

BRENNAN  
CENTER  
FOR JUSTICE

SOLUTIONS 2018

# CRIMINAL JUSTICE

AN ELECTION AGENDA FOR CANDIDATES,  
ACTIVISTS, AND LEGISLATORS

*by Lauren-Brooke Eisen and Inimai Chettiar*

**VOTE**



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## FOREWORD

How can we fix American government? How can we make sure it works for all?

In the wake of the convulsive 2016 election, there may be no more pressing question.

Nor will 2016 likely be the last such eruption. American politics has stagnated for years, locked in arid debate on old ideas. Political parties have become increasingly tribal. Elections are drenched in money and marked by intense polarization. Government dysfunction has created an opening for racially divisive backlash politics, while ignoring long-range economic, social, and environmental challenges.

Until we reckon with that public discontent, we'll continue to be entangled in the same battles we've been fighting for decades.

It is time for fresh thinking, which is why the Brennan Center for Justice is producing Solutions 2018, a series of three reports setting out democracy and justice reforms that are intended to help break the grip of destructive polarization.

This volume sets out proposals to reform the criminal justice system and end mass incarceration. Others will show how we can ensure free and fair elections, curb the role of big money in American politics, and protect constitutional freedoms amid new threats.

We hope these proposals are useful to candidates, officeholders, activists, and citizens. The 2018 election should be more than a chance to send a message. It should be an opportunity to demand a focus on real change.

What counts is not what we are against, but what we are for.

A handwritten signature in black ink that reads "Michael Waldman". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Michael Waldman  
*President*



# Criminal Justice

## An Election Agenda for Candidates, Activists, and Legislators

- I. Eliminate Financial Incentives for Incarceration
- II. Enact Sentencing Reform
- III. Pass Sensible Marijuana Reform
- IV. Improve Law Enforcement
- V. Respond to the Opioid Crisis
- VI. Reduce Female Incarceration





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## Executive Summary

This report sets forth an affirmative agenda to end mass incarceration in America. The task requires efforts from both federal and state lawmakers.

Today, criminal justice reform stands on a knife's edge. After decades of rising incarceration and ever more obvious consequences, a powerful bipartisan movement has emerged. It recognizes that harsh prison policies are not needed to keep our country safe.

Now that extraordinary bipartisan consensus is challenged by the Trump administration, through inflammatory rhetoric and unwise action. Only an affirmative move to continue reform can keep the progress going.

The United States has less than five percent of the world's population, but nearly one quarter of its prisoners.<sup>1</sup> About 2.1 million people are incarcerated in this country, the vast majority in state and local facilities.<sup>2</sup> Mass incarceration contributes significantly to the poverty rate.<sup>3</sup> It is inequitable, placing a disproportionate burden on communities of color. It is wildly expensive, in some cases costing more to keep an 18-year-old in prison than it would to send him to Harvard.<sup>4</sup> Our criminal justice system costs \$270 billion annually, yet does not produce commensurate public safety benefits.<sup>5</sup>

Research conclusively shows that high levels of imprisonment are simply not necessary to protect communities. About four out of every ten prisoners are incarcerated with little public safety justification.<sup>6</sup> In fact, 27 states have reduced both imprisonment and crime in the last decade.<sup>7</sup> A group of over 200 police chiefs, prosecutors, and sheriffs has formed, whose founding principles state: "We do not believe that public safety is served by a return to tactics that are overly punitive without strong purpose . . . we cannot incarcerate our way to safety."<sup>8</sup>

In cities, states, and at the federal level, Republicans and Democrats have joined this effort. They recognize that today's public safety challenges demand new and innovative politics rooted in science and based on what works. The opioid epidemic, mass shootings, and cyber-crime all require modern responses that do not repeat mistakes of the past.

Crime is no longer a wedge issue, and voters desire reform. A 2017 poll from the Charles Koch Institute reveals that 81 percent of Trump voters consider criminal justice reform important.<sup>9</sup> Another, from Republican pollster Robert Blizzard, finds that 87 percent of Americans agree that nonviolent offenders should be sanctioned with alternatives to incarceration.<sup>10</sup> And according to a 2017 ACLU poll, 71 percent of Americans support reducing the prison population — including 50 percent of Trump voters.<sup>11</sup>

But the politician with the loudest megaphone has chosen a different, destructive approach. Donald Trump, and his Attorney General Jeff Sessions, falsely insist there is a national crime wave,<sup>12</sup> portraying a country besieged by crime, drugs, and terrorism — "American carnage," as he called it in his inaugural address.<sup>13</sup>

But, crime in the United States remains at historic lows. While violent crime and murder did increase in 2015 and 2016, new data show crime and violence declining again in 2017.<sup>14</sup> The national murder rate is approximately half of what it was at its 1991 peak.<sup>15</sup>

Those who seek to use fear of crime for electoral gain are not just wrong on the statistics; they are also wrong on the politics.

Now, to continue the progress that has been made, it is up to candidates running for office to boldly advance policy solutions backed by facts, not fear. This report offers reforms that would keep crime low, while significantly reducing incarceration. Most solutions can be enacted through federal or state legislation. While most of the prison population is under control of state officials, federal policy matters too. The federal government's prison population is larger than that of any state.<sup>16</sup> Further, Washington defines the national political conversation on criminal justice reform. And although states vary somewhat in their approach to criminal justice, they struggle with similar challenges. The state solutions in this report are broadly written as “models” that can be adapted.

## I. Eliminate Financial Incentives for Mass Incarceration

- **End the Federal Subsidization of Mass Incarceration.** Federal grants help shape criminal justice policy at state and local levels. For decades, these grants have subsidized the growth of incarceration. To reverse that flow, Congress can pass the “Reverse Mass Incarceration Act.” This bill would dedicate \$20 billion over 10 years to states that reduce both crime and incarceration, reshaping state and local policy.<sup>17</sup> It is the biggest step the federal government can take to end over-incarceration.
- **Abolish State Cash Bail.** The decision of whether a defendant should be jailed while awaiting trial is often based on a defendant's wealth, not on public safety. Rich offenders can literally buy their way out of jail, while poor people charged with nonviolent crimes remain incarcerated for want of a few hundred dollars. This is unfair and unsafe. States can abolish cash bail, and instead make detention decisions based on an objective analysis of whether a defendant will return to court or poses public safety risks.
- **Calibrate State Fines to Defendants' Ability to Pay.** Courts also continue to levy fees and fines on people convicted of crimes and civil violations. While doing so, they fail to consider someone's ability to actually pay the debt demanded of them, often causing people to cycle through modern-day debtors' prisons. To end this practice, states can require courts to calibrate their fees and fines to a defendant's income and ability to pay.

