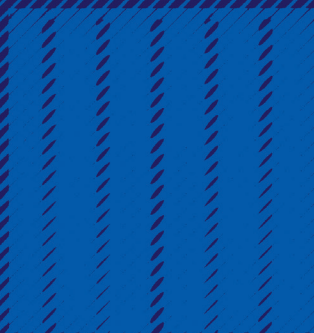


Blueprint for Smart Justice
Nationwide



Blueprint *for* Smart Justice Nationwide

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Executive Summary

The United States locks up more of its people than any other nation in the world, with more than 2.1 million adults in prisons and jails in 2018.¹ Its incarceration system spans 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails, as well as military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.²

The staggering size of the criminal legal system in the United States is unprecedented. We call this “mass incarceration” – a shameful policy failure most accurately described as a national crisis. Mass incarceration has damaged families, wreaked havoc on communities of color, and wasted trillions of taxpayer dollars.

Widespread deprivation of liberty causes tremendous harm to those trapped within the criminal legal system. Not only have the millions³ of people in our jails and prisons lost their freedom, too often they also lose their jobs, homes, and family relationships.⁴ Once out of prison, people living with criminal records face thousands of legal restrictions that often make it nearly impossible for them to obtain basic necessities to survive, including employment, education, and affordable housing.⁵

The consequences of mass incarceration are not contained within the criminal legal system – they overflow into American society. When somebody is incarcerated, families not only lose their loved one behind prison or jail walls, family members on the outside must often take on additional financial burdens to care for one another in their absence. Entire communities – particularly Black communities

– have been ripped apart by overpolicing and overincarceration. Taxpayers pay billions each year⁶ to sustain the oversized and overused criminal legal system, even as necessary resources for schools and health care continue to be cut.⁷

Fortunately, calls to reverse course on incarceration in the U.S. are growing in response to decades of damage wrought by a reliance on the criminal legal system to address substance misuse, mental health needs, poverty, and underfunded schools. While we have begun to see small but notable gains in reducing the incarcerated population, we have much, much farther to go.

The ACLU’s Campaign for Smart Justice is committed to transforming our nation’s criminal legal system and building a new vision of community wellbeing, public safety, and justice. The Campaign is dedicated to cutting the nation’s incarcerated population in half and challenging racism in the criminal legal system.

To advance these goals, the Campaign partnered with the Urban Institute to conduct a research project analyzing the kinds of changes needed to cut the number of people in prison in each state by half and reduce racial disparities in the criminal legal system. In every state, Urban Institute researchers identified the unique primary drivers of incarceration and predicted the impact of reducing prison admissions and length of stay on state prison populations, state budgets, and the racial disparity of those imprisoned.

The analysis was eye-opening.

All states rely too heavily on incarceration. Each state’s prison population across the country has ballooned in recent decades, growing by 328 percent between 1980

and 2017.⁸ Compared to other countries, every state's incarceration rates are exceptionally high.⁹ However, some states rely on incarceration far more than others. For example, Louisiana had the highest imprisonment rate of any state in 2017 – six times higher than that of Massachusetts.¹⁰

While admissions to prisons grew alongside mass incarceration's rise, people enter prison for a wide range of offenses that vary from state to state.¹¹ For example, one-third (32 percent) of people who entered prison in Arizona in fiscal year 2017 were admitted for a drug possession or distribution offense.¹² By contrast, about one in five (19 percent) people admitted to Maryland prisons in for a new offense in 2016 were there for a drug offense.¹³

The length of time that people are required to spend in prisons also drives mass incarceration. In comparison to many other nations, prison sentences in the United States are exceptionally long.¹⁴ Harsh sentencing practices, limited opportunities to earn time off, and restrictive release policies all contribute to long stays in prison across the country. As a result, seven states in 2014 had prison populations in which more than one in 20 people had already been imprisoned for 20 years or more.¹⁵

In every state, we found that reducing the prison population by itself does little to diminish racial disparities in incarceration and in some cases would worsen them. Since the average state imprisonment rate for Black adults is over five times as high as the rate for white adults,¹⁶ urgent work remains for advocates, policymakers, and communities across the nation to include in any criminal legal reform efforts policing and prosecutorial reforms that are specific to combating these disparities.

The cost of incarceration to taxpayers is enormous: In fiscal year 2018, U.S. states spent \$55.8 billion from their general funds on corrections and Congress appropriated more than \$7.2 billion to the Federal Bureau of Prisons (BOP).¹⁷

It doesn't have to be this way, and this Blueprint provides the way out. Bold leadership from policymakers can help bring this era of mass

incarceration to an end. To start, legislatures must decriminalize offenses that should not require a criminal legal system response, divert people who can be better served in the community away from the system, and ensure that once released, people are not trapped in an endless cycle of poverty and reincarceration.

Prosecutors must also use their power to dismantle mass incarceration. Passing legislation to require that prosecutors' offices collect and publish basic data will help the government and public better understand the role and power wielded by prosecutors across the country and hold them accountable for damaging practices. Local prosecutors' offices can play a key role by adopting internal policies and practices that treat incarceration as a last-resort option in their toolbox.

Moreover, policymakers should overhaul the pretrial system – the front door to the criminal legal system. Courts should establish strong presumptions of release without conditions at arraignments, letting people return home whenever possible before trial. Legislators should pass laws to eliminate wealth-based discrimination, ensuring people aren't trapped in the system just because they cannot afford to get out. Where states have not banned for-profit companies from the pretrial system, the federal government can mandate oversight of bail bond insurance companies and other industry actors.

Policymakers should also ensure alternatives to incarceration, such as probation and parole, do not drive people into jails and prisons. They should pass laws that ban the use of incarceration as a response to rule-breaking behaviors that do not involve a new offense. Moreover, they should reduce the amount of time people serve on probation, capping its length at a maximum of three years and establishing opportunities for early discharge.

Sentencing and release reform play a crucial role in reducing the number of people incarcerated in the U.S. and dismantling mass incarceration. State legislatures must stop expanding their criminal codes and instead work toward slowing the flow of people into prisons and reducing the amount of time they spend there. This will involve eliminating mandatory minimums,

truth-in-sentencing laws, and life, life without parole, and nearly life sentences. Those who have served substantial time in prison must be given a meaningful opportunity for release or to earn a shortened sentence – a chance often taken away by dysfunctional parole boards and a lack of opportunity to demonstrate the rehabilitation that has taken place behind bars.

The Smart Justice 50-State Blueprint project is necessarily driven by data. In each state and at the national level, the project documents how many people are incarcerated, for how long, for what offenses, and what reforms can contribute to a reduction in that population by 2025. Yet it's crucial to remember that behind all those numbers are millions of real people – neighbors, parents, friends, sons, and daughters – whose lives are being torn apart by the criminal legal system.

Some of these numbers, or at least their enormity, may sound familiar. What is less familiar is a solution; a roadmap out of the mess of mass incarceration. The Smart Justice 50-State Blueprints offer just this. This project is a call to action – not just for lawmakers and high-level stakeholders, but for communities across the U.S. Dismantling our reliance on incarceration at the state and federal level is possible, and we have a plan.

The Outsize Reach of the Criminal Legal System

The vast size of the criminal legal system in the United States is unprecedented. Globally, the U.S. has the highest incarceration rate at 655 per 100,000 residents, with more than 2.1 million adults in prisons and jails in 2018.¹⁸ Its incarceration system spans 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails, as well as military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.¹⁹ The majority of incarcerated people are held under state control. A 2019 report found that three in five people (61 percent) in adult correctional institutions were in state prisons, while 29 percent were in local jails and 10 percent were under federal control.²⁰

A far greater number of people, however, are under community supervision – a set of programs that supervise people convicted of offenses in their local

communities, often imposing onerous conditions that can drive people into prisons or jails. In 2016, an estimated 4.5 million adults were under community supervision, 81 percent of whom were on probation.²¹ A 2018 report estimated that the total number of people under correctional control at any given time – incarcerated or under supervision – was 6.7 million.²² For perspective, if the population under correctional control were its own state, it would be the 16th largest in the nation, comparable to the size of Tennessee.²³

An even greater number of people come into contact with the criminal legal system over the course of a year. For example, law enforcement officials make more than 10 million arrests each year.²⁴ At least 4.9 million people are jailed at least once in a year, and more than one in four are jailed multiple times in a single year.²⁵

The reach of the criminal legal system is so outsized that, according to Federal Bureau of Investigation files,

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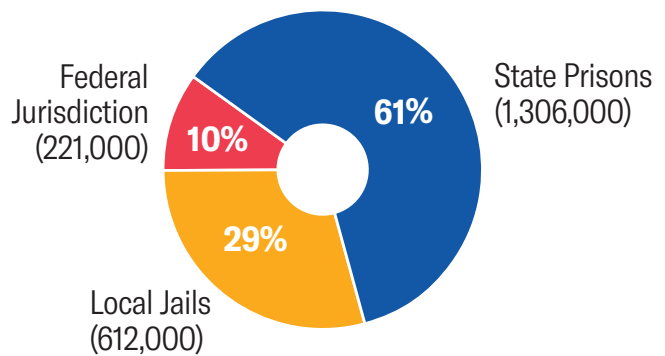
OUTSIZE REACH

The United States has the **highest incarceration rate** in the world.

In 2018, there were more than **2.1 million** adults in U.S. prisons and jails.

A 2018 report estimated that there were **6.7 million** people are under correctional control at any given time, whether incarcerated or under supervision.

