

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

DEBRA L. RASKIN
PRESIDENT
PHONE: (212) 382-6700
FAX: (212) 768-8116
draskin@vladeck.com

October 5, 2015

Hon. Yvette Clarke
U.S. House of Representatives
2351 Rayburn Office Building
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Clarke:

The New York City Bar Association issued a report last week titled, “Mass Incarceration: Seizing the Moment for Reform,” calling on federal and state leaders to “make the reduction of mass incarceration a top priority.” (A copy of the report is enclosed.) Building on the bipartisan groundswell of support for criminal justice reform and the growing body of evidence pointing to the deleterious financial, social and economic effects of mass incarceration, the City Bar also announced the formation of a Mass Incarceration Task Force that will be made up of prosecutors, defense attorneys, judges, experts in re-entry issues for the formerly incarcerated, and other experts and criminal law practitioners to tackle the scourge of over-incarceration in the United States and to advocate for change on the federal, state and city levels.

Citing a “critical juncture” and a “historic opportunity” for change, the City Bar calls on Congress and state legislatures to repeal or reduce mandatory minimum sentencing provisions; reduce the sentences recommended by sentencing guidelines and similar laws for non-violent offenses; expand the sentencing alternatives to prison including drug programs, mental health programs and job training programs; expand the availability of rehabilitative services, including counseling and educational opportunities, during and after incarceration so that individuals can successfully re-enter society and avoid recidivism; eliminate or reduce financial conditions of pretrial release; provide opportunities for individuals with misdemeanor and non-violent felony convictions to seal those records to prevent employment and other types of discrimination; and, in New York, enact legislation to raise the age of juvenile jurisdiction from 16 to 18 years old.

Bills like the “Smarter Sentencing Act,” the “SAFE Justice Reinvestment Act” and the Senate’s recently announced “Sentencing Reform and Corrections Act” make clear that federal legislators are focused on the endemic problem of mass incarceration and the urgent need for reform. We urge you and your fellow members of Congress to continue working to reduce our staggering population of incarcerated individuals and to diminish the economic and societal costs of our current criminal justice system.

The growing dialogue and bipartisan recognition in recent years that our current levels of incarceration are both enormously expensive and unjustified has brought us to a crucial moment where there is real opportunity for change. But there is a great deal of work to be done. The City Bar is excited about the momentum that is building behind this issue and we stand ready to assist.

Respectfully,

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October 5, 2015

Hon. Steve Israel
U.S. House of Representatives
2457 Rayburn HOB
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Israel:

The New York City Bar Association issued a report last week titled, “Mass Incarceration: Seizing the Moment for Reform,” calling on federal and state leaders to “make the reduction of mass incarceration a top priority.” (A copy of the report is enclosed.) Building on the bipartisan groundswell of support for criminal justice reform and the growing body of evidence pointing to the deleterious financial, social and economic effects of mass incarceration, the City Bar also announced the formation of a Mass Incarceration Task Force that will be made up of prosecutors, defense attorneys, judges, experts in re-entry issues for the formerly incarcerated, and other experts and criminal law practitioners to tackle the scourge of over-incarceration in the United States and to advocate for change on the federal, state and city levels.

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October 5, 2015

Hon. Hakeem Jeffries
U.S. House of Representatives
1607 Longworth House Office Building
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Jeffries:

The New York City Bar Association issued a report last week titled, “Mass Incarceration: Seizing the Moment for Reform,” calling on federal and state leaders to “make the reduction of mass incarceration a top priority.” (A copy of the report is enclosed.) Building on the bipartisan groundswell of support for criminal justice reform and the growing body of evidence pointing to the deleterious financial, social and economic effects of mass incarceration, the City Bar also announced the formation of a Mass Incarceration Task Force that will be made up of prosecutors, defense attorneys, judges, experts in re-entry issues for the formerly incarcerated, and other experts and criminal law practitioners to tackle the scourge of over-incarceration in the United States and to advocate for change on the federal, state and city levels.

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October 5, 2015

Hon. Peter T. King
U.S. House of Representatives
339 Cannon House Office Building
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative King:

The New York City Bar Association issued a report last week titled, “Mass Incarceration: Seizing the Moment for Reform,” calling on federal and state leaders to “make the reduction of mass incarceration a top priority.” (A copy of the report is enclosed.) Building on the bipartisan groundswell of support for criminal justice reform and the growing body of evidence pointing to the deleterious financial, social and economic effects of mass incarceration, the City Bar also announced the formation of a Mass Incarceration Task Force that will be made up of prosecutors, defense attorneys, judges, experts in re-entry issues for the formerly incarcerated, and other experts and criminal law practitioners to tackle the scourge of over-incarceration in the United States and to advocate for change on the federal, state and city levels.

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October 5, 2015

Hon. Carolyn Maloney
U.S. House of Representatives
2308 Rayburn House Office Building
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Maloney:

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October 5, 2015

Hon. Gregory Meeks
U.S. House of Representatives
2234 Rayburn HOB
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Meeks:

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October 5, 2015

Hon. Grace Meng
U.S. House of Representatives
1317 Longworth HOB
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Meng:

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October 5, 2015

Hon. Jerrold Nadler
U.S. House of Representatives
2109 Rayburn HOB
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Nadler:

The New York City Bar Association issued a report last week titled, “Mass Incarceration: Seizing the Moment for Reform,” calling on federal and state leaders to “make the reduction of mass incarceration a top priority.” (A copy of the report is enclosed.) Building on the bipartisan groundswell of support for criminal justice reform and the growing body of evidence pointing to the deleterious financial, social and economic effects of mass incarceration, the City Bar also announced the formation of a Mass Incarceration Task Force that will be made up of prosecutors, defense attorneys, judges, experts in re-entry issues for the formerly incarcerated, and other experts and criminal law practitioners to tackle the scourge of over-incarceration in the United States and to advocate for change on the federal, state and city levels.

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October 5, 2015

Hon. Kathleen Rice
U.S. House of Representatives
1508 Longworth H.O.B.
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Rice:

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October 5, 2015

Hon. Nydia Velazquez
U.S. House of Representatives
2302 Rayburn House Office Building
Washington, DC 20515

Re: Statement on Mass Incarceration

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Hon. Lee Zeldin
U.S. House of Representatives
1517 Longworth House Office Building
Washington, DC 20515

Re: Statement on Mass Incarceration

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Hon. Charles B. Rangel
U.S. House of Representatives
2354 Rayburn HOB
Washington, DC 20515

Re: Statement on Mass Incarceration

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Debra L. Raskin

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

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October 5, 2015

Hon. Joseph Crowley
U.S. House of Representatives
1436 Longworth House Office Building
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Crowley:

The New York City Bar Association issued a report last week titled, “Mass Incarceration: Seizing the Moment for Reform,” calling on federal and state leaders to “make the reduction of mass incarceration a top priority.” (A copy of the report is enclosed.) Building on the bipartisan groundswell of support for criminal justice reform and the growing body of evidence pointing to the deleterious financial, social and economic effects of mass incarceration, the City Bar also announced the formation of a Mass Incarceration Task Force that will be made up of prosecutors, defense attorneys, judges, experts in re-entry issues for the formerly incarcerated, and other experts and criminal law practitioners to tackle the scourge of over-incarceration in the United States and to advocate for change on the federal, state and city levels.

