

All of us rely on the criminal justice system to keep us safe and maintain order. We expect it to meet the fundamental aims of our criminal laws: to separate the guilty from the innocent, to

American Bar Association

CRIMINAL JUSTICE SYSTEM IMPROVEMENTS

incapacitate truly dangerous individuals, and to promote deterrence and retribution for those who violate law. We also expect the criminal law and the criminal justice system to be fair and even-handed and to rehabilitate criminal offenders. And we expect the criminal justice system to assist offenders who have completed their sentences to reenter the community as product citizens and to avoid commission of crimes in the future.



CRIMINAL JUSTICE SYSTEM IMPROVEMENTS

All of us rely on the criminal justice system to keep us safe and maintain order. We expect it to meet the fundamental aims of our criminal laws: to separate the guilty from the innocent, to incapacitate truly dangerous individuals, and to promote deterrence and retribution for those who violate law. We also expect the criminal law and the criminal justice system to be fair and even-handed and to rehabilitate criminal offenders. And we expect the criminal justice system to assist offenders who have completed their sentences to reenter the community as productive citizens and to avoid commission of crimes in the future.

Our current national policy on crime prevention, control and punishment, however, is overbalanced toward punishment. The result is that we imprison offenders, particularly nonviolent offenders, in number and length that are out of proportion to the rest of the world, largely as a result of the broad use of mandatory minimum sentences. Sentences for nonviolent drug offenders are excessive, especially for drug crimes related to crack cocaine. We impede access to judicial relief when confinement conditions are not just harsh, but unconstitutionally abusive. We continue to punish offenders even after their release from incarceration through excessively harsh “collateral consequences” that impede their ability to become law-abiding, contributing members of society; likewise, we deprive offenders, as well as those at risk of becoming offenders, of necessary educational and social services, thereby failing adequately to prevent crime and to reduce the level of recidivism.

This approach makes no sense in the best of times. It is particularly unwise in an era calling for fiscal prudence. Unnecessarily lengthy sentences, especially mandatory minimums, should be reduced, and unnecessary collateral punishment should be eliminated. Funds should be shifted from support for unnecessary, and unnecessarily lengthy, incarceration to proactive and preventive strategies for gang and drug offenses and for alternatives to incarceration and programs for reentry. The fairness of the criminal justice process should be promoted through increased funding for defense services, particularly in capital cases; through prison oversight and the loosening of restrictions on prisoner lawsuits; through juvenile justice reform; and through efforts to study and eliminate racial disparities. Recently enacted severe restrictions that have all but eliminated federal habeas corpus review of state court convictions should be revised.

Rightly or wrongly, the public’s view of the entire justice system – and that of the legal profession – is strongly colored by its perception of how the criminal justice system is functioning.

Citizens appropriately look to the legal profession for answers on how to improve the criminal justice system.

The ABA recognizes that our nation is experiencing a fiscal crisis of unprecedented proportion. Many of the Association’s recommendations for improving the nation’s criminal justice system call for increasing federal, and in some cases state, funding of certain programs and activities. We understand that this will require new resources. However, the costs of incarceration, recidivism, and, more significantly, wasted and unproductive lives, suggest that enhanced funding will pay dividends to both society and the economy in the long run.

The following are recommendations that the ABA believes will improve the criminal justice system:

Shift funding priorities from interdiction and prosecution of illegal drugs to a balanced strategy that is more proactive and preventive

Policy makers have since the 1980s placed primary emphasis on the role of law enforcement in our National Drug Control Strategy. The total number of drug arrests in 1980 more than tripled by 2005. The federal courts have been flooded with drug cases, with prosecutions rising 144 percent in the period 1985-2002. Drug prosecutions have come to comprise a growing proportion of the criminal caseload, rising from 20 percent of federal defendants in 1982 to 33 percent of federal defendants by 2004. This rise in prosecutions has led to more persons being subjected to the mandatory minimum sentences enacted by Congress in 1986 and 1988. Similar trends have taken place in the states. From 1980 to 2003 the number of drug offenders in state prisons rose from 19,000 to 251,000, signifying an increase from 6 percent to 20 percent of all inmates. During the same period the number of drug offenders in federal prison rose from 4,900 to 87,000, representing an increase from 25 percent of all inmates to 55 percent. In absolute

numbers, these changes over nearly three decades represent more than a 1200 percent increase in drug offenders in prison.

More than two-thirds of funding for anti-drug initiatives has been designated for law enforcement and interdiction, while only one-third has been devoted to demand-reduction measures, including education, prevention and treatment. The ABA has long urged Congress to substantially increase funding to establish education, prevention and treatment programs as widely as possible to reduce and discourage the use of harmful drugs.

As the first step toward reaching these goals, the ABA urges the new Administration to direct its National Drug Control Policy to shift spending priorities immediately toward greater demand-reduction efforts. A change from the present 67-33 formula to perhaps a 50-50 allocation would be an appropriate beginning, with increasing resources given to prevention, education and treatment as evidence emerges that those programs are succeeding.