U.S. INCARCERATED POPULATION (2019)



more than 70 million people living in the United States have an arrest record or a criminal conviction.²⁶

The State of State Prison Systems

State prison populations across the country have ballooned in recent decades, driving the rise of mass incarceration. The number of adults in state prisons nationwide grew by 328 percent between 1980 and 2017, peaking in 2009 with 1,407,369 adults in prison.²⁷ As of 2017, there were 1,306,305 adults in state prisons nationwide. That year, the three largest state prison systems were in the three most populous states: Texas (157,584 people in prison), California (129,920 people), and Florida (98,504 people).²⁸

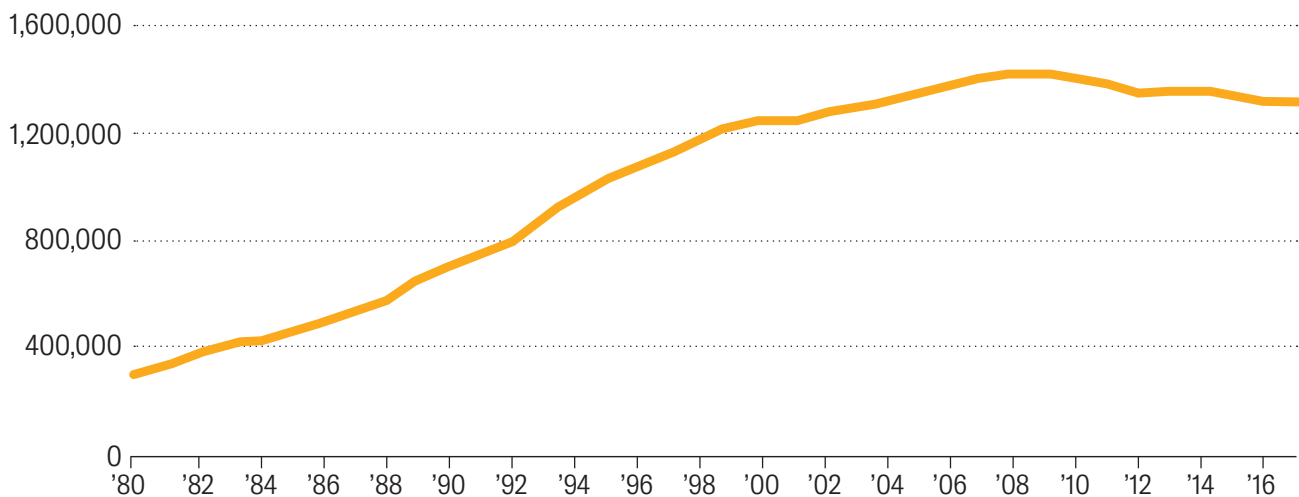
While state prison populations across the country have all risen dramatically over the past few decades, some states rely on incarceration far more than others. For example, Louisiana had the highest imprisonment rate of any state in 2017, with 942 people in state prison per 100,000 adults in the state.²⁹ That year, Louisiana's imprisonment rate was six times that of Massachusetts, which had the lowest imprisonment rate of any state, at 150 people in state prison per 100,000 adults.³⁰ Compared to other countries, however, even the states

with the lowest incarceration rates are exceptionally high. For example, Massachusetts' 2016 incarceration rate was higher than that of Belarus, South Africa, or Turkey.³¹

States have broad jurisdiction to design the parameters of their prison systems. Most states run prison systems primarily to hold people serving felony sentences of a year or more, relying on locally run jails to confine people held pretrial or serving sentences for misdemeanor offenses. Six states, however, have a unified system in which the state oversees all incarceration, including people held pretrial: Alaska, Connecticut, Delaware, Hawai`i, Rhode Island, and Vermont.³² States also vary in sentencing parameters, such as which offenses are prison-eligible, how sentence length is determined, whether or how to impose mandatory sentences or additional sentencing penalties, whether or how to incorporate opportunities for early release, and whether or how to use community supervision in combination with incarceration when a sentence is handed down.

Finally, while a growing number of states are engaging in criminal legal reform, the nature of the reform and the capacity to collect and publish data to track progress varies widely from state to state. States that lack a robust system for collecting, analyzing, and

STATE PRISON POPULATIONS (1980–2016)



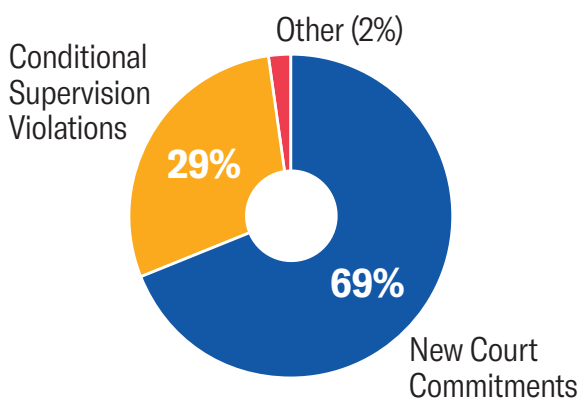
Source: BJS, Corrections Statistical Analysis Tool.

publishing data in their criminal legal systems are at a disadvantage for advancing reform. States such as Utah or Minnesota have detailed data systems that allow them to diagnose problems and develop solutions. Other states lack basic metrics such as data on annual prison admissions, information on mental and behavioral health needs, details on whether people sent to prison from community supervision committed a new offense or violated supervision rules, and race and ethnicity information that accurately documents Latinx or Native American people in prison.³³ In these states with more limited data collection, advocates and policymakers have less information to use to devise strategies to reduce prison populations and address racial disparities in incarceration.³⁴

What Is Driving People Into State Prisons?

Stemming state prison population growths requires understanding why and how often states sentence people to serve time behind bars. Predictably, the number of times people were sent to prison each year grew alongside rising prison populations. The number of annual admissions³⁵ to state prisons increased by 314 percent between 1980 and 2007, when it peaked before declining by 19 percent between 2007 and 2016. Still, the number of admissions to state prisons in 2016 was three times the number of admissions in 1980.³⁶

ADMISSIONS TO STATE PRISONS IN 2017



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STATE PRISON SYSTEMS

The number of adults in state prisons nationwide **grew by 328 percent** between 1980 and 2017.

In 2017, Louisiana's imprisonment rate was **six times** that of Massachusetts.

In 2017, the **three largest state prison systems** were in Texas, California, and Florida.

In 2017 alone, there were a reported 561,863 admissions to state prisons. Of these admissions, an estimated two-thirds (67 percent) were new commitments from court.³⁷ People enter prison for a wide range of offenses³⁸ that vary from state to state. For example, one-third (32 percent) of people who entered prison in Arizona in fiscal year 2017 were admitted for a drug possession or distribution offense,³⁹ and Maine had a similar proportion of admissions for drug offenses in 2018.⁴⁰ By contrast, about one in five (19 percent) people admitted to Maryland prisons for a new offense in 2016 were there for a drug offense.⁴¹

Of 2017 admissions to state prisons, three in 10 people (30 percent) reentered prison after being on some form of community supervision.⁴² While intended as an alternative or supplement to incarceration, community supervision (such as probation in lieu of imprisonment and parole as a means of early release from prison) can also be a driver of prison admissions. Long supervision terms, onerous restrictions, and high — sometimes unreasonable — levels of scrutiny can all make it difficult for people to succeed under supervision and can ultimately channel people into jails and prisons. Half of people who exit community supervision do so without successfully having completed their supervision terms, and these “failures” can result in incarceration. Every year, nearly 350,000 people enter prison or jail from community supervision.⁴³

This is often because people on community supervision live under intense scrutiny, with a wide range of conditions that can be difficult to comply with, leading

to high rates of detection for breaking any of a litany of supervision rules. Typical rules include fines or fees levied regardless of the individual’s ability to afford them, regular drug and alcohol tests, strict curfews, regular reporting to supervision officers and specific programs, and prohibitions on associating with other people who have criminal records – even if they are family or friends.⁴⁴ Courts may also impose special conditions, such as banning people from sitting in the front seat of a car or requiring a bumper sticker announcing the car owner is convicted of a sex offense.⁴⁵ In 2015, the Robina Institute estimated that people on federal or state probation may need to comply with 18 to 20 requirements a day to remain in good standing.⁴⁶ Violating any of these conditions can result in incarceration. Thus, revocations to prison for technical violations of community supervision conditions are an important – and often overlooked – driver of admissions to prisons and jails.⁴⁷ The proportion of prison admissions that are caused by technical revocations from community supervision – and how those admissions are defined and categorized – varies from state to state. For example, in 2017, 37 percent of admissions to Wisconsin prisons were in the “revocation only” category, which made up the largest share of admissions that year.⁴⁸

Across all state prison systems, many people who are released eventually return to prison. States measure

AT A GLANCE

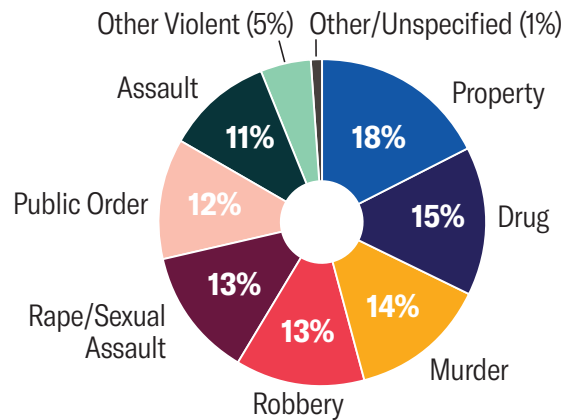
DRIVERS INTO PRISONS

The number of admissions to state prisons in 2016 was **three times** the number in 1980.

More than half of all people released from state prisons will return to prison within five years.

People with conviction records face **more than 44,000 legal regulations** that routinely block them from truly reentering society.