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October 5, 2015

Hon. Jose E. Serrano
U.S. House of Representatives
2227 Rayburn HOB
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Serrano:

The New York City Bar Association issued a report last week titled, “Mass Incarceration: Seizing the Moment for Reform,” calling on federal and state leaders to “make the reduction of mass incarceration a top priority.” (A copy of the report is enclosed.) Building on the bipartisan groundswell of support for criminal justice reform and the growing body of evidence pointing to the deleterious financial, social and economic effects of mass incarceration, the City Bar also announced the formation of a Mass Incarceration Task Force that will be made up of prosecutors, defense attorneys, judges, experts in re-entry issues for the formerly incarcerated, and other experts and criminal law practitioners to tackle the scourge of over-incarceration in the United States and to advocate for change on the federal, state and city levels.

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October 5, 2015

Hon. Eliot L. Engel
U.S. House of Representatives
2462 Rayburn HOB
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Engel:

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October 5, 2015

Hon. Nita M. Lowey
U.S. House of Representatives
2365 Rayburn HOB
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Lowey:

The New York City Bar Association issued a report last week titled, “Mass Incarceration: Seizing the Moment for Reform,” calling on federal and state leaders to “make the reduction of mass incarceration a top priority.” (A copy of the report is enclosed.) Building on the bipartisan groundswell of support for criminal justice reform and the growing body of evidence pointing to the deleterious financial, social and economic effects of mass incarceration, the City Bar also announced the formation of a Mass Incarceration Task Force that will be made up of prosecutors, defense attorneys, judges, experts in re-entry issues for the formerly incarcerated, and other experts and criminal law practitioners to tackle the scourge of over-incarceration in the United States and to advocate for change on the federal, state and city levels.

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October 5, 2015

Hon. Sean Patrick Maloney
U.S. House of Representatives
1529 Longworth House Office Building
Washington, DC 20515

Re: Statement on Mass Incarceration

Dear Representative Maloney:

The New York City Bar Association issued a report last week titled, “Mass Incarceration: Seizing the Moment for Reform,” calling on federal and state leaders to “make the reduction of mass incarceration a top priority.” (A copy of the report is enclosed.) Building on the bipartisan groundswell of support for criminal justice reform and the growing body of evidence pointing to the deleterious financial, social and economic effects of mass incarceration, the City Bar also announced the formation of a Mass Incarceration Task Force that will be made up of prosecutors, defense attorneys, judges, experts in re-entry issues for the formerly incarcerated, and other experts and criminal law practitioners to tackle the scourge of over-incarceration in the United States and to advocate for change on the federal, state and city levels.

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MASS INCARCERATION: SEIZING THE MOMENT FOR REFORM*

INTRODUCTION

The United States has the highest rate of incarceration in the world.¹ Our country has only 5% of the world's population, yet we incarcerate 25% of the world's prisoners. In real numbers, that statistic translates into 2.3 million people behind bars. There are currently five times as many people incarcerated now than there were in 1970.²

While no one doubts that incarceration is generally appropriate to protect society from those who commit violent offenses, it has, unfortunately, become the default remedy for a host of non-violent offenses in instances where other more effective remedies are available. While the adverse effects of this approach have been felt by many, our country's massive and reflexive use of incarceration as the solution to all criminal problems has had a disproportionate (and devastating) impact on African-American and Latino young men. African-Americans and Latinos collectively account for 30% of our population, but they represent 60% of our current inmates. The raw numbers are striking: approximately one in every 35 African-American men, and one in 88 Latino men is presently serving time behind bars (in contrast to one in 214 white men).³ Studies have also shown that our current levels of incarceration are shockingly expensive, costing taxpayers billions and billions of dollars each year. Over-incarceration has other extraordinarily damaging effects, including contributing to the poverty rate and long-term unemployment, and stigmatizing those who have served time in prison in numerous ways.

We believe that the United States is at a critical juncture in the debate about mass incarceration. This Report, on behalf of the New York City Bar Association, is intended to highlight this historic opportunity and to urge federal and state leaders to make the reduction of mass incarceration a top priority. Specifically, as explained in greater detail below, we recommend that:

* This report was developed by the Executive Committee of the New York City Bar Association after receiving extensive input from the City Bar committees with particular expertise in this area: Federal Courts, Criminal Justice Operations, Corrections and Community Reentry, Criminal Law, Criminal Advocacy, Criminal Courts, Civil Rights and White Collar Crime. The City Bar's thanks go to the following members who made significant contributions to the report: Matthew Bova, Ira Feinberg, Allegra Glashausser, Monica Hickey-Martin, Michael Miller, Victor Olds, Helen O'Reilly, Karen Seymour, MaryAnn Sung and Ona Wang. Special thanks go to John Savarese and his colleagues Carol Miller and Robinson Strauss at the law firm of Wachtell, Lipton, Rosen & Katz, for so expertly guiding this process.

- Congress and State legislatures repeal mandatory minimum sentencing provisions or, at least, reduce substantially the length of the terms these provisions mandate and the range of offenses to which they apply;
- Congress and State legislatures reduce substantially the sentences recommended by sentencing guidelines and similar laws for non-violent offenses;
- Congress and State legislatures expand significantly the alternatives to prison available to judges imposing sentences, including drug programs, mental health programs and job training programs and, in cases of incarceration, expand significantly the availability of rehabilitative services, including access to higher education, vocational training and substance abuse and mental health services, during and following incarceration so that individuals can successfully reenter society and avoid recidivism;
- Congress and State legislatures eliminate or reduce substantially financial conditions of pretrial release. Incarceration at the pretrial stage, even for a few days, has terrible downstream repercussions for individuals, disrupting lives and leading to a higher likelihood of further incarceration, for longer periods and also higher rates of rearrest;
- Congress and State legislatures provide opportunities for individuals with misdemeanor and non-violent felony convictions to seal those records to prevent employer discrimination; and
- the New York State Legislature should enact legislation to raise the age of juvenile jurisdiction from 16 to 18 years old.

With the enactment of these changes, our country's political leaders, sentencing judges, and law-enforcement authorities can take a long and desperately needed step toward reducing the dire consequences of mass incarceration.**

The New York City Bar Association has an extensive record of commenting upon and testifying about statutes, programs and policies relating to the reform of both the federal and the New York criminal justice systems. An Appendix to this Report summarizes the key recent reports and comments in this area by the City Bar, and reflects our long-standing support for legislative and other initiatives that will reduce over-incarceration, enhance the fairness of our criminal justice system, reduce racial disparities in sentencing, and, at the same time, protect public safety.

** This Report addresses the broader issues presented by mass incarceration and is not intended as a comprehensive analysis of all sentencing concerns that could be raised with respect to the entire range of criminal offenses.