Support broad use of alternatives to incarceration

The United States currently relies on imprisonment as its principal criminal sanction far more than any other country worldwide. Over the course of the past three decades, the state and federal prison population has increased nearly seven-fold, from fewer than 200,000 prisoners in 1970 to 1,520,000 by 2007, with an additional 800,000 prisoners held in local jails. With a total of 2.3 million Americans in prison or jail, the United States currently incarcerates almost 25 percent of the world's prisoners, while making up only 5 percent of the world's population. An additional 7 million persons are on probation or parole. About 1.5 million U.S. children currently have a parent in prison. Our per capita rate of incarceration of 737 persons per 100,000 residents exceeds that of China and Russia, and far exceeds that of other industrialized nations. Further, our system disproportionately incarcerates African Americans and, in some

cities, places over half of all young African-American men under criminal justice supervision. The cost of maintaining the nation's prison system has risen to more than \$56 billion a year.

Over 200,000 people are incarcerated under the jurisdiction of the Federal Bureau of Prisons, making it the largest prison system in the country. The population has more than doubled in the last 20 years due largely to a jump in incarcerations for drug and public order offenses. Violent offenses are responsible for only 8 percent of the increase in the prison population. The high rates of incarceration for nonviolent offenses, and the significant cost associated with imprisonment, highlight the need to reduce the federal prison population by diverting low-level offenders from prison.

The ABA supports the expanded use of alternatives to incarceration in the federal system. Virtually every state criminal justice system makes use of a wide variety of forms of imprisonment short of incarceration, such as probation, home detention, intermittent confinement and community service. In the federal criminal justice system these alternatives have been greatly curtailed in recent years. In 1984, more than 30 percent of federal defendants were sentenced to probation without any term of imprisonment. By 2006 that figure had dwindled to a mere 7.5 percent, as 92.5 percent of offenders were sentenced to imprisonment.

There is a growing consensus that criminal justice policy in the United States must evolve beyond an over-reliance on incarceration for the significant portion of offenders who pose little or no threat to the community. The ABA Justice Kennedy Commission in 2003 made this first among its key recommendations to address over-reliance on imprisonment. It recommended that "lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses and that alternatives to incarceration should be available to less serious offenders." The ABA in 2007 adopted a

recommendation from its Commission on Effective Criminal Sanctions stating the principle that “offenders who are not charged with very serious offenses, such as a predatory crime, a crime involving substantial violence, a crime involving large scale drug trafficking, or a crime of equivalent gravity, should be eligible for community placement, and for community-based treatment programs, diversion and deferred adjudication.”

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

Therefore, when a deferred adjudication/deferred sentencing/diversion option requires a defendant to enter a guilty plea as a condition of participation, these programs should also offer the incentive to defendants and their counsel of having the charges dismissed and the record expunged if the terms of probation are successfully completed, so that collateral consequences will not be triggered. Deferred adjudication should be an alternative available for most drug offenses that do not involve significant trafficking or violence.

The ABA recommends that the President and Congress encourage the Attorney General and members of the U.S. Sentencing Commission to support expanding the sentencing guideline ranges for nonviolent offenses to include non-imprisonment sentencing options in a broader range of cases, and that the President appoint Commissioners who endorse this practice.

Repeal all statutory mandatory minimum sentences

Responding to public fears about the growing crack cocaine epidemic and some high-profile cocaine-related deaths, Congress in the mid-1980s adopted mandatory minimum prison sentences for drug crimes. These were expanded in following years to apply to a growing number of offenses, including gun offenses, sex crimes and crimes of violence. These laws, which force even low-level and first-time offenders to serve lengthy mandatory minimum prison terms, have been called “manifestly unjust and harsh” by many federal judges, both liberal and conservative, across the country. Mandatory minimums eliminate judicial discretion and prevent judges from fashioning sentences that comply with the consideration and purposes of sentencing laid out in the federal sentencing statute at 18 U.S.C. § 3553(a).

Mandatory prison sentences are not the most cost-effective way to increase safety nor have they proved to be more effective than sentences that are proportionate and individualized. Valuable resources are being wasted on expanding prison capacity instead of addressing underlying problems. Reliance on community-based alternatives for less serious offenders could eventually reduce recidivism and the number of people incarcerated.

Mandatory minimums, originally designed to incapacitate drug kingpins and to deter others from selling or using drugs, have not resulted in significant changes in the illegal drug trade over time, and their predominance has come at a high price in economic and social terms. Even more disturbing, there is abundant empirical evidence showing that these sentencing schemes disproportionately affect minorities.

The ABA has long called for repeal of mandatory minimum sentences, most recently as a key recommendation of ABA Kennedy Commission to address an overburdened U.S. criminal justice system that is over-reliant on imprisonment. The ABA urges the new

Administration to support, and Congress to enact, sentencing reform legislation that will repeal mandatory minimum sentences for federal crimes.