PEOPLE SERVING STATE PRISON SENTENCES BY MOST SERIOUS OFFENSE



their recidivism rates in different ways, but national estimates indicate that more than half of all people released from state prisons in a given year will return to prison within five years.⁴⁹ Many people transitioning out of incarceration must not only contend with the rules of their supervision, they also face more than 44,000 legal regulations that routinely block people with conviction records from truly reentering society – barriers ranging from employment and education to housing and food.⁵⁰

The Current State Prison Population

More than 1.3 million adults were in state prisons in 2017, a decrease of almost 7 percent from the nearly 1.4 million adults under the jurisdiction of state prison systems in 2007.⁵¹ In part, this decrease is due to evolving policies that are beginning to reverse the effects of mass incarceration. Still, learning about the current prison population allows policymakers the opportunity to better understand how to tailor future policies to further reduce mass incarceration.

Across the country, just under half (45 percent) of the people in state prisons in 2017 were serving time for sentences not categorized as violent. This includes 18 percent for property offenses, 15 percent for drug offenses, and 12 percent for public order offenses.⁵² From state to state, however, there is significant variation in the offense distribution among state

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STATE PRISON POPULATION

More than **1.3 million people** were in state prisons in 2017.

In state prisons in 2017, **18 percent** were serving time for property offenses, **15 percent** for drug offenses, and **12 percent** for public order offenses.

In Michigan, **three in four people** in prison in 2016 were there for an “assaultive offense,” while in South Dakota, **one in three people** in prison in 2019 were there for a drug offense.

prison populations. For example, in Michigan, three in four people in prison (74 percent) in 2016 were there for an “assaultive offense” and 8 percent of people in prison were serving time for a drug offense.⁵³ By contrast, in South Dakota, one in three people in prison (33 percent) in 2019 were there for a drug offense, including 18 percent for drug possession and 9 percent for unauthorized ingestion.⁵⁴ In Mississippi, about one-quarter (24 percent) of people in prison in fiscal year 2015 were there for a drug offense.⁵⁵ This variation illustrates the importance of developing data-driven reforms that address the unique drivers of mass incarceration in each state.

The Current Local Jail Population

Local jail populations reflect an array of system-involved people, including people recently arrested, those detained before trial, and those convicted of an offense and sentenced to, generally, less than a year behind bars. At the end of 2016, there were an estimated 612,000 people held in local jails in the United States.⁵⁶ But because many people stay in jail for a relatively short period of time, the number of people admitted to jails across the country in a given year is much higher. In 2016, jails reported 10.6 million

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JAIL POPULATION

In 2016, jails reported **10.6 million** admissions.

Three in four people held in local jails in 2016 were awaiting trial and had not been convicted of a crime.

A 2016 study found that people in jail before their trial had a median annual income of **\$15,109** in 2015 dollars prior to their incarceration.

total admissions, a daily average of 731,300 people incarcerated in jails at any given time, with an average of 25 days in expected length of stay.⁵⁷

Three in four (75 percent) people held in jail at the end of 2016 were awaiting trial and had not been convicted of a crime.⁵⁸ Some people in jail have just been arrested and will make bail within hours or days, while many others cannot afford to make bail – or are not offered bail – and remain behind bars until their trial. A 2016 Prison Policy Initiative report found that people in jail had a median annual income of \$15,109 in 2015 dollars prior to their incarceration, putting the \$10,000 median bail amount imposed for felony defendants (as of a 2009 study) beyond reach for many.⁵⁹ Only a small number (less than 150,000 on any given day in 2016) of people held in local jails have been convicted, primarily of misdemeanor offenses, and are serving sentences of generally under a year.⁶⁰

Why Do People Stay in Prison for So Long?

State prison population growth is not only the result of high admission numbers – the length of time that people are required to spend in prisons also drives mass incarceration. In comparison to many other nations, prison sentences in the United States are exceptionally long.⁶¹ While length of stay trends vary from state to state, across all states with comparable

and available data, people are imprisoned for longer periods now than in the past. The National Research Council reported that about half of the 222 percent growth in the state imprisonment rate between 1980 and 2010 was due to an increase in time served in prison for all offenses.⁶² In most states, the most dramatic increase has been among people serving time for crimes categorized as violent.⁶³

In many states, a significant portion of the prison population has already served a long period of time in prison. In 2014, seven states had prison populations in which more than one in 20 people had been imprisoned for 20 years or more. That year, Massachusetts and California had the prison populations with the largest proportion of people who had been imprisoned for the longest period. In both states, nearly 8 percent of people in state prisons had served at least 20 years already.⁶⁴

Harsh sentencing practices, limited opportunities to earn time off, and restrictive release policies all contribute to long stays in prison. States vary in the proportion of the prison population serving actual or de facto⁶⁵ life sentences, either with or without the possibility of parole, but California, Louisiana, and Utah top the charts. In those three states, more than one in four people in prison are serving some type of life sentence.⁶⁶ Many states use mandatory minimum prison sentences or additional “sentencing enhancement” penalties that can trigger long stays in prison regardless of the circumstances of the offense or the judge’s assessment of what is appropriate. Many states also have rigid time-served requirements that require people to complete a certain portion of their sentences regardless of demonstrated readiness for release. Michigan is one of the most extreme examples; there, people in prison are required to serve 100 percent of their minimum term, with no opportunity to earn credits or good time off.⁶⁷ Still other states have limited or no parole authority, compromising their ability to make individualized release decisions.

Long prison terms do not effectively protect public safety, and can actually have the opposite effect. Studies have long concluded that criminal activity is strongly correlated with age, beginning in adolescence, steadily dropping for most crimes after a person’s

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LENGTH OF IMPRISONMENT

About half of the **222 percent** growth in the state imprisonment rate between 1980 and 2010 was due to an increase of time served in prison for all offenses.

In California, Louisiana, and Utah, more than **one in four** people in prison are serving some type of life sentence.

Research shows that there is **little to no relationship** between length of incarceration and likelihood of committing additional crimes in the future.

early twenties, and sharply declining by their late thirties.⁶⁸ In 2014, for example, 18-year-olds had the highest arrest rate for robbery—nearly twice as high as the rate for 24-year-olds, and almost four times as high as the rate for 30-to-34-year-olds.⁶⁹ Keeping people in prison for long periods of time, even for serious crimes, produces diminishing returns for public safety.⁷⁰ Worse, it can be counterproductive to public safety goals, as it disincentivizes participation in reentry programming and contributes to unsustainably large prison populations in many states. Additionally, research shows that there is little to no relationship between length of incarceration and likelihood of committing additional crimes in the future.⁷¹ In fact, incarceration may actually be criminogenic, increasing the chances that some people will return to prison after being released.⁷² Thus, decarceration efforts can be part of larger public safety strategies. Between 2007 and 2017, 34 states reduced both imprisonment and crime rates simultaneously.⁷³

Who Is Imprisoned?

State criminal legal systems are characterized by significant disproportionality among who is arrested, detained, and incarcerated, and for how long. There are extreme racial and ethnic disparities that increase

at each stage of case processing, from arrest to sentencing and release from incarceration.⁷⁴ In 2017, most people imprisoned under state jurisdiction (an estimated 69 percent) were people of color, though they comprised just over one-third (36 percent) of the overall U.S. adult population.⁷⁵ This disparity has had a devastating impact on communities of color in the United States.

Even so, the full scale of racial and ethnic disparities – and other disparities, such as disproportionate involvement of LGBTQ people and people with disabilities – in the criminal legal system is obscured by failures to collect and analyze demographic data on people involved in the system. States vary widely in the extent to which they track, analyze, and report demographic data on the people they incarcerate,⁷⁶ leaving policymakers and advocates with only approximations of the full scope of disparity nationwide.⁷⁷ Without these data, policymakers and the public lack key information they need to fully understand the disparate impacts of mass incarceration and develop targeted solutions.

Black People: Black people are overrepresented throughout the criminal legal system and in state prisons nationwide.⁷⁸ As of 2017, the average state imprisonment rate of Black adults was over five times as high as that of white adults.⁷⁹ In many states – including New Jersey, Wisconsin, Minnesota, Vermont, and Iowa – this disparity is much more extreme.⁸⁰ In 2017, Black people accounted for 33 percent of the state prison population in the U.S. and just 12 percent of the nation’s adult population.⁸¹

Latinx People: Although Latinx people are routinely undercounted in state prison populations,⁸² the available data point to stark disparities. As of 2017, the state imprisonment rate of Latinx adults was nearly three times as high as that of white adults. In some states – including Massachusetts, Connecticut, Pennsylvania, and New York – this disparity is even more extreme.⁸³ In 2017, Latinx people made up 22 percent of people serving sentences in state prisons and 16 percent of all adults in the U.S.⁸⁴

Native American and Native Alaskan People: As of 2017, the nationwide imprisonment rate of adults

identified as Native American or Native Alaskan was estimated to be three times that of white adults.⁸⁵ In many states – including Alaska, Montana, North Dakota, and South Dakota – this disparity is even greater.⁸⁶ In 2017, Native American and Native Alaskan people accounted for an estimated 1.5 percent of the prison population and less than 1 percent of the nation’s adult population.⁸⁷

Incarceration has a disproportionate impact on Native Alaskans. Although they made up only 13 percent of the state adult population, Alaska Natives comprised 37 percent of the incarcerated population in Alaska in 2017, and one in 26 Alaska Native men in the state were incarcerated. That year, the incarceration rate of Alaska Native adults (2,100 per 100,000) was four times that of white adults.⁸⁸

Native Hawaiian People: Incarceration in Hawai`i has a profoundly heavy impact on Native Hawaiian communities. While Native Hawaiians and Pacific Islanders made up an estimated 23 percent of adults in the state in 2018,⁸⁹ the Hawai`i Department of Public Safety reported that 40 percent⁹⁰ of people incarcerated under the state’s jurisdiction in 2018 were Native Hawaiians, and another 6 percent were identified as Samoan or “Guam/Pacific Islander.”⁹¹ A 2010 Office of Hawaiian Affairs report found that Native Hawaiians were overrepresented at every stage of the criminal legal system. That report noted that Native Hawaiians were more likely to receive a prison sentence post-conviction and were likely to receive a longer prison sentence or probation term than most other racial or ethnic groups for similar offenses.⁹²