I. Recent Bipartisan Efforts to Promote Reform Legislation

Bipartisan recognition has grown in recent years that our current levels of incarceration are both enormously expensive and unjustified. The criminal justice system has been estimated to cost taxpayers approximately \$260 billion a year currently; such spending has grown 400% over the past 30 years.⁴ Average annual cost per inmate has been estimated to be almost \$30,000 for federal inmates and approximately \$60,000 for New York State inmates.⁵ According to a recent study by the National Academy of Sciences, corrections spending has “outpaced budget increases for nearly all other key government services (often by wide margins), including education, transportation, and public assistance.”⁶

However, while the costs of mass incarceration soar, the benefits remain speculative and uncertain.⁷ Studies do not show any consistent relationship between incarceration rates and crime rates.⁸

At the federal level, Republicans, Democrats, and Independents are currently working together to promote reform legislation. In 2014 and in 2015, the “Smarter Sentencing Act” was introduced in the Senate and House, with strong bipartisan support.⁹ This bill would provide urgently needed reform of current mandatory minimum sentences for drug offenses, which represent a significant majority of all convictions carrying a mandatory minimum.¹⁰ The bill would (1) reduce mandatory minimum sentences for many drug offenses by half or more; (2) expand the availability of the “safety valve” so that more non-violent drug offenders may qualify for a sentence below the mandatory minimum; and (3) permit current federal prisoners to seek relief retroactively under the Fair Sentencing Act of 2010, which reduced the gross racial disparity in sentencing for cocaine-based or “crack” offenses.

Reforms such as the Smarter Sentencing Act would also save taxpayers billions of dollars. The Congressional Budget Office estimates that the Smarter Sentencing Act would lead to prison cost savings of approximately \$4 billion over 10 years, while the Department of Justice estimates potential prison cost savings as high as \$7.4 billion over 10 years and as much as \$24 billion over 20 years.¹¹

The Obama administration has made criminal justice reform and the problem of mass incarceration a top policy issue since at least 2013, when then-Attorney General Eric Holder announced initiatives for a “smarter” approach to crime and incarceration.¹² The Justice Department, for example, modified its charging policies so that low-level non-violent drug offenders will no longer necessarily be charged with the most serious crime that could be charged against them. Most recently, on July 14, President Obama gave a major speech during the NAACP’s annual convention on the moral and economic imperative to reduce the prison population. The President called for expanding opportunities for young men of color, easing mandatory minimum sentencing and restoring voting rights for offenders.¹³

Legislative activity has increased in recent months in an effort to reach an appropriate compromise package on reforms that can be sent to the President.¹⁴ For example, in late June, Representatives Jim Sensenbrenner (R-WI) and Bobby Scott (D-VA) introduced the “SAFE [Safe, Accountable, Fair, Effective] Justice Reinvestment Act of 2015” in the House of Representatives. With 39 bipartisan co-sponsors to date, this bill is modeled on reforms already enacted in certain

states. The bill offers a different approach to sentencing reform than the Smarter Sentencing Act: rather than reduce mandatory minimums by half, it would limit the application of mandatory minimums to only high level drug traffickers rather than low-level offenders.¹⁵ In addition, the bill would, among other things, expand eligibility for pre-judgment probation; promote greater use of probation for lower-level offenders; promote greater use of alternative drug courts, courts for veterans, mental health courts and similar programs; expand various programs designed to reduce recidivism through in-prison education and post-prison supervision; and create performance-based funding grants for states.

II. The Root Causes of Mass Incarceration

The increase in incarceration rates can be traced principally to two legal developments: (1) an increase in the number, and length, of prison sentences,¹⁶ and (2) an increase in sentencing ranges for violent and non-violent offenses, particularly as a result of the wide adoption, beginning in the 1970s, of mandatory sentencing laws.¹⁷ Taking discretion away from sentencing judges, these laws imposed mandatory minimums, often on first-time offenders, and required life sentences for certain recidivists.¹⁸ Other developments also played a significant role in the precipitous growth of the prison population, including parole abolition, and the widespread adoption of habitual offender and truth-in-sentencing laws.¹⁹

A substantial portion of the increase in incarceration since 1980 stems from incarceration for drug offenses. In federal prisons, for instance, 4,479 people were incarcerated for drug offenses in 1980, while 98,200 people were incarcerated for drug offenses in 2013 (more than a 2,000% increase).²⁰ Additionally, while drug offenders comprised about 20% of the federal prison population in 1980, they comprised about 50% of that population in 2013.²¹

The voting public has generally supported robust spending on prosecutions and incarceration,²² and politicians have regularly tapped into that support by attempting to portray themselves as “tough on crime.” There are low voter-turn-out rates among those hit hardest by mass incarceration—the poor, minorities, and the young.²³

Mass incarceration has also tended to benefit certain public and private employees, thus providing powerful financial incentives among some constituencies to press for continuation of these policies. On the public side, thousands of Americans work as corrections officers. This group lobbies politicians (through pressure and donations) for “tough on crime” policies²⁴ and provides significant electoral support for politicians who support high prosecution and incarceration rates.

On the private side, prison privatization has given some companies a strong economic interest in mass incarceration. For example, the Corrections Corporation of America (“CCA”), the largest private prison operator in America, operates 61 prison facilities (only the federal government and three state governments operate more facilities).²⁵

III. The Devastating Collateral Consequences of Mass Incarceration

At this moment in our country's history, there is an increasingly urgent interest in addressing the societal consequences of mass incarceration. As noted above, bipartisan federal legislation has garnered strong support from organizations across the political and ideological spectrum. The current focus is not only on the budgetary costs of incarceration, but also on the immense adverse social consequences -- particularly on African-American and Latino populations who have disproportionately borne the brunt of these policies. As noted above, African-American males are six times more likely to be incarcerated than white males and 2.5 times more likely than Hispanic males.²⁶ Even a short time in jail can have disastrous consequences. Thus, for example, recent studies have shown that pretrial detention, no matter how brief, can increase the likelihood of a future prison sentence, severely impact an individual's economic prospects, and promote the possibility of future criminal behavior.²⁷ The existing regime also stigmatizes those who have served prison time in numerous ways, again undermining the likelihood that these individuals will be able to rejoin their communities as positive, self-supporting members of society. A prison record is often a profound impediment to employment, thereby making it harder to avoid the dismal cycle of recidivism.²⁸

The mass incarceration issue has resulted in a rare consensus among most major 2016 Presidential candidates that action must be taken now to begin to address these problems. The long term effects on each adult who has been incarcerated are often devastating, from the immediate, such as loss of housing, to the long term, such as the loss of educational and employment opportunities, federal and state social welfare benefits and a voice at the ballot box.²⁹ And these effects are not limited to the incarcerated individual; they flow to the children, partners, spouses and families of those incarcerated as well, thereby multiplying the negative consequences of incarceration to a staggering percentage of the United States population.

There are significant obstacles standing in the way of addressing the collateral consequences of criminal convictions and incarceration. Among these are the devastating effect of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the Welfare Reform Law)³⁰ and the resistance to expanding eligibility for Pell grants, a form of federal educational financial aid, to those who are incarcerated.

