



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
CORRECTIONS AND COMMUNITY REENTRY**

The Committee on Corrections and Community Reentry (the “Committee”) of the New York City Bar Association (the “Association”) respectfully submits the following recommendations to the Trump Administration. The Association is a 147-year-old organization of over 24,000 lawyers, advocates, and judges dedicated to improving the administration of justice. Committee members include prosecutors, public defenders, attorneys in private practice, and public policy professionals. We share a commitment to sound policy and the just application of laws related to incarceration and reentry into mainstream society. In this spirit, we make the following three recommendations.

**I. CONTINUE EFFORTS TO LIMIT SOLITARY CONFINEMENT IN
FEDERAL, STATE AND LOCAL FACILITIES**

We urge your administration to take action to reduce the inhumane and counter-productive use of solitary confinement in federal, state, and local facilities. Specifically, your administration should: 1) limit the use of solitary confinement and create alternatives in federal prisons operated by the Bureau of Prisons and immigration authorities; 2) establish best practices and provide funding for limiting the use of solitary confinement and creating alternatives in states and localities; and 3) ensure transparency and oversight of federal, state, and local facilities.

Solitary confinement has never been shown to reduce prison violence. In fact, several state prison systems, including those in Maine, Mississippi, and Colorado, have significantly reduced the number of people in solitary confinement while seeing prison violence *decrease*. A decrease in prison violence means fewer injuries to correction officers and incarcerated people alike.

The sensory deprivation, lack of normal human interaction, and extreme idleness of solitary confinement have been proven to lead to intense suffering and physical and psychological damage.¹ Isolation has been shown to create mental health problems, or exacerbate

¹ See, e.g., Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, Journal of Law & Policy, Vol. 22:325 (2006), available at: http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law_journal_law_policy (“Psychiatric Effects of Solitary”); Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement*, 49 Crime & Delinq. 124 (Jan. 2003), available at: <http://www.supermaxed.com/NewSupermaxMaterials/Haney-MentalHealthIssues.pdf>; Stuart Grassian and Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, Correctional Mental Health Report, Vol. 13, No. 1 (May/June 2011); Sruthi Ravindran, *Twilight in the Box: The suicide statistics, squalor & recidivism haven’t ended solitary confinement. Maybe the brain studies will,*

pre-existing ones,² and increase the risk of suicide and self-harm. A recent study in New York City jails found that people who were held in solitary confinement were nearly seven times more likely to harm themselves and more than six times more likely to commit potentially fatal self-harm than their counterparts in general confinement.³ The National Commission on Correctional Health Care recently re-examined its guidelines on isolation and concluded that isolation in excess of 15 consecutive days “is cruel, inhumane, and degrading treatment, and harmful to an individual's health” and also further concluded that “[j]uveniles, mentally ill individuals, and pregnant women should be excluded from solitary confinement of any duration.”⁴

In light of the psychological damage solitary confinement inflicts, it is troubling to consider that many states and localities release people from long stays in solitary confinement directly to the streets when their time is up. People who have been subjected to solitary confinement have a higher rate of re-offending than their counterparts in general confinement. Clearly, public safety is not being served by the status quo.

In 2016 the U.S. Department of Justice (“DOJ”) completed a comprehensive analysis of restrictive housing in federal and state facilities and proposed a series of “Guiding Principles” to limit the use of such confinement. The DOJ concluded in its Executive Summary, “as a matter of policy, we believe strongly this practice should be used rarely, applied fairly, and subjected to reasonable constraints.”⁵

II. REMOVE CANNABIS FROM SCHEDULE I OF THE CONTROLLED SUBSTANCES ACT

We urge you to order the Drug Enforcement Administration (“DEA”) to remove cannabis (also known as marijuana) from Schedule I of the Controlled Substances Act. Cannabis should be an unlisted substance, and the DEA and other federal agencies should develop a regulatory scheme similar to the use regulation of alcohol and tobacco.

