



## STATEMENT ON CRIMINAL JUSTICE REFORM

Federal Criminal Procedure Committee

Approved by the Board of Regents  
March 2019

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# STATEMENT ON CRIMINAL JUSTICE REFORM

Over the last four decades, this country’s incarceration rate more than quadrupled, while at the same time, careful empirical studies showed that these dramatic increases failed to reduce recidivism or increase rehabilitation.<sup>1</sup> A national consensus took hold that the costs of increased rates of incarceration are much greater than our lawmakers and courts ever anticipated and that it was time to re-examine criminal justice policies. In jurisdictions that have addressed the need for reform over the last few years, the benefits of that re-examination have been substantial. After years of bipartisan effort to pass federal criminal justice reform, on December 21, 2018, President Trump signed into law the FIRST STEP Act, short for “Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person” Act. The statute is intended to shorten certain federal prison sentences for non-violent offenders by, among other things, shortening mandatory minimum sentences, easing the federal “three strikes” rule, and expanding the drug safety valve to give judges more discretion to deviate from mandatory minimum sentences.<sup>2</sup>

The Federal Criminal Procedure Committee of the American College of Trial Lawyers (“ACTL”) applauds the passage of the FIRST STEP Act, but sees it only as the first of many steps that should be taken to reform our criminal justice system. We urge full consideration of reforms not only at the federal level, but also at the state and local levels of our criminal justice system.<sup>3</sup>

The United States approach to sentencing and incarceration, particularly of non-violent drug offenders - which have a disproportionate impact on racial and ethnic minorities, women and juveniles - deserves thoughtful re-assessment. Racial and ethnic minorities are disproportionately impacted by onerous bail requirements, often in misdemeanor cases, that can result in unnecessary jail time, often with devastating consequences. Moreover, sentencing policies often fail to address or reduce drug dependence and mental illness, thus resulting in a higher likelihood of re-offense. Many current criminal justice policies also adversely impact a defendant’s employability, thereby contributing to greater rates of unemployment and poverty among the formerly incarcerated, while increasing costs on taxpayers.

The ACTL believes it is important to highlight these important state and national criminal justice issues and encourages their thorough and neutral consideration. We also encourage criminal practitioners from both sides of the aisle to advocate for diversion and, when appropriate, mental

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1 See, e.g., Schanzenbach, Diane Whitmore, et al. (Oct. 2016), *Twelve Facts about Incarceration and Prisoner Reentry*, Economic Facts, The Hamilton Project, The Brookings Institution. <https://www.brookings.edu/research/twelve-facts-about-incarceration-and-prisonerreentry/>;

Cullen, F.T., Jonson, C.L. & Nagin, D.S. (2011), *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, *The Prison Journal*, 91(3\_suppl), 48S-65S.

2 FIRST STEP Act of 2018, S.756 – 115<sup>th</sup> Congress (2017-2018), available at: <https://www.congress.gov/bill/115th-congress/senate-bill/756/text?q=%7B%22search%22%3A%5B%22first+step+act%22%5D%7D&r=5&s=2> (hereinafter “FIRST STEP Act”). For a summary of the FIRST STEP Act see *First Step Act Section by Section Summary* (Dec. 14, 2018), Prepared by National Conference of State Legislatures, available at: [http://www.ncsl.org/documents/statefed/First\\_Step\\_Act\\_Summary\\_Dec2018.pdf](http://www.ncsl.org/documents/statefed/First_Step_Act_Summary_Dec2018.pdf)

3 The American College of Trial Lawyers recognizes and thanks the Honorable R.L. Gottsfeld, ACTL Fellow Larry A. Hammond, and Donna Lee Elm, Federal Public Defender for the Middle District of Florida, the co-authors of *Fixing Arizona’s Mass Incarceration Dilemma*, available at: <https://morrisoninstitute.asu.edu/products/fixing-arizona%E2%80%99s-mass-incarceration-dilemma>. This Statement is based in large part on excerpts from their comprehensive article, which excerpts have been used here with their permission. ACTL also recognizes and thanks Fellow and Federal Criminal Procedure Committee Vice Chair Sharon L. McCarthy for her skillful work on this Statement.

health treatment in lieu of prison. We seek collaboration with the judiciary, pre-trial and probation departments in addressing this process in order to develop effective and evidence-based alternatives when fashioning pre-trial release conditions and punishments for non-violent offenders. We hope that this paper will serve to better inform both state and federal practitioners on these issues.

#### A. SCOPE OF THE OVER-INCARCERATION PROBLEM

While there is no question that significant prison sentences are warranted in many circumstances, particularly when violence or sexual exploitation of children is involved, the United States has the highest incarceration rate in the world.<sup>4</sup> State and federal prison populations in the United States total over 2.3 million, which accounts for nearly 25% of the world’s prison population.<sup>5</sup> Former Attorney General Holder illustrated the scope of the problem:

From the late 1970s, America’s incarceration rate more than quadrupled, to over 700 per 100,000 people from about 130; compare that with Russia, for example, which imprisons about 150 people per 100,000. Between 1970 and 2005, America’s prison and jail population increased sevenfold to approximately 2.2 million from about 300,000. The United States has about 5 percent of the world’s population, yet about 22 percent of its known prisoner population. In 2010, it cost about \$80 billion per year to house these people in our prisons and jails.<sup>6</sup>

Further, for several years leading up to 2015, federal prosecutors had charged crimes carrying mandatory minimum penalties in two-thirds of their cases involving drug trafficking.<sup>7</sup> Policy about such practices has varied, but the Obama administration clearly discouraged charging mandatory minimums for low-level, nonviolent drug offenders<sup>8</sup> and changed other charging practices that would result in unduly long sentences. Consequently, as of 2015, federal prosecutors had reduced mandatory minimum sentence charging to less than half of the drug cases – the lowest rate

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4 Baz Dreisinger (2016), *Incarceration Nations: A Journey to Justice in Prisons Around the World*, (New York: Other Press) at 8. (hereinafter “*Incarceration Nations*”).

5 Id.

6 Eric Holder, *Sentences Full of Errors*, *New York Times* (Aug. 14, 2016) at SR6. Holder also decried the “radical bias in the criminal justice system” where “more than twice as many African-Americans as whites were in state prisons for drug offenses” by the early 2000s. Black neighborhoods across the country have been disproportionately affected by the number of African-Americans serving long, mandatory minimum sentences for drug offenses, so that some states require lawmakers to consider a “racial impact statement” before approving any criminal justice system legislation. States with such a statute, as of July 2017, are Iowa, Connecticut and Oregon. Minnesota also uses a racial impact statement, but it is not mandatory. New Jersey is the latest to pass such a statute. On average, African-Americans are incarcerated in state prisons at five times the rate of whites across the country. See Beth Reinhard & Kate King, *Racial Impact Bill in New Jersey Underscores National Justice Debate*, *Wall Street Journal* (July 16, 2017) at A4.

7 Department of Justice Press Release, February 15, 2015, “In Milestone for Sentencing Reform, Attorney General Holder Announces Record Reduction in Mandatory Minimums Against Nonviolent Drug Offenders,” available at: <https://www.justice.gov/opa/pr/milestone-sentencing-reform-attorney-general-holder-announces-record-reduction-mandatory>.

8 Memorandum from Attorney Gen. Eric Holder, Jr., U.S. Dep’t of Justice, to the U.S. Attorneys & Assistant Attorney Gen. for the Criminal Div. (Aug. 12, 2013), available at: <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-andatory-minimum-sentences-convict-enhancements-in-certain-drugcases.pdf>



on record.<sup>9</sup> In 2017, however, the Trump administration reversed course and rescinded those Obama era reforms, directing prosecutors to charge offenses carrying the highest possible sentence.<sup>10</sup> While there are open questions about the effect the current Department of Justice charging policy (requiring prosecutors to charge offenses carrying the highest possible sentence) will have on incarceration levels, the passage of the FIRST STEP Act is encouraging and may serve to blunt the impact of the charging policy by, among other things, reducing the three-strike mandatory penalty from life imprisonment to 25 years and the 20-year mandatory minimum for drug felons to 15 years.<sup>11</sup>

Our nation’s sentencing laws produce some of the harshest sentences in the world. We are one of just nine countries that punish via both life sentences and the death penalty.<sup>12</sup> Just 20 percent of countries have life without parole sentences; yet the United States resorts to it even for nonviolent first-time offenders.<sup>13</sup> In 2016, there were 161,957 people serving life sentences in our prisons, and an additional 44,311 serving “virtual life” sentences of 50 years or more.<sup>14</sup> Together these groups represent 13.9 percent of the total prison population,<sup>15</sup> or 50.3 of every 100,000 individuals in the national population.<sup>16</sup> Ratios in France (0.7 per 100,000), Germany (2.4 per 100,000), India (5.5 per 100,000) and the United Kingdom (13.4 per 100,000) were markedly lower.<sup>17</sup>

Statistics concerning U.S. incarceration of women and juveniles are equally as alarming. Over 30 percent of the world’s imprisoned women are in the United States – twice the rate of China and four times the rate of Russia.<sup>18</sup> Between 1980 and 2016, the rate of incarceration for women grew by over 700 percent.<sup>19</sup> Two-thirds of the women incarcerated in the United States were convicted of nonviolent offenses.<sup>20</sup> The social impact of incarcerating women (who typically bear critical child-rearing responsibilities) is considerable. More than 60 percent of American women in state prisons have children under the age of 18.<sup>21</sup> An estimated 2.6 million American children have a parent in prison. These children are often placed in chaotic, financially strapped homes, and are more likely to be sexually abused and later imprisoned themselves.<sup>22</sup> Research has shown that children of an incarcerated parent fare worse psychologically and physiologically than children whose parents have died.<sup>23</sup>

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9 Holder, Sentences Full of Errors, *supra* note 6. The incarceration rate was impacted by these changes in charging practices and other criminal justice reforms. “In 2015, the number of American prisoners declined more than 2 percent, the largest decrease since 1978. By 2014, the incarceration rate for black men, while still stratospheric, had declined 23 percent from its peak in 2001.” See James Forman, Jr., Justice Springs Eternal, op-ed, *The New York Times* (Mar. 26, 2017) at 1 and 5.

10 Memorandum from Attorney Gen. Jefferson Sessions, U.S. Dep’t of Justice, to All Federal Prosecutors (May 10, 2017), available at: <https://www.justice.gov/opa/press-release/file/965896/download>

11 See *supra* note 2, FIRST STEP Act, Title IV, “Sentencing Reform.” This provision will not be applied retroactively to anyone sentenced before enactment of the FIRST STEP Act.

12 Incarceration Nations, *supra* note 4, at 8.

13 Jennifer Turner, *A Living Death: Life Without Parole for Nonviolent Offenses*. American Civil Liberties Union (2013) at 21, 39-67, available at: <https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses>.

14 Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long Term Sentences*, The Sentencing Project (May 3, 2017), available at: <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>

15 Id.

16 *Life Imprisonment: A Policy Briefing*, Penal Reform International and University of Nottingham (May 2018), Table 1, available at: [https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI\\_Life-Imprisonment-Briefing.pdf](https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI_Life-Imprisonment-Briefing.pdf)

17 Id.

18 Roy Walmsley, *World Female Imprisonment List*, 4<sup>th</sup> ed., Institute for Criminal Policy Research (Nov. 9, 2017).

19 E. Ann Carson, *Prisoners in 2016*, Washington, D.C.: Bureau of Justice Statistics (Jan. 9, 2018).

20 Nicholas Kristof, *Mothers in Prison*, *New York Times* (Nov. 27, 2016) at SR1 & SR6.

21 Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children*, Washington, D.C.: Bureau of Justice Statistics (Aug. 2008), available at: <https://www.bjs.gov/content/pub/pdf/pptmc.pdf>.

22 Id.

23 See generally Remarks of Michele B. Goodwin at the ACTL Spring Phoenix General Session on March 3, 2018.

The United States also has the highest rate of youth confinement of any developed country. On any given day, nearly 53,000 youth are held in facilities away from home as a result of juvenile or criminal justice involvement; nearly one in ten is held in an adult jail or prison.<sup>24</sup> Moreover, our country was among only a handful of nations that had, in the past few decades, imposed death penalty and life without parole sentences on juveniles. In that respect, we kept company with China, the Congo, Iran, Pakistan, Yemen, Saudi Arabia, and Nigeria.<sup>25</sup> Fortunately, recent Supreme Court decisions have declared the death penalty and mandatory life without parole for juvenile offenders unconstitutional, finding both policies violate the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>26</sup> Those holdings, however, had negligible impact on the number of juveniles already imprisoned and do not prevent discretionary life sentences for homicides committed by juveniles.

America's Death Rows have been criticized famously for being overpopulated. Among their liabilities are inhumane isolative treatment, the length of time spent on "the Row," and its cost. However due to abolition in some jurisdictions, reductions in capital charging, a popular opinion shift against the death penalty, unavailability of means to execute, and the costs of capital litigation, our Death Row populations have been decreasing steadily in the past fifteen years. At the turn of the century, there were approximately 3,500 on America's Death Rows, but that number decreased to 2,817 in 2017.<sup>27</sup> At the same time, however, the number of people sentenced to life without parole continues to surge, leading many to call it "the other death penalty" and its recipients inhabitants of "life row."

Also significantly, many individuals in local and county custody are there for minor violations such as driving with suspended licenses, shoplifting, or evading subway fares. Ironically, it is often those incarcerated on minor infractions who are least able to post bail, and they may have been jailed for longer periods of time due to their inability to pay court-imposed fees.<sup>28</sup> This has effectively created in some areas "an unconstitutional modern-day debtors' prison," keeping

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24 Wendy Sawyer, *Youth Confinement: The Whole Pie*, The Prison Policy Initiative (Feb. 27, 2018), available at: <https://www.prisonpolicy.org/reports/youth2018.html>

25 Human Rights Watch, *Iran, Saudi Arabia, Sudan: End Juvenile Death Penalty* (Oct. 8, 2010), available at: <https://www.hrw.org/news/2010/10/08/iran-saudi-arabia-sudan-end-juvenile-death-penalty>. See also Campaign for the Fair Sentencing of Youth at <https://www.fairsentencingofyouth.org/about-the-issue/> (overview of U.S. practice of subjecting juveniles to life sentence without parole).

26 See *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (declaring juvenile death penalty unconstitutional); *Graham v. Florida*, 560 U.S. 48 (2010) (declaring the use of mandatory life without parole sentences for persons who committed non-homicide crimes as juveniles unconstitutional) and *Miller v. Alabama and Jackson v. Hobbs*, 132 S. Ct. 2455 (2012) (extending *Graham's* prohibition of mandatory life sentences to juveniles convicted of homicide offenses).

27 NAACP Legal Defense & Education Fund, *Death Row U.S.A.* (Summer 2017) at 1, available at <https://deathpenaltyinfo.org/documents/DRUSASummer2017.pdf>; Mark Berman, *The Steady Decline of America's Death Rows*, The Washington Post (May 6, 2017).

28 *Jails Have Become Warehouses for the Poor, Ill and Addicted, a Report Says*, New York Times (Feb. 11, 2015) at A19. See also Ram Subramanian, Christian Hendrickson & Jacob Kang-Brown, *In Our Backyard: Confronting Growth and Disparities in American Jails*, Vera Institute of Justice (Dec. 2015), available at: <https://www.vera.org/publications/in-our-own-backyard-confronting-growth-and-disparities-in-american-jails>; Ram Subramanian, et al, *Incarceration's Front Door: The Misuse of Jail in America*, Vera Institute of Justice (Feb. 2015), available at: <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>; Campbell Robertson, *Missouri City to Pay \$4.7 Million etc.*, New York Times (Jul. 16, 2015) at A12 & 13 (discussing the sums paid "to compensate nearly 2000 people who spent time in the city's jail for not paying fines and fees related to traffic and other relatively petty violations").

impoverished people behind bars, as was documented recently in Ferguson, Missouri.<sup>29</sup>

Furthermore, having a criminal record is a serious bar to employment. “One in three U.S. adults has a criminal record that will show up on a background check, meaning that nearly 70 million people – disproportionately people of color – could be summarily excluded from the work force, regardless of their educational background or relevant skill set.”<sup>30</sup> An Indiana study revealed that unemployed and underemployed parolees are far more likely to reoffend than those who are fully employed.<sup>31</sup> Because unemployment correlates strongly with recidivism, prior incarceration contributes to the over-incarceration problem. Hence a criminal justice policy that maximizes offenders’ opportunities to secure or maintain work is a necessary priority.

## **B. EXAMPLES OF SPECIFIC CRIMINAL JUSTICE REFORMS**

State reform initiatives have often led the way in resolving over-incarceration issues. The 46 states that have taken recent action to reduce their prison populations approved an impressive 201-plus separate measures to reform their sentencing and corrections systems.<sup>32</sup> The movement to reduce prison overcrowding, which began in 2009,<sup>33</sup> focuses on four areas:

- (1) reforming the bail system;
- (2) creating opportunities to divert offenders from the criminal justice system and using special courts to adjudicate particular types of charges;
- (3) enacting sentencing reform (including expanding opportunities for early release from prison, as well as using alternatives to imprisonment for community supervision violations); and
- (4) supporting re-entry into the community.<sup>34</sup>

To make this headway, states often created task forces to tackle reform and recommend changes. Additionally, these groups have profitably used data-driven research and evidence-based approaches. Finally, they often create oversight bodies to ensure that their proposals in fact achieve their goals.<sup>35</sup>

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29 Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted, a Report Says*, *supra* note 28; *see also*, Jessica Feierman, et al., *Debtors’ Prisons for Kids? The High Cost of Fines and Fees in the Juvenile Justice System*, Juvenile Law Center (2016), which that illustrates the destructive results of charging court fees and fines to juveniles, many of whom come from impoverished families and are not able to enter the work force due to their age, available at: [http://www.jlc.org/sites/default/files/publication\\_pdfs/JLC\\_debtorsPrison\\_9-6v2.pdf](http://www.jlc.org/sites/default/files/publication_pdfs/JLC_debtorsPrison_9-6v2.pdf)

30 Jo Craven McGinty, *This Column is on Your Permanent Record*, Wall Street Journal (Aug. 8, 2015) at A2. “Arrest record or criminal record” is usually defined to include anyone who has been arrested or taken into police custody, whether or not charges are ever filed or ultimately dropped. Thus, those never convicted of a crime may have a criminal history or record.

31 John Nally, Susan Lockwood, Taiping Ho, & Katie Knutson, *The Post-Release Employment and Recidivism among Different Types of Offenders with a Different Level of Education: A Five-Year Follow-up Study in Indiana*, Justice Policy Journal, 9(1), 1-29 (Spring 2012).

32 Rebecca Silber, Ram Subramanian, & Maia Spotts, *Justice in Review: New Trends in State Sentencing and Corrections 2014-2015* (hereinafter “New Trends”), Vera Institute of Justice (May 2016) at 4 & 8, available at <https://www.vera.org/publications/justice-in-review-new-trends-in-state-sentencing-and-corrections-2014-2015>

33 *Id.*

34 *Id.* at 6.

35 *Id.* at 5 & 52; *and see, e.g.*, Nebraska LB 907 (2014) and *A More Just New York City*, Independent Commission on New York City Criminal Justice and Incarceration Reform, available at [www.morejustnyc.com](http://www.morejustnyc.com).

## 1. Bail Reform

The pre-trial bail system in this country has produced some notable trends. In New York City in 2016, of those defendants in both felony and misdemeanor cases who had bail conditions set by a court, nearly 89 percent were unable to make bail at arraignment.<sup>36</sup> As a result, defendants remaining in pre-trial detention were sent more often than not to Rikers Island, renowned for its harsh conditions.<sup>37</sup> It, of course, follows that indigent defendants suffer enormous collateral consequences from pre-trial detention, including the loss of their jobs, which jeopardizes the financial security of their families, often putting them into economically perilous situations that require them to depend increasingly on social safety net programs.

In March 2016, the Department of Justice issued an unusual “Dear Colleagues” letter to state and local courts expressing constitutional concerns about using bail or bond practices that keep indigent defendants incarcerated because they cannot afford to pay for their release.<sup>38</sup> That letter was rescinded in December 2017 by the Department of Justice, drawing protest, notably from the American Bar Association.<sup>39</sup>

Despite the DOJ’s withdrawal of its prior statement, jurisdictions throughout the United States have tackled the issue of bail reform in creative ways. For example, an Arizona Task Force determined how best to eliminate “money for freedom,” which had been a key component of Arizona’s bail system. It made 65 recommendations.<sup>40</sup> For instance, the previous system had been based on the charges rather than the risk the defendant posed.<sup>41</sup> The Task Force recommended replacing charging-based detention “with a risk-based release decision system ... to keep the high risk people in jail and release low- and medium-risk individuals, regardless of their access to money.”<sup>42</sup> The theory is that a risk-based approach maintains public safety while maximizing release of those who pose no threat. Toward that end, all Arizona superior courts adopted the “Arnold Grid” or “Public-Safety Assessment” (PSA) grid to better assess risk, producing “smarter” pre-trial release. Arizona was a pilot state for the Arnold Foundation, which developed the instrument.<sup>43</sup> The Arnold

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36 A More Just New York City, *Beyond Bail or Nothing: The Case for Expanding Supervised Release*, Independent Commission on New York City Criminal Justice and Incarceration Reform (July 2018) at 5, available at: <https://static1.squarespace.com/static/577d72ee2e69cfa9dd2b7a5e/t/5b4380e088251beed8d4c188/1531150581999/Beyond+Bail+or+Nothing>

37 Id.

38 Debra Cassens Weiss, *Justice Department Warns Local Courts About Illegal Enforcement of Fees and Fines*, ABA J (Mar. 14, 2016). The March 2016 letter is no longer available on the DOJ website.

39 Statement of ABA President Hilarie Bass re: Consideration of excessive fines and bail, American Bar Association (Dec. 22, 2017) available at [https://www.americanbar.org/news/abanews/aba-news-archives/2017/12/statement\\_of\\_abapre01/](https://www.americanbar.org/news/abanews/aba-news-archives/2017/12/statement_of_abapre01/). (“The ABA asks the Department of Justice to reconsider this directive and calls on judges and jurisdictions across the country to curtail setting any excessive fines or bail without consideration of the ability of the individual to pay. If we, as a country, are to live up to the ideal of equality under the law, then there cannot be a price on justice.”).

40 Task Force on Fair Justice for All, *Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies*, (hereinafter “Task Force”) at 2-7, available at: [https://www.azcourts.gov/Portals/74/TFFAIR/Reports/FINAL%20FairJustice%20Aug%202012-final%20formatted%20versionRED%20\(002\).pdf?ver=2016-08-16-090815-647](https://www.azcourts.gov/Portals/74/TFFAIR/Reports/FINAL%20FairJustice%20Aug%202012-final%20formatted%20versionRED%20(002).pdf?ver=2016-08-16-090815-647).

41 Id. at 27.

42 Id.

43 Id. at 27 & 35; and see [www.ArnoldFoundation.org](http://www.ArnoldFoundation.org). According to a statewide opinion poll conducted in November/December 2016, most Arizonans strongly support the changes in the bail system. Bill Hart, *Bail or Jail? Most Arizonans Support Changes in the Bail System*, ASU Morrison Institute for Public Policy (Jan. 2017), available at [https://morrisoninstitute.asu.edu/sites/default/files/bail\\_poll\\_0.pdf](https://morrisoninstitute.asu.edu/sites/default/files/bail_poll_0.pdf). The recent Arizona Judicial Conference (6/21-6/23/2017) also featured pretrial release innovations and the abolishment of money for justice in Arizona.

Grid provides an evidence-based release system – fulfilling one of the recommendations of the Task Force. The grid produces a failure-to-appear score as well as a new criminal activity score. Both are based on the PSA, comprised of nine factors such as age at arrest, whether the current charge is a crime of violence, prior convictions, prior violent convictions, and prior failures to appear. In its second six months of implementation, this use of the grid resulted in 44% more releases on personal recognizance, and 23% more supervised releases.<sup>44</sup> In 2018, California became the first state to pass legislation fully abolishing cash bail, which is now on hold pending a November 2020 statewide referendum.<sup>45</sup> Other states are also considering elimination of cash bail.<sup>46</sup>

Bail reform, however, can present another problem: an increase in the number of pre-trial defendants held without bail when courts are hesitant to release defendants to the community. Maryland is a recent example of this conundrum. In 2017, the Maryland Court of Appeals revised the rules pertaining to pretrial release, in an effort to reduce the number of people incarcerated simply because they could not make cash bail. That effort, however, has had a surprising result: judges are increasingly ordering pre-trial defendants held without bail.<sup>47</sup> As a result, criminal justice reform advocates have called for additional reforms on bail practices in Maryland, including:

- release for all defendants with misdemeanors and drug offenses;
- restricting the use of “no bail” as a substitute for cash bail;
- improving pretrial services to aid those with a history of failure to appear in court; and

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44 Judicial Branch News, Strategic Projects Spotlight (Jan. 2017) at 7, available at: <https://www.superiorcourt.maricopa.gov/MediaRelationsDepartment/docs/newsletters/Jan17.pdf>. The PSA pretrial assessment has been implemented in all 15 Superior Courts and is being administered in some counties for the municipal courts. The assessment individually predicts FTA (Failure to Appear), NCA (New Criminal Activity) and for the first time has a prediction of violence which is flagged in the report. This is what makes PSA unique. For the differences between the prior COMPAS tool and the PSA used in Arizona with respect to bail risk assessment tools, see Jason Tashea, *Risk Assessment Algorithms Challenged in Bail, Sentencing and Parole Decisions*, ABA J (Mar. 2017), available at: [http://www.abajournal.com/magazine/article/algorithm\\_bail\\_sentencing\\_parole/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email). Arizona additionally already uses a risk-based system for juveniles, so there is no “money for freedom” system in juvenile courts. A juvenile may only be held in detention if he or she will not “be present at any hearing or the juvenile is likely to commit an offense injurious to self or others.” Task Force, *supra* note 40, at 27. With the use of an evidence-based risk assessment tool, Detention Screening Instrument, the juvenile court is doing a better job of keeping children in the community even though our population is expanding. “There is a reduction in detention and a lowering of referrals to juvenile corrections and to an adult criminal division. Over five years, the incarceration declined 35% (detention) and 40% (juvenile corrections).” JPD Trends and Implications (March 2017), internal working paper prepared by the Research and Planning Services Division, Juvenile Probation Department of the Judicial Branch of Maricopa County; and see Bill Hart, *Juvenile Justice in Arizona: The Fiscal Foundations of Effective Policy*, Children’s Action Alliance and ASU Mottison Institute for Public Policy (Jan. 2016) at 12.

45 See Thomas Fuller, *California is the First State to Scrap Cash Bail*, The New York Times (Aug. 28, 2018), available at: <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html> (Senate Bill 10 was to take effect on October 1, 2019). Since the passage of Senate Bill 10 in August 2018, enough signatures were gathered to put a referendum on California’s November 2020 ballot to revoke the law. See Michael McGough, *The Fate of California’s Cash Bail Industry Will Now Be Decided on the 2020 Ballot*, The Sacramento Bee (*January 17, 2019*), available at: <https://www.sacbee.com/news/state/california/article224682595.html>

46 For instance, in his 2019 State of the State address, New York Governor Andrew Cuomo proposed ending cash bail entirely and requiring a judicial finding of danger to the community or risk of flight before a defendant can be held in pre-trial detention. See Governor Cuomo Outlines 2019 Social Justice Initiative: The Time Is Now (Jan. 15, 2019), available at <https://www.governor.ny.gov/news/governor-cuomo-outlines-2019-justice-agenda-time-now>.

47 Scott Dance, *Since Bail Reform, Maryland Holding Fewer People Who Can’t Afford Bond, Assembly Panel Told*, The Baltimore Sun (Jan. 16, 2018), available at: <https://www.baltimoresun.com/news/maryland/politics/bs-md-bail-reform-statistics-20180116-story.html> (“But the flip side of the trend [of fewer bonds being imposed] is that more defendants are also being held without bail – about 20 percent of those appearing at bail hearings, up from 7.5 percent before the rule change.”).

- increase the amount of time defense attorneys can spend with defendants before they appear for bail hearings.<sup>48</sup>

At its 2017 annual meeting in New York, the American Bar Association’s House of Delegates adopted Resolution 112C, urging courts to release defendants on their own recognizance unless “release on cash bail or secured bond is necessary to assure the defendant’s appearance and no other conditions will suffice for that purpose.” Resolution 112C further urges that courts be prohibited from “imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay.”<sup>49</sup>

## 2. Diversion Programs

Many states have initiated broad diversion from prison programs. Innovations include deferred adjudication or deferred prosecution/judgment, conditional discharge, and eventual dismissal of charges when a defendant has been compliant with supervision.<sup>50</sup> This obviates not only imprisonment, but also criminal convictions. Furthermore, a number of states identify defendants eligible for non-custodial alternatives such as citation and release, or notice-to-appear tickets, rather than custody.<sup>51</sup>

Other innovations address specific factors that are known to contribute to re-offense. At first contact, these programs try to identify individuals with underlying needs that contribute to criminal behavior (such as homelessness, mental illness, or substance abuse), and refer them to community-based treatment and service programs.<sup>52</sup>

One of the more productive measures is expanding problem-solving courts that try to focus intervention on, for instance, veterans, drunk drivers, or domestic violence offenders.<sup>53</sup> Targeted treatment and social work, orchestrated through a problem-solving criminal court, can correct underlying problems thereby intervening in a cycle of re-offense.

An example of being more selective in charging also occurs in law

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48 Woody Woodruff, *Maryland’s Bail Reform is Failing in Prince George’s. Why?*, Progressive Maryland (July 6, 2018), available at [https://www.progressivemaryland.org/maryland\\_s\\_bail\\_reform\\_is\\_failing\\_in\\_prince\\_george\\_s\\_why](https://www.progressivemaryland.org/maryland_s_bail_reform_is_failing_in_prince_george_s_why)

49 Resolution available online at: <https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/112C.pdf>.

50 New Trends, *supra* note 32, at 15; *and see* California AB 2309 (2014). Diversion programs were created nationally to spare first-time or low-risk defendants the harsh consequences of a criminal record and allow prosecutors more time to go after dangerous offenders. The wrong way to do it is exemplified by Shalia Dewan and Andrew W. Lehren, *An Alabama Prosecutor Sets the Penalties and Fills the Coffers*, New York Times (Dec. 13, 2016) at A1 & A16 (the diversion system in this Alabama county “resembles a dismissal-for-sale scheme, available only to those with money, and in some cases, favor... generating more than \$1 million for his office in the last five years”).

51 New Trends, *supra* note 32, at 11; *and see* Idaho SB 1352 (2014). Another example is New York which used to have thousands of arrests each year for possessing trivial amounts of marijuana (in 2011, 50,000 people were arrested on charges of public possession, which has been decreased to about 16,600 arrests in 2015); a policy was introduced under which those with tiny amounts of marijuana were issued the equivalent of a traffic summons instead of having to go through the legal system. But despite research showing that whites and minority citizens use marijuana at similar rates, Black and Latino New Yorkers “are still far and away more likely to be singled out for low-level arrests that have little public safety value, but seriously damage their lives.” The Editorial Board, *Race and Marijuana Arrests*, New York Times (Nov. 25, 2016) at A26.

52 New Trends, *supra* note 32, at 11; *and see* Montana HB 33 (2015).

53 New Trends, *supra* note 32, at 12 & 14; Arkansas SB 472 (2015), and Arizona’s problem-solving courts.

enforcement; police chiefs have granted police officers more discretion to determine whether to arrest an individual or make a treatment referral.<sup>54</sup>

Some jurisdictions have also adopted medication-assisted treatment using methadone, buprenorphine, or extended-release injectable naltrexone.<sup>55</sup> The effectiveness of these medical therapies, as an evidence-based practice for treating opioid dependence and other addictions, has enabled judges to have greater confidence in releasing defendants instead of ordering detention.

Finally, given that veterans comprise 10% of the incarcerated population, and they often struggle with mental illness, anger management, and substance abuse, many states are now offering targeted justice system programs to provide treatment and social services to offending veterans.<sup>56</sup> An example is Arizona's expansion of the Homeless Court structure to include Veterans Courts.<sup>57</sup>

The Deferral of Sentencing Pilot Program adopted in 2014 in Los Angeles County offers another example of a highly successful structured diversion system.<sup>58</sup> It only applies to first-time offenders charged with nonviolent misdemeanors who are willing to plead guilty or no contest. Judges have discretion to defer a sentence for up to a year during which time the offender must comply with terms and conditions. Upon successful completion, the charges are dismissed.

### 3. Reducing Prison Terms

States also have developed strategies to reduce prison populations by lowering the number coming into prison at all, as well as the length of time they remain there. These innovations are led by sentence-reduction legislation, making some offenses eligible for non-prison sanctions, thereby expanding probation availability to those convicted of low-level, nonviolent property and drug offenses.<sup>59</sup> Imprisonment is replaced by custodial placement in treatment and rehabilitation centers, providing options for drug offenders to recover so as to prevent recidivism – while at the same time lowering the prison population.

Research has established that community-based treatment approaches are

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54 New Trends, *supra* note 32, at 11; *and see* Washington SB 2627 (2014).

55 New Trends, *supra* note 32, at 13. The report advises that sentencing alternatives such as drug courts often prohibit these medications in treatment. *But see* Indiana HB 1304 and SB 464 (2015) (authorizing use of drugs for inmates for medication-assisted treatment of opioid or alcohol dependence).

56 New Trends, *supra* note 32, at 16. Returning veterans often struggle with known criminal risk factors at higher rates than others such as mental illness, substance abuse, unemployment, homelessness, and PTSD. *And see* <https://www.washingtonpost.com/posteverything/wp/2016/07/08/one-reason-homeless-they-cant-afford-lawyers/>.

57 New Trends, *supra* note 32, at 16.

58 New Trends, *supra* note 32, at 15; *and see* California AB 2124 (2014).

59 New Trends, *supra* note 32, at 19-20; *and see* Wyoming SB 38 (2015) and Alaska SB 64 (2014).

more effective in reducing recidivism for substance abusers than incarceration.<sup>60</sup> Fourteen states have enacted medical amnesty laws that protect drug users from drug use prosecution when it is discovered as a result of their seeking medical attention for overdose or addiction.<sup>61</sup>

Many states also have reduced penalties for property offenses.<sup>62</sup> Many others place greater reliance on graduated sanctions for probation compliance violations, so that prison is not the default response to any type of violation.<sup>63</sup>

Other advances shorten or avoid lengthy sentences. “Evidence that longer sentences have no more than a marginal effect on reducing recidivism [has resulted in moving] away from the severe mandatory minimum sentences enacted during the past 30 years.”<sup>64</sup> For instance, states have enacted sentencing reform making more offenses probation-eligible, reclassifying felony classes and penalties, shortening sentences in general, and giving judges the power to resentence people premised on good conduct in prison or jail.<sup>65</sup> Some have increased means for inmates to earn release credits, or made parole more available. Inmates are more motivated to engage in prison programs when they have a realistic likelihood of earning an earlier release.<sup>66</sup>

Additionally, more “Safety Valve”<sup>67</sup> reductions from mandatory minimum sentences have allowed for shorter sentences.<sup>68</sup> This allows authorities to interdict in an individual’s early foray into criminal conduct, without devastating consequences. Interestingly, though states do not generally repeal mandatory minimum sentencing statutes, they have been far more willing to create Safety Valve exceptions.<sup>69</sup> For instance, Maryland allows Safety Valve for drug offenses when the case would otherwise “result in substantial injustice and is unnecessary for public safety.” North Dakota allows it for all crimes but armed offenses so as to avoid “manifest injustice” (defined as “unreasonably harsh or shocking the conscience”). Oklahoma permits Safety Valve for nonviolent offenses when the harsher mandatory sentence is “not necessary for public safety, is unjust in the

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60 New Trends, *supra* note 32, at 10, 13, 18 and 19; *and see* Indiana HB 1304 (2015). For instance, in Vermont, an addict may call the Vermont Attorney General’s office and get enrolled in a program that steers low-level lawbreakers with drug addictions into treatment and other services, bypassing incarceration and if they live up to their agreement to stay clean, the reward is a clean record and no jail, probation or work crew. The program also covers low-risk offenders with mental health problems. Jennifer Levitz & Scott Calvert, *Vermont’s Radical Experiment to Break the Addiction Cycle*, *The Wall Street Journal* (Dec. 23, 2016), available at: <https://www.wsj.com/articles/vermonts-radical-experiment-to-break-the-addiction-cycle-1482510297> Hopefully, a plus in the battle to elevate mental health care will come from psychiatrist Elinore F. McCance-Katz, who currently serves as the nation’s first Assistant Secretary for Mental Health and Substance Abuse.

61 New Trends, *supra* note 32, at 26; *and see* North Carolina SB 154 (2015).

62 New Trends, *supra* note 32, at 20; *and see* Texas HB 1396 (2015) (raising felony threshold for various property crimes to \$2,500).

63 New Trends, *supra* note 32, at 19.

64 *Id.* at 27.

65 *Id.* at 27-28, 34-37; *and see* California AB 1156 (2015) and Alabama SB67 (2015), for a comprehensive program of criminal justice reforms.

66 New Trends, *supra* note 32, at 28-30; *and see* Arizona HB 2593 (2014) (modifying parole eligibility standards for persons who committed crimes before the age of 18). Under this law, those imprisoned for life without parole are eligible for parole after serving a minimum term. Anyone released under this condition will remain on life-long parole.

67 “Safety Valve” is sentencing legislation which permits first-time, low-level, or young offenders who have not demonstrated violent conduct to avoid the steep mandatory sentencing structure that is otherwise in place if the defendant truthfully provides the government all information and evidence that he or she has concerning the offense. See, e.g., United States Sentencing Guidelines Section 5C1.2 “Limitation on Applicability of Statutory Minimum Sentences in Certain Cases.”

68 New Trends, *supra* note 32, at 27. California’s Three Strikes law is a perfect example of a severe mandatory minimum policy. For a discussion of Arizona’s more benign three strikes laws, 13-706 (A) and (B), see R.L. Gottsfield and Michael Rice, *Arizona’s Criminal Three Strikes Laws*, *Greater Phoenix, Attorney at Law Magazine* (July 2011) at 8.

69 New Trends, *supra* note 32, at 27.



particular circumstances of the case or if the defendant is eligible, absent prior convictions, for diversion or alternative sentencing.”<sup>70</sup>

Statutes that allow judicial officers wide discretion in applying their Safety Valves are particularly effective. They place the judgment concerning appropriate punishment for criminal conduct back in the hands of trained and experienced jurists who were selected to exercise sound judgment in conformance with the values of the community that they serve. Safety Valve laws in North Dakota and Oklahoma have thoughtfully implemented such options.<sup>71</sup> For instance, Oklahoma’s provides:

Notwithstanding any other statute or law to the contrary, a judicial officer has discretion to disregard a mandatory minimum sentence in a given case, where such a mandatory sentence is unjust under the particular circumstances of the case and not necessary for public safety. This section does not apply in the case of any offense charged and proven as violent or dangerous or serious or if a weapon is used to carry out or attempt to carry out a criminal offense.<sup>72</sup>

A major feature of the FIRST STEP Act is the expansion of sentencing courts’ ability to apply the safety valve provisions of 18 U.S.C. Section 3553 to certain non-violent, low level drug offenders under certain specific circumstances. This provision is likely to have a significant impact on the length of federal prison terms for certain drug offenders.<sup>73</sup>

Some states have enacted laws expressly directed at reducing over-incarceration. A prime example is California’s Proposition 47.<sup>74</sup> The United States Supreme Court had previously held that California’s operation of its prisons (at nearly 200% capacity, with high rates of mental illness, disease, malfunctioning water and electrical systems, insufficient programming and gang violence) violated the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>75</sup> The Court ordered the state to reduce its prison population by 63.5 % and improve health services. Consequently, in 2011, California initiated “Realignment,” a prison population reduction program. It reduced penalties, raised nonviolent felony thresholds, and transferred certain low-level offenders to out-of-state prisons and into county-level community supervision or local jails.<sup>76</sup> This was expanded in 2014 with Proposition 47, which scaled some nonviolent felonies down to misdemeanors, raised felony thresholds further for property crimes, and revised drug offense sentencing for simple

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70 See generally *id.* at 27; and see Maryland HB 121 (2015); North Dakota HB 1030 (2015); Oklahoma HB 1518 (2015).

71 New Trends, *supra* note 32, at 27.

72 Oklahoma HB 1518 (2015). Arizona’s A.R.S. 13-603L permits a sentencing judge to advise in writing at the time of sentence that what the law requires “is clearly excessive” and allows the defendant to petition the board of executive clemency for a commutation of sentence, a sort of Safety Valve statute that has been ineffective in materially reducing Arizona prison population. By contrast, in Arizona, judicial officers are advised: “The intentional failure by the court to impose the mandatory sentences or probation conditions in this title is malfeasance.” A.R.S. Section 13-701(I). This provision would have to be modified or deleted altogether should Arizona adopt a Safety Valve measure.

73 FIRST STEP Act, *supra* note 2, at Section 402.

74 New Trends, *supra* note 32, at 31.

75 The U.S. Supreme Court upheld the finding of a three-person appeals court panel on two prior class-action cases against the state of California. The first case, *Coleman v. Brown*, concerned incarcerated people with serious mental disorders. The second case, *Plata v. Brown*, concerned incarcerated people with serious medical conditions. Both cases stemmed from inhumane conditions and insufficient treatment programs associated with California prison overcrowding. *Brown v. Plata*, 563 U.S. 493 (2011).

76 New Trends, *supra* note 32, at 31.

possession for recreational use.<sup>77</sup> Importantly, those already imprisoned for offenses covered by Proposition 47 could apply for reduced sentences retroactively under the new sentencing scheme. “Successful applicants will be able to have their convictions downgraded from felonies to misdemeanors, and to receive credit for time already served.”<sup>78</sup>

On the federal level, Clemency Project 2014 was a program that expired at the end of President Obama’s term on January 19, 2017. In order for federal prisoners to qualify for Clemency Project 2014, they had to meet six criteria:

- (1) they were currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today;
- (2) they were non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels;
- (3) they had served at least 10 years of their prison sentence;
- (4) they did not have a significant criminal history;
- (5) they demonstrated good conduct in prison; and
- (6) they had no history of violence prior to or during their current term of imprisonment.<sup>79</sup>

Of the 24,000 petitions made under the program, 1,696 sentences were commuted.<sup>80</sup> The average reduction in sentence made by a Clemency Initiative commutation was 39.0 percent, representing a reduction in sentence of more than 11 years (140 months).<sup>81</sup>

The recently enacted federal FIRST STEP Act has a provision to address recidivism reduction through a system of risk and needs assessment. Through this assessment system, the federal Bureau of Prisons (“BOP”) is required to determine each prisoner’s risk of recidivism and assign prisoners to appropriate “recidivism reduction” programs or other “productive activities,” the successful completion of which may result in early transfer into prerelease custody or supervised release.<sup>82</sup>

#### 4. Supporting Re-Entry into Society

Over-incarceration also can be reduced by avoiding recidivism. One of the best ways is to help inmates adjust upon their return to the community. States have developed various re-entry programs and services, facilitating access to a variety of general services available to all their people as well as some programs designed to benefit ex-offenders. These resources help released inmates gain employment, easing the harmful impact of fees and fines. Limiting public access to criminal history information is also useful for successful re-entry. Changes reducing the

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77 Id.

78 Id.

79 See United States Department of Justice, Clemency Initiative, available at: <https://www.justice.gov/pardon/clemency-initiative>.

80 See *An Analysis of the Implementation of the 2014 Clemency Initiative*, United States Sentencing Commission (Sept. 2017) at 18, available at: [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901\\_clemency.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf).

81 Id. at 17.

82 See *supra* note 2, FIRST STEP Act, Title I, “Recidivism Reduction.”

more drastic collateral consequences of a criminal conviction also help support re-entry.

States have developed specific reforms to ease the transition from prison to the community. Adequate funding/staffing for these programs is naturally a prerequisite. Some states have provided grants to counties implementing workforce development programs that include vocational training and post-secondary education for their parolees or probationers.<sup>83</sup> State prisons in a few jurisdictions also hired pre-release specialists who offer individualized case management aimed at preparing prisoners for release.<sup>84</sup>

Although successful programs have emerged across the country,<sup>85</sup> in order to make broad and long-term improvements in recidivism, re-entry must be a national priority. Accepting as given that some who return from prison will fail, and may fail more than once, the answer need not, however, always be a return to prison. An increasing number of well-devised state programs give discretion to counselors and law enforcement officers to divert nonviolent individuals to programs where they might have a chance of success.

Because so many releasees have substance abuse or mental illness problems, initiating re-entry programming well *before* release has proven beneficial. Thus, some jurisdictions involve community-based mental health consultants to ease re-entry transition of inmates with mental illness.<sup>86</sup> Others provide pre-release substance abuse counseling, financial planning, transportation, housing assistance, and aid in obtaining public benefits.<sup>87</sup> Similarly, providing inmates with vocational and educational opportunities while incarcerated can help prepare them to secure employment when they get out. Many prisons offer vocational opportunities in fields in which inmates likely will find work, such as construction, truck driving, manufacturing, plumbing, heating, diesel technology, ventilation, and air conditioning. Those also offer releasees a sustainable wage.<sup>88</sup> Work release or day parole programs additionally allow inmates to seek employment, attend school, secure medical treatment, and care for family or property so that they are better prepared to move back into society.<sup>89</sup>

Facilitating family reunification is an important adjunct to traditional re-entry planning. Research has shown that strengthening ties between inmates and their families both

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83 New Trends, *supra* note 32, at 39; *and see* California AB 2060 (2014).

84 New Trends, *supra* note 32, at 39; *and see* Colorado HB 14-1355 (2014).

85 Most impressive have been programs initiated to assist women returning from prison. In Arizona, for instance, the Department of Corrections now offers a 9-month, in-patient Women's Recovery Academy at its women's facility, followed by aftercare and reentry assistance. Information available at <https://corrections.az.gov/location/19/perryville>. Additional re-entry services and counseling have been made available to women in that State through an organization known as Sage Counseling. Aside from re-entry services, Sage also provides family reunification, parenting, domestic violence, and substance abuse treatment. Information available at <http://www.sagecounseling.net/programs.html>. As to drug rehabilitation, *see* Craig Harris, *How Gov. Doug Ducey is Hoping to Offer More Prisoners a 'Real Second Chance,'* The Republic (Feb. 5, 2017), available at: <https://www.azcentral.com/story/news/politics/arizona/2017/02/05/arizona-prisoner-re-entry-program-expansion/96773294/> addressing the substance abuse counseling available at the Maricopa Reentry Center in North Phoenix: "If Gov. Doug Ducey gets his way, the nascent re-entry program will expand with a \$518,000 infusion from the state budget" and the addition of "six more substance-abuse counselors and a re-entry planner which would allow more people to enroll" and which "marks a shift in the state's philosophy on incarceration and how to pay for it.").

86 New Trends, *supra* note 32, at 39.

87 *Id.*; *and see* Indiana HB 1268 (2014).

88 New Trends, *supra* note 32, at 39; *and see* Indiana SB 173 (2015).

89 New Trends, *supra* note 32, at 40; *and see* Michigan SB 581 (2014).

promotes rehabilitation and avoids recidivism.<sup>90</sup> Releasees who are invested in their community also may develop a greater sense of civic-mindedness, producing a positive effect on their respect for their community's laws. Therefore, many re-entry programs include encouraging civic participation as well as volunteerism.<sup>91</sup>

Many releasees trying to “go straight” after prison find that they cannot navigate the legal and social services challenges that they face. Some basic needs can be met in re-entry, such as securing identification cards before release from prison,<sup>92</sup> obtaining health insurance upon release,<sup>93</sup> and easing restoration of driver's licenses that were revoked.<sup>94</sup> Some states have extended food stamp eligibility to ex-offenders,<sup>95</sup> even changing eligibility for the federal Supplemental Nutrition Assistance Program (despite its contrary rules).<sup>96</sup> A novel approach is passing laws to shield landlords from liability claims based solely on a tenant's criminal record; this offers lessors greater confidence in providing housing to ex-offenders.<sup>97</sup>

Some releasees have been stymied in their job search by having to answer the employment application question inquiring about a past criminal record. That yes/no “box” on applications can result in no interview, yet if they had the chance to interview, ex-offenders' eagerness, skills, and frank discussions of their record might have gotten them the job. Hence the “ban the box” movement sought to prevent employers from asking about criminal convictions at least on the job application. In response, a number of states legislated “ban the box” policies.<sup>98</sup> That movement aims to increase employment of ex-offenders by reducing the millstone of a criminal record. Koch Industries, as a leader in American business, adopted this practice.<sup>99</sup> Nearly half the states have banned questions about criminal backgrounds on job applications, though most policies affect government hiring and not private employers.<sup>100</sup> At the same time, some European nations (currently Britain is dealing with this) have recognized a “right to be forgotten,” which would require internet providers to remove certain damaging information such as criminal records after a set period of time. Some American states are starting to look into this as well. In fact, some jurisdictions in this country enacted legislation to limit public access to, dissemination of, and use of criminal information

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90 New Trends, *supra* note 32, at 41; *and see* Hawaii SB 2308 (2014). Some prisons indeed have nurseries. *See* Jessica Pishko, *The Rise of Prison Nurseries: Even a Prison Cannot Ignore Biology*, Pacific Standard (Feb. 18, 2015).

91 New Trends, *supra* note 32, at 41.

92 *Id.* at 42; *and see* California AB 2308 (2014); U.S. Department of Justice, *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons* (2016) (helping inmates obtain government-issued ID prior to their release is noted as a significant Bureau of Prisons reform). Some states favor restoration of voting rights as well. New Trends, *supra* note 32, at 42; *and see* California AB2243 (2014). z

93 New Trends, *supra* note 32, at 42; *and see* California AB 2570 (2014).

94 New Trends, *supra* note 32, at 42 & 44; *and see* Florida HB 53 (2014) and Delaware SB 217 (2014).

95 New Trends, *supra* note 32, at 42 & 44; *and see* Missouri SB 680 (2014).

96 New Trends, *supra* note 32, at 43; *and see* Texas SB 200 (2015).

97 New Trends, *supra* note 32, at 43 & 49 -50; *and see* Texas HB 1510 (2015) and Texas SB 1902 (2015).

98 New Trends, *supra* note 32, at 43-47. “Ban the box” refers to a movement advocating that employment applications remove the question whether the applicant has a criminal record so that an individual can at least make the first cut based on his or her education or employment record and proceed to an interview where a criminal record question may then be asked.

99 *See* article by Mark V. Holden, General Counsel and Senior Vice President of Koch Industries, *Why Koch Industries 'Banned the Box'*, Wall Street Journal (Aug. 17, 2016).

100 New Trends, *supra* note 32, at 44; *but cf.*, Ben Leubsdorf, *'Ban the Box' Laws May Worsen Hiring Discrimination, New Research Finds*, Wall Street Journal (Oct. 3, 2016) (may create a wider racial gap when it comes to which applicants are interviewed and hired).

altogether.<sup>101</sup> Because securing a business license can be hampered by a criminal record, some states allow it as long as the business is not related to the individual’s criminal record.<sup>102</sup>

Since fines, fees, and costs may exceed defendants’ ability to make ends meet, some re-entry programs prohibit imprisonment or probation of those in financial hardship for failure to pay a court-ordered fee or fine.<sup>103</sup> Likewise, some states bar courts from contracting with collection agencies to collect money from probationers/parolees who are unable to pay fines, fees, or surcharges.<sup>104</sup>

## 5. Impact of Multi-Faceted Approaches

New York and Colorado have led the way to reduce over-incarceration through a number of approaches. From 1999 to 2012, the prison population in New York decreased by 26%, and eleven prisons closed.<sup>105</sup> In Colorado, the prison population declined by just over 7% during the same period, and four prisons closed. This was accomplished by drastically reducing sentences for drug offenses, providing multiple paths for offenders to avoid incarceration for drug charges, removing mandatory minimum sentences, relaxing conditions of parole, and reducing return to prison for noncompliance violations.<sup>106</sup>

Nebraska provides a practical example of a broad-based, successful re-entry program. It created a varied and expansive “Vocation and Life Skills Program” that begins in prison. It features job and life skills training inside the walls, requires parole officers to provide transitional support in obtaining housing, job training, employment, education, healthcare coverage, and medical assistance, and enacted “ban the box” legislation.<sup>107</sup>

Beginning in 2007, the United States District Court for the Eastern District of Pennsylvania implemented a multi-faceted approach to reducing recidivism and easing re-entry into society through its Supervision to Aid Re-entry (“STAR”) program. The STAR program, which is a model for other federal courts across the country, represents a significant commitment by all facets of the criminal justice system. The program focuses on pre-release offenders in the mid-level of recidivism risk who agree to enter the program and operates through bimonthly group sessions in open court before a judge for 52 weeks. The sessions are monitored by the US Marshals and recorded by a court reporter. Before each session, the judges meet with representatives of the U.S. Attorney’s Office, the Federal Public Defender’s Office, the Probation Office, and the Department of Justice Reentry Coordinator to discuss each participant’s progress. At the group sessions, all

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101 New Trends, *supra* note 32, at 49-51; *and see* Illinois HB 3149 (2015). Limiting public access to, dissemination of, and use of criminal history information is accomplished by expanding eligibility for remedies that shield criminal records from public view searches as expungement or sealing mechanisms and also by mandating the removal of print and electronic publication of booking photographs and arrest records.

102 New Trends, *supra* note 32, at 45; *and see* New Hampshire HB 1368 (2014).

103 New Trends, *supra* note 32, at 47; *and see* Colorado HB 14-1061 (2014). The Arizona Code of Judicial Administration adopted the policy of not revoking probation solely for nonpayment of fees, fines or restitution.

104 New Trends, *supra* note 32, at 48; *and see* Georgia HB 328 (2015).

105 Between 2007 and 2016, the crime rate in New York State decreased nearly 18.3 percent. New York State Crime Report (Sept. 2017), available at: <http://www.criminaljustice.ny.gov/crimnet/ojsa/NYSCrimeReport2016.pdf>.

106 James Kilgore, *Understanding Mass Incarceration: A People’s Guide to the Key Civil Rights Struggle of our Time*, (New York: The New Press, 2015) 232-233.

107 New Trends, *supra* note 32, at 40; *and see* Nebraska LB 907 (2014).

participants “are required individually to discuss their accomplishments and identify any obstacles they are encountering in the reentry process.”<sup>108</sup> Among many other things, the following types of assistance are provided to program participants:

- low-interest, uncollateralized loans of up to \$15,000 for housing, education, or automobiles;
- funds designated by the Board of Judges to support a model program providing construction jobs for reentry participants to rehabilitate abandoned homes in Philadelphia, done together with a non-profit organization (Revive and Restore);
- free intensive group and one-on-one counseling and cognitive behavioral therapy to modify criminal thinking patterns, provided by the Drexel University Psychology Department;
- emergency assistance through a fund established by the Philadelphia Bar Foundation to provide housing, food, medical care, furniture, vocational testing and other fees not covered by U.S. Probation using Second Chance Act funds;
- legal assistance from law students and various legal organizations; and
- resume review by federal law clerk volunteers.<sup>109</sup>

A statistical analysis of the first 237 re-entry court participants concluded that the re-entry court is associated with a 72 percent reduction in supervision revocation.<sup>110</sup>

## CONCLUSION

Through this Statement, the ACTL seeks to highlight the important work being done on the local, state and federal levels throughout the United States to embrace and promote alternatives to incarceration, most recently by the passage of the bipartisan FIRST STEP Act. We encourage criminal practitioners to draw upon the examples of success and advocate for diversion and other options in lieu of jail or prison. Finally, we call upon the judiciary, pre-trial and probation departments to study programs that have addressed this process in order to adopt and develop effective and evidence-based alternatives when fashioning pre-trial release conditions and punishments for non-violent offenders.

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108 Memorandum from L. Felipe Restrepo & Timothy R. Rice to Petrese B. Tucker, Annual Report – Reentry Court (July 20, 2017) at 5, available at: <http://www.paed.uscourts.gov/documents/speccourtprog/2017%20Reentry%20Annual%20Report.pdf>.

109 Id.

110 Caitlin J. Taylor, *Program Evaluation of the Federal Reentry Court in the Eastern District of Pennsylvania*, La Salle University Department of Sociology & Criminal Justice (Nov. 2014) at 13, available at: [https://digitalcommons.lasalle.edu/cgi/viewcontent.cgi?article=1000&context=soc\\_crj\\_faculty=soc\\_crj\\_faculty](https://digitalcommons.lasalle.edu/cgi/viewcontent.cgi?article=1000&context=soc_crj_faculty=soc_crj_faculty).

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