Women: Although they make up a relatively small portion of all people in state prisons (8 percent as of 2016), the number of women in state prisons has grown at more than twice the rate of men since 1980.⁹³ In 2017, the states with the highest women’s imprisonment rates were Oklahoma, Kentucky, South Dakota, and Idaho.⁹⁴ Nationally, women are overwhelmingly imprisoned for nonviolent offenses. In 2017, nearly two-thirds (63 percent) of women in state prisons had been sentenced for an offense not classified as violent, such as a drug or property offense.⁹⁵ Women in state prisons are more likely than men to face the challenges of being imprisoned as parents: In a 2004

survey, nearly two-thirds (62 percent) of women in state prisons reported having children, compared to half (51 percent) of men.⁹⁶

LGBTQ People: People who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ) disproportionately come into contact with the criminal legal system and are overrepresented in United States prisons and jails.⁹⁷ A 2011–12 survey found that self-identified lesbian, gay, and bisexual people were more than three times as likely to be incarcerated as the U.S. adult population, and the difference was even starker for women.⁹⁸ Incarceration rates are especially high for low-income LGBTQ people and transgender and gender non-conforming people of color.⁹⁹ Prisons are extremely unsafe places for LGBTQ people, both physically and psychologically, as they face elevated risks of sexual victimization, isolation in solitary confinement, and punitive sanctions.¹⁰⁰ In state and federal prisons, the risks are greatest for transgender people; a 2011–2012 survey found that 40 percent of transgender respondents reported having been sexually victimized while imprisoned.¹⁰¹

Older People: Though generally considered to pose a negligible risk to public safety,¹⁰² many people over 55 remain in prison as they age. The number of people 55 or older in state prisons rose by 400 percent between 1993 and 2013, due to both an influx of older people entering prisons and a growing proportion of people aging in prison due to long prison terms.¹⁰³ As of 2015, people in this age bracket represent a growing portion of every state’s prison population.¹⁰⁴ Prisons are particularly challenging environments for the elderly and disabled, who may be especially susceptible to victimization and harsh conditions and who may not have access to adequate care.¹⁰⁵ Providing health care and special facilities to people as they age can be extremely expensive for prisons; the annual cost of incarcerating someone over age 50 is twice the cost of the average person.¹⁰⁶

People with Mental Health and Substance Use Disorders: Mental health and substance use disorders are prevalent among people in prison. The most recent national estimates (from 2011–12) suggest that half (50 percent) of people in state and federal prisons had some indicator of a mental health disorder;

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DEMOGRAPHICS

As of 2017, the average state imprisonment rate of Black adults was **over five times** as high as that of white adults.

In 2017, nearly **two-thirds** of women in state prisons had been sentenced for an offense not classified as violent, such as a drug or property offense.

The most recent national estimates suggest that **half of the people** in state and federal prisons had some indicator of a mental health disorder.

women exhibited these indicators at higher rates than men.¹⁰⁷ In 2006, 1.5 million people in prisons and jail met clinical criteria for a substance abuse disorder, but only 11 percent of incarcerated people with substance use disorders had received treatment since their admission.¹⁰⁸ Although data are limited and research has struggled to document the full extent of mental health and substance use disorders among the criminal legal system–involved population, it is clear that existing treatment falls far short of these needs.¹⁰⁹

Many people in local jails also experience mental health disorders. One national survey found that about one-quarter (26 percent) of respondents in jails reported having experiences of “serious psychological distress” in the past 30 days, and 44 percent reported that a mental health professional had told them they had a mental disorder at some point in the past.¹¹⁰

People with Low Educational Attainment:

The most recent Bureau of Justice Statistics (BJS) report conducted about the educational backgrounds of people in prison was in 2003.¹¹¹ This national report found that of those in state prisons in 1997, about 68 percent had not received a high school diploma, including 40 percent who had completed some high school or less and 28 percent who had obtained a

AT A GLANCE

BUDGET

The United States spent **\$55.8 billion** from state general funds on corrections in fiscal year 2018.

Between 1979 and 2013, total state and local spending on prisons and jails increased at **three times the rate** of total spending on public primary and secondary education.

A 2017 analysis concluded that the full monetary cost of mass incarceration in the United States amounts to an **estimated \$182 billion every year**.

As costly as they are, state prisons represent just a fraction of the national spending on corrections. A 2017 analysis concluded that the full monetary cost of mass incarceration in the United States – from policing and bail fees to prison telephone calls and post-release supervision – amounts to an estimated \$182 billion every year.¹¹⁸

GED. More recent reports from individual states show that these rates remain high. A 2019 Minnesota report shows that over a quarter (26 percent) of the people in prison did not have a high school diploma or GED.¹¹² Meanwhile, a 2018 report from Georgia shows that nearly half (48 percent) of the people entering its prisons during that fiscal year had an 11th grade education or less.¹¹³

Budget Strains

Mass incarceration comes with an enormous cost to state governments and taxpayers. Even as some state prison populations have declined in recent years, state spending on corrections¹¹⁴ has continued to grow. Altogether, states spent an estimated \$55.8 billion from state general funds on corrections in fiscal year 2018, accounting for 7 percent of state general fund expenditures that year.¹¹⁵ Between 1979 and 2013, total state and local spending on prisons and jails increased at three times the rate of total spending on public primary and secondary education.¹¹⁶ Some states have lowered their corrections spending in recent years, including several that have closed prisons and reduced the number of correctional employees in response to lower incarcerated populations.¹¹⁷

THE FEDERAL INCARCERATION SYSTEM

The federal incarcerated population has also ballooned in recent decades. The number of people imprisoned under federal control grew by 677 percent between 1980 and 2016, peaking in 2012 with 217,815 people.¹¹⁹ As of 2017, 183,058 people — about one in 10 adults in prison in the United States — were under federal jurisdiction.¹²⁰

While the federal prison population has declined along with most state prison populations in recent years, the federal system population has dropped faster than the average decrease across states.¹²¹ The number of people held by federal correctional authorities peaked in 2012 and has dropped significantly since then, declining by 16 percent by 2017.¹²²

Notably, while state prison systems generally have jurisdiction over people sentenced for violating state offenses (primarily felonies), the Federal Bureau of Prisons (BOP) system has jurisdiction over a broader range of people. For example, in addition to people convicted of violating federal law, most people convicted of Washington, D.C., code felonies serve their time in federal prisons.¹²³

The number of annual admissions to federal correctional facilities increased dramatically (349

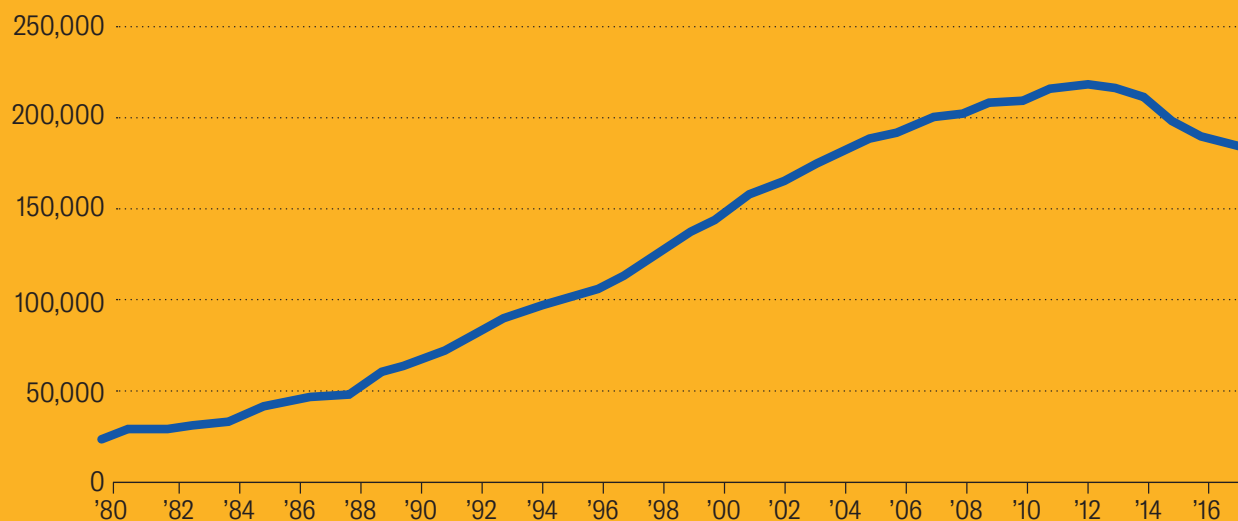
percent) between 1980 and 2011, when it peaked before declining by 27 percent between 2011 and 2016. Still, like state prison admissions, the number of admissions to federal prisons in 2017 was much higher — over three times as high — than the number of admissions in 1980.¹²⁴

In 2017, there were a reported 44,708 admissions to federal correctional facilities. Of these admissions, an estimated 90 percent were new commitments from court, while 10 percent were returns to prison by people who had been released from prison to some form of community supervision.¹²⁵

The primary offense breakdown among people serving sentences in federal prisons is different from that of state prisons. Unlike people in state prisons, nearly half (47 percent) of people serving federal sentences in 2017 were incarcerated for a drug offense, and over one-third (39 percent) were incarcerated for public order offenses such as liquor law violations and violations of probation or parole. A very small proportion of people serving time under federal control that year were there for violent (8 percent) or property (6 percent) crimes.¹²⁶

Many people in federal prisons have extremely long sentences. As reported in October 2019 by the BOP, nearly half (49 percent) of people in federal prisons are sentenced to 10 years or more. Within that group, more than 27,000 people are serving 20

FEDERAL PRISON POPULATION



years or more — nearly 17 percent of the total federal sentenced population.¹²⁷

Harsh sentencing practices, limited opportunities to earn time off, and restrictive release policies all contribute to long stays in federal prisons. Federal mandatory minimum prison sentences and additional sentencing enhancement penalties can trigger long sentences regardless of the circumstances of the offense or the judge's assessment of what is appropriate. Moreover, in 1984, Congress eliminated federal parole, removing the opportunity to be considered for individualized release for everyone convicted of federal offenses after 1987 and sentenced to serve time in prison.¹²⁸

Many people who are released from federal prisons eventually return to the justice system. In 2016, the U.S. Sentencing Commission released a report studying people who were released from federal prison or began new probation terms in 2005. The report found that about half (49 percent) of them were rearrested within eight years for either a new crime or a violation of their probation or release conditions, and 32 percent were reconvicted, and a quarter (25 percent) were reincarcerated in that same time period.¹²⁹

Federal prisons have significant disproportionality among who is incarcerated.