The tide is turning toward legalizing cannabis. A nationwide Gallup poll released last October showed 60 percent of respondents supporting legal use.⁶ Before the last election, four

Neon Magazine, Feb. 27, 2014, available at: <http://neon.co/magazine/living-together/what-solitary-confinement-does-to-the-brain/>; Joseph Stromberg, *The Science of Solitary Confinement*, Smithsonian Magazine, Feb. 19, 2014, available at: <http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/#.Uwoq5RsSWaQ.email>. (All websites last visited February 28, 2017.)

² See Gilligan and Lee Report at 3-5.

³ Homer Venters, et. al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, American Journal of Public Health, Mar. 2014, Vol. 104, No. 3, available at: <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>.

⁴ National Commission on Correction Health Care, *Solitary Confinement (Isolation), Position Statement* (April, 2016), available at: <http://www.ncchc.org/solitary-confinement>.

⁵ U.S. Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, Executive Summary, at 1 (2016).

⁶ Art Swift, “Support for Legal Marijuana Use Up to 60% in U.S.,” Gallup (Oct. 19, 2016), available at http://www.gallup.com/poll/196550/support-legal-marijuana.aspx?g_source=Social%20Issues&g_medium=newsfeed&g_campaign=tiles.

states and the District of Columbia had legalized the adult recreational use of cannabis.⁷ On Election Day last November, four more states followed suit, including California, the nation's most populous state.⁸ Before the election, 25 states had legalized the medical use of cannabis.⁹ On Election Day three more followed suit, including Florida.¹⁰ These state actions are inconsistent with federal law, because the DEA continues to list cannabis among "drugs with no currently accepted medical use" on Schedule I. At a time when many states are responding to their constituents' changing views of cannabis and charting new policy courses, the federal government should not maintain an inflexible, contrary policy.

When properly regulated, cannabis can become a major generator of tax revenue. Economists estimate that between \$4 billion and \$12 billion in federal tax revenues can be generated from legal cannabis sales.¹¹ Furthermore, each individual state can reap tens of millions of dollars in new tax revenue for state coffers. For example, Oregon collected more than \$25 million in new tax revenue from cannabis sales in the first six months of 2016.¹² States with larger populations, such as New York, Florida, and Texas, stand to realize even greater tax revenue gains.

In addition to generating new tax revenue, states and the federal government will be able to cut billions of dollars in spending. States spend approximately \$3.6 billion every year enforcing prohibition of cannabis.¹³ Cannabis prohibition is, in many cases, a "gateway" to criminalization, whereby young people are marked with a criminal record for cannabis possession or sale. This forms a foundation for more and more severe consequences for further offenses. Removing cannabis from Schedule I would send a clear message to the states that have not de-criminalized cannabis possession that they should consider doing so. In addition to reducing expenditures, decriminalizing cannabis possession would free law enforcement to focus more attention on its most vital tasks: fighting serious crime and terrorism.

Even if your administration is not prepared to move cannabis out of Schedule I immediately, it is long past time for the federal government to hold evidentiary hearings on the proper classification of cannabis and whether the Department of Justice (rather than the

⁷ Joseph Henchman & Morgan Scarborough, *Marijuana Legalization and Taxes: Lessons for Other States from Colorado and Washington*, The Tax Foundation (May 12, 2016), available at http://taxfoundation.org/article/marijuana-legalization-and-taxes-lessons-other-states-colorado-and-washington#_ftn1blog.ericgoldman.org/archives/2013/09/when_should_sea.htm.

⁸ Jag Davies, "Marijuana Wins Big, as Dark Struggles Loom," Drug Policy Alliance (Nov. 9, 2016), available at <http://www.drugpolicy.org/blog/marijuana-wins-big-dark-struggles-loom>.

⁹ Henchman & Scarborough, *Marijuana Legalization and Taxes*.

¹⁰ Davies, "Marijuana Wins Big."

¹¹ Jacobi, Liana and Michelle Sovinsky. 2016. "Marijuana on Main Street? Estimating Demand in Markets with Limited Access." *American Economic Review*, 106(8): 2009-45 at 2040.

¹² Noelle Crombie, *Oregon collects \$25.5 million in marijuana taxes since start of the year*, The Oregonian/OregonLive (Aug. 22, 2016), available at http://www.oregonlive.com/marijuana/index.ssf/2016/08/oregon_collects_255_million_in.html.