Eliminate sentencing disparities

In 1986 Congress enacted the Anti-Drug Abuse Act which differentiated between two forms of cocaine – powder and crack – and singled out crack cocaine for dramatically harsher punishment. In 1988 Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for simple possession of five grams of crack cocaine. In what has come to be known as the 100:1 quantity ratio, it takes 100 times more powder cocaine than crack cocaine to trigger the harsh five - and ten - year mandatory minimum sentences, that were anchored to the U.S. Sentencing Guidelines.

On May 15, 2007, the United States Sentencing Commission (USSC) submitted to Congress its fourth report on federal cocaine sentencing policy. In this latest report, as with every submission since 1995, the USSC called on Congress to reform sentences for crack cocaine offenses. In response to the Commission’s report in 1995, the ABA House of Delegates adopted a policy recommendation that squarely endorsed the Commission’s proposal to equalize quantity thresholds for crack and powder offenses and called on Congress to enact legislation to eliminate the sentencing disparity between crack and powder cocaine offenses.

The Commission’s report, *Cocaine and Federal Sentencing Policy*, provides an exhaustive account of the research, data and viewpoints that led to its recommendations for crack sentencing reform. The recommendations include:

- Raising the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences to focus penalties on serious and major traffickers;

- Repeal of the mandatory minimum penalty for simple possession of crack cocaine; and
- Rejection of legislation that addresses the drug quantity disparity between crack and powder cocaine by lowering the powder cocaine quantities that trigger mandatory minimum sentences.

The disparate impact of this sentencing policy on the African-American community has become evident. Our 1995 policy, which supports treating crack and powder cocaine offenses similarly, was developed in recognition that the different treatment of these offenses has a “clearly discriminatory effect on minority defendants convicted of crack offenses.” According to the Commission’s 2007 report, African Americans *constituted 82 percent of those sentenced* under federal crack cocaine laws, although 66 percent of those who use crack cocaine are Caucasian or Hispanic. Indeed, the Commission reported that revising the crack cocaine threshold would do more to reduce the sentencing gap between African Americans and Caucasians “than any other single policy change,” and would “dramatically improve the fairness of the federal sentencing system.”

The ABA agrees with the Commission’s careful analysis that the present 100:1 quantity ratio is unwarranted and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce a large racial disparity in sentencing. There is strong bipartisan agreement that this law must be changed and the time is ripe for a new Administration to forge a consensus solution for reform of this unjust law.

The ABA urges the new Administration to support and Congress to enact legislation to implement the Commission’s recommendations for reform of federal cocaine offense sentencing laws.

Enact legislation to study and address racial disparities in the criminal justice system

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

For more than two decades the proportion of racial and ethnic minorities entangled within the criminal justice system has grown exponentially: members of minority populations now comprise more than two-thirds of persons convicted of offenses in federal courts, and nearly three-quarters of federal prisoners are either black or Hispanic. Decisions made by U.S. Attorneys about whom they will prosecute and the types of offenses they prioritize for enforcement can have a strong impact on this disparity. Recognizing the importance of this issue to our justice system, the ABA Kennedy Commission in 2003 recommended support for formation of task forces at federal, state, and local levels to collect data, study and make recommendations to address racial disparities in the criminal justice system.

The bipartisan Justice Integrity Act, introduced in the 110th Congress by Senators Biden, Cardin, Kerry and Specter, provides a mechanism by which pilot programs would be established in ten federal districts to evaluate issues of racial and ethnic fairness in the practices of U.S. Attorney offices. The Act is intended to develop data that will disclose whether and to what extent (a) racial and ethnic disparities are attributable to criminal justice policies and practice; (b) any policies and practices that do produce disparities are fully justified as appropriate responses to criminal behavior; and (c) disparities may be attributable in whole or in part to discrimination or unconscious bias.

The ABA urges the new Administration to support and Congress to enact this effort and the Justice Integrity Act.

Support successful community reentry for formerly incarcerated persons and reduce collateral consequences of conviction

1. Appropriate full funding for the Second Chance Act

In April 2008, President George W. Bush signed the Second Chance Act (Public Law No. 110-199), which authorizes \$160 million a year for two years to expand assistance for people currently incarcerated, those returning to their communities after incarceration, and children with parents in prison.

A key aspect of our overburdened prison system is prisoner reentry. Each year, more than 700,000 persons are released from prisons back into our communities and many hundreds of thousands more adult and juvenile offenders are released each year from jails. More than 100,000 prisoners are being released each year without any form of community correctional supervision, although studies show that community supervision combined with some form of rehabilitative program following a prisoner's release helps reduce recidivism. Of these, almost two-thirds are expected to be rearrested for a felony or serious misdemeanor within three years. The recidivism rate for the one in six offenders returning from prison who are under the age of 21 is even higher.