## II. Enact Sentencing Reform

- **Pass the Federal Sentencing Reform and Corrections Act.** Federal prison sentences are far too long, saddling offenders with punishments that bear little relationship to public safety or deterrence. The Sentencing Reform and Corrections Act, backed by a powerful bipartisan coalition, would cautiously reduce federal sentences in some cases, a first step toward broader sentencing reform.
- **Eliminate State Imprisonment for Lower-Level Crimes.** Incarceration is too often the punishment of first resort. It is expensive, often counterproductive, and should be used consistently to meet the overarching goals of enhancing public safety and rehabilitation. Sentencing laws can be reconstructed to fit these parameters and eliminate prison as a punishment in more cases. If implemented nationwide, it would lead to a 25 percent reduction in the national prison population — while preserving public safety.<sup>18</sup>
- **Make State Sentences Proportional to Crimes.** Similarly, state prison sentences are also excessively long. A growing volume of research shows that there is little or no relationship between length of incarceration and recidivism. Recalibrating state prison sentences around common-sense factors, rather than simple retribution, would safely cut another 14 percent of the prison population.<sup>19</sup>
- **Cut State Imprisonment by 40 Percent.** Better yet, the foregoing two solutions combined would net a 40 percent reduction in incarceration, as explained in a 2016 Brennan Center report. This is the first comprehensive plan to safely and significantly cut mass incarceration. It would save more than \$180 million over the next decade — the equivalent of 270,000 police officers, or 360,000 probation officers.<sup>20</sup>

## III. Pass Sensible Marijuana Reform

- **Prevent Federal Interference in State Laws.** Most Americans — around 60 percent — support marijuana legalization.<sup>21</sup> Thirty states and the District of Columbia have decriminalized marijuana in some fashion<sup>22</sup> — either easing penalties for marijuana use or legalizing the drug outright, while keeping down crime. Yet federal laws still punish marijuana possession harshly.<sup>23</sup> Worse, the Justice Department has taken steps to increase federal prosecution of marijuana even in states that have decriminalized it. As more states look to decriminalize marijuana, Congress can halt this contradictory approach by prohibiting federal interference in state marijuana policy, eliminating prison as a sanction for marijuana offenses, or classifying marijuana as a less serious drug.

- **Reform State Marijuana Laws.** More states can bring their marijuana laws in line with what voters want. They can eliminate imprisonment for marijuana offenses, or ease restrictions on the drug — especially as Washington heads in the opposite direction.

#### IV. Improve Law Enforcement

- **Create a Federal Police Corps.** The relationship between police and communities of color has grown increasingly tense. To rebuild this important bond, while increasing the ability of police to fight crime, Congress can fund the recruitment and training of a new generation of police officers, trained in 21<sup>st</sup> century techniques such as conflict de-escalation, community policing, and reducing unnecessary arrests and incarceration. This program could help reshape American law enforcement to better fight crime without exacerbating mass incarceration.
- **Pass State Laws Encouraging Police to Divert Individuals to Social Services.** Police often lack appropriate pathways to send individuals they encounter — whether or not they are suspects, to necessary social services. As a result, police arrest and book people when unnecessary. This has turned America's jails and prisons into de facto drug and mental health treatment facilities, as people with profound health problems are sent to prison instead of receiving the help they need. Police departments across the country have developed innovative programs that divert individuals to social services and treatment instead of arresting and jailing them. States can increase funding for such programs.
- **Change Federal Prosecutor Incentives.** There is an increasing awareness of the role prosecutors in contributing to mass incarceration. Current metrics for evaluating prosecutors reward them for pursuing more cases, winning more convictions, and garnering longer sentences. Congress can provide bonus dollars to federal prosecutors' offices that reduce crime and incarceration in their districts. This will encourage prosecutors to only use incarceration when necessary, and to shift their practices to a more modern and equitable model. Alternatively, a similar reform can be implemented by a more amenable Justice Department.
- **Reform State Prosecutor Incentives.** States can similarly incentivize local prosecutors to change their practices through legislation that would charge counties for their share of the prison population, or reward prosecutors' offices that reduce crime and incarceration in their jurisdictions.
- **Adopt New Practices for Local Prosecutors.** A large coalition of mainstream prosecutors and police has formed across the country to call for an end to unnecessary incarceration. Dozens of reform-minded prosecutors are being swept into office.<sup>24</sup> These leaders can advance justice reform through hiring and training a new generation of prosecutors, changing incentives for line prosecutors, and declining to prosecute minor offenses, among other reforms.

## V. Respond to the Opioid Crisis

- **Advance a Sensible National Response to Opioids.** Opioid overdose deaths are at a record high.<sup>25</sup> But the White House’s new “war on opioids” is not the answer. Conservatives, progressives, and law enforcement officials agree that the original war on drugs did not work. Congress can offer modern solutions without repeating mistakes of the past. It can start by: reducing the flow of opioids, expanding resources for prevention and treatment, and encouraging the Justice Department to focus enforcement on major traffickers and abusive marketers.
- **Reduce State Opioid Deaths.** Similarly, states can regulate opioid prescriptions, expand prevention and treatment resources, and divert those struggling with addiction to treatment instead of prison.

## VI. Reduce Female Incarceration

- **Pass the Federal Dignity for Incarcerated Women Act.** For the last 40 years, the growth rate of incarcerated women has been double that of men. One in four women is pregnant or has a child under the age of one when she enters prison.<sup>26</sup> The prison system was not built to respond to the needs of women. The Dignity for Incarcerated Women Act would expand visitation policies for mothers, eliminate shackling, and enhance access to female health needs.
- **Curb the Number of Women Entering State Prisons.** The solutions throughout this report would help free women that are unnecessarily incarcerated. As an additional measure, states can ensure that female defendants, especially mothers of young children, are diverted to alternatives to prison when possible.

# I. Eliminate Financial Incentives for Incarceration

- 1 End the Federal Subsidization of Mass Incarceration
- 2 Abolish State Cash Bail
- 3 Calibrate State Fines to Defendants' Ability to Pay

# 1 End the Subsidization of Mass Incarceration

While the national prison crisis has many causes, a principal contributor is a web of perverse financial incentives that spur arrests, prosecutions, and lengthy prison sentences.

Even though criminal justice policy is largely a state and local affair, the federal government plays an outside role through the \$8.4 billion in grants it awards annually.<sup>27</sup> Since the 1960s, much of this funding has gone to support tougher sentences, more arrests, and more prisons.

A prime example is the Violent Crime Control and Law Enforcement Act of 1994 (the “Crime Bill”). It authorized \$12.5 billion to states to increase incarceration.<sup>28</sup> Twenty states did just that, resulting in a dramatic rise in prison populations.<sup>29</sup> For decades, through such programs, the federal government has sent grants to states and cities on autopilot to subsidize the “war on drugs” and to aid other anti-crime initiatives. Jurisdictions often seek these additional “bonus” dollars and will modify policy to get them.

To change course, the federal government can deploy a similar menu of incentives. Termed a “Reverse Crime Bill,” or the “Reverse Mass Incarceration Act.” Essentially a “reverse” of the 1994 bill, it would reward those states that reduce both crime and imprisonment. The legislation would authorize \$20 billion in funds over 10 years to states that cut their prison populations by 7 percent every three years and stabilize or lower crime. This can be done either by creating a new grant, or by directing current funds to support state activities proven to reduce crime and incarceration. States would be free to choose the best path to achieve these goals, rather than obeying some federal mandate.