Black People: Black people are overrepresented throughout the federal system. In 2017, 37 percent of the people serving time in the federal prison system were Black adults, while Black people made up only 12 percent of the nation's adult population that year.¹³⁰

Latinx People: In 2017, 32 percent of people serving time in the federal prison system were Latinx adults, while Latinx people made up only 16 percent of the nation's adult population that year.¹³¹

Native American and Native Alaskan People: While Native American and Native Alaskan people accounted for less than 1 percent of the nation's adult population in 2017, they made up 2 percent of the people incarcerated under federal jurisdiction that year.¹³²

Women: Although women make up a relatively small portion of all people in the federal prison system (7 percent in 2017), the number of women in federal prisons grew by 808 percent from 1980

to 2016, surpassing the growth in the number of men in federal prisons in the same time span.¹³³ Women in the federal prison system, like men, are overwhelmingly imprisoned for nonviolent offenses. In 2017, only 5 percent of women in federal prison were imprisoned for offenses categorized as violent. That same year, over half (57 percent) were serving time for drug offenses, one-fifth (20 percent) for public order offenses, and 17 percent for property offenses.¹³⁴

Older People: As of October 2019, one in five people (19 percent) incarcerated in the federal prison system was over the age of 50.¹³⁵

People Receiving Mental Health or Substance Use Treatment: According to the BOP, nearly 174,000 people were receiving mental health treatment as of June 2019, ranging from people with lower-level care needs to those who require inpatient psychiatric care.¹³⁶ Moreover, at that time, nearly 48,000 people were receiving drug treatment or education within federal prison, and an additional 9,671 were receiving BOP-provided community-based transitional drug treatment.¹³⁷ A 2004 survey found that 40 percent of people in federal prisons reported having symptoms of mental health disorders in the past 12 months.¹³⁸

People with Low Educational Attainment: The most recent Bureau of Justice Statistics report conducted about the educational backgrounds of prisoners was in 2003. This national report found that among people in federal prisons in 1997, about half (49 percent) had not received a high school diploma, including 27 percent who had completed some high school or less and 23 percent who had obtained a GED.¹³⁹

The cost to maintain the federal prison system is enormous. In fiscal year 2018, Congress appropriated more than \$7.2 billion to the BOP.¹⁴⁰ In fiscal year 2017, the average cost of incarceration for a person in the federal prison system was \$36,299.25 for the year (or \$99.45 per day).¹⁴¹

Ending Mass Incarceration in the United States: A Path Forward

Mass incarceration is a result of many systems failing to support our communities. To end it, we must develop policies that better address inadequacies throughout our education, health care, and economic systems – to name a few.

But focus on the criminal legal system itself is also necessary. We can hold people accountable and ensure public safety while respecting fundamental civil rights. We can create a criminal legal system that keeps communities safe, offers second chances and rehabilitation, treats people fairly, and challenges racism. We can advance a vision of reform that not only replaces the current criminal legal system but also heals and rebuilds communities most harmed by mass incarceration.

Bold leadership from today’s policymakers to enact reforms at every point in the system will help bring an end to this shameful era of mass incarceration, from reducing the amount of time people serve in prison to reducing the number of people entering jails and prisons in the first place. The below policies implemented at local, state, and federal levels could cut the U.S. jail and prison population by half.

Reducing Admissions

To end mass incarceration, the United States must break its overreliance on jails and prisons as a means to hold people accountable for their behaviors. Evidence indicates that prisons seldom offer adequate solutions to wrongful behavior. In fact, imprisonment can be counterproductive – increasing cycles of harm and violence and failing to provide rehabilitation for

incarcerated people or adequate accountability to the survivors of crime.¹⁴²

Reforms to decrease the vast number of people coming into the criminal legal system would prevent people from coming into the system altogether, divert people who would be better served outside the system, and ensure people are not trapped in an endless cycle of reincarceration once released. Here are some strategies:

- **Decriminalize more behaviors and activities:** Legislatures should move away from a culture of criminalization, stop expanding the criminal code, and look at alternatives to incarceration. Criminal legal policies and practices must consider incarceration the very last resort, rather than the first response to misbehavior. Legislatures should revise criminal codes to decriminalize behaviors and activities that do not require criminal law investigation and interference, such as addiction, mental illness, truancy, and lack of fee and fine payment.
- **Reduce police interactions and arrests:** Police policies and actions are instrumental in deciding who gets stopped, searched, arrested, and funneled into the criminal legal system; indeed, the United States’ overincarceration crisis begins at the front end of the system, with officers acting as gatekeepers. Police make more than 10 million arrests each year.¹⁴³ Many of these arrests focus on misdemeanors and infractions – on any given day from 2015 through 2017, about 230,000 people were in jail for these kinds of offenses.¹⁴⁴ Nationally, state and local governments should eliminate

broken-windows policing¹⁴⁵ and remove the police from enforcement of quality-of-life offenses and traffic infractions that do not present an immediate safety concern.

Many jurisdictions also station police officers in schools in the misguided belief that they will be an effective solution to school-based misbehavior. In fact, this practice results in heavy-handed and carceral responses to normal adolescent behavior, resulting in more than 61,000 school arrests in the 2015–16 school year.¹⁴⁶ This both fuels racial disparities in the legal system and drains resources from preventing violence in the first place. State and local governments should ban the routine presence of police in schools, only allowing law enforcement into schools when there is a real, immediate, and active physical threat to student and staff safety.

The federal government can play a significant role in reshaping policing nationally. The president should reconvene the President’s Task Force on 21st Century Policing and develop incentives for local departments to adopt its report recommendations. The U.S. attorney general should enforce the Death in Custody Reporting Act¹⁴⁷ to collect data on police and community encounters and investigate and challenge unconstitutional policing. To directly impact federal law enforcement, the U.S. attorney general should also issue a federal use of force guidance that restricts law enforcement to using force only when necessary and ends the practice of civil forfeiture. Congress should eliminate the Department of Defense 1033 program to prevent police from obtaining military weapons and equipment, eliminate or redirect spending for programs that perpetuate overpolicing and mass incarceration (e.g., COPS grants, Byrne JAG grants, and DEA funding), fund the Civil Rights Division to properly investigate police misconduct, and set up funding incentives to encourage local police departments to develop law enforcement–led diversions in lieu of arrest for nonserious offenses.

- **Reform prosecutorial practices:** Prosecutors are the most powerful actors in the criminal legal system. Unfortunately, for decades, prosecutors have embraced “tough on crime” policies and practices that have hyper-focused their offices toward more convictions and harsher punishments. Between 1994 and 2008, felony charges filed by prosecutors rose by nearly 40 percent, even while reported crime and arrests were falling.¹⁴⁸ This approach has increased jail and prison populations dramatically and lengthened sentences through aggressive charging and plea bargaining practices.

State and local governments should reform prosecutorial practices to reverse this trend. An important first step: Pass legislation mandating robust prosecutorial data collection and transparency so the government and public alike better understand how prosecutors use their discretion in order to inform future policies. Moreover, legislatures should limit expansive and pervasive criminal codes to shrink the scope of charging options available to prosecutors, enact reasonable regulations and guardrails on prosecutors (e.g., turning over evidence to the defense early in a case and recording the reasoning behind prosecutors’ court recommendations), and establish community advisory or review boards to oversee local prosecutors with sufficient authority to correct course when necessary.

Local prosecutors’ offices should also adopt internal policies and practices to end mass incarceration. Prosecutors’ offices should remove current policies or practices that incentivize prosecutors toward increased charges and convictions (e.g., staff bonus and promotion decisions that hinge on conviction rates), engage community members to better understand their points of view on how prosecutors should use discretion, and educate prosecutors on best practices to avoid driving people back into the system. Importantly, prosecutors should adopt policies that treat incarceration as a last resort, such as incentivizing prosecutors to decline

charging people who would be better served outside the legal system, offering diversion from the system into treatment or other services, recommending no pretrial detention or bail, participating in restorative justice programs, pursuing alternative-to-prison sentencing options upon conviction, implementing policies that require prosecutors to charge the lowest level possible, justifying short sentencing recommendations when incarceration is deemed necessary, and supporting parole release when available.

The federal government can play a significant role in reshaping both federal and local prosecution practices. The U.S. attorney general should develop a fairer charging policy that would limit the use of mandatory minimums and criminal history in decision-making, eliminate sentencing enhancements from plea negotiations, mandate open file discovery, require transparency on case decisions, and end “zero tolerance” prosecutions. Congress should also legislatively mandate transparency from U.S. attorneys, establish financial incentives for federal prosecutors to reduce prison population and recidivism rates, and end absolute immunity for federal prosecutors. Moreover, Congress should provide federal funding and agency resources to investigate local prosecutor misconduct and financially incentivize local prosecutors to reduce their state prison populations and recidivism rates.