Prisoners upon release face countless barriers when trying to reenter society, and societal costs are high when they fail. The legal barriers to employment and housing for convicted persons make reentry difficult under the best of circumstances, and many of those released from prison return to communities where persistent poverty, lack of jobs, limited access to drug or alcohol treatment, lack of access to health care, and lack of affordable housing are the norm.

Our failure to prepare people leaving prison for reentry into the community thus becomes a major contributor to homelessness.

The Second Chance Act seeks to promote public safety by reducing recidivism. The services to be funded under the Second Chance Act include education and job training in prison, drug treatment during and after incarceration, mentoring programs for adults and juveniles leaving prison, and early release for certain elderly prisoners convicted of nonviolent offenses. State and local governments burdened by the unprecedented growth in jail and prison populations need these important programs to ensure public safety. High rates of recidivism are a key reason prison populations continue to increase nationally. Over the next five years, continued prison expansion will cost states an additional \$25 billion, according to a recent report by the Pew Charitable Trust.

The ABA urges the new Administration and Congress to support full funding of the Second Chance Act.

2. Enact a federal statute on felony voting rights

Although the right to vote forms the core of American democracy, one significant group of American citizens is still denied the right to the franchise: 5.3 million Americans are not allowed to vote because of a felony conviction. Four million of these live, work, and raise families in our communities, but because of a conviction in their past are still denied the right to vote. The disproportionate impact on people of color continues to this day. Nationwide, 13 percent of African-American men have lost the right to vote, a rate that is seven times the national average.

The ABA believes that voting is a fundamental right of citizenship and should be automatically restored to citizens upon release from prison. Successful reentry into the community by large numbers of former prisoners depends in part on establishing a sense of belonging and

responsibility. The restoration of the fundamental right of participation in the community that voting represents reinforces the likelihood of successful reentry for former prisoners and serves to lessen the ongoing collateral consequences of a conviction once a criminal sentence has been served.

Post-incarceration voting rights restoration can be achieved at the federal level through passage of the Democracy Restoration Act, legislation which seeks to restore the right to vote in federal elections to all persons with felony convictions who are not in prison. The new President could also work to assure compliance with current state laws by designating an entity in his Administration to document the de facto disenfranchisement of eligible voters with felony convictions in each of the 50 states.

Over the last decade, 16 states have changed their laws to restore voting rights or ease the restoration process. Since 2005, Florida, Iowa, Maryland, Nebraska, Rhode Island and Tennessee have all restored voting rights to substantial numbers of former offenders in their states. These changes at the state level have worked to increase favorable public awareness and national attention among the voting public, the national media and opinion leaders. In 2008, the intense focus on voting and participation has presented an opportunity to spotlight the importance of this issue on a national level.

The ABA urges the new Administration to support and Congress to enact restoration of post-incarceration voting rights through the Democracy Restoration Act, legislation which would restore the right to vote in federal elections to all persons with felony convictions who are not in prison.

3. Enact legislation to improve the reliability of FBI criminal background check information provided to employers

More and more, employers are conducting criminal background checks on job applicants, which can make it much more difficult for the

millions of Americans with criminal records to find employment and become productive, law-abiding members of society. Legislation introduced in the 110th Congress as the Fairness & Accuracy in Employment Background Checks Act, H.R. 7033, would improve the accuracy and reliability of criminal record information maintained by the FBI and provide critical safeguards when the FBI conducts criminal background checks for employment purposes.

Each year, more than five million criminal background checks are generated by the FBI for civil purposes, mostly for employment, surpassing the number generated to investigate crimes. According to the Attorney General, however, 50 percent of the FBI records are currently incomplete or inaccurate. While we recognize the necessity of criminal background checks for safety-sensitive jobs, we are concerned that the FBI's system may be so seriously flawed that it does a disservice to large numbers of U.S. workers and employers who want to enter into an employment relationship but are prevented from doing so by inaccurate FBI records.

The proposed legislation adopts strategies to fix the FBI records before they are released and the damage is potentially done. For example, the FBI has a special unit that tracks down incomplete criminal records for federal gun checks required under the Brady law. As a result of these investigations, two-thirds of the incomplete state records are updated within three days. The Fairness & Accuracy in Employment Background Checks Act applies this simple, yet workable approach to employment background checks as well. In addition, the bill incorporates several basic consumer protections that already apply to private screening firms under the Fair Credit Reporting Act, thus ensuring that workers are treated fairly and with full knowledge of the facts. The ABA urges the new Administration to support and Congress to enact the Fairness & Accuracy in Employment Background Check Act in the 111th Congress.

Provide strong federal leadership in reforming the juvenile justice system

The new President and the 111th Congress will have an early opportunity to act on significant reforms to the nation's juvenile justice system. That system is severely overburdened after years of federal neglect and overly reliant on punitive sanctions and incarceration. Key legislative reform initiatives developed in the 110th Congress are primed for action.