This proposal is the most powerful tool the federal government has to end mass incarceration. It is the only proposed solution that would help rein in state prison populations (where 87 percent of the country’s prison population is housed), while ensuring the hard-earned public safety gains over the past quarter-century are not lost.<sup>30</sup> States like Illinois have used similar financial incentives to encourage counties to reduce imprisonment rates.<sup>31</sup>

*The Reverse Mass Incarceration Act would accelerate progress in the states. If enacted, it would reduce the national prison population by up to 20 percent over 10 years, saving \$97 billion.*

Legislation of this type has already been introduced in Congress: H.R. 3845 by Rep. Tony Cárdenas (D-Cal.) and S. 1458 sponsored by Sens. Cory Booker (D-N.J.) and Richard Blumenthal (D-CT).<sup>32</sup> If Congress used current grant streams, instead of creating a new one, these proposals could gain bipartisan support. Conservative and liberal groups alike — from the R Street Institute to the NAACP to the Police Foundation — support tying federal grants to measurable reductions in crime and incarceration.<sup>33</sup>



As noted above, 27 states cut crime and imprisonment rates simultaneously.<sup>34</sup> This politically and geographically diverse group includes California, New York, and Texas.<sup>35</sup> The Reverse Mass Incarceration Act would accelerate progress in the states. If enacted, it would reduce the national prison population by up to 20 percent over 10 years, saving \$97 billion.<sup>36</sup>

Some academics argue the allotted funds are insufficient to create change, and the bill doesn't provide incentives to local prosecutors and corrections. However, history has repeatedly shown that local actors clamor for federal funds and change their behavior to get them, even for small amounts. In addition, local prosecutors and corrections officials would be able to receive these funds from their states if they reduce crime and incarceration together. The bill creates incentives for all state and local actors to change their behavior.

## 2 Abolish Cash Bail

Most states still make decisions regarding whether a suspect should remain behind bars while they wait for a trial based primarily on the defendant's financial means. Judges release defendants in exchange for money deposited with the court (i.e., bail) to ensure the defendant returns to court. If a defendant fails to show up for the next hearing, he forfeits the money.

This system is wildly inequitable, affecting the poor disproportionately. It is difficult for many individuals to come up with dollar amounts (such as \$1000) to secure release while wealthy individuals, some of whom are charged with more serious crimes, avoid jail because they can afford bail. Approximately 450,000 people are currently in jail awaiting trial.<sup>37</sup>

This wealth-based system of pre-trial detention must end. Not only is it morally objectionable, it does little to protect public safety.

*Research finds that those jailed pretrial are four times more likely to be sentenced to prison compared to those released before trial.*

In almost every jurisdiction, per state statute, the court can consider only two factors in deciding whether to even offer the defendant the option of bail. They are: the likelihood the defendant will appear again in court, and whether the defendant will be arrested for a new crime while awaiting trial.

Detaining a defendant before trial has grave risks for both the defendant and the community. Research finds that those jailed pretrial are four times more likely to be sentenced to prison compared to those released before trial.<sup>38</sup> Jailed defendants are quicker to plead guilty after experiencing horrific conditions. They therefore often decide to plead guilty to a lower charge and accept fewer years behind bars rather than roll the dice at trial on a higher charge carrying more time — even if they could win in court.<sup>39</sup>

In lieu of money bail, many states are changing to a system more grounded in public safety. They have directed courts to assess the risk each defendant poses either of not returning to court for trial or of committing a crime while released. These assessments analyze factors such as a defendant's work and arrest history, and categorize defendants into low, medium, or high-risk. Judges then consider these risks in determining whether a defendant is eligible for pre-trial release. Of course, judges must also retain discretion when making these decisions.<sup>40</sup>

New Jersey and Kentucky have made such changes. New Jersey eliminated cash bail and moved to risk assessments in January of 2017. By January 2018, the state decreased its pretrial population by 20 percent.<sup>41</sup> Kentucky has relied on pretrial risk assessments since 2011 and has seen positive results, to the tune of 90 percent of released defendants returning to court and not committing new crimes.<sup>42</sup>

Some researchers warn that these assessments can exacerbate unjust racial disparities. These assessments consider social factors — such as education level, family structure, or employment history — that can negatively affect African-American and Latino defendants due to structural societal inequities. Any system of risk assessment must ensure not to exacerbate racial disparities.<sup>43</sup>

### 3 Calibrate Fines to Defendants' Ability to Pay

The criminal justice system, and the courts in particular, increasingly rely on funding from fines<sup>44</sup> collected from defendants, many of whom are financially struggling. It is, to put it mildly, an absurd system that extracts a heavy human toll. Oftentimes when defendants cannot pay their fines, they are simply locked up, turning jails into modern day debtors' prisons, with defendants racking up even more fees they cannot possibly re-pay.<sup>45</sup>

These charges are an outgrowth of mass incarceration. As the criminal justice system exploded, so did its costs. States — many facing tight budgets — chose to shift the increasing cost to defendants instead of picking up the tab.

These fines frequently cause profound harm to criminal defendants, their families, and entire communities. This is particularly the case when nonpayment results in incarceration. And criminal justice debt functions as a significant barrier to a person's chances to successfully reenter society after a conviction. Even assuming an ex-offender can find a job, typically paying minimum wage, the earnings are reduced to practically nothing because of garnishments to pay their bill to the criminal justice system.<sup>46</sup>

What is required is a calibration of fines commensurate with a defendant's ability to pay them. The most practical way to implement this policy is to assess fines based on a percentage of a defendant's income. This is commonly referred to as a "day fine."<sup>47</sup> Fines are denoted in terms of the number of days of income a person must forego. Courts are then authorized to scale financial sanctions up or down depending on a defendant's income. Calculations of such fines are relatively simple as they depend on the defendant's income and other assets.

Day fines were successfully implemented for a brief period in Maricopa County, Arizona, as part of a series of experiments during the late 1980's. During this period the percentage of people fully paying off their court debt more than doubled during the experiment, ultimately increasing the revenue generated by the fines. The recidivism rate also dropped from 17 percent to 11 percent for this group.<sup>48</sup> While jurisdictions like Maricopa County saw day fines successfully implemented, in other parts of the country the experiments were deemed failures. Experts agree the practice did not take off largely because it was conceived at the height of the "tough on crime" furor of the late 1980s and early 1990s, when policymakers were less receptive to graduated sanctions that were seen as the opposite of punitive.<sup>49</sup>

Additionally, implementing a system of graduated sanctions can be challenging because of the difficulty of obtaining financial information, and the complication of performing ability-to-pay calculations can burden already overworked court staff.<sup>50</sup> But a well-designed system for graduating economic sanctions need not be complicated or hard to implement. Calculations can be simple and easy with basic tools of accounting.<sup>51</sup>



## II. Enact Sentencing Reform

- 1 Pass the Federal Sentencing Reform and Corrections Act
- 2 Eliminate State Imprisonment for Lower-Level Crimes
- 3 Make State Sentences Proportional to Crimes
- 4 Cut State Imprisonment by 40 Percent

# 1 Pass the Sentencing Reform and Corrections Act

Over the past 30 years, Congress has passed more than 100 new laws imposing mandatory minimum sentences, causing the federal prison population to balloon by 750 percent, from 22,000 prisoners to 200,000.<sup>52</sup> This increase did not come without a steep price tag. Federal prison spending grew more than 600 percent during this time.<sup>53</sup>

Today's prison population is slightly below the 2012 peak, but the system is still well over capacity.<sup>54</sup> This year, however, the Department of Justice projects a 2 percent growth, reversing this trend.<sup>55</sup>

One solution: pass federal legislation to reduce unnecessarily long sentences.

