ should commit to an internal review of marijuana’s designation as a Schedule I substance, with a view to recommending Schedule III or lower.
- The Administration should revise Executive Order 12564 Drug-free Federal Workplace Sec. 7. “Definitions,” so that the term “illegal drugs” does not mean the use of a controlled substance pursuant to a valid prescription or physician’s recommendation, or other uses authorized by state or federal law.
- Executive orders dealing with prohibitions on hiring drug users in either Department of Defense positions or any position with a clearance should be rescinded.

Legislative Proposals

- Congress should pass legislation to end federal marijuana prohibition.

Resources and Experts

- Alison Holcomb, Arnold Impact
- John Hudak, Deputy Director of the Center for Effective Public Management, The Brookings Institution
- Michael Collins, Deputy Director, National Affairs, Drug Policy Alliance
- Robert Capecchi, Marijuana Policy Project

VI. Drug Law Enforcement

Summary of the Issue

The BOP is operating at nearly 140 percent capacity, costing \$7 billion annually³¹. Nearly half of those incarcerated are in for nothing more than a drug law violation. Two-thirds of the women are incarcerated for nonviolent drug offenses, and most are mothers³². If we are to reduce our incarceration problem, we need to reform the federal agencies charged with enforcing drug laws.

Background

U.S. drug policy has long prioritized supply-side reduction over demand-side reduction. Since the 1970's, the federal drug budget has allocated the largest share of funding for eradication, interdiction, and diversion efforts both inside and outside the U.S. However, law enforcement activities have failed to reduce the trafficking of heroin and illicit opioids.

Moreover, the presence or harshness of criminal penalties for drug possession or use in open societies appears to have had no impact on levels of use.³³ Criminalizing people who sell and use drugs, especially opioids, has actually amplified the risk of fatal overdoses and diseases, increased stigma and marginalization, and driven people away from needed treatment, health, and harm reduction services.³⁴

Evidence suggests that the majority of people using pharmaceutical opioids without a valid prescription are obtaining them for free from friends and family, while only a subset of this same group actively engage in “doctor shopping,” steal medication from people they know, or buy diverted medication illegally.³⁵ People with a history of using pharmaceutical opioids are also switching to heroin in growing numbers.³⁶ Some proportion of the switching that is occurring between pharmaceutical opioids and heroin has likely been the result of crackdowns by law enforcement on legal and illegal sources for prescription pain relievers.³⁷

Available evidence also suggests that people may be more likely to switch to heroin when law enforcement crackdowns force a drop in pharmaceutical opioid availability or an increase in its cost.³⁸ Law enforcement activity is likely a driving factor in the creation of new heroin markets in rural communities. As heroin use has increased, average potency has increased while the average price of the drug has fallen.³⁹

Overdose deaths from synthetic opioids, namely fentanyl, nearly doubled between 2013 and 2014. Non-pharmaceutical fentanyl, manufactured in illicit laboratories and added to batches of heroin imported into the U.S., may be driving this increase in synthetic opioid deaths.⁴⁰ Some lawmakers in Congress have proposed enhancing penalties for illicit fentanyl distribution. However, individuals selling smaller quantities of heroin often are unaware of the presence of fentanyl in heroin supplies.

Since 2007, more than 35 states and the District of Columbia passed what are known as “Good Samaritan” overdose prevention laws to provide witnesses who call 911 limited protections from arrest and prosecution for drug-related law violations.⁴¹ These laws are needed since witnesses to an illicit drug overdose often hesitate to call for help, or don’t make the call as they fear arrest.⁴² Many jurisdictions that have implemented these laws have not invested in public awareness

campaigns to notify high-risk populations about the existence of these laws.

The Drug Enforcement Agency's (DEA) mission is to enforce controlled substance laws, but history has shown in the U.S. that prohibition does not work. The DEA's budget for fiscal year 2015 was \$2.88 billion. Their employees increased from 1,500 in 1973 to today's 9,200. While the Agency's reach is enormous, they still have not reduced the availability of drugs or the harms associated with them. Additionally, the DEA has been linked to numerous scandals, including illegal killings in Honduras and taxpayer-funded sex parties in Colombia – the latter forcing the then-head of the DEA Michele Leonhart to resign.⁴³ The DEA's decision in August 2016 to not reschedule marijuana demonstrated that it remains an agency that ignores science and public opinion.⁴⁴

A joint task force is a collaboration between state or local law enforcement and federal law enforcement. As far as drug crime is concerned, the collaboration often takes the form of a local law enforcement agency working with the DEA to pursue suspected drug offenders. The idea is that there is a federal connection to the case (inter-state trafficking for example), but this is often not the case. The proliferation of joint task forces has meant that the federal government subsidizes local law enforcement missions that they may not otherwise engage in due to a lack of funds. This has incentivized local law enforcement to take on more drug cases that they would not have the ability to take on without calling in the DEA or another agency. There is no threshold for what constitutes local/state collaboration with the federal government, and therefore cases can involve people convicted of low level offenses operating within a state's boundaries that could otherwise be resolved without the federal government playing a role.