1. Enact legislation to reauthorize and strengthen the JJDP

Enacted in 1974 and most recently authorized in 2002, the Juvenile Justice and Delinquency Prevention Act (JJDP) provides for a nationwide juvenile justice planning and advisory system spanning all states and territories; federal funding for delinquency prevention and improvements in state and local juvenile justice programs and practices; and operation of a federal agency (Office of Juvenile Justice and Delinquency Prevention) dedicated to training, technical assistance, model programs, and research and evaluation to support state and local efforts. The JJDP was due to be reauthorized in 2007. The House and Senate held hearings on JJDP reauthorization in the 110th Congress and the Senate Judiciary Committee approved reauthorizing legislation in July 2008.

The ABA urges early action to strengthen and reauthorize the JJDP and to appropriate sufficient federal funding to enable state compliance with the Act. States must be required to provide prompt access to qualified counsel for all youth in the juvenile justice system. Reauthorization legislation should strengthen the Act's four core protections for youth that states must implement: (1) to phase-out and eliminate the use of court orders that place noncriminal status offenders in "lock-ups"; (2) to remove youth from adult jails; (3) to maintain "sight and sound separation" of youth from adults in adult facilities; and (4) to require states to take concrete steps to reduce racial and ethnic disparities in the juvenile justice system.

The new Administration should also move promptly to restore and strengthen the Office of Juvenile Justice and Delinquency Prevention (OJJDP), which administers the JJDPA and has been severely under-funded and under-staffed in recent years.

The ABA also supports expansion of the Act to support state efforts to provide assessment, treatment, diversion, family engagement, and other services for youth whose principal needs are substance abuse and mental health treatment. Children with mental health and developmental disabilities are overrepresented in the juvenile justice system; studies have reported that as many as three-fourths of incarcerated youth have mental health disorders and about one in five has a severe disorder.

2. Enact legislation to support positive youth development community-based alternatives to gang activity

The ABA also supports passage of legislation targeted at preventing youth gang formation and gang violence. Legislation introduced in the House of Representatives in the 110th Congress as the Youth Promise Act would increase federal support and incentives for states to afford home- and community-based care, services and interventions for the vast number of juveniles under court supervision who do not need to be and should not be in institutional or residential placements. This legislation would strengthen underfunded prevention programs as alternatives to duplicative and overly punitive legislative proposals that would inappropriately sweep more youth into the federal juvenile and criminal justice systems. The Youth Promise Act would require training at the local level nationwide that complies with the ABA Juvenile Justice Standards for the representation and care of youth in the juvenile justice system.

The ABA believes that the Youth Promise Act takes the right approach to reducing gang violence. It focuses on assisting states and communities to undertake and implement comprehensive, evidence-based strategies to

prevent and reduce youth violence while helping at-risk youth avoid gang activity and become productive members of their communities. Several of the other bills introduced in the 110th Congress that address gang violence would federalize ordinary street crime that should be handled at the state level and provide for new and enhanced federal penalties that the ABA strongly opposes, such as mandatory minimum sentences or life without parole. Rather than focusing resources on bringing more youth into the juvenile and criminal justice systems, the Youth Promise Act supports community-based efforts to prevent youth from entering the justice system through implementation of evidence-based methods proven to reduce youth violence and delinquency.

Enact prison reform legislation

1. Amend the PLRA

The Prison Litigation Reform Act (PLRA) was enacted by Congress in 1996 with the intent to stem frivolous prisoner lawsuits, but has worked over time systematically to block meritorious suits as well. Too often it has been interpreted to deny access to the courts to hear the claims of victims of rape, assault, religious restrictions, and other rights violations.

Over a decade of experience has shown that the PLRA's preliminary screening is sufficient to fulfill the legislation's purpose. By requiring courts summarily to dismiss prisoner cases that are frivolous, malicious, or fail to state a legal claim, this provision has greatly reduced the burden on courts posed by prisoner cases that are not meritorious. However, the ABA believes that certain other provisions of the PLRA must be amended or repealed to restore meaningful access to the courts for incarcerated adults and youth. These include (1) repeal of the provision that prohibits prisoners from bringing lawsuits for mental or emotional injury without demonstrating a "physical injury"; (2) amendment of the provision regarding exhaustion of administrative remedies which requires prisoners to present their claims to

prison officials before filing suit; (3) restoration of judicial discretion to grant the same range of remedies in prisoners' civil rights actions that they possess in other civil rights cases; (4) allowing prisoners who prevail on civil rights claims to recover reasonable attorney's fees like others whose civil rights have been violated; and (5) repeal of the provision extending the PLRA to juveniles confined in juvenile facilities.