In October, a bipartisan group of lawmakers reintroduced the Sentencing Reform and Corrections Act of 2017 (SRCA). Sponsors included Sen. Judiciary Committee Chair Chuck Grassley (R-IA), Jeff Flake (R-AZ), Lindsey Graham (R-SC), Mike Lee (R-UT), Tim Scott (R-SC), Cory Booker (D-NJ), Dick Durbin (D-Ill.), and Patrick Leahy (D-VT). The bill would reduce mandatory minimum sentences for nonviolent drug offenders, provide more discretion to judges, and increase reentry programming proven to cut recidivism.

Of course, federal sentencing reform cannot end mass incarceration alone. But it is a needed step. Although the bill passed the Senate Judiciary Committee, 16-5, and is backed by advocates across the political spectrum and law enforcement groups such as Law Enforcement Leaders to Reduce Crime & Incarceration,

*Connecticut, South Carolina, and Ohio have proven that reducing mandatory minimums works.*

it is staunchly opposed by Sessions and the White House.<sup>56</sup> Sessions successfully killed the 2015 version of this bill. Further, Sessions has issued orders to increase federal charges and encourage more drug prosecutions, which will likely increase the federal prison population.<sup>57</sup>

In contrast, several states, such as Connecticut, South Carolina, and Ohio, have proven that reducing mandatory minimums works.<sup>58</sup> These states and others have enacted reforms and seen crime and prison rates fall simultaneously.<sup>59</sup> And research indicates that excessive incarceration can increase crime in some cases. Criminologists often call prison “criminogenic,” meaning it can increase the criminal behavior of prisoners upon release.<sup>60</sup> Studies have shown this effect is particularly powerful on low-level and nonviolent offenders.<sup>61</sup>

By reducing mandatory minimums for nonviolent offenders, the SRCA will align federal policy with the latest research, both preserving reductions in crime and reducing unnecessary incarceration. This action will push back on Sessions' efforts to increase federal imprisonment.

## 2 Eliminate Imprisonment for Lower-Level Crimes

Incarceration is too often the punishment of first resort. Since 1970, the state prison population has grown by more than by 650 percent, today standing at 1.3 million prisoners.<sup>62</sup> Over that time, state corrections spending increased over 220 percent, once adjusting for inflation.<sup>63</sup>

Many have mistakenly correlated the decline in crime with the increase in incarceration. But studies show that incarceration has long since passed the point where locking up additional prisoners would have a pronounced effect on reducing crime.<sup>64</sup> A study from the National Academy of Sciences corroborates findings from the Brennan Center: “When the incarceration rate is high, the marginal crime reduction gains from further increases tend to be lower, because the offender on the margin between incarceration and an alternative sanction tends to be less serious. In other words, the crime fighting benefits of incarceration diminish with the scale of the prison population.”<sup>65</sup> Although there is some relationship between increased incarceration and lower crime, at a certain point, locking up additional people is not an effective tool for crime control.

*Studies show that incarceration has long since passed the point where locking up additional prisoners would have a pronounced effect on reducing crime.*

Studies also prove that alternative sanctions hold offenders accountable while more effectively reducing recidivism.

The 2016 Brennan Center report found that 25 percent of prisoners, 364,000 people, who committed lower-level offenses could be better sanctioned by such alternatives. This would save \$11.5 billion annually, about twice as much as the federal government spends on the opioid crisis.<sup>66</sup>

States can pass legislation to eliminate imprisonment for lower-level offenses barring exceptional circumstances. Such crimes include: drug possession, lesser burglary, minor drug trafficking, minor fraud or forgery, minor theft, and simple assault. Legislation can mandate alternatives to prison — such as treatment, community service, electronic monitoring, or probation — to be the default sentences for these crimes. The legislation should provide flexibility for judges to depart from mandates if certain enumerated factors are present, such as repeat serious offenses or the heinous circumstances of the crime. States can also make these changes retroactive to apply to current prison rolls.

As noted above, Sessions has taken the polar opposite view, arguing that releasing inmates before their maximum time is served will have “long-lasting, harmful consequences” for the country. However, Sessions largely stands alone, an outlier even in his own party. Reducing unnecessary incarceration is even the consensus view among Sessions’ fellow conservatives. For instance, several prominent conservative groups — Americans for Tax Reform, Faith and Freedom Coalition, FreedomWorks, and Right on Crime — wrote to Trump asking for sentencing reform. “Just as we recognize those who pose

a danger to society must be behind bars,” they wrote, “for many others such as addicts and those with mental illnesses public safety can best be advanced through treatment-based approaches.”<sup>67</sup> Meanwhile, Republican states have already shown this approach can work. Florida, Mississippi, South Carolina, and Texas have all diverted low-level offenders to drug treatment programs and reduced both crime and incarceration.<sup>68</sup>

Not only does using prison as a knee-jerk reaction to crime devastate families and communities, but many of today’s overly punitive prison sentences produce little public safety benefits. Sentencing individuals convicted of lesser crimes to alternative sanctions would prove more just, equitable, less costly, and more effective at reducing recidivism.



### 3 Make Sentences Proportional to Crimes

As prison populations increased, so has the time inmates spend there. The 1990s and 2000s saw states of all demographic and political compositions pass laws aimed at keeping people in prison longer. Between 1993 and 2009, the average prison stay for state inmates increased by 33 percent. While the increase in prison stays was most dramatic for violent crimes, prison stays also increased for property and drug crimes.<sup>69</sup>

The laws that increased time served are not based on evidence showing that longer stays behind bars enhance public safety. Instead, they were based on a collective “guess” that more prison time would reduce crime. However, scientific evidence shows just the opposite: longer prison stays often produce higher recidivism rates, or at the very least, result in diminishing returns in enhanced public safety. Many studies indicate that the longer one stays in prison, the more likely he or she is to reoffend upon release.<sup>70</sup> Other research finds little to no relationship between lengths of stay and recidivism.<sup>71</sup> Long sentences often simply hold people in prison until they “age out of crime.”<sup>72</sup> The 2016 Brennan Center report also examined the lengths prisoners spent behind bars, and concluded that 14 percent, 212,000 people, had been in prison longer than necessary.

