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Written Statement to the Charles Colson Task Force on Federal Corrections  
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In 1974, Robert Martinson and two colleagues issued a report purporting to assess all the evaluations of criminal rehabilitation programs between 1945 and 1967. Their conclusion, summarily expressed as “nothing works,” was that “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on criminal recidivism.”<sup>1</sup> For a variety of social and political factors, the theory that “nothing works” took hold, defining sentencing and corrections policy for the next three decades. The recommendations of this task force will help guide policymaker seeking to replace the “nothing works” paradigm with a new reality based on “what works,” but this task force’s most important challenge lies in its capacity to fundamentally alter the national mindset to recognize that justice must include forgiveness.

Of course, despite the decline of criminal justice demagoguery and growing consensus for reform, the current criminal justice system remains the product of outdated public and political notions. The demise of the rehabilitative model ushered in a new era of tough-on-crime policies, chief among them reliance upon imprisonment as the punishment of choice and determinate sentencing, in particular lengthy determinate sentences for drug offenses. These sentences are the key drivers for the federal prison population and many other social ills. NACDL firmly believes that decriminalization of controlled substances, with a concomitant investment in harm reduction and public health strategies, is the only appropriate approach to the problem of substance abuse. The national dichotomy in the approach to alcohol and other threats to public health, versus the approach to controlled substances, is irrational and unsustainable.

The unintended consequences of determinate sentencing – inordinate guilty plea rates, prison overcrowding, ballooning prison budgets, and racial disparities – have been discussed by other witnesses. NACDL is especially concerned about the inordinate influence of criminal

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history on federal sentences. Defendants with relatively minor prior offense are subjected to significant increases in sentence, regardless of whether the prior offenses relate to the instant offense or suggest some need for a greater punishment. Absent empirical support that these prior convictions are strongly indicative of recidivism, there is simply no justification for this severe increase. On the contrary, this scheme greatly exacerbates the racial and ethnic disparities prevalent at every stage of the criminal justice system, from police contacts to case outcomes, and enhances punishment on those suffering from mental health or substance abuse issues.

Part and parcel of determinate sentencing, truth-in-sentencing laws, which require that offenders serve a specific percentage of their sentences without parole or meaningful good time reductions, have paralyzed corrections policy and inhibited the development of evidence-based rehabilitative programs. Safer, more effective and more humane prisons require greater good time incentives and in-prison opportunities for training, education and treatment. The current paltry 54-days of good time per year do not adequately incentivize good behavior or preparation to reenter to society. We are aware of legislative efforts to accelerate prison release based on risk assessments and participation in recidivism-reduction programs.<sup>2</sup> While NACDL has not taken a position on these well-intentioned bills, we believe the legitimacy of such a scheme depends on its ability to allocate opportunities and rewards in a way that does not exacerbate existing racial disparities. Moreover, NACDL is keenly aware from studying problem-solving courts that providing enhanced programming and incentives to low-risk offenders is not the most cost-efficient or effective means of reducing recidivism.<sup>3</sup>

Even assuming adequate sentencing reform and robust early release mechanisms, there will always be convictions and sentences (or classes of such) that, in hindsight, do not serve the ends of justice. In such instances, executive pardons and clemency are useful and appropriate remedies. Use of the clemency power has varied widely among executives and has never been fully maximized to achieve greater fairness and correct injustice. In recent years, several governors have been successful in reinvigorating the clemency power through transparent, regularized and consistent processes that earned the public's trust. The task force should recommend that the President follow this model and implement a more routinized system for reviewing and granting clemency applications.

Any institution that dehumanizes and mistreats those within its custody undermines the goals of successful rehabilitation and reentry. Of particular concern are policies that ignore the

importance of social interaction, misusing solitary confinement and encumbering the full breadth of family relationships. NACDL opposes the use of long-term restrictive housing because it results in greater prison violence, endangers the psychological health of inmates, and undermines prisoner reentry and public safety. Research shows that people who experience long periods of isolation in prison often experience serious and sometimes lasting deterioration in mental and physical health, and prisoners who are released from segregation directly to the community reoffend at higher rates than general-population prisoners.<sup>4</sup> There is some evidence that reliance on restrictive housing by the Federal Bureau of Prisons has declined recently, and the agency should reinforce this trend by formally limiting the use and length of prisoner isolation.

At the same time, studies have consistently found that prisoners who maintain close contact with family while incarcerated have better post-release outcomes and lower recidivism rates.<sup>5</sup> Extended family visits, including conjugal visits, should be an integral component of the federal corrections system. Facilitating longer family visits, with opportunities for intimacy between spouses, will help sustain healthy marital relationships; according to some studies, conjugal visits may reduce prison violence as well.<sup>6</sup> For guidance, the Federal Bureau of Prisons could look to the experience of California, Connecticut, New York and Washington, all of which allow conjugal visits in their prisons.

Also of vital importance are contacts and communications between the prisoner and legal counsel. The Federal Bureau of Prisons must adopt procedures that better facilitate attorney-client communications; in particular, the agency should provide a means for prisoners to have confidential, unmonitored electronic communications with their lawyers.