2. Enact prison oversight legislation

The United States imprisons a higher percentage of its population than any other country. One in every 100 adults in the United States is behind bars. Federal, state and local governments currently spend approximately \$62 billion per year on adult and juvenile corrections and are projected to need as much as \$27 billion in additional operational and capital funds over the next five years to accommodate projected prison expansion and operation. However, despite the massive expenditure of taxes and the profound effect that prison has on the individual, the community and public safety, there is very little oversight of prisons or public accountability for what takes place behind bars. There are no national standards for the treatment of prisoners and there is no systematic national oversight to ensure that the constitutional and human rights of prisoners are protected.

The ABA approved a policy in August 2008 calling for federal and state governments to establish public entities independent of any correctional agency to regularly monitor and report publicly on the conditions in all correctional facilities. The report includes key requirements for the effective monitoring of correctional and detention facilities.

The federal courts have traditionally provided this necessary oversight because they ensure that no matter how disfavored and disenfranchised the individual, he or she has the opportunity to seek vindication of his or her rights in the courtroom. Indeed, through the implementation of oversight by the federal courts in the 1970's and 1980's, the country's prisons were

transformed—from dungeons that betrayed American ideals of innate human dignity—to modern, correctional institutions. Since the enactment of the PLRA in 1996, however, the power of the federal courts to provide oversight has been drastically undercut. As a result, it is essential that the government implement alternative forms of oversight through creation of new federal and state oversight entities, if necessary, or by augmenting existing agencies with new authority through legislation.

The ABA urges the new Administration to support and Congress to enact reform of the PLRA and legislation to establish public oversight of prisons nationwide.

Provide federal funding for indigent defense services at the federal, state and local levels and establish a National Center for Public Defense Services

1. Provide federal funding and support for quality state public defense systems and establish a National Center for Public Defense Services

Despite the Supreme Court's ruling in *Gideon v. Wainwright* that poor people in state criminal cases have the right to the assistance of effective counsel, and similar rulings in misdemeanor and juvenile cases, thousands of people charged with crimes either never have an attorney at all or are represented by appointed counsel or public defenders who have overwhelming caseloads and low pay that make it difficult or impossible for them to provide effective representation. The chronic failure to meet the needs in federally mandated public defense services has been repeatedly and compellingly documented, including the 2004 American Bar Association comprehensive study, "*Gideon's Broken Promise: America's Continuing Quest for Equal Justice.*"

The failure to provide adequate counsel for the accused who cannot afford to hire an attorney calls into question the integrity of the criminal

justice system. This failure undermines the legitimacy of criminal convictions: innocent people go to jail; wrongdoers escape responsibility; money is wasted; victims do not receive justice; and existing racial and economic disparities are exacerbated. Despite well-documented systemic failure at the state and local level to provide effective assistance of counsel, the federal government is neither encouraging nor supporting compliance with *Gideon's* requirement.

Indigent defense providers across the nation are facing debilitating budget cuts as a result of the continuing economic crisis that has the majority of states reporting fiscal shortfalls. While the entire criminal justice system has been impacted by these cuts, public defender offices have been particularly hard hit because they have been chronically under-funded for years.

This continuing lack of funding has led to crippling caseloads in offices that have been forced to lay off attorneys and staff, cannot afford to fill vacancies, and have fallen into a culture of high attrition due to shamefully low pay. In many misdemeanor and juvenile courts, defendants have no lawyers at all. Recently, public defenders in many jurisdictions have resorted to litigation and withdrawn from cases, fearful that maintaining such high caseloads would cause them to violate their ethical responsibilities to their clients.

Current federal policies exacerbate already existing resource imbalances between the prosecution and defense by furnishing funding to the states for prosecution and law enforcement functions, as well as for training and technical assistance for prosecutors and law enforcement agencies while providing almost no analogous support for state-based public defense services. State prosecutors receive millions of dollars each year in direct federal funding through the Justice Assistance Grants program, while defense attorneys, who represent accused persons, many of whom are innocent of the charges alleged, receive virtually no federal funding. Prosecutors often have ready access to federally funded

crime labs, while too often defense attorneys are denied access or provided inadequate or no funding for essential testing.

The ABA has long recommended that the disparity in resources be remedied. Principle 8 of the ABA's *Ten Principles of a Public Defense Delivery System* provides that "[t]here should be parity of workload, salaries and other resources ... between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead expenses."

The ABA believes that the next Congress and the new Administration should work together to provide sufficient financial support to the states, local government and territories for the provision of public defense services in criminal and juvenile delinquency proceedings, comparable to the federal government's support for the prosecution function. Indigent defense systems should receive Justice Assistance Grants funding the same as that received by state prosecutorial systems.

To ensure that state criminal justice systems meet constitutional requirements, each state should be required, as a condition of receiving federal criminal justice funding, that they promulgate and move to implement public defense standards that are consistent with the ABA's *Ten Principles of a Public Defense Delivery System*.