State legislation can cut sentence maximums and minimums defined in criminal statutes and sentencing guidelines so they are more proportional to the crimes committed. Though it is difficult to categorically determine precise optimal sentence lengths, the 2016 report examined several options. It concluded that a 25 percent reduction may be justified for the major crimes making up 58 percent of the prison population: aggravated assault, murder, nonviolent weapons offenses, robbery, serious burglary, and serious drug trafficking.<sup>73</sup>

*Research shows that sentence lengths have diminishing returns on crime control leading several states to successfully enact sentencing reform.*

This would save almost \$6.6 billion annually and reduce sentences on average by about 15 months. Sentencing laws should similarly be reviewed and likely recalibrated for all crimes, remembering that research shows that sentence lengths have diminishing returns on crime control.

Cutting sentence lengths by 25 percent may appear to many as a radical step. Prominent criminologists have called for sentences lengths to return to 1975 or 1990 levels when sentences were severe. But, to return to 1990 levels, for example, today’s average prison stay would need to be cut by almost 40 percent.<sup>74</sup> A 25 percent reduction of the sort proposed here is moderate in comparison.

Many states have seen success with such reforms. In 2008, Mississippi reduced the time-served requirement for minor drug offenses to 25 percent of the original sentence.<sup>75</sup> Since then, the state’s incarceration rate has fallen by 17 percent, while crime fell by 6 percent.<sup>76</sup> In 2011, the Texas legislature passed a bill allowing drug offenders to reduce their sentence lengths by completing educational programs.<sup>77</sup> Since 2011, Texas reduced crime by 18 percent with an accompanying 12 percent reduction in the incarceration rate.<sup>78</sup>

This reform would ensure that sanctions for serious crimes involving significant prison time are at levels that deter recidivism while protecting public safety, and achieve significant savings.<sup>79</sup>

## 4 Cut Imprisonment by 40 Percent

For state candidates, there is a bold step that would reduce state imprisonment rates by 40 percent. How? By ending imprisonment for lower-level crimes (reducing rolls by 25 percent), and cutting prison sentences by 25 percent for other crimes (reducing rolls by an additional 14 percent). Of course, exact results will vary from state to state depending on the composition of its prison population.

As noted, the 2016 Brennan Center report found that 40 percent of the national prison population is incarcerated with little public safety justification. It laid out the first comprehensive plan to safely and significantly cut incarceration, calling on states to mandate alternative sentences for a host of lower-level offenses as well as to reduce sentences for major crimes that account for a majority of the prison population. These recommendations would shrink today's system from 1.46 million prisoners to an estimated 580,000, and would curtail the major drivers of mass incarceration in the future. They would save over \$180 billion

*Since 2008, 35 states reduced their crime rates and imprisonment rates.*

over 10 years.<sup>80</sup> It's the equivalent of hiring 270,000 new police officers, 360,000 probation officers, or sending two million young people to college.<sup>81</sup>

Many states have already cut their prison population without jeopardizing public safety. Since 2008, 35 states reduced their crime rates and imprisonment rates. Reforms vary from state to state, but typically they prioritize prison space for people who have committed serious offenses, divert lower-level offenders to alternative sanctions, and invest savings in programs that more effectively reduce recidivism and crime.<sup>82</sup> A plan to cut imprisonment rolls by 40 percent would build on these reforms.

The first principle of 21st century sentencing should be to protect public safety. Current recidivism rates and social science research indicate that today's sentencing practices are failing in their primary task: protecting the public by levying the most effective and cost-efficient sanction to prevent the convicted from committing another crime. This new framework will prioritize community protection over punishment for punishment's sake.

# III. Pass Sensible Marijuana Reform

- 1 Prevent Federal Interference  
in State Marijuana Laws
- 2 Reform State Marijuana Laws

# 1 Prevent Interference in State Marijuana Laws

Local marijuana laws have changed dramatically in the last decade. States like California, Colorado, and Vermont passed laws or ballot initiatives to legalize marijuana for adult use. Thirty states and the District of Columbia have legalized, decriminalized, or allowed its medical use.<sup>83</sup> In the last decade, crime has fallen by 22 percent in these states.<sup>84</sup>

Voter support for legalization has exploded, reaching 64 percent in a Gallup poll last year. And for the first time, a majority of Republicans expressed support.<sup>85</sup> Research also indicates that marijuana is not as harmful as other drugs. It is on par with alcohol and tobacco use.<sup>86</sup> Its use has been shown to treat seizures, pain, and other conditions.<sup>87</sup>

Yet each year law enforcement makes more than 640,000 marijuana arrests, with almost 90 percent for possession.<sup>88</sup> Marijuana enforcement has resulted in vast racial disparities. Although marijuana use between black and white Americans is similar, black individuals are four times as likely to be arrested for marijuana possession.<sup>89</sup> There are an estimated 25,000 people in prison for marijuana offenses, costing \$80 million annually.<sup>90</sup>

*Every dollar spent enforcing outdated marijuana laws is a dollar not spent combatting opioid use, murders, and serious financial crimes.*

And marijuana use is still illegal under federal law. In 2013, Attorney General Holder directed prosecutors to refrain from enforcing federal laws in states where it is legal. But this year, Sessions reversed that order, and made clear his belief that marijuana is dangerous and federal drug policy will prevail.<sup>91</sup> Not only is the Justice Department out of step

with the Republican voters who put them there, and the American public generally, its policies are also fiscally imprudent. Every dollar spent enforcing outdated marijuana laws is a dollar not spent combatting opioid use, murders, and serious financial crimes.

To prevent a showdown between Washington and states, federal policymakers can consider these solutions:

- **Pass the Respect State Marijuana Laws Act:** This legislation would amend federal drug laws to clarify they do not apply to the production, possession, or distribution of marijuana in states where such activity is legal. It would prevent federal officials from prosecuting individuals and businesses in those states. 67 percent of voters think Congress can take such action.<sup>92</sup>
- **End Imprisonment for Marijuana Crimes:** As another step, Congress can pass legislation ensuring that prison is eliminated as a sanction for any marijuana offense at the federal level. These individuals could receive treatment or probation instead, reserving financial resources to fight violent crime.

- **Allow More Research on Marijuana:** Congress can change marijuana’s place on the federal schedule of controlled substances, which describes how strictly a drug is regulated. Federal law classifies marijuana as a “Schedule I” drug, meaning it has “no currently accepted medical use” and is more dangerous than cocaine.<sup>93</sup> It can be reclassified to a lower level, such as Schedule II or III. This would not affect penalties for marijuana use, but it would open up avenues for medical research.<sup>94</sup> Though a small step, it paves the way toward more evidence-based policy. Attempts to reschedule marijuana have failed as recently as 2016, but Congress can revisit this issue.<sup>95</sup> Notably, this action can also be accomplished by a reform-minded Attorney General reinstating Holder’s order.

## 2 Reform Marijuana Laws

To help bring state law into line with voter sentiments, state legislators can implement the following solutions:

- **End Imprisonment for Marijuana Offenses:** Policymakers can introduce legislation that eliminates imprisonment for marijuana offenses. Jail and prison space is expensive, and those beds should not be used for those convicted of marijuana offenses. This reform would result in 25,000 people released from prison nationwide.<sup>96</sup> These individuals can be better served by treatment, probation, or electronic monitoring.
- **Decriminalize or Legalize Marijuana:** State lawmakers can consider championing efforts to decriminalize (meaning possession remains a criminal act but no longer subject to prosecution) or legalize (meaning personal use is no longer illegal). Organizations including the Drug Policy Alliance and NAACP have endorsed this proposal.<sup>97</sup> (The Brennan Center takes no position.) Given its dramatic popularity among voters, colliding with the Attorney General's renewed war on marijuana, this reform has growing political cachet.

# IV. Improve Law Enforcement

- 1 Create a Federal Police Corps
- 2 Pass State Laws Encouraging Police to Divert Individuals to Social Services
- 3 Change Federal Prosecutor Incentives
- 4 Reform State Prosecutor Incentives
- 5 Adopt New Practices for Local Prosecutors

# 1 Create a Police Corps

Republicans, Democrats, police, and communities of color all acknowledge the need to improve policing. Progressives focus on the strained relationship between police officers and communities of color — the legacy of tragedies in Baltimore, Dallas, Ferguson, and other cities. Conservatives highlight the need to support state and local law enforcement.<sup>98</sup>

Policing is one of the significant criminal justice policies that can affect both crime and incarceration rates. The police make the first determination of whether someone will enter the justice system. This leads to booking, prosecution, and jail.

The federal government has traditionally supported local policing through grant programs and other initiatives. Between 1994 and 2001, the Community Oriented Policing Services program (“COPS”) provided \$7.3 billion to hire and train 100,000 officers.<sup>99</sup> The Trump administration’s 2019 budget eliminates COPS Office funding.<sup>100</sup> COPS has also been criticized for failing to ensure that hired officers actually practiced “community policing,” in which law enforcement officers are trained and encouraged to build trust with the community.

One powerful way to modernize law enforcement is to provide federal backing for hiring a new generation of police officers specifically trained in the latest crime prevention techniques that also result in fewer unnecessary arrests, shootings, and incarceration.

The federal government could launch a “Police Corps” designed to revamp the police force with new officers trained in modern techniques — 20,000 officers each year for five years, totaling \$40 billion.<sup>101</sup> These officers would be trained to carry out a 21st century policing mission, focusing on preventing and reducing crime, while reducing unnecessary incarceration. They would learn “evidence-based” and community policing practices and represent diverse cultural and racial backgrounds. For example, officers would be trained to identify individuals with mental health or drug addiction needs and divert them into rehabilitative services or treatment instead of jail. Officers could also be trained in de-escalation techniques, and in how to recognize and combat unconscious bias. The program could select cities to receive officers through a competitive application process, and periodically review their effectiveness.

It could attract widespread support from police chiefs and officers. In its legislative agenda for the 115th Congress, the International Association of Chiefs of Police specifically called for funding for grant programs that enhance law enforcement’s ability to effectively reduce crime and build trust with the community.<sup>102</sup> The program could also attract support from activists and civil rights groups calling for widespread police reform.

Building a new Police Corps would transform the practices and culture of law enforcement from the inside, while helping secure stronger ties between police and communities and more effectively focus resources on crime reduction. It would also enlist law enforcement officers as part of the drive for criminal justice reform. The program could help overcome rhetoric that falsely pits law enforcement against reformers and communities and mark a strong first step toward uniting police and citizens around shared interests.



## 2 Pass Laws Encouraging Police to Divert Individuals to Social Services

Too many individuals who suffer from drug or mental health issues are captured in the criminal justice system. It is estimated that 79 percent of today's prisoners suffer from either drug addiction or mental illness, with 40 percent suffering from both.<sup>103</sup> Prisons have become ill-equipped hospitals.

Diversion programs — which reroute individuals away from the standard arrest-detention-incarceration cycle to alternatives such as drug and mental health treatment or social services — are an effective reform. They provide individuals needed services instead of simple punishment. These services treat the underlying problem, making it less likely the individuals will continue to cycle in and out of prison.

*Prisons have become ill-equipped hospitals.*

These programs are also supported by law enforcement. Police officers often express frustration that they are required to arrest someone suffering mental health or drug problems because there are no other interventions upon which they can rely other than the criminal justice system. Given the choice, said former Louisiana Police Superintendent, Ronal Serpas, “police officers will choose alternatives to arrest for those who need mental health and drug addiction treatment — not a prison cell.”<sup>104</sup>

Several police departments have created programs to divert people with drug and mental health problems out of the criminal justice system and into the treatment they need.

New York recently invested \$90 million for two diversion centers that will provide short-term services for those with mental health and substance use needs, providing police officers the ability to bring those they previously would have arrested to a diversion center. The city estimates that the centers, which opened this year, can divert almost 2,400 low-level offenders annually.<sup>105</sup>

New York borrows its model from a successful experiment in Seattle. In 2011, Seattle instituted the Law Enforcement Assisted Diversion (“LEAD”) program, which encourages officers to bring low-level arrestees to treatment or social services, rather than to booking. LEAD allows police officers to direct people suspected of low-level crimes, particularly drug crimes and prostitution, into community-based treatment instead of arresting and jailing them. In a study of the Seattle LEAD program, participants were found to be 58 percent less likely to be rearrested compared to those arrested and booked.<sup>106</sup>

Those running for state office can champion legislation that increases funding for existing or new LEAD-type models. These diversion programs suit everyone: results show they preserve public safety, they're cheaper than prison, they provide offenders the treatment they need, and they reduce recidivism.

## 3 Change Prosecutor Incentives

Prosecutors are powerful actors. They decide what charge to bring, recommend sentences, and control plea bargaining — a process that determines the resolution of 94 percent of criminal cases.<sup>107</sup>

Prosecutors focus almost exclusively on law enforcement rather than considering crime prevention. They tend to think of their report card — especially at election time — in terms of numbers of people prosecuted and length of sentences meted out. U.S. Attorneys, for example, receive resources based in part on these metrics.

There is a better way: Prosecutors' incentives can be reoriented toward the twin goals of reducing crime and reducing mass incarceration.

In recent years, many lawmakers, advocates, and researchers are beginning to see the role of prosecutors more broadly, and as forces for change. In 2015, a powerful coalition formed with over 200 police chiefs and prosecutors who believe they have role to play in reducing incarceration. Reform-minded prosecutors were elected in 2016 and 2017 in cities such as Chicago, Dallas, Denver, Philadelphia, Tampa, and St. Louis. Although local officials handle the overwhelming majority of prosecutions, the federal government can lead by example.

Five years ago, then U.S. Attorney General Eric Holder issued a directive encouraging federal prosecutors to prioritize enforcing violent crimes, and refrain from charging lower-level offenders with crimes carrying mandatory minimum sentences.<sup>108</sup> These efforts contributed to a 12 percent drop in the federal prison population.<sup>109</sup> Similarly, in 2014, Senator Doug Jones (D-AL), former U.S. Attorney, led a taskforce which recommended that federal prosecutors reform their incentives so that they reduce incarceration and crime together.

In May of 2017, however, Sessions reversed Holder's orders and mandated that all prosecutors in the country's 93 U.S. Attorneys' offices seek the harshest charges possible in all federal cases, drawing criticism from conservatives and progressives alike.<sup>110</sup> Undoing the previous administration's efforts to realign the incentives of prosecutors' risks increasing the federal prison population.

How can lawmakers place federal prosecutors back on course?

Congress can pass legislation providing U.S. Attorneys' Offices bonus funds if they reduce unnecessary incarceration, crime, and recidivism in their jurisdictions. This practice has successful similar models in the states. California and Illinois, for example, have offered probation officers incentives to reduce the number of people they send back to prison, achieving a reduction in incarceration and costs, while crime continued to fall.<sup>111</sup>

Alternatively, lawmakers can encourage the Justice Department under a more amenable Attorney General to institute these incentives for U.S. Attorney Offices and line prosecutors. Progress could be determined using “success measures,” such as an increase in the proportion of violent and serious cases on the office docket; the decrease in violent and serious crime in the district; a reduction in the percentage of defendants sentenced to incarceration; or a decrease in the federal prison population attributable to that district. These measures could be modified for line prosecutors and incorporated into the Justice Department’s periodic evaluations of U.S. Attorney Offices. U.S. Attorneys Offices’ could also measure progress toward benchmarks in each individual prosecutor’s Performance Work Plans. Lastly, these benchmarks could be considered when making decisions about bonuses and promotions. This reform could cut imprisonment enough to save the government nearly \$12 billion over 10 years — and as much as \$20 billion if applied more robustly.<sup>112</sup>

## 4 Reform Prosecutor Incentives

State policymakers can also take action to modernize local prosecutorial practices. Some options:

- **Charge Counties for Use of Prisons:** Legislators can hold county prosecutors accountable for their share of the state prison population. States could charge counties some share of the cost of the number of prisoners they house from each county.<sup>113</sup> This cost-shifting would ensure that prosecutors send to prison only those offenders who need to be there. For example, in 2018, Ohio implemented a program assessing penalties on some counties for every low-level offender they send to prison.<sup>114</sup>
- **Provide Prosecutor Offices Bonus Dollars to Reduce Crime and Incarceration:** Alternatively, states can enact legislation that rewards prosecutors' offices when they reduce crime and incarceration together. Success measures that legislatures could use to track these outcomes: the percent decrease in the number of defendants sentenced to prison, and the percent decrease in violent and serious crime in the jurisdiction. Measuring these goals encourages prosecutors to opt, whenever appropriate, for lower charges or incarceration alternatives, while preserving public safety. Similar incentives have been applied to transform probation officers' practices with much success. Illinois, for example, instituted a program in 2009 to provide some counties with additional dollars if they sent 25 percent fewer probationers to prison. The program saved \$47 million over 4 years and diverted more than 2,000 nonviolent offenders, while cutting recidivism by as much as 20 percent.<sup>115</sup>

Holding prosecutors accountable for their share of the prison population is novel and some local prosecutors may balk at such constraints. Yet given increasing public awareness of the prosecutors' vast authority and discretion — and prosecutors' own recognition that they should play a role in reducing incarceration rates — the climate is ripe for such innovative solutions.<sup>116</sup>

## 5 Adopt New Practices for Prosecutors

Reform-minded prosecutors have a large role to play in ending mass incarceration. Prosecutors operate with wide discretion, and as a result, have considerable power to reshape their criminal justice systems. There are several reforms these new leaders can implement to achieve this goal:

- **Use the Bully Pulpit:** District attorneys are uniquely positioned to speak out on the need to end the over-reliance on incarceration. They are generally considered credible sources about crime fighting by the press, the public, and even judges and law enforcement.
- **Hire and Train a New Generation of Prosecutors:** Chief prosecutors can prioritize hiring and training line prosecutors who reflect their values and dismiss those not willing to adapt. They can recruit and hire applicants with a more flexible view of sentencing as well as applicants that reflect the diversity of the communities they serve.
- **Change Incentives for Line Prosecutors:** District attorney offices often reward line prosecutors on the basis of conviction rates or the lengths of sentences they secure. These criteria earn career advancement as well as respect from colleagues. However, these rewards can change to reflect the changing perspective of the role of a prosecutor and reward attorneys who prioritize seeking rehabilitation over simply seeking convictions. District attorneys can incentivize prosecutors who take full advantage of diversion or treatment programs for defendants. A 2014 Brennan Center report, *Federal Prosecution for the 21<sup>st</sup> Century*, lays out a similar proposal for federal prosecutors, which can be adapted for local needs.<sup>117</sup>
- **Decline to Prosecute Minor Offenses:** District attorneys can issue office policies indicating that line prosecutors should refrain from prosecuting minor offenses when possible. This will allow prosecutors to prioritize more serious crime and alleviate unnecessary incarceration. For example, in 2017, Houston D.A. Kim Ogg, announced that her office would no longer prosecute low-level marijuana offenses. This saved the county \$25 million and cleared one tenth of its docket in just one year.<sup>118</sup> Her reasoning was simple. “We are not a safer society or a safer greater Houston urban area because marijuana was aggressively prosecuted.” Similarly, Manhattan D.A. Cy Vance has announced his office will stop prosecuting subway “turnstile jumping,” which public defenders have complained clog their dockets.<sup>119</sup>
- **Clear Existing Bench Warrants for Minor Offenses:** Long standing arrest warrants for petty crimes, such as drinking in public or traffic tickets, can drive a wedge between communities and law enforcement. District attorneys can eliminate such warrants for certain low-level crimes. Four district attorneys in New York City recently took a step in the right direction by collectively eliminating 664,000 10-year-old warrants for petty crimes and misdemeanors.<sup>120</sup>

- **Recommend Proportional Sentences:** Judges retain discretion in setting sentences within the bounds set by law, but generally rely on prosecutor recommendations when doing so. District attorneys can issue directives encouraging line prosecutors to recommend lower sentences when appropriate.<sup>121</sup>
- **Stop Requesting Cash Bail for Low-Level Offenses:** District attorneys can do their part to reduce economic inequities by issuing directives to their offices to stop requesting bail for low-level offenses except in exceptional circumstances. Offices in Philadelphia, Brooklyn, and Manhattan have already taken such action.<sup>122</sup>

# V. Respond to the Opioid Crisis

- 1 Advance a Sensible National Response to Opioids
- 2 Reduce State Opioid Deaths

# 1 Advance a Sensible National Response to Opioids

According to the most recently available data, more than 40,000 Americans died from an opioid-related overdose in 2016, and the number is still increasing.<sup>123</sup> More Americans now die from an opioid overdose than from a traffic accident.<sup>124</sup>

Trafficking of illegal opioids, such as heroin and fentanyl, is part of the problem. But the over-prescription of legal opioids, such as oxycodone and codeine, is another. Each year, one third of American adults receive an opioid prescription.<sup>125</sup> In one West Virginia town, there were more than 6,000 opioid pills per resident.<sup>126</sup> As a result, nearly half of all opioid abuse starts with abusing someone else's prescribed pills.<sup>127</sup>

*The opioid crisis not a problem we can incarcerate our way out of. Returning to outdated drug war policies will not help.*

This crisis extends far beyond the “Rust Belt.” According to the Center for Disease Control, states on or close to the eastern seaboard also suffer high drug overdose rates. West Virginia and Ohio have the highest rate of drug overdose deaths, but New Hampshire, Washington, D.C., and Pennsylvania trail close behind. Border states like California and Texas have the fewest.<sup>128</sup>

In response, Trump created a Commission to study the crisis,<sup>129</sup> and declared a national emergency in October 2017.<sup>130</sup> But federal policy has changed little since then.<sup>131</sup> February's bipartisan budget deal earmarked \$6 billion for treatment for opioid addiction,<sup>132</sup> but that amount is insufficient to provide treatment to all those suffering.<sup>133</sup> Additionally, the President insists that his promised “border wall” with Mexico will somehow stop opioid deaths,<sup>134</sup> and the administration launched a public “war on opioids” last month.<sup>135</sup>

Sessions has similarly prioritized enforcement, establishing a new Drug Enforcement Agency division in Kentucky to combat opioid abuse,<sup>136</sup> and pledging to increase criminal penalties for artificial opioids to match those of naturally occurring ones.<sup>137</sup> But this is not a problem we can incarcerate our way out of. Returning to outdated drug war policies will not help.

Federal lawmakers can curb the devastating effects of opioid abuse — without relying on mass incarceration. Options include:

- **Decreasing Opioid Supply:** Contrary to Trump's claims, the work of stopping the flow of opioid overdose drugs does not start with a border wall.<sup>138</sup> It starts at home. One way to decrease supply: a tax on opioid production. By levying a small tax per pill, the government could incentivize manufacturers to slow the number of pills entering legal and grey markets. Such taxes have been levied on tobacco and alcohol.<sup>139</sup> Sen. Joe Manchin's (D-W.Va.) Budgeting for Opioid Addiction Treatment Act would institute a tax on pharmaceutical companies that manufacture opioids.<sup>140</sup>



- **Expand Prevention and Treatment Programs:**

- The federal government can support key funding initiatives to help states pay for prevention and treatment. The Combating the Opioid Epidemic Act, sponsored by Sen. Bob Casey (D-Pa.),<sup>141</sup> for example, would give states \$45 billion over ten years to fund such programs.<sup>142</sup>
- Lack of insurance and cost are two major barriers to effective substance abuse treatment. 31 percent of people who needed, but did not receive, treatment for substance abuse cited cost or lack of insurance as the reason.<sup>143</sup> One solution is to expand Medication Assisted Treatment (MAT), which pairs medical treatment with behavioral and psychological therapy.<sup>144</sup> MAT has been called “the gold standard” for addiction treatment.<sup>145</sup> But it is not widely used, as most people can’t afford it.<sup>146</sup> While all states provide Medicaid coverage for some MAT options, some states do not cover all needed options.<sup>147</sup> Congress can help by requiring Medicaid to cover all types of MAT, allowing patients access to the most effective drug treatment for their unique needs. The President’s FY 2019 budget proposes this very solution.<sup>148</sup> Researchers and medical advocates, including the Kaiser Family Foundation, have supported this proposal to address opioid abuse.<sup>149</sup>
- Lawmakers can resist cuts to social safety net programs that fund treatment. Full repeal of the Affordable Care Act (ACA), for example, would jeopardize Medicaid funding, tripling the uninsured rates in states such as Kentucky, New Hampshire, and West Virginia — all places with above-average overdose rates.<sup>150</sup> Groups such as the Drug Policy Alliance and Kaiser Family Foundation have noted that restricting the availability of healthcare could worsen the opioid crisis.<sup>151</sup>

- **Focus Prosecution Resources on Traffickers and Abusive Marketers:** There is a growing consensus — shared by the President’s opioid commission — that effective drug enforcement focuses on reducing the supply of drugs, rather than penalizing users and small-time dealers.<sup>152</sup> Toward that end, Congress can use its oversight power to encourage the Justice Department to focus enforcement resources on major traffickers and companies flouting drug manufacturing regulations.<sup>153</sup> Sessions recently announced a task force to target opioid manufacturers and distributors, one step in the right direction.<sup>154</sup>

## 2 Reduce Opioid Deaths

The day-to-day work of combating opioid addiction falls on state and local governments. Officials can consider the following options as a start:

- **Regulate Prescription Opioids:** Preliminary research finds a correlation between the rate of opioid prescriptions and the rate of overdose deaths in states.<sup>155</sup> Among other things, over-prescription leads to pills entering the grey market, helping fuel other peoples' addictions.<sup>156</sup> Some states have addressed this problem by placing limits on when and how doctors can prescribe opioids for pain management. In 2017, New Jersey passed a bipartisan bill that requires doctors to limit initial opioid prescriptions to five days' worth of pills, down from 30 days.<sup>157</sup> Similarly, starting in 2017, Delaware capped initial opioid prescriptions at a seven-day supply.<sup>158</sup>
- **Expand Prevention and Treatment Programs:** States can also increase funding for prevention and treatment. One way states can do so is by opting into the federal Medicaid expansion, as allowed by the Patient Protection & Affordable Care Act ("ACA"). The federal insurance program Medicaid does not, on its own, cover impoverished childless adults. But under the ACA, states can pass legislation to accept federal dollars and standards of care, and use it to provide healthcare for this group through Medicaid.<sup>159</sup> Kentucky made this change in 2014, with dramatic results. In 2013 more than a quarter of people admitted to the hospital for an opioid overdose were uninsured. By 2015, just one year after the change, under 3 percent of admitted opioid patients lacked insurance.<sup>160</sup> Most northeastern states, including high-overdose states like New Hampshire and Vermont, have already acted to similarly expand Medicaid. But eight states with above average opioid death rates have not. Those states include Florida, North Carolina, and Tennessee.<sup>161</sup> Lawmakers in these states can pass legislation to expand Medicare. This solution is backed by groups including the Center for Budget & Policy Priorities to address opioid abuse.<sup>162</sup>
- **Provide Treatment Instead of Incarceration for Opioid Use:** Many worry that the "war on opioids" rhetoric used by the administration and other public officials will lead to more generations of drug users imprisoned instead of helped. Incarcerating people struggling with addiction does nothing to cure the underlying problems. States can divert individuals struggling with opioid addiction to treatment instead of prison.<sup>163</sup>

# VI. Reduce Female Incarceration

- 1 Pass the Federal Dignity for Incarcerated Women Act