- **Strengthen indigent defense:** Well-trained and sufficiently resourced defense counsel is critical not just for respecting constitutional rights, but for preventing unjust and unnecessary incarceration. Yet, public defense systems nationwide fail both defendants and the attorneys tasked with representing them. Defending attorneys’ crushing caseloads, a dearth of investigatory and expert resources, and lack of sufficient time to meet with clients, review discovery, and engage in significant motion practice have combined to threaten — and sometimes eviscerate — the Sixth Amendment

right to counsel to which all defendants are entitled. Indigent defense reform would have a widespread impact. According to a recent BJS indigent defense survey of 28 states, public defenders and appointed indigent defense counsel represented nearly 80 percent of criminal cases in 2013.¹⁴⁹

Public defense systems must be provided with increased funding, resources, and oversight — on par with the resources provided to the prosecution function — to ensure that all defendants receive constitutionally sufficient representation, regardless of where they happen to be prosecuted or how much money they have. Local and state governments should establish caseload or workload standards, prohibit fixed-fee contracts for defending attorneys or conflict attorneys tasked with representing indigent defendants, require compensation for such services to be paid at a reasonable hourly rate, and provide loan forgiveness for new lawyers who choose to serve as public defenders.

Local and state governments should require counsel for every person accused of crime at the first court appearance where pretrial release decisions are made, eliminate the imposition of fees to recover costs of representation from people who are indigent, and expand access to counsel in civil matters such as child welfare and housing. Where no public defender with a manageable caseload is available to represent an indigent defendant, legislatures should require the dismissal of the case.

The federal government can play a significant role in reshaping both federal and local indigent defense. The Department of Justice should reestablish the Office for Access to Justice, which worked to increase access to counsel and legal assistance for people who are unable to afford lawyers. Additionally, Congress should pass federal legislation that bolsters funding and resources specifically for public defender offices at all levels, provides a mechanism whereby states and localities can seek grant funding to cover public defense-related costs,

and eliminates barriers to civil rights lawsuits in federal court for systemic public defense suits or creates a private right of action for such suits. Congress should also establish the position of “U.S. public defender general” to serve as an equal counterpart to the attorney general in federal cases.

- **Overhaul pretrial systems:** The pretrial system is the front door of the criminal legal system, beginning when a person is arrested and ending only when resulting charges are resolved by dismissal, plea, or trial. Every year, millions of people are pulled into this system, separated from their families and loved ones and subjected to long periods of incarceration based on the mere accusation of a crime. Courts determine whether someone in the pretrial system may return home while awaiting resolution of their charges. They require some people to pay money bail, though many cannot afford the amount; others are denied release altogether and must languish in jail instead. This all occurs while people are presumed innocent under the law.

Local and state governments should overhaul criminal pretrial procedures to create a fairer, smarter system. Courts should facilitate speedy individualized release hearings with necessary due process protections, including rights to counsel, discovery, and witness examination, a strong presumption of release without conditions, and heightened standards for the imposition of liberty-restricting conditions of release. Additionally, courts should create an informant registry, require corroborating evidence for warrants and convictions based on informant testimony, hold mandatory reliability hearings, and enhance disclosure requirements. Courts should further remove the burdens that the system currently imposes on defendants by decreasing the number of required in-person court dates, making rescheduling more convenient and flexible, providing free childcare and public transportation, and compensating people who are detained whose cases are later dismissed or who are acquitted.

Moreover, legislatures should pass laws to eliminate wealth-based discrimination by evaluating a person’s ability to pay, eliminating payments for any conditions of release as well as fees on monetary bonds, banning for-profit bail and pretrial supervision companies, and prohibiting courts and prosecutors from using pretrial services and diversion programs as revenue-generating endeavors. To impact jail populations more directly, legislatures should pass laws to expand eligibility for mandatory and presumptive prebooking release with no conditions, narrowly limit who can be jailed before conviction, and expand access to diversion programs. Lastly, they should ensure robust appeal rights and speedy trial protections for persons who are jailed, as well as those released on liberty-restricting conditions.

The federal government can similarly influence pretrial practices. Congress should introduce a bill to reform the Bail Reform Act by eliminating the presumption of detention for drug offenses and modifying any sentencing guideline language that discourages trials within the federal criminal system. Moreover, to impact state and local systems, Congress should pass legislation mandating federal oversight of bail bond insurance companies and industry actors, incentivizing states to end money bail systems that do not consider a person’s ability to pay, enacting pretrial procedural protections, and encouraging states to decrease their pretrial populations.

- **Expand alternatives to incarceration:** Several types of alternative-to-incarceration programs have shown great success in reducing both violent and nonviolent criminal activity. Programs offering support services such as substance use treatment, mental health care, employment, housing, health care, and vocational training — often with a community service requirement — have significantly reduced recidivism rates for participants.¹⁵⁰ For offenses involving violence, restorative justice programs — which are designed to hold responsible people

accountable and support those who were harmed — can be particularly promising. When they are rigorous and well-implemented, these processes have not only been demonstrated to reduce recidivism for defendants,¹⁵¹ they have also been shown to decrease symptoms of posttraumatic stress in victims of crime.¹⁵² Judges must have all options at their disposal besides imprisonment. By a 3-to-1 margin, crime survivors prefer holding people accountable using alternatives to prison, such as rehabilitation, mental health treatment, drug treatment, or community service.¹⁵³ To ensure courts use these alternatives, legislatures should pass laws that require nonincarceration for misdemeanors and presume nonincarceration for felonies.

- **Shrink community supervision:** Extended periods of supervision with unnecessarily burdensome conditions can interfere with a person’s ability to successfully reenter society, increasing the risk of reincarceration, often for minor or technical violations of a person’s terms of parole or probation. With rapper Meek Mill’s reincarceration in 2017 for popping a wheelie while under community supervision,¹⁵⁴ national attention is now focused on supervision’s undue burdens, fueling recent calls for reform.

State and local governments must reduce the burdens of community supervision. Courts should encourage judges to consider when probation is appropriately applied, mandating that it should be applied only as an alternative to prison and not applied to people who should not remain in the criminal legal system. Legislatures should reduce initial probation lengths in criminal codes, capping them at three years, and establish opportunities for early discharge, such as an earned compliance credit program and automatic early discharge based on compliance and risk. Moreover, legislatures should eliminate blanket probation and parole conditions, requiring any conditions to have an articulable nexus to a risk or need of that particular individual, and end wealth-based probation and parole practices that allow

extended terms due to nonpayment of fines, fees, restitution, or other court costs. Additionally, federal probation offices should measure the success of their officers by successful reentry and lowered recidivism rates. Congress should pass legislation that financially encourages states to use similar metrics.

- **Reduce probation and parole revocations:** Too often, people revoked from supervision go to prison for technical violations, not for committing new offenses. Missing curfew or lack of employment could result in incarceration. Racial disparities are stark in revocation decision-making. Legislatures should enact policies that prevent community supervision from directly driving people into jails and prisons, such as banning the use of supervision revocations and short-term incarceration for violations that do not involve a new offense, requiring a system of graduated sanctions with incentives for compliance and swift responses to violations in lieu of incarceration, and establishing community supervision oversight bodies to review decisions to revoke supervision. Federally, Congress should oppose any bills that expand arrest authority and other police powers for federal probation officers, and should pass laws to prohibit imprisonment for technical violations of probation and supervised release, including failure to pay fines and fees.
- **End the War on Drugs:** Nearly 50 years ago, President Richard Nixon declared a “War on Drugs” — a campaign that has cost roughly \$1 trillion, has produced little to no effect on the supply of or demand for drugs in the United States, and has contributed to making America the world’s largest incarcerator.¹⁵⁵ The War on Drugs has sent millions of people to prison, seriously eroded civil liberties and civil rights, limited those branded with criminal records from gaining employment and housing, and cost taxpayers billions of dollars a year. Voters strongly believe the War on Drugs isn’t working — in fact, a 2018 Rasmussen Reports national

survey found that 75 percent of likely voters believe America is losing this “war.”¹⁵⁶

State and local governments should end the War on Drugs by passing a slew of legislations aimed at reversing the criminal legal system’s approach to addiction and the drug trade. First, legislatures should decriminalize drug possession, reduce penalties for other drug offenses, and require courts to retroactively resentence people currently serving time for those offenses. Instead of relying on the criminal legal system, the government should respond to addiction with treatment, which can more effectively reduce crime.¹⁵⁷ Legislatures should invest in building and improving community-based treatment to provide quality services, require first responders to offer treatment rather than arresting people, and require other pretrial system stakeholders to screen for and offer diversion into treatment when substance use care would be more beneficial than incarceration. Legislatures should also pass laws to eliminate the burden on those who have been impacted by the War on Drugs, including expunging state drug conviction records, eliminating barriers to public benefits, and allowing their full participation in legal marijuana industries.

The federal government – a forceful proponent of the War on Drugs – can act to swiftly end it. First, the president should publicly declare an end to the failed and ineffective War on Drugs. The Department of Justice should issue a guidance that directs federal resources away from enforcement of drug offenses. Moreover, Congress should pass legislation to federally deschedule drugs, applying this change retroactively, and expunge the records of federal drug convictions, eliminate barriers to federal public benefits for those with drug records, and ensure drug use or participation in legal drug industry does not impact immigration status or the ability to naturalize of noncitizens. Congress should oppose any federal bills that would expand or increase penalties for offenses involving synthetic drugs, such as the increase of

mandatory minimums for fentanyl distribution. To influence state and local systems, Congress should also pass legislation that financially incentivizes the decriminalization of drug possession and reduced penalties for other drug offenses.