The new Congress should also consider and enact legislation to implement the longstanding ABA recommendation that it establish and fund a National Center for Public Defense Services to serve as an independent coordinating authority that would strengthen state public defense services by conducting and hosting public defense training programs and by administering federal funds for state public defense programs. Until such a center is established and funded, a new position within the DOJ dedicated to indigent defense services should be created. This position should be filled by an experienced defender who can advocate for programs and funding to improve public defense services.

Congress should separately authorize federal technical assistance and training for state, local and territorial public defense systems, and the attorneys who participate in them, comparable to the federal government's support for the prosecution function. The Bureau of Justice Assistance of the U.S. Department of Justice should use some of its discretionary funding for these functions, as it has done in the past.

Last, the ABA urges Congress and the new Administration to support full funding of the John R. Justice Prosecutors and Defenders Incentive Act of 2008, which authorizes student loan repayment assistance for prosecutors and public defenders in order to improve public safety by assisting prosecutor and defender offices in their ability to hire and retain high-quality lawyers.

2. Increase support for federal appointed defense counsel

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to ...have the Assistance of Counsel for his defense.

Representation by counsel is central to the fair administration of criminal justice. The Criminal Justice Act (CJA) of 1964 authorizes payment for representation of indigent defendants accused of committing federal crimes. Under the Act, each U.S. District Court is required to develop a plan for furnishing counsel and investigative, expert and other services needed for adequate representation in trial and appellate proceedings. The CJA authorizes federal courts to provide counsel to indigent defendants: a panel of private attorneys, a Community Defender Organization (CDO), and a Federal Public Defender Organization. CJA panel attorneys handle approximately 25 percent of all cases nationwide and all of the indigent cases in districts without a CDO or Federal Public Defender.

The compensation for CJA panel attorneys is set by statute at a maximum compensation rate of \$125 per hour. The statute allows for a yearly increase in the rate to be determined by the Judicial Conference. The current rate set by the Judicial Conference is \$102 per hour for panel attorneys in noncapital cases and \$174 in capital cases. These rates remain below minimum recommended figures necessary to assure representation by qualified attorneys. Judges around the country report that the low compensation rates seriously compromise their ability to recruit qualified attorneys to take CJA appointments. As the practice of federal criminal law continues to become more complex, it becomes more and more important that judges be able to recruit qualified attorneys to provide effective representation.

The ABA urges the new Administration and Congress to support increases in the federal CJA panel rates.

3. Increase support for and improve state death penalty representation

Funding for death penalty cases has been chronically inadequate to achieve effective representation in the states. Yet, such a significant amount of funding needs to be spent on death penalty representation that it dramatically reduces the ability to provide effective assistance of counsel in all other cases. The impact of this inadequate funding is most dramatically demonstrated by the growing number of exonerations in death penalty cases. In its most ambitious attempt to study the administration of the death penalty in the United States, the ABA's Death Penalty Moratorium Project recently concluded a four-year assessment of the death penalty systems in eight states. The assessments confirmed that ineffective defense representation is a consistent and systemic problem throughout the states surveyed. Because the ABA has assessed a critical number of death penalty states, and based on our long-standing work and experience in this area, we can reasonably conclude that the same

problems exist in many jurisdictions that were not assessed.

The law entitles an indigent capital defendant the right to a lawyer who is competent to represent him or her. The effectiveness of defense counsel is the most critical factor that determines whether an individual will receive a fair trial, and the death penalty. In the majority of capital trials, however, a defendant lacks the means to hire a lawyer with sufficient knowledge and resources to provide adequate representation. Consequently, the accused must rely on the lawyer that the state provides, often newly admitted, inexperienced, or incompetent court-appointed lawyers, or overburdened public defenders.

States are currently failing to provide adequate resources for defense systems and individual defense counsel in large part because of policies set by Congress. Congress in 1996 eliminated all federal funding from the Post-Conviction Defender Organizations that had represented many death row prisoners and had advised appointed and pro bono lawyers who handled capital habeas corpus cases in state and federal courts. When many state governments refused to replace this critical funding, the means of providing effective and experienced legal assistance to capital defendants and death row prisoners also disappeared, just at the time when the law became more complicated than ever. This action by Congress, in our view, has had disastrous consequences on the quality and availability of legal representation for those persons facing a possible death sentence and significantly and regrettably heightened the risk that an innocent person may be executed.

The 2004-enacted Innocence Protection Act was intended to help reduce the risk of wrongful convictions and executions in capital cases. The Act includes a provision authorizing grants to states to improve their appointment of qualified defense counsel in capital cases and conditions those grants on states adopting minimum standards for defense counsel and prosecutors in capital cases. Grants for such a purpose must be

matched by equal-sized grants to prosecutors to enhance their ability to effectively prosecute state capital cases and *vice versa*. This grant program has never been funded; with the Innocence Protection Act up for reauthorization in 2009, the new Administration and Congress should revisit this provision and approve amendment of the Act to reach the goal of helping states to improve appointment of qualified defense counsel in capital cases.