The Welfare Reform Law bars anyone convicted of a federal or state drug-related crime from receiving federally funded food stamps (Supplemental Nutritional Assistance Program – SNAP) or cash assistance (Temporary Assistance to Needy Families - TANF) *for life*, regardless of whether the individual has completed his sentence, received clemency, overcome addiction or gone on to be a law-abiding member of society.³¹ The ban thus prevents those convicted of drug crimes from accessing the very safety net that can help them through their recovery and reentry into society, undermining efforts at rehabilitation. While certain states like New York have “opted-out” of the federal ban, many states continue to deny such benefits to those formerly incarcerated individuals.³²

The Federal Pell Grant program provides need-based grants for undergraduate and postgraduate education. The program is named for Senator Claiborne Pell, who stressed the importance of using education to reduce crime and noted that it “costs much less to educate a prisoner than it does to keep one behind bars.”³³ He lost that debate and prisoners were excluded

from eligibility for the grants as part of the Violent Crime Control and Law Enforcement Act of 1994.³⁴ President Obama recently announced that the U.S. Department of Education will pursue a pilot program to allow such grants for certain incarcerated individuals.³⁵

As the debate surrounding the loss of rights and benefits of those currently incarcerated and previously convicted continues, we should not lose sight of one of the four traditional goals of the criminal justice system: rehabilitation. It is in the interest of society, as well as of those convicted, that we remain closely focused on building programs that will preserve and extend this important purpose of punishment.

IV. The City Bar Supports the Efforts of Our Public Leaders

The New York City Bar Association applauds and supports the efforts of those officials who have taken the lead in raising concerns about, and calling for thoughtful reconsideration of, certain federal and New York state criminal policies. Former Attorney General Eric Holder's direction to federal prosecutors to refrain from using the 21 U.S.C. § 851 sentencing enhancement to induce guilty pleas, for example, is a constructive step towards reducing overzealous imposition of mandatory life sentences.³⁶ Further, the Justice Department's support of President Obama's commitment to grant clemency to certain nonviolent drug offenders is another valuable step towards redressing unduly harsh sentences imposed under the old regime.³⁷ The Southern District of New York's recent adoption of a pretrial pilot program for non-violent young adults, offering counseling and social services, which is aimed at reducing, deferring or dismissing the charges in appropriate cases, may also help reduce unnecessarily harsh sentences for young offenders.³⁸ This follows the establishment by the Eastern District of New York of two similar programs in 2000 and 2012 to provide alternatives to incarceration for non-violent criminal defendants.³⁹

A number of our local leaders have supported a clear message from the top and have implemented a number of valuable reforms. The City Bar praises the "Justice Reboot" initiative undertaken by Chief Judge Jonathan Lippman of the New York Court of Appeals and Mayor Bill de Blasio. This initiative will reduce case delays, cut the Rikers Island jail population and streamline the summons process.⁴⁰ Chief Judge Lippman also submitted legislation to the New York State legislature in 2013 that would create a presumption against requiring bail for defendants who are not a safety or flight risk.⁴¹ In early July, New York City announced that it will end the requirement of cash bail for low-level crimes.⁴² Manhattan District Attorney Cyrus A. Vance, Jr. has supported this change as a way to enhance fairness in the criminal justice system, and his office has agreed to provide most of the initial \$18 million for the new supervised release program.⁴³

The City Bar applauds Governor Cuomo for accepting a series of twelve recommendations made by his Council on Community Re-Entry and Reintegration which will address some of the employment, healthcare, and housing barriers that are routinely faced by the formerly incarcerated.⁴⁴ Further, the City Bar supports the work of Mr. Vance, along with that of Governor Cuomo, Chief Judge Lippman, Mayor de Blasio, Police Commissioner Bratton, and many state legislators, who have pushed to raise the age of criminal responsibility in New York to 18 instead of 16.⁴⁵ The City Bar also applauds the efforts of the New York State Legislature for its 2010 law making New York the first state in the nation to allow the vacatur of prostitution-related

convictions for survivors of sex-trafficking.⁴⁶ More than sixty women have had their records cleared in New York, and eighteen other states have now adopted similar statutes.⁴⁷

V. Looking Back and Looking Forward

Recognizing that mass incarceration is a devastating problem is only the beginning. Initiatives to address the issue must aim to ameliorate, to the extent possible, the harmful effects of past policies and practices, while also looking forward to meaningful reforms that will prevent similar missteps in the future.

We urge those in positions of authority to correct the mistakes of the past. For example, the President and the Governor should use their clemency powers to commute sentences that are simply far too long to fit the crime. When passing new common-sense criminal and sentencing laws, Congress and state legislatures should consider making these changes retroactive. While our court system has long placed great value on “finality,” this consideration must yield in the face of the massive numbers of people serving long sentences for no reason other than the lack of a mechanism to reconsider their case. On the federal side, we must reassess the possibility of reintroducing parole. While debating how to make our criminal laws better, we must not leave behind the many tens of thousands in our jails and prisons who could be released today without posing a threat to anyone.

Looking forward, the City Bar urges political leaders to make every effort to ensure that the mistakes of the past are not repeated. This perspective requires, among other things, that the legal system refrain from vesting prosecutors with sole, unreviewable authority to trigger enhanced sentences. It also means looking at the costs of incarceration, examining common-sense reforms such as those discussed above, and accepting that good ideas for criminal justice reform can come from unexpected sources. This Report outlines a few of the many good ideas that we believe will move us closer to lower rates of incarceration. However, there are many more such ideas that are worthy of serious consideration.

Whether we look back to fix the missteps of the past, or look forward to create better, smarter criminal justice laws and sanctions – one thing is clear: change requires political courage. We encourage all those with authority to make decisions to be courageous and bold in their reform efforts.

VI. Successful Initiatives

Consensus has been growing that it is possible – and necessary for our economy and society – to both reduce crime *and* reduce the level of incarceration.⁴⁸ Since 2000, many states have enacted reforms to achieve this goal, by focusing on alternatives to incarceration for non-violent offenders and parole violators.⁴⁹

In general, successful initiatives aimed at reducing mass incarceration have taken two forms – legislative and policy changes (most common) and, less commonly, impact litigation.⁵⁰ Several states have passed numerous legislative reforms over the years that have not only raised awareness of some of the issues surrounding mass incarceration, but have also resulted in the release of thousands of prisoners and successfully reduced the overall prison population.⁵¹

CONCLUSION

The current levels of incarceration in the United States were not achieved overnight and are not necessarily amenable to one overarching solution. It is clear, however, that maintaining the status quo is not an option. The problems caused by our current criminal justice policies are multi-faceted and will require multi-pronged, creative solutions to correct the inequities caused by the existing regime as well as thoughtful proposals for reform going forward. We urge federal and state leaders to take action to eliminate mandatory minimums, or at least reduce the length of those terms and limit the range of offenses to which they apply, thus returning more discretion to sentencing judges. We urge our leaders to take the necessary steps to substantially reduce the sentences recommended by sentencing guidelines and similar laws for non-violent offenses, significantly expand the range of alternatives to prison available to sentencing judges, and to provide opportunities to those convicted of certain offenses to seal the records of their convictions. We also urge federal and state leaders to eliminate or reduce substantially financial conditions of pretrial release, which can completely upend the lives of individuals and their families whether or not they are ever convicted of a crime, and to restore sorely needed rehabilitative services aimed at increasing the likelihood that those who have been incarcerated have a chance to successfully rejoin their communities as productive members of society. Finally, we believe it is time for New York to join the vast majority of states that have raised the age of juvenile jurisdiction from 16 to 18 years old, which will help reduce recidivism, be more cost-effective, and minimize the array of collateral consequences now faced by youths charged as adults.

We are encouraged by the heightened focus from both sides of the political spectrum on the problems associated with mass incarceration. In addition to enacting the specific reforms we have noted, we urge leaders in the field to experiment with new approaches to these problems and to remain open to innovative ways to address the profound effects on our society that the phenomenon of mass incarceration has caused.