- **Eliminate legal restrictions for people with records:** There are at least 70 million people in America who are living with an arrest record or a criminal conviction. In fact, one in three adults in America have a criminal record.¹⁵⁸ People with arrest and conviction records are routinely blocked from truly reentering society by nearly 45,000 legal restrictions.¹⁵⁹ Legislatures and departments of correction should remove punitive restrictions, create programs that support people with records as they reintegrate into society, and provide state and federal funding for reentry resources.

Pervasive discrimination exists against people with a criminal record in employment decisions. Nearly 75 percent of formerly incarcerated people are still unemployed a year after release.¹⁶⁰ A lack of stable employment increases the likelihood that an individual will return to jail or prison. Legislatures should pass laws that ban questions regarding criminal history from all job applications, incentivize private sector employers to hire people with a criminal record, and remove barriers to occupational licensing for those with criminal records. Congress should pass legislation to ensure accuracy in FBI background checks, which often influence public and private employment decisions.

Education can also provide people with employment opportunities. Yet, 37 percent of people incarcerated in federal and state prisons did not graduate from high school.¹⁶¹ A criminal record imposes further barriers to higher education, such as elimination from consideration for federal financial aid assistance and college admissions inquiries into records. Legislatures should increase access to education for people while they are incarcerated and when they return to their communities

by eliminating barriers to higher education, ensuring all formerly incarcerated people have access to all available financial aid assistance, including PELL grants, and college admissions applications do not inquire into criminal history.

Further, having a means of transportation is key to fulfilling the conditions of one's release, including making mandatory appointments and holding employment. Yet, many people recently released from incarceration have had their drivers' licenses revoked or suspended for unpaid fines and fees, and driving on a suspended or revoked license can trigger their rearrest.¹⁶² Local and state legislatures should pass laws that remove all legal and financial barriers to acquiring a driver's license for formerly incarcerated people.

Not having secured housing prior to release is used as a reason to hold people past their release dates, resulting in people spending more time behind bars.¹⁶³ People with felony convictions are often banned from accessing subsidized housing.¹⁶⁴ State and federal legislatures should invest in transitional housing options to support successful reentry, as well as repealing laws that prohibit people with a record from living in subsidized or publicly owned housing.

The Supplemental Nutrition Assistance Program and Temporary Assistance for Needy Families, which help people who cannot afford food, do not guarantee timely access for people released from incarceration, regardless of their food insecurity. Congress should eliminate prohibitions and barriers to nutrition assistance, temporary assistance, Social Security, and other federally administered public benefits based on incarceration or criminal history.

The majority of people released from prison suffer from chronic health conditions that require treatment. In a 2008 Urban Institute study, about four in 10 men and six in 10 women reported a combination of physical health, mental health, and substance use disorder conditions.¹⁶⁵ Without specific support, these

individuals are more likely to face housing insecurity and an inability to maintain employment.¹⁶⁶ State and federal departments of correction must provide thorough assessments of health needs during the reentry planning process and ensure immediate access to Medicaid, disability, and other forms of public assistance prior to release.

Lastly, 6 million people are precluded from voting because of previous felony convictions.¹⁶⁷ Moreover, people who are incarcerated or completing probation or parole are unable to vote.¹⁶⁸ Congress and state legislatures should restore all citizens' fundamental right to vote, including those with criminal convictions and those who are currently incarcerated.

Reducing Time Served

Reducing the amount of time people serve, even by just a few months, can lead to thousands fewer people in state and federal prisons. This can be achieved through reforms that would focus on more appropriate sentence lengths, provide processes to adjust sentences, and develop robust release opportunities.

- **Reduce sentence lengths:** Extreme sentencing laws and practices are keeping people incarcerated for far longer than ever before. These sentencing trends have resulted in prison overcrowding and fiscal burdens on states trying to accommodate a rapidly expanding system. Sentencing reform is the key to both slowing the flow of people into our prisons and removing obstacles to release after an appropriate amount of time. State and local legislatures should defelonize all offenses that do not involve a specific and harmed victim, review criminal codes to shorten all sentence ranges to more appropriate and fair lengths, and impose mandatory maximums with a cap of 20 years on any prison sentence. To effectively enact these policies, legislatures must eliminate all laws that increase prison time to exorbitant lengths, such as mandatory minimums and

truth-in-sentencing laws, as well as life, life without parole, and nearly life sentences. All new sentencing reforms should be applied retroactively, so that those already serving harsh sentences or living with burdensome records for the same offenses may seek relief. Moreover, legislatures should institute a “second look” process for anyone serving 10 years or more, allowing them to apply for resentencing before a court. The federal government should enact similar reforms, beginning with the elimination of mandatory minimums for drug offenses, a driver of admissions into federal prisons. These changes would address mass incarceration, prison overcrowding, and the exorbitant costs of incarceration while continuing to support crime survivors – one poll found that even among survivors of violence, 60 percent prefer shorter prison sentences and more spending on prevention and rehabilitation.¹⁶⁹

- **Increase release opportunities:** Today, people are spending longer in prison than ever before, in part because the criminal legal system fails to release people at the back end. Long after people have served substantial time in prison, have been rehabilitated, and are ready to return to their communities, tens of thousands of people remain incarcerated as release mechanisms remain underutilized, broken, or nonexistent.

Release opportunities do not guarantee release – rather, they provide moments of consideration for release. Legislatures across the country should expand release eligibility for all offenses so everyone serving time can have the opportunity to demonstrate their rehabilitation and readiness for reentry. They should pass laws to create presumptive release policies triggered by the number of years served, which would presume release at an eligibility date unless the parole board objects; increase the number of hearings available for release consideration; create and encourage an increased use of medical release for individuals with medical conditions; establish geriatric release eligibility for people age 50 and older and encourage its use; and

implement more programming inside prisons through which people are able to earn time off of their sentences.

State and federal legislatures should also establish fairer release consideration structures. They should pass laws that establish holistic criteria for release decision-making, increase transparency and fairness in all release hearings and decisions, establish a right to counsel when under consideration for release, forbid using the nature or severity of the applicant’s original offense as a basis for denial, require documentation in the record of the denial rationale for parole grants or denials, and allow immediate reapplication for consideration to people who are denied release.

- **Expand clemency:** Prisons are overcrowded with people serving long, draconian sentences. The power of clemency – the opportunity to pardon a person convicted of an offense or shorten their sentence through commutation – allows the U.S. president and state governors to correct these unjust sentences, scaling them back to more appropriate levels.

Clemency is one of the most impactful unilateral executive actions presidents and governors can make to reduce the prison population. The U.S. president should commit to an expansive clemency process that regularly reviews cases of individuals in federal prison, similar to President Barack Obama’s Clemency Initiative. The initiative should include across-the-board, proactive reviews of entire categories of persons incarcerated in federal prisons, including those incarcerated for drug possession, the elderly, the sick, and people serving extraordinarily long sentences. Moreover, it should presume release for certain categories of persons, for example, people still serving time for drug-related offenses where there has been a subsequent change in the law reducing or eliminating incarceration for those offenses.

State governors should develop a similar process that would regularly review thousands of

individual cases in state prisons and determine whether their sentences should be commuted or pardoned. Moreover, state governors should consider categorical clemency, including for people over the age of 55 who have served at least 5 years of their sentence, everyone sentenced to more than 20 years for drug-related offenses, people who would not get as lengthy a sentence if convicted under today's laws, those serving time for crimeless revocations, people serving additional time under sentencing enhancements, custodial parents and caregivers, people who have completed educational and vocational programs or earned good time without any disciplinary action, victims of domestic or sexual assault who committed crimes against their abuser, those convicted in conspiracy and felony murder cases who did not commit the underlying crime, people who are facing potential deportation consequences, individuals who were under the age of legal consent when their crimes were committed, and people who pled guilty due to prosecutorial threats.

Public support for the use of clemency in high-profile cases arises regularly. In 2018, President Donald Trump commuted the federal life sentence of Alice Marie Johnson, a 63-year old grandmother convicted of drug charges, after she had served more than 20 years behind bars when both public and celebrity support reached his desk.¹⁷⁰ In January 2019, Tennessee Governor Bill Haslam commuted Cyntoia Brown's life sentence for killing a man who had picked her up for sex when she was a teenage trafficking victim, after her case received widespread attention.¹⁷¹ Most cases, however, do not gain national attention and viral public outcry for clemency, but are equally deserving of eligibility and review.

Reducing Racial Disparities

Reducing the number of people who are imprisoned in the United States will not on its own significantly reduce racial disparities in the prison system.

People of color (especially Black, Latinx, and Native American people) are at a higher risk of becoming involved in the legal system, including living under heightened police surveillance and being at higher risk for arrest. This imbalance cannot be accounted for by disparate involvement in illegal activity, and it grows at each stage in the criminal system, beginning with initial law enforcement contact and increasing at subsequent stages, such as pretrial detention, conviction, sentencing, and post-release opportunity.¹⁷² Focusing on only one of the factors that drive racial disparity does not address issues across the whole system.

Racial disparity is so ingrained in the system that it cannot be mitigated solely by reducing the scale of mass incarceration. Shrinking the prison population across the board will likely result in lower imprisonment rates for all racial and ethnic populations, but it will not address comparative disproportionality across populations. For example, focusing on reductions to prison admissions and length of stay in prison is critically important, but those reforms do not address the policies and practices among police, prosecutors, and judges that contribute greatly to the racial disparities that plague the prison system.

New Jersey, for example, is often heralded as one of the most successful examples of reversing mass incarceration, passing reforms that led to a 26 percent decline in the state prison population between 1999 and 2012.¹⁷³ However, the state did not target racial disparities in incarceration and, in 2014, Black people in New Jersey were still more than 12 times as likely to be imprisoned as white people — the highest disparity of any state in the nation.¹⁷⁴

Ending mass incarceration is critical to eliminating racial disparities, but insufficient without companion efforts that take aim at other drivers of racial inequities outside of the criminal legal system. Reductions in disparate imprisonment rates require implementing explicit racial justice strategies.