The ABA urges the new Administration and Congress to support a renewed federal commitment to funding the resources necessary to assure competent representation for defendants in state death penalty cases.

Enact Federal Habeas Corpus Reform

Despite grave concerns about the reliability of capital convictions, federal legislation, most prominently the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and U.S. Supreme Court decisions on federal habeas corpus have significantly limited access to federal review of state court convictions. As a result, defendants who have suffered serious constitutional violations, such as inadequate defense counsel, racially discriminatory jury selection, and suppression of exculpatory evidence, are left with no recourse. The constraints on the federal courts to serve as a final check on state capital convictions are particularly damning for prisoners asserting claims of actual innocence when we know with certainty that defendants have been, and will be, wrongly convicted of capital crimes. In fact, as of August of this year, 130 death row inmates from 26 states have been officially exonerated upon proof of innocence and released from custody after serving years (often decades) on death row. The conviction and execution of innocent defendants is a moral travesty.

Since AEDPA's enactment in 1996, state and federal prisoners have been forced to navigate a labyrinth of complex procedural rules and stringent deadlines to assert claims of serious constitutional violations in post-conviction

proceedings. State prisoners particularly have been burdened by AEDPA, which requires greater deference to state court decisions and, thus, constrains federal review of federal constitutional violations. Indeed, federal courts may only grant habeas relief to state prisoners where the state court's decision was "contrary to, or involved an unreasonable application of clearly established federal law" or was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

Interpretations of these limitations by the U.S. Supreme Court and lower federal courts have created an unduly high burden for petitioners to obtain federal habeas relief. Moreover, a one-year statute of limitations and prohibitions against successive habeas petitions serve as an absolute bar to federal habeas review. As a result, federal courts are unable to reach the merits of substantive claims, which include claims of racial bias in jury selection, ineffective assistance of counsel, and prosecutorial misconduct, due to substantial deference to state court proceedings or to technical reasons.

AEDPA also provided "opt-in" procedures, codified in chapter 154 of the Judiciary Code, that would expedite habeas proceedings for death-sentenced petitioners convicted in certain qualifying states that meet standards for capital defense representation. The USA PATRIOT Improvement and Reauthorization Act (PIRA) passed in 2006, included amendments to the opt-in provisions that authorize the U.S. Attorney General, rather than federal courts of appeals, to determine which states had met the opt-in qualifications and to lengthen the timeline for district courts to issue their capital habeas decisions under the opt-in provisions.

Barring access to the federal courts undermines confidence in criminal convictions as thousands of prisoners are left with no recourse for constitutional violations that deprived them of a fair trial. This is especially alarming for prisoners facing death sentences, where there should be no margin of error. With the knowledge that prejudicial error will occur in an

unacceptable number of criminal proceedings, including capital cases, it is imperative that we ensure access to federal post-conviction proceedings to protect the fairness, accuracy, and integrity of the criminal justice system.

The ABA supports enactment of key reforms to restore meaningful federal habeas corpus review of state court convictions. First, the habeas-related provisions of AEDPA and PIRA should be amended so that federal courts are more accessible to prisoners asserting claims of constitutional violations with less deference to prior decisions. The ABA supports repeal or extension of the one-year statute of limitations and elimination of the rule that a violation of the statute of limitations is an absolute bar to federal habeas review. Second, the ABA supports repeal or amendment of the provisions of the PIRA that expedite post-conviction proceedings through a grant of authority to the U.S. Attorney General to determine state qualification for "opt-in" procedures and to make those determinations retroactive. AEDPA and PIRA should be amended to assure that habeas corpus petitioners get full review in federal court or a suspension of the statute of limitations if a state fails to meet its Sixth and Eighth Amendment obligations and to allow courts to extend deadlines for good cause shown.

The recommendations discussed above are among a wide range of issues endorsed by the ABA and are by no means exhaustive. We emphasize these issues because of their timeliness and importance to our nation.

For more information, please contact Thomas M. Susman, Director of the ABA's Governmental Affairs Office, at susmant@staff.abanet.org or (202) 662-1765.

For more information on ABA Legislative Priorities, visit <http://www.abanet.org/poladv>.

American Bar Association

With more than 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

ABA Governmental Affairs Office

The ABA Governmental Affairs Office (GAO) serves as the focal point for the Association's advocacy efforts before Congress, the Executive Branch and other governmental entities on diverse issues of importance to the legal profession on which the ABA House of Delegates has adopted policy. The GAO concentrates its advocacy efforts on the Association's Legislative and Governmental Priorities that are selected annually by the ABA Board of Governors from a list of over 1,000 policy positions adopted by the ABA House of Delegates. When appropriate, the GAO calls upon the Grassroots Action Team for grassroots advocacy assistance. The GAO also works closely with ABA member entities to communicate the views of the Association to numerous governmental entities on a broad range of issues of concern to policy makers and the legal profession. In total, each Congress, the GAO lobbies on approximately 100 different legislative issues.