Prosecution at the federal level typically involves tougher penalties, leading to increases in incarceration; almost half of those incarcerated at the federal level are there for drug crimes.⁴⁵ State

and local authorities must be able to build cases on their own, unless there is a strong federal nexus. Currently, the DEA pays investigative overtime for the state and local task force officers, as well as investigative expenses such as payments to informants, "buy money" to purchase contraband, undercover vehicles, and surveillance equipment. In 2016, the DEA State and Local Task Force Program managed 271 state and local task forces, which included Program Funded, Provisional, High Intensity Drug Trafficking Area program, and Tactical Diversion Squads.⁴⁶

Task forces and line officers have practiced stop and frisk, temporarily detaining someone while patting them down, but this practice came under the radar for not actually focusing on criminals or detecting many illegal guns. In fact, NYPD's stop-and-frisk policy has resulted in the unconstitutional arrests of more than 600,000 New Yorkers – predominantly young men of color – for marijuana possession since 1996 even though possessing small amounts of marijuana has been decriminalized since 1977. In 2013, Judge Scheindlin found that NYPD officers have been stopping innocent people in the street without any objective reason to suspect them of wrongdoing and "adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data." In addition to what Judge Scheindlin called the "human toll of unconstitutional stops."

A return to law and order policing will only endanger more citizens, since crime and violent crime rates have been low for more than fifty years. While spikes in homicide, by individuals and law enforcement have caused a great deal of concern, addressing the safety of all Americans is imperative. As the country has moved away from criminalizing drug use, and towards treating drug use as a public health issue, there have been more and more voices calling for the decriminalization of all drugs. In other words, individuals who use drugs should not face criminal penalties. Many groups, including Drug Policy Alliance, Human Rights Watch, and the ACLU have all come out in support of all drug decriminalization.

Executive Branch Proposals

- The Administration should dissolve the Drug Enforcement Agency (DEA) and incorporate its work into the FBI, focusing on violence reduction not just drug reduction.
- The responsibility for drug classifications and determining medicinal benefits should shift from the DEA to HHS, or a non-governmental entity such as the National Academy of Sciences.
- The Administration should limit the use of joint drug task forces, end the High Intensity Drug Trafficking Area program (HIDTA), and set clear rules for what constitutes collaboration between the federal government and state/local authorities in drug cases.
- The president’s budget should include funding to incentivize state and local officials to replicate diversion programs.

Legislative Proposals

- Congress should audit the DEA to review its operations, expenditures and actions.
- Congress should establish a baseline for what constitutes collaboration between the federal government and state/local authorities in drug cases. Raising the threshold amount of drugs it takes to constitute a federal drug law violation would encourage federal law enforcement agencies to focus on major drug traffickers that cross state or national boundaries – leaving the

investigation, arrest, and prosecution of low-level offenders to states.

VII. Drugs and Foreign Policy

Summary of the Issue

U.S. foreign policy impacts drug issues through overseas programs, support for country programs, and diplomacy. In past decades, the U.S. focused its efforts and influence primarily on tough on crime/ tough on drugs policies and rhetoric, requiring that countries around the world and our partners at the United Nations (UN) focus on the total elimination of illegal drugs from the world market. In the intervening years, however, this prohibition approach has proven to be unsuccessful in achieving its stated goals, including causing a human rights and security crisis in Latin America, as well as extraordinarily costly by both financial and ethical measures. As a result, the U.S. has begun to review and revise its approach to one more focused on what really matters: health, public safety, and human rights.

Background

The U.S. has always been a leader among its international partners on drug policy. Though the U.S. has begun to shift its focus toward public health-driven policies that yield positive results, the shift must also happen internationally in order for us to see a truly significant reduction in drug misuse, addiction, and related harms. Many of our strong international partners are also moving in this direction, and the new administration should continue to exert its influence to encourage other UN member states to adopt more health-focused and humane drug policies.