¹³ *Marijuana Arrests by the Numbers*, ACLU (retrieved Jan. 6, 2016), available at <https://www.aclu.org/gallery/marijuana-arrests-numbers>.

Department of Health and Human Services, or the Treasury Department) should continue to have primary regulatory authority over it.

III. MAINTAIN A FAIR CHANCE EMPLOYMENT POLICY

We urge your administration to maintain the current federal fair chance employment policy. The two components of this policy are: 1) rulemaking from the Office of Personnel Management (“OPM”) that “bans the box”—the box on an initial job application that asks about a criminal record—and thereby delays inquiry into criminal history until later in the federal hiring process; and 2) the Fair Chance Business Pledge, which has been taken by some of the nation’s preeminent corporations.

Including both convictions and offenses charged but never proven, around 70 million Americans have some sort of criminal record. This number represents almost one in three working-age Americans.¹⁴ Given these statistics, a fair chance employment policy is necessary so that a wide swath of the potential labor force is not automatically disqualified from employment because of a criminal record. Our society’s shared goal should be to avoid a permanent class of unemployed citizens that saps the economic strength of local communities and the nation.

A fair chance policy strengthens the workforce by opening the path to gainful employment. Having legitimate work helps curb recidivism for those trying to overcome the specter of past wrongdoing. In the absence of a fair chance policy, all too often a criminal record is an automatic barrier to employment, regardless of an applicant’s particular circumstances. Employment disqualification for those with criminal records further punishes people who have already paid their debt to society. It also restricts opportunities that would help the formerly incarcerated successfully reintegrate and become productive members of society, rather than returning to crime.

OPM finalized its version of “ban the box” in December 2016. This follows the directive of the Presidential Memorandum issued in April 2016 declaring that hiring practices within the federal government must be altered to promote the “rehabilitation and reintegration of formerly incarcerated individuals.”¹⁵

In addition to the federal government, 24 states have adopted similar “ban the box” policies pertaining to government employment. Nine states, the District of Columbia, and 29 cities and counties have also required removal of the past conviction question on the initial applications of private employers.¹⁶

¹⁴ Statistics on American incarceration rates are from <https://www.whitehouse.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

¹⁵ For discussion and background concerning OPM’s “ban the box” rule, *see* <https://www.federalregister.gov/documents/2016/12/01/2016-28782/recruitment-selection-and-placement-general-and-suitability>.

¹⁶ The 24 states are: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin, while the nine states adopting removal of conviction

The Fair Chance Business Pledge represents a vital next step in federal fair chance policy. Companies taking the pledge demonstrate an awareness of the traditional bias toward people with prior convictions and an ongoing commitment to reducing needless barriers to employment. The pledge commits employers to actions including “banning the box,” ensuring that information about an applicant’s criminal record is considered in its proper context, and engaging in a pattern of hiring that does not categorically eliminate certain jobs for those with criminal records. Major companies and organizations that have already taken the pledge include: American Airlines, Coca-Cola, Facebook, Georgia Pacific, Google, Hershey, the Johns Hopkins Hospital and Health System, Koch Industries, Libra Group, PepsiCo, Prudential, Starbucks, Uber, Under Armour/Plank Industries, Unilever and Xerox.¹⁷

The best practices set forth by the U.S. Equal Employment Opportunity Commission (“EEOC”) in 2012 provide private employers with useful guidance on hiring people with criminal records. The EEOC identifies an employer’s individualized assessment of the applicant’s background as a fundamental part of developing a meaningful fair chance policy.¹⁸

We thank you for considering these recommendations.

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history from private employment applications are: Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont. A listing of the localities that have extend their fair-chance laws to private employers within their areas includes: Austin, Baltimore, Buffalo, Chicago, Columbia (MO), the District of Columbia, Los Angeles, Montgomery County (MD), New York City, Philadelphia, Portland (OR), Prince George’s County (MD), Rochester, San Francisco, and Seattle. Statistics on jurisdictions adopting fair-chance laws are found at <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

¹⁷ See <https://www.whitehouse.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

¹⁸ For a statement on EEOC guidance regarding the use of arrest or conviction records in employment decisions see “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VIII