Some examples include:

- Ending overpolicing in communities of color
- Preventing police from using predictive policing technologies and requiring police to solicit public

comment before adopting any new policing technologies that “tech-wash” existing racially disparate practices¹⁷⁵

- Regularly assessing how prosecutorial offices exacerbate racial disparities in the legal system to identify and eliminate bias
- Investing in diversion/alternatives to detention in communities of color
- Reducing the use of pretrial detention and eliminating wealth-based incarceration
- Ending sentencing enhancements based on location (e.g., drug-free school zones)
- Reducing exposure to reincarceration due to revocations from supervision
- Requiring racial impact statements before any new criminal law or regulation is passed and requiring legislation to proactively rectify any potential disparities that may result from new laws or rules
- Eliminating discriminatory gang sentencing enhancements that disproportionately target people of color
- Abolishing the death penalty, as numerous studies have illustrated racial disparities are rampant throughout the capital sentencing process¹⁷⁶
- Removing actuarial algorithms from all pretrial system decisions due to their potentially detrimental racial impact, lack of transparency, and limited predictive value
- Encouraging judges to use their power to dismiss cases that originate with school officials or on school grounds when the matter may be adequately addressed through school disciplinary or regulatory processes to avoid incarcerating children during their most formative years
- Eliminating fines and fees, which effectively criminalize poverty

“Merely reducing sentence lengths, by itself, does not disturb the basic architecture of the New Jim Crow. So long as large numbers of African Americans continue to be arrested and labeled drug criminals, they will continue to be relegated to a permanent second-class status upon their release, no matter how much (or how little) time they spend behind bars. The system of mass incarceration is based on the prison label, not prison time.”¹⁹¹

— From *The New Jim Crow*, Michelle Alexander

- Shifting funding from law enforcement and corrections to community organizations, job creation, schools, drug and mental health treatment, and other social service providers

Reducing Disability Disparities

The rates of people with disabilities in the U.S. criminal system are two to six times that of the general population.¹⁷⁷ In particular, people with psychiatric disabilities are dramatically overrepresented in jails and prisons across the country.¹⁷⁸

- People showing signs of mental illness are twice as likely to be arrested as people without mental illness for the same behavior.¹⁷⁹
- Twenty-six percent of people in jail meet the threshold for recent serious psychological distress — about five times higher than the general U.S. population.¹⁸⁰
- People with mental illness are sentenced to prison terms that are, on average, 12 percent longer than other people in prison.¹⁸¹
- People with mental illness stay in prison longer because they frequently face disciplinary action from conduct that arises due to their illness

— such as attempted suicide — and they seldom qualify for early release because they are not able to participate in rehabilitative programming, such as educational or vocational classes.¹⁸²

Furthermore, sentencing reforms appear to leave people in prison with psychiatric disabilities behind. In recent years in California, for example, the prison population has decreased by more than 25 percent following a court order, but the number of people with a serious mental disorder has increased by 150 percent — an increase in both the rate and the absolute number of incarcerated people with psychiatric disabilities.¹⁸³

Screening tools to evaluate psychiatric disabilities vary by state and jurisdiction, but the most reliable data indicate that more than half of jail populations and close to half of prison populations have mental health disabilities.¹⁸⁴ The fact that people with mental health disabilities are arrested more frequently, stay incarcerated longer, and return to prisons faster is not due to any inherent criminality related to psychiatric disabilities. It arises in part because of the lack of accessible and appropriate mental health treatment in the community; in part because of a perception of dangerousness by police, prosecutors, and judges; and in part because prison staff and probation officers fail to recognize and accommodate disability.

Many people of color in jails and prisons are also people with disabilities, and efforts to reduce racial disparities must go hand in hand with efforts to reduce disability disparities.¹⁸⁵ Not surprisingly, many of the strategies to reduce disability disparities are similar to approaches that reduce racial disparities. Some examples include:

- Creating behavioral health centers to divert people before arrest, run by state departments of health, as alternatives to jails, or emergency rooms for people experiencing mental health crises or addiction issues
- Training dispatchers and police to divert people with mental health issues who commit low-level nuisance offenses to behavioral health centers — jurisdictions that have followed this

approach have significantly reduced their jail populations¹⁸⁶

- Ending arrest and incarceration for low-level public order charges, such as being drunk in public, urinating in public, loitering, trespassing, vandalism, and sleeping on the street. If needed, refer people who commit these offenses to behavioral health centers.
- Requiring prosecutors to offer diversion for people with mental health and substance use disabilities who are charged with low-level offenses
- Evaluating prosecutors' charging and plea bargaining practices to identify and eliminate disability bias
- Requiring prosecutors' offices be transparent in their hiring practices, charging decisions, and plea deals
- Investing in diversion programs and alternatives to detention designed for people with disabilities, including programs that provide supportive housing, Assertive Community Treatment, wraparound services, and mental health supports
- Reducing the use of pretrial detention while increasing reminders of court dates and other supports to ensure compliance with pretrial requirements
- Reducing reincarceration due to parole or probation revocations through intensive case management, disability-competent training for officers on alternatives to incarceration and reasonable modifications to requirements of supervision, and no return to incarceration for first and second technical violations
- Addressing bias against mental disabilities in risk assessment instruments used to assist decision-making in the criminal legal system
- Shifting funding away from law enforcement and corrections into supportive housing, intensive case management, schools, drug and mental health treatment, community organizations, job creation, and other social service providers

TAKING THE LEAD

A myriad of policymakers and criminal legal system stakeholders can commit to and implement bold reforms to end mass incarceration.

U.S. President and State Governors: They can take bold leadership positions in favor of criminal legal reform, prioritizing decarceration and racial justice on their policy agendas and swiftly acting through often-untapped executive action by appointing reform-minded officials within the system, expanding clemency programs, and signing executive orders to establish bodies tasked with conducting in-depth research and community engagement on criminal legal issues.

Attorneys General: They can champion criminal legal reform policies with lawmakers through advisory opinions on how the state should enforce the law and with the public at convenings. They can also use their influential positions to establish prosecutorial standards in decision-making, provide meaningful prosecutorial and law enforcement oversight, and present directives to prosecutors aimed at reducing incarceration, increasing diversion, and improving case processing.

State and Local Lawmakers: They decide which offenses to criminalize, what penalties to include, how long sentences can be, and when to take away discretion from judges. They can change criminal laws to remove prison as an option when better alternatives exist, decriminalize or depenalize certain activities, and fund the creation of alternatives, including diversion programs that provide supported housing, treatment, and vocational training. They hold vast local authority over reforms to criminal practices and policies in their communities, including — though not limited to — funding mental health and substance use treatment so it is available for people who need it before they encounter the criminal legal system.

Police: They are generally the first point of contact with the criminal legal system. The practices that police employ in communities can shape the public's view of and trust in that system. Police can decide where and who to patrol, question, and search, what offenses to arrest people for, whether or not to arrest people, and how much force to use during encounters with the public. Police departments can also participate in diversion programs, which enable officers to divert people into community-based intervention programs rather than the criminal legal system.

Prosecutors: They make decisions on when to prosecute an arrest, what charges to bring, which plea deals to offer and accept, and what sentences to seek from a judge or jury. They can decide to divert people to treatment programs (for example, drug or mental health programs) rather than send them to prison. And they can decide not to seek enhancements that greatly increase the length of sentences.

Judges: They often have discretion over pretrial conditions imposed on defendants that impact their criminal legal results. For example, individuals who are jailed while awaiting trial are more likely to plead guilty and accept longer prison sentences than people who are not held in jail pretrial. Judges also have the ability to accept or reject plea deals, regulate prosecutorial behavior during the criminal process, and exercise discretion in sentencing. They can consider alternatives to incarceration whenever possible, set shorter supervision and incarceration lengths, and limit sentencing conditions to those that are necessary and related to the offense.

Departments of Correction: They provide reentry and earned credit programming to people serving their sentences and have the authority to both expand access to these programs and seek sufficient funding to ensure they are of higher quality. Moreover, they hold vast discretion in decisions of medical and geriatric release.

Parole Boards: They decide when to allow people to leave prison and can adopt policies to presume release upon eligibility, unless the board objects. They can also establish fairer structures and processes for the people to whom they are considering granting early release. Moreover, if the parole board is trained to consider and accommodate disability issues, they may recognize and release more people who have disciplinary issues in their records that are due to a lack of accommodations for their disabilities.

Probation and Parole Officers: They can set terms of community service that do not overburden people reentering society, develop policies that more appropriately respond to broken rules and do not rely on jail and prison time, and adopt a risk-needs-responsivity model in their offices to better reduce recidivism rates. Moreover, they can improve screening and assessment processes and develop recidivism reduction training.

Conclusion

A majority of Americans across the political spectrum agree that our current system does not work, and they want change.¹⁸⁷ A 2018 nationwide survey showed that 59 percent of likely voters prefer a federal candidate who supports reducing the number of people in jails and prisons, and 75 percent of candidates prefer a candidate who supports reducing racial disparities in the criminal legal system.¹⁸⁸

This strong support should not be surprising, considering that one out of every two American adults has had an immediate family member incarcerated.¹⁸⁹ That equals 113 million Americans¹⁹⁰ who have personally experienced the failures and harms of mass incarceration up close and are desperate to vote for change.

Accomplishing all of the reforms in this Blueprint would almost certainly result in a decrease in incarceration well beyond 50 percent. This Blueprint provides policymakers a variety of options to reach the 50 percent goal from which they can choose the policy reforms that align with their vision, values, and analysis of political feasibility.

Endnotes

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