Currently there are approximately 45,000 laws and rules in U.S. jurisdictions that restrict opportunities and benefits in one way or another based upon a conviction or arrest.<sup>7</sup> More than one in four adults in the United States — some 65 million people — have a criminal record.<sup>8</sup> At the same time, the collateral consequences of conviction — specific legal restrictions, generalized discrimination and social stigma — have become more severe, more public and more permanent. These consequences affect virtually every aspect of human endeavor, including employment and licensing, housing, education, public benefits, credit and loans, immigration status, parental rights, interstate travel, and even volunteer opportunities. The primary legal mechanisms put in place to restore rights and status— executive pardon and judicial expungement — have atrophied or become less effective. The recent obsession with background

checks has made it all but impossible for a person with a criminal record to leave the past behind. An arrest alone can lead to permanent loss of opportunity; charges that are never prosecuted, or are eventually dismissed, live on in the digital world.

In 2011 NACDL established a Task Force on Restoration of Rights and Status After Conviction. The Task Force heard testimony from more than 150 witnesses at hearings in Chicago, Miami, Cleveland, San Francisco, New York, and Washington, DC. Witnesses included individuals with criminal records, defense attorneys, state and federal judges, prosecutors, social scientists, re-entry professionals, probation and correctional personnel, employers, background screening companies, a congressman, a former governor, and local, state and federal officials. The Task Force also conducted site visits and reviewed a wide range of studies, reports, and articles on various restoration and relief mechanisms, and on collateral consequences more generally. NACDL's report, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime: A Roadmap to Restore Rights and Status After Arrest of Conviction*, lays out the results of this investigation and the steps needed to set our nation on the right path (available at: [www.nacdl.org/restoration/roadmapreport](http://www.nacdl.org/restoration/roadmapreport)).

The comprehensive recommendations articulated in the report are distilled into 10 overarching principles. Relief from the consequences of a criminal record is currently made up of a patchwork of approaches that are sometimes inconsistent and often irrational, with wide variations between states and even within a particular state. The United States desperately needs, and NACDL urges the nation to adopt, a coherent national approach to the restoration of rights and status after a conviction. At the federal level, five general approaches should be pursued:

- Mandatory consequences should be repealed, and discretionary disqualifications should be limited based on a substantive and temporal correlation between the offense of conviction and the benefit at issue;
- Existing legal mechanisms that restore rights and opportunities should be reinvigorated and new ones established;
- Non-conviction dispositions should be expanded and utilized;
- Incentives should be created to encourage employers, landlords and other decision-makers to consider individuals with convictions for certain opportunities; and
- Access to criminal history records for non-law enforcement purposes must be subject to reasonable limitations.

To lay the groundwork for these recommendations, government entities, the legal profession, the media and the business community must promote a change in the national mindset to embrace the concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful stereotypes and labels applied to individuals who have had an encounter with law enforcement and the criminal justice system.

To conclude, NACDL notes that among the Commission's overarching mission is the development of policy recommendations to avert continued growth of the nation's prison system, to ensure offender accountability and to reduce recidivism. To accomplish these goals, society must address the front, middle and back of the system. Fewer people should be imprisoned, and those that are should be imprisoned for shorter periods. While in custody, the emphasis must shift from warehousing to rehabilitation, embracing strategies that foster training, education and family values. And on the back end, society must tear down the network of barriers that impede opportunity and relegate to second class status those who have paid their debt to society.

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<sup>1</sup> Robert Martinson, "What Works? Questions and Answers about Prison Reform," *The Public Interest*, Spring 1974, pp. 22-54; Douglas Lipton, Robert Martinson and Judith Wilks, *The Effectiveness of Correctional Treatment* (New York: Praeger, 1975).

<sup>2</sup> CORRECTIONS Act (S.467), 114th Congress; Recidivism Risk Reduction Act (H.R.759), 114th Congress.

<sup>3</sup> America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform, <http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20217>.

<sup>4</sup> Andersen, H. S., Sestoft, D. D., Lillebæk, T. T., Gabrielsen, G. G., Hemmingsen, R. R., & Kramp, P. P. (2000), —A Longitudinal Study of Prisoners on Remand: Psychiatric Prevalence, Incidence and Psychopathology in Solitary vs. Non-Solitary Confinement. *Acta Psychiatrica Scandinavica*, 102(1), 19; *Confronting Confinement: A Report of The Commission on Safety and Abuse in America's Prisons* (2006), [http://www.prisoncommission.org/pdfs/Confronting\\_Confinement.pdf](http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf).

<sup>5</sup> Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty State Survey*, 32 *YALE L. & POL'Y REV.* 149 (2013).

<sup>6</sup> D'Alessio, Stewart J., Jamie Flexon, and Lisa Stolzenberg (2013) "The Effect of Conjugal Visitation on Sexual Violence in Prison." *American Journal of Criminal Justice* 38:13-26.

<sup>7</sup> See [www.abacollateralconsequences.org](http://www.abacollateralconsequences.org).

<sup>8</sup> The Nat'l Emp't Law Project, *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment at 27 n.2* (March 2011), available at [http://www.nelp.org/page/-/65\\_Million\\_Need\\_Not\\_Apply.pdf?nocdn=1](http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1).