The U.S. government has the opportunity to influence the international debate and UN processes, with a goal of revising the drug control system to recognize that the policies of the past – criminalizing drug use, possession, production, and distribution – are inconsistent with full respect and

Resources and Experts

- Jamil Dakwar, Director, Human Rights Program, American Civil Liberties Union
- Bill Piper, Director, National Affairs, Drug Policy Alliance
- Neill Franklin, Law Enforcement Action Partnership
- Radley Balko, The Washington Post

protection for international human rights. The result and enforcement of these policies has led to the creation of a profitable but illicit drug trade that perpetuates corruption, spawns egregious human rights violations, and undermines democracy around the world.

In April of 2016, the UN hosted the UN General Assembly Special Session (UNGASS) on the World Drug Problem, the first UNGASS on this topic since 1996. The 2016 UNGASS demonstrated a dramatic shift – both in the U.S. and in many nations around the world – towards a drug policy that prioritizes health, safety, and human rights over abolition and control; however, much work remains to be done. Hundreds of advocates and non-governmental organizations sent an open letter to UN Secretary General Ban Ki-Moon calling for “enlightened leadership...for reform of global drug control policies” and for “[t]he role of criminalization...[to] be limited to the extent truly required to protect health and safety.”⁴⁷

The U.S. can positively influence in the global realm, through education and foreign aid, in highlighting the U.S.’s shift to health-focused drug policy. Indonesia, for instance, continues to execute individuals for drug offenses by firing squad. Since President Rodrigo Duterte took office in May in the Philippines, more than 3,000 people have been murdered and 700,000 admitted drug users are under threat to confinement in concentration camp-like conditions. In this extremely deadly version of the “war on drugs,” the U.S. should be deeply concerned about both immediate and long term consequences to health and human rights. People who use drugs have turned themselves in to authorities – undoubtedly out of fear for their lives – and who will now face time in overcrowded prisons and likely be subjected to inhumane and involuntary drug treatment programs. The UN drug control agencies have urged Duterte’s administration to put an immediate halt to its lethal anti-drug campaign.

Executive Branch Proposals

- The Administration should articulate a position that human rights obligations should be prioritized over drug treaty enforcement.
- The Administration should establish a new framework based on health and human rights for international drug policy, including but not headed by enforcement-oriented agencies, relying heavily on input from the Department of Health and Human Services.
- The Administration, through the Office of National Drug Control Policy (ONDCP) and the State Department, should create a robust mechanism for domestic agency engagement in UN preparatory meetings on drug policy.
- The State Department and U.S. Agency for International Development should suspend or restrict drug enforcement aid to countries that apply the death penalty for non-violent offenses, or that engage in extrajudicial killings.⁴⁸

Legislative Proposals

- Congress should support relevant foreign aid appropriations in line with public health, sustainable development, and human rights goals.
- Congress should repeal two never-used drug death penalty provisions..⁴⁹

Resources and Experts

- Diederik Lohman, Acting Director, Health and Human Rights, Human Rights Watch
- Hannah Hetzer, Drug Policy Alliance
- Sanho Tree, Director, Drug Policy Project, Institute for Policy Studies
- Coletta Youngers, Senior Fellow, Washington Office on Latin America
- David Borden, Executive Director, StoptheDrugWar.org

VIII. Novel Psychoactive Substances

Summary of the Issue

In recent years, hundreds of novel psychoactive substances (NPS) have appeared in U.S. laws. Criminalizing these substances has worsened public health indicators associated with NPS use. A health-focused strategy is needed to reduce harms associated with NPS use.

Background

In recent years, the emergence of NPS, ranging from synthetic cannabinoids such as “K2” and “Spice,” to synthetic opioids such as “bath salts” and fentanyl, has posed a number of challenges for policymakers. Lawmakers at both the federal and state level have largely responded to emerging substances with legislation criminalizing people who use and distribute them.

People use NPS for a multitude of reasons, but common motives include the need to avoid a positive drug test (since NPS are generally undetectable), the low prices and widespread availability of NPS (sometimes over the counter), and the desire to self-medicate and/or experience pleasure.

All 50 states have laws on the books that ban particular NPS compounds. In 2012, Congress passed legislation banning more than two dozen NPS compounds and current legislation that would criminalize additional NPS substances is pending. However, these laws banning NPS have not stopped manufacturers from selling banned substances or creating new compounds that skirt existing laws, just as alcohol prohibition did not stop bootleggers. Many of these laws have in fact incentivized manufacturers to invent new substances to replace what was banned. As this process repeats, chemical compounds are manipulated in ways that have never been studied for their health effects, potentially increasing, not mitigating, the dangers to public health.

There are other potential approaches to regulating NPS other than outright prohibition and criminalization. In July 2013, New Zealand’s parliament enacted a historic new law that created an FDA-like process for approving NPS if their relative safety can be demonstrated. While the outlines of the law are unique to New Zealand, it is one example of a different approach to this issue. Demand for NPS could drop if people have legal and regulated access to marijuana. The vast majority of synthetic cannabinoids likely would not exist today if not for the prohibition of marijuana itself.

Executive Branch Proposals

- The Administration should formulate and promote policies that contextualize drug use on a scale from non-problematic to problematic and recognize the need to address underlying social determinants of health, such as employment and housing.
- The Administration should expand and fund harm reduction initiatives across the continuum of care, redirecting funding from abstinence-only treatment programs towards ones that embrace a harm reduction perspective as necessary.
- The Administration should support federally-funded educational campaigns regarding NPS that are evidence-based and focused on harm reduction and health-based solutions.
- The Administration should support scientists and public health experts in making scheduling decisions, rather than law enforcement.

Legislative Proposals

- Congress should appropriate major new investments in initiatives that improve public health and education outreach to people who use NPS and reduce harms associated with NPS use, especially programs that connect people with housing and harm reduction services.
- Congress should task a commission with evaluating different approaches to NPS, including a New Zealand-style model, to the regulation of

NPS and make appropriate recommendations to Congress.

Resources and Experts

- Grant Smith, Deputy Director, National Affairs, Drug Policy Alliance
- Ross Bell, Executive Director, New Zealand Drug Policy Foundation

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Sakira Cook (Leadership Conference on Civil and Human Rights)
Jessica Crockett (Howard University School of Law Legislative Clinic)
Monique Dixon (NAACP Legal Defense Fund)
Laura Downton (National Religious Campaign Against Torture)
Amy Fettig (National Prison Project of the ACLU)
Christian Fisher (Howard University School of Law Legislative Clinic)
Neill Franklin (Law Enforcement Action Partnership)
Angelyn Frazer (National Association of Criminal Defense Lawyers)
Karen Garrison (Mommie Activist and Sons)
Antonio Ginatta (Human Rights Watch)
Kara Gotsch (The Sentencing Project)
Gabrielle de la Gueronniere (Legal Action Center)
Annelise Hafer (Citizens United for the Rehabilitation of Errants)
Hamedah Hasan
Micah Haskell-Hoehl (American Psychological Association)
Will Heaton (CEO Works)
Jason Hernandez (Crack Open the Door)
Diane Smith-Howard (National Disability Rights Network)
Andrea James (National Council of Incarcerated and Formerly Incarcerated Women & Girls)
John Linton (retired – Department of Education)
Meghan Maury (National LGBTQ Task Force)
Jesselyn McCurdy (American Civil Liberties Union)
Jasmine Mickens (Open Society Policy Center)

Marcy Mistrett (Campaign for Youth Justice)
Kyle O'Dowd (National Association of Criminal Defense Lawyers)
Imani Oakley (Howard University School of Law Legislative Clinic)
Mark Osler (University of St. Thomas School of Law)
Maritza Perez (Mexican American Legal Defense and Educational Fund)
Bill Piper (Drug Policy Alliance)
Nicole Porter (The Sentencing Project)
Amy Povah (CAN-DO Foundation)
Justin Roberts (American Civil Liberties Union)
Cynthia Roseberry (Clemency Project 2014)
Josephine Ross (Clinic Director, Howard University School of Law Legislative Clinic)
Caitlin Schnur (Heartland Alliance)
Christopher Scott (Open Society Policy Center)
Riya Shah (Juvenile Law Center)
Grant Smith (Drug Policy Alliance)
Kemba Smith (Kemba Smith Foundation)
Manohn Soumahoro (Howard University School of Law Legislative Clinic)
Steve Steurer (Citizens United for the Rehabilitation of Errants)
Charlie Sullivan (Citizens United for the Rehabilitation of Errants)
Nkechi Taifa (Open Society Policy Center)
Sarah Turberville (The Constitution Project)
Jasmine Tyler (Open Society Policy Center)
Ebony Underwood (We Got Us Now)
Monica Del Villar (Howard University School of Law Legislative Clinic)
Elayne Weiss (National Low Income Housing Coalition)
Ayana Williams (Howard University School of Law Legislative Clinic)
Melvin Wilson (National Association of Social Workers)
Jose Woss (Friends Committee on National Legislation)
Melissa Young (Heartland Alliance)