We hope this Report will prompt further experimentation and promote the exchange of ideas. We also hope the City Bar will be a resource and clearinghouse for such initiatives and information. To that end, we will maintain on the City Bar's website a special section devoted to collecting and making available reports, legislative initiatives, data and other information relevant to the continuing debate on mass incarceration.

September 2015

ENDNOTES

- ¹ ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 (10th ed. 2013), available at http://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_10.pdf ; See also NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014), available at <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes> (noting the U.S. incarceration rate is “5 to 10 times higher than the rates in Western European and other liberal democracies”).
- ² Inimai Chettair, *Executive Summary* to DR. OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 3 & n.3 (2015) [hereinafter WHAT CAUSED THE CRIME DECLINE], available at https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf.
- ³ President Barak Obama, Remarks at the Annual NAACP Conference (July 14, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.
- ⁴ Inimai Chettiar, *A National Agenda to Reduce Mass Incarceration*, in SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE [hereinafter SOLUTIONS] 123, 124 & n.3 (Inimai Chettiar & Michael Waldman, eds., Brennan Ctr. for Justice, 2015), available at https://www.brennancenter.org/sites/default/files/analysis/Solutions_American_Leaders_Speak_Out_On_Criminal_Justice.pdf.
- ⁵ Notice, Bureau of Prisons, Annual Determination of Average Cost of Incarceration, 79 Fed. Reg. 26996 (May 12, 2014), available at <https://www.federalregister.gov/articles/2014/05/12/2014-10859/annual-determination-of-average-cost-of-incarceration> (the average cost of incarceration for Federal inmates in Fiscal Year 2013 was \$29,291.25); VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10 (Jan. 2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf> (\$60,076 average annual cost per N.Y. inmate).
- ⁶ NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, *supra* note 1, at 314; Press Release, The National Academies of Sciences, Engineering, and Medicine, U.S. Should Significantly Reduce Rate of Incarceration; Unprecedented Rise in Prison Population ‘Not Servicing the Country Well,’ Says New Report (Apr. 30, 2014), available at <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=18613> (noting the “negative social consequences and burdensome financial costs” from high incarceration rates).
- ⁷ *Id.* at 337 (“The incremental deterrent effect of increases in lengthy prison sentences is modest at best.”); WHAT CAUSED THE CRIME DECLINE, *supra* note 2, at 7 (“This report finds that incarceration in the U.S. has reached a level where it no longer provides a meaningful crime reduction benefit.”). See also Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xii-xiii (2015), available at http://georgetownlawjournal.org/files/2015/06/Kozinski_Preface.pdf (“We may be spending scarce taxpayer dollars maintaining the largest prison population in the industrialized world, shattering countless lives and families, for no good reason.”).
- ⁸ See WHAT CAUSED THE CRIME DECLINE, *supra* note 2, at 7 & tbl. 2; SOLUTIONS, *supra* note 4, at 1 (“Paradoxically, letting certain people out of jail, or never putting them there in the first place may be the best thing we can do to make our country safer.”).
- ⁹ Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2014); Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015); Smarter Sentencing Act of 2015, H.R. 920, 114th Cong. (2015). To date, the Senate bill has 12 co-sponsors and the House bill has 55 co-sponsors. There is also broad support for the bill among disparate constituencies and organizations, including law enforcement organizations, taxpayer advocacy organizations, civil rights organizations, and religious organizations.
- ¹⁰ See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 122 & tbl. D-2 (Oct. 2011), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal->

[criminal-justice-system](#) (showing over 77% of defendants convicted of an offense carrying a mandatory minimum penalty were convicted of a drug trafficking offense in fiscal year 2010).

¹¹ Press Release, Sen. Mike Lee, According to CBO, Smarter Sentencing Bill Would Reduce Prison Costs by More Than \$4 Billion (Sept. 15, 2014), available at <http://www.lee.senate.gov/public/index.cfm/2014/9/release-lee-durbin-according-to-cbo-smarter-sentencing-bill-would-reduce-prison-costs-by-more-than-4-billion>.

¹² Eric Holder, Attorney Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

¹³ See President Barack Obama, *supra* note 3; Bryon Tau, *Obama Decries 'Mass Incarceration' in Call for Prisons Overhaul*, WALL ST. J., July 14, 2015, available at <http://www.wsj.com/articles/obama-decries-mass-incarceration-in-call-for-prisons-overhaul-1436917797>.

¹⁴ Justin Sink, *Obama to Push U.S. Sentencing Change Backed by Koch Brothers*, BLOOMBERG BNA, July 10, 2015, available at <http://www.bloomberg.com/politics/articles/2015-07-10/cost-of-vast-u-s-prison-population-allies-obama-and-republicans?cmpid=yhoo>.

¹⁵ H.R. 2944, 114th Cong. (2015). The bill would also modestly expand the “safety valve” provision and provide retroactive relief under the Fair Sentencing Act.

¹⁶ For instance, since 1970, 2.2 million individuals were convicted of a felony or misdemeanor in New York. Approximately “90% of these individuals committed misdemeanors or non-violent felonies.” NEW YORK CITY BAR, REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE, THE CRIMINAL JUSTICE OPERATIONS COMMITTEE, THE CORRECTIONS AND COMMUNITY REENTRY COMMITTEE AND THE CRIMINAL ADVOCACY COMMITTEE: THIS BILL IS APPROVED WITH SUGGESTED MODIFICATIONS 2 & n.3 (July 2015), available at <http://www2.nycbar.org/pdf/report/uploads/20072824-ReportonA.7030S.5169reSealingMisdemeanorFelonyRecords.pdf>. (citing data provided by the New York Department of Criminal Justice Services).

¹⁷ See, e.g., Press Release, The Pew Charitable Trusts, New Pew Study Finds 36 Percent Increase in Prison Time Served (June 6, 2012), available at <http://www.pewtrusts.org/en/about/news-room/press-releases/0001/01/01/new-pew-study-finds-36-percent-increase-in-prison-time-served> (explaining that from 1992 through 2009, average prison sentences increased by 36% with the highest increase in Florida at 166%); Judge Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison*, THE NATION, Oct. 24, 2012, available at <http://www.thenation.com/article/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri/>.

¹⁸ For a comprehensive discussion of the impact of federal mandatory minimums, particularly their interaction with the sentencing guideline system, see U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, *supra* note 10.

¹⁹ See NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, *supra* note 1, at 74-85.

²⁰ THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 3 (updated Apr. 2015), available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

²¹ *Id.* at 2.

²² A 2010 poll asked people how they felt about the following statement: “It does not matter how much it costs to lock up criminals, we should pay whatever it takes to make sure our communities are safe.” 63% agreed with that statement, and 40% “strongly agreed.” 45% also agreed that “parole and probation are just a slap on the wrist and not a substitute for prison.” PUBLIC OPINION STRATEGIES & BENENSON STRATEGY GROUP, NATIONAL RESEARCH OF PUBLIC ATTITUDES ON CRIME AND PUNISHMENT 4 (Sept. 2010), available at <http://www.saferfoundation.org/files/documents/Pew%20Center%20-%20Public%20Survey%20Prison%20Pop.pdf>.

²³ See Bernadette Rabuy & Daniel Kopf, PRISON POLICY INITIATIVE, PRISONS OF POVERTY: UNCOVERING THE PRE- INCARCERATION INCOMES OF THE IMPRISONED (July 2015), available at

<http://www.prisonpolicy.org/reports/income.html>; E. Ann Carson, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 (Sept. 2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>; NONPROFIT VOTE, AMERICA GOES TO THE POLLS, VOTER PARTICIPATION GAPS IN THE 2012 PRESIDENTIAL ELECTION (2013), available at <http://www.nonprofitvote.org/new-report-on-turnout-gaps-in-2012-election/> (explaining that from 2000 through 2012, there was a 15 to 21 point gap between the turn-out rates of those making less than 50,000 and those making more than 75,000, and a 16 to 25 point gap between turn-out rates of those who were 18-29 and those who were over 30); Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote?*, THE ATLANTIC (Jan. 10, 2014), available at <http://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/>; PEW RESEARCH CTR., WHO VOTES, WHO DOESN'T, AND WHY: REGULAR VOTERS, INTERMITTENT VOTERS, AND THOSE WHO DON'T (2006), available at <http://www.people-press.org/2006/10/18/who-votes-who-doesnt-and-why/>.

²⁴ See Mike Riggs, *Public Sector Prison Unions Spending Almost as Much on Campaigns as Private Prison Companies*, REASON.COM, Aug. 22, 2012, available at <http://reason.com/blog/2012/08/22/what-does-it-mean-that-public-sector-pri>.

²⁵ CCA, CCA's Nationwide System of Correctional Centers, available at <http://www.cca.com/locations>.

²⁶ E. Ann Carson, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 8 & tbl. 8 (Sept. 2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf> (providing imprisonment rate of sentenced state and federal prisoners by sex, race, Hispanic origin, and age).

²⁷ See RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (Feb. 2015) available at http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report_02.pdf. See also Nick Pinto, *The Bail Trap*, N.Y. TIMES, Aug. 13, 2015, available at <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> (“The long-term damage that bail inflicts on vulnerable defendants extends well beyond incarceration. Disappearing into the machinery of the justice system separates family members, interrupts work and jeopardizes housing.”)

²⁸ See Eric Holder, Attorney Gen., Keynote Address at the Brennan Center for Justice: Shifting Law Enforcement Goals to Reduce Mass Incarceration (Sept. 23, 2014), available at <https://www.brennancenter.org/analysis/keynote-address-shifting-law-enforcement-goals-to-reduce-mass-incarceration> (“[F]or far too long – under well-intentioned policies designed to be “tough” on criminals – our system has perpetuated a destructive cycle of poverty, criminality, and incarceration that has trapped countless people and weakened entire communities – particularly communities of color.”). In an unprecedented decision, U.S. District Court Judge John Gleeson recently expunged a 14-year-old fraud conviction of a woman who claimed her criminal record caused undue employment difficulties. Judge Gleeson noted the “growing recognition that the adverse employment consequences of old convictions are excessive and counter-productive.” *Doe v. U.S.*, No. 14-MC-1412, --- F.Supp.3d --- (E.D.N.Y. May 21, 2015), available at <https://img.nyed.uscourts.gov/files/opinions/14mc1412d05212015.pdf> (“Doe’s case highlights the need to take a fresh look at policies that shut people out from the social, economic, and educational opportunities they desperately need in order to reenter society successfully.”).

²⁹ See, e.g., THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY (2010), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pca_assets/2010/CollateralCosts1.pdf.pdf; John Tierney, *Prison and the Poverty Trap*, N.Y. TIMES, Feb. 18, 2013, available at <http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html?pagewanted=all>.

³⁰ Pub. L. No. 104-93, 110 Stat. 2105 (1996).

³¹ See Marc Mauer & Virginia McCalmont, THE SENTENCING PROJECT, A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS (rev. 2014), available at http://sentencingproject.org/doc/publications/cc_A%20Lifetime%20of%20Punishment.pdf.

³² *Id.* at 2.

³³ Beth Schwartsapfel, *Obama Is Reinstating Pell Grants For Prisoners: But will politics eventually trump cost and data?* THE MARSHALL PROJECT, July 30, 2015, available at <https://www.themarshallproject.org/2015/07/30/obama-is-reinstating-pell-grants-for-prisoners>; 140 Cong. Rec. S1,275-76 (daily ed. Feb. 9, 1994) (statement of Sen. Claiborne Pell), available at <http://www.gpo.gov/fdsys/pkg/CREC-1994-02-09/html/CREC-1994-02-09-pt1-PgS28.htm>.

³⁴ Pub. L. 103-322, § 20411, 108 Stat. 1796 (1994). *See also* Lois M. Davis et al., RAND CORP., HOW EFFECTIVE IS CORRECTIONAL EDUCATION, AND WHERE DO WE GO FROM HERE?: THE RESULTS OF A COMPREHENSIVE EVALUATION 66, 80 (2014), *available at*

http://www.rand.org/content/dam/rand/pubs/research_reports/RR500/RR564/RAND_RR564.pdf (noting nearly half of existing postsecondary education programs within correctional facilities were closed following the 1994 legislation, and suggesting their research indicates reinstatement of Pell Grant eligibility “may have a substantial effect in expanding postsecondary opportunities for state prisoners”).

³⁵ Press Release, U.S. Dept. of Education, U.S. Department of Education Launches Second Chance Pell Pilot Program for Incarcerated Individuals (July 31, 2015), *available at* <http://www.ed.gov/news/press-releases/us-department-education-launches-second-chance-pell-pilot-program-incarcerated-individuals>.

³⁶ Memorandum from Attorney Gen. Eric Holder to Dept. of Justice Attorneys, Guidance Regarding § 851 Enhancements In Plea Negotiations (Sept. 24, 2014), *available at* <http://www.fd.org/docs/select-topics/sentencing-resources/memorandum-to-all-federal-prosecutors-from-eric-h-holder-jr-attorney-general-on-851-enhancements-in-plea-negotiations.pdf?sfvrsn=6>.

³⁷ Press Release, U.S. Dept. of Justice, Attorney General Holder: Justice Department Set to Expand Clemency Criteria, Will Prepare for Wave of Applications from Drug Offenders in Federal Prison (Apr. 21, 2014), *available at* <http://www.justice.gov/opa/pr/attorney-general-holder-justice-department-set-expand-clemency-criteria-will-prepare-wave>.

³⁸ Notice to the Bar, S.D.N.Y. Office of the District Court Executive, SDNY Young Adult Opportunity Program (Aug. 17, 2015), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=notice_bar&id=383.

³⁹ Second Report to the Board of Judges, Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program, E.D.N.Y., U.S. Pretrial Services Agency, (Aug. 2015), *available at* https://img.nyed.uscourts.gov/files/local_rules/ATI.EDNY_SecondReport.Aug2015.pdf.

⁴⁰ Press Release, Office of the Mayor of New York City, Mayor de Blasio and Chief Judge Lippman Announce Justice Reboot, an Initiative to Modernize the Criminal Justice System (Apr. 14, 2015), *available at* <http://www1.nyc.gov/office-of-the-mayor/news/235-15/mayor-de-blasio-chief-judge-lippman-justice-reboot-initiative-modernize-the>.

⁴¹ Hon. Jonathan Lippman, The State of the Judiciary 2013 (Feb. 5, 2013), *available at* <https://www.nycourts.gov/ctapps/news/SOJ-2013.pdf> (“More than simply being unfair, incarcerating indigent defendants for no other reason than that they cannot meet even a minimum bail amount strips our justice system of its credibility and distorts its operation.”).

⁴² Rick Rojas, *New York City to Relax Bail Requirements for Low-Level Offenders*, N.Y. TIMES, July 8, 2015, *available at* <http://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html>.

⁴³ Andrew Keshner, *City, DA Pledge \$17.8 Million to Expand Supervised Release*, N.Y.L.J., July 9, 2015, *available at* <http://www.newyorklawjournal.com/id=1202731598195/City-DA-Pledge-178-Million-to-Expand-Supervised-Release>.

⁴⁴ Press Release, Office of the Governor of New York, Governor Cuomo Announces Executive Actions to Reduce Barriers for New Yorkers with Criminal Convictions (Sept. 21, 2015), *available at* <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-reduce-barriers-new-yorkers-criminal-convictions>. As announced this week, Governor Cuomo committed his administration to fully implement and enforce the twelve solution-oriented recommendations, including the adoption of a “fair chance hiring” policy for competitive New York State agency positions and the creation of uniform guidelines to evaluate applicants for state occupational licenses.

⁴⁵ *See* Jeff Storey, *Raise-the-Age Movement Gains Momentum*, N.Y.L.J., Mar. 24, 2015, *available at* <http://www.newyorklawjournal.com/id=1202721365483/RaisetheAge-Movement-Gains-Momentum>; FINAL REPORT OF THE GOVERNOR’S COMMISSION ON YOUTH, PUBLIC SAFETY AND JUSTICE: RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM IN NEW YORK STATE (2015), *available at* <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReportofCommissionYouthPublicSafetyandJus>

[tice 0.pdf](#). New York is only one of two states that prosecutes all youths as adults once they turn 16. See RAISE THE AGE NEW YORK, GET THE FACTS, available at <http://raisetheagency.com/get-the-facts>.

⁴⁶ Act of Aug. 13, 2010, ch. 332, 210 McKinney's Sess. Laws of N.Y. 1083 (codified at N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney Supp. 2015)).

⁴⁷ Edna Ishayik, *Law Helps Those Who Escape Sex Trafficking Erase Their Criminal Record*, N.Y. Times, Mar. 23, 2015, available at <http://www.nytimes.com/2015/03/24/nyregion/law-helps-those-who-escape-sex-trafficking-shed-its-stigma-too.html>.

⁴⁸ See Chettiar, *supra* note 2, at 124.

⁴⁹ *Id.* at 124, 128; see also, e.g., Kamela D. Harris, Attorney Gen. of California, *Shut the Revolving Door of Prison*, in SOLUTIONS 37, 38-40; Marc Levin, Founder and Policy Director of Right on Crime and Director of the Center for Effective Justice at the Texas Public Policy Foundation, *A System that Rewards Results*, in SOLUTIONS 67, 68.

⁵⁰ Impact litigation is used rarely, but can be helpful in raising public awareness of issues that can in turn sway legislators to make appropriate legislative changes. As an example, in Alabama, which has one of the highest incarceration rates in the country, impact litigation has tended to be on two fronts – to challenge laws resulting in overly draconian re-incarceration of parolees (for example, for technical, non-violent parole violations), and also to seek shorter paths to parole for certain classes of offenders in special circumstances.

⁵¹ For a comprehensive survey of recently enacted legislative reforms at the state level, see RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, RECALIBRATING JUSTICE: A REVIEW OF 2013 STATE SENTENCING AND CORRECTIONS TRENDS 4, 15 (July 2014) available at <http://www.vera.org/sites/default/files/resources/downloads/state-sentencing-and-corrections-trends-2013-v2.pdf> (noting that between “2006 and 2012, 19 states reduced their prison population” and categorizing various policy changes such as the implementation by several states of “mechanisms for the safe, earlier release of offenders.”). For example, in 2007 Texas enacted a series of reforms, including the establishment of additional substance abuse treatment centers, pretrial diversion programs and an overhaul of the juvenile corrections system, which have resulted in a substantial decrease in both the incarceration rate and the overall crime rate. See Reid Wilson, *Tough Texas Gets Results by Going Softer on Crime*, WASH. POST, Nov. 27, 2014, available at <http://www.washingtonpost.com/blogs/govbeat/wp/2014/11/27/tough-texas-gets-results-by-going-softer-on-crime/>; Ken Cuccinelli, *Texas Shows How to Reduce Both Incarceration and Crime*, NATIONAL REVIEW, May 18, 2015, available at <http://www.nationalreview.com/article/418510/texas-shows-how-reduce-both-incarceration-and-crime-ken-cuccinelli>. California's reforms have also achieved notable reductions in the prison population. In November 2014, the state passed Proposition 47 (the Reduced Penalties for Some Crimes Initiative), which reduces certain non-violent felonies to misdemeanors. These changes involve mostly crimes involving property valued at under \$1000 but also include charges of personal illegal drug use. Although relatively new, Proposition 47 has resulted in the release of more than 2,700 inmates after their felony convictions were reduced to misdemeanors. See Melody Gutierrez, *California Prisons Have Released 2,700 Inmates Under Prop. 47*, SFGATE, Mar. 6, 2015, available at <http://www.sfgate.com/crime/article/California-prisons-have-released-2-700-inmates-6117826.php>. The measure is expected to save California between \$100 and \$200 million. Passed in 2012, Proposition 36, modifying elements of the Three Strikes Law, provides that a third strike (third felony conviction) can result in a life sentence only when the new felony conviction is “serious or violent.” The bill also authorized retroactive relief/sentencing under which approximately 2000 prisoners have been released. The combined impact of Propositions 47 and 36 has been to drive down state prison and jail populations without significantly increasing the state's overall crime rate. See Jessica Eaglin, *California Quietly Continues to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUSTICE, Feb. 17, 2015, available at <https://www.brennancenter.org/blog/california-quietly-continues-reduce-mass-incarceration>.

APPENDIX

Over the last twenty years, the City Bar has been a key voice on the criminal justice issues implicated by the rising rate of incarceration and the post-release difficulties facing those who have served time in prison. Set forth below are summaries of the recent reports and comments in this area.

- **June 1994 — Mandatory Minimum Sentences.** In a 1994 letter addressed to Congressman Jack Brooks, the Criminal Law Committee advocated for reduced mandatory minimums for low-level drug couriers and sellers with no significant criminal records, no involvement in violence, and no significant role in any substantial drug operation.¹
- **1996 — Bail Reform.** In 1996, the City Bar's Criminal Courts Committee and Corrections and Community Entry Committee issued a report opposing amendments to New York's statutory bail regime that would, among other things, run counter to the presumption in favor of release in the least restrictive conditions.²
- **January 2000 — Rockefeller and Predicate Felony Drug Laws.** In a letter addressed to Speaker Sheldon Silver, City Bar President Michael A. Cooper advocated for reform of the Rockefeller and predicate felony drug laws, including restoring sentencing discretion to trial judges in most or all drug cases, making those sentencing changes retroactive, reducing minimum prison terms for lower level drug related offenses, and expanding funding for alternatives to incarceration.³
- **November 2008 — Sealing of Drug Convictions.** The City Bar's Criminal Law Committee supported the conditional sealing of certain drug convictions in a 2008 report. It reasoned that such sealing would allow citizens of New York State the opportunity to secure housing, employment, education, and vocational training that would otherwise be unavailable by virtue of convictions.⁴
- **July 2013 — Bail Reform.** In a July 2013 report, the Criminal Courts Committee and the Corrections and Community Reentry Committee advocated against the passage of Bill A.6799/S.4483 because it would permit New York judges to set a prohibitively high bail and/or preventively detain an accused without constitutionally required procedural safeguards.⁵
- **January 2014 — Parole.** The Corrections and Community Reentry Committee drafted a letter in January 2014 to the Counsel of the Department of Corrections and Community Supervision, advocating for improving the procedures of the state's Parole Board. The Committee urged the Parole Board to place greater emphasis on individuals' ability to reenter society; such an analysis would focus on their accomplishments while incarcerated and evidence-based assessments of their re-entry risk. Ultimately, beyond allowing ex-offenders the opportunity to reintegrate, that approach would also likely result in significant savings by reducing inmate population.⁶

- **February 2015 — Employment Discrimination Against Individuals With Criminal Records.** The Civil Rights Committee of the City Bar has long promoted equal employment opportunities for applicants with criminal records in order to allow more New Yorkers to successfully reenter the workforce. In February 2015, the City Bar released a report supporting amending the NYC Administrative Code to prohibit discrimination based upon arrest record or criminal conviction and to “ban the box.”⁷ On June 11, 2015, the New York City Council passed the “Ban the Box” bill, under the Fair Chance Act, restricting use of criminal records in hiring. (The “box” refers to the box to be checked on job applications that ask the applicant if he or she has been convicted of a crime). The Act will prohibit employers from inquiring into applicants’ criminal histories until later in the hiring process where such information would be less likely to lead to unlawful discrimination.
- **March 2015 — Juveniles and the Justice System.** The City Bar has urged increasing the age of juvenile jurisdiction from 16 to 18 years old, as is the law in the vast majority of states. In a 2015 report titled, “Raising the Age of Criminal Responsibility,” the City Bar noted “that raising the age will reduce recidivism; that adult jails are dangerous for youth; that alternatives to incarceration are a more effective and cost-efficient way to reduce youth recidivism than detention and incarceration; that youth charged as adults face an array of collateral consequences that prevent them from moving forward with their lives; and that raising the age will help to reduce racial and ethnic disparities in our criminal justice system.”⁸
- **June 2015 — Mandatory Minimum Sentences.** Since 1994, the City Bar continued to voice opposition to mandatory minimum sentences. These sentences: (1) limit the discretion of district court judges in favor of a “one-size-fits-all” approach that frequently results in unduly harsh and unjust sentences, particularly for drug offenses; and (2) have resulted in enormous growth of the federal prison population and the exacerbation of racial disparities in the treatment of federal offenders. In a June 2015 letter to the Chairs and Ranking Members of the Senate and House Judiciary Committees, the City Bar expressed support for the Smarter Sentencing Act. The Act would reduce mandatory minimum sentences for many drug offenses by 50-60% and would ultimately reduce prison overcrowding and prison costs.⁹
- **July 2015 — Sealing Misdemeanor and Non-Violent Felony Convictions.** In a July 2015 City Bar report, the Criminal Courts Committee, the Criminal Justice Operations Committee, the Corrections and Community Reentry Committee and the Criminal Advocacy Committee expressed support for bill A.7030/S.5169, which proposed additional opportunities for individuals with misdemeanor and felony records in New York State to seal those records in order to prevent the likelihood of employment discrimination. Similar to their endorsement of the “Ban the Box” bill in February 2015, the Committees demonstrated that the bill would enhance employment opportunities for individuals with criminal histories, promote fairness, preserve public safety, and undermine recidivism.¹⁰

ENDNOTES TO APPENDIX

¹ Letter from John J. Kenney, Chair, Comm. on Criminal Law, New York City Bar, to Rep. Jack Brooks, Re: Violent Crime Control and Law Enforcement Act (June 2, 1994), *available at* <http://www2.nycbar.org/pdf/report/uploads/LettertoCongressreViolentCrimeControlandLawEnforcementAct1994.pdf>.

² NEW YORK CITY BAR, REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE AND THE CORRECTIONS AND COMMUNITY REENTRY COMMITTEE, A.6799/S.4483: THIS BILL IS OPPOSED 2 (July 2013), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072490-BailLegislation.pdf>.

³ Letter from Michael A. Cooper, President, New York City Bar, to Hon. Sheldon Silver (Jan. 4, 2000), *available at* <http://www2.nycbar.org/pdf/report/uploads/LettertoAssemblySpeakerSilver2000.pdf>.

⁴ NEW YORK CITY BAR, REPORT ON LEGISLATION BY THE COMMITTEE ON CRIMINAL LAW, A.4552: THIS BILL IS APPROVED (Nov. 2008), *available at* http://www.nycbar.org/pdf/report/A_4552_Memo.pdf.

⁵ NEW YORK CITY BAR, REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE AND THE CORRECTIONS AND COMMUNITY REENTRY COMMITTEE: THIS BILL IS OPPOSED (July 2013), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072490-BailLegislation.pdf>.

⁶ Letter from Allegra Glashauser, Chair, Corrections and Community Reentry Comm., New York City Bar, to Terrence X. Tracy, Dept. of Corrections and Supervision, Bd. of Parole, Re: Comments re: Notice of Proposed Rule Making, 9 NYCRR, Part 8001 and Sections 8002.1(a) and (b), 8002.2(a) and 8002.3 (Jan. 23 2014), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072648-CommentonParoleBoardsProposedRegulations.pdf>.

⁷ NEW YORK CITY BAR, REPORT ON LEGISLATION BY THE CIVIL RIGHTS COMMITTEE AND CORRECTIONS AND COMMUNITY REENTRY COMMITTEE, INT. 0318-2014: THIS BILL IS APPROVED (Feb. 2015), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072855-EmploymentDiscriminationArrestRecord.pdf>.

⁸ NEW YORK CITY BAR, REPORT ON LEGISLATION: RAISING THE AGE OF CRIMINAL RESPONSIBILITY (Mar. 2015), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072872-RaisingtheAgeofCriminalResponsibility.pdf>.

⁹ Letter from Ira M. Feinberg, Chair, Federal Courts Comm., New York City Bar, to the Chairs and Ranking Members of the Senate and House Judiciary Comms., Re: The “Smarter Sentencing Act,” (June 4, 2015), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072921-LetterreSmarterSentencingActdatedJune420152.pdf>.

¹⁰ NEW YORK CITY BAR, REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE, THE CRIMINAL JUSTICE OPERATIONS COMMITTEE, THE CORRECTIONS AND COMMUNITY REENTRY COMMITTEE AND THE CRIMINAL ADVOCACY COMMITTEE, A7030/S5169: THIS BILL IS APPROVED WITH SUGGESTED MODIFICATIONS (July 2015), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072824-ReportonA.7030S.5169reSealingMisdemeanorFelonyRecords.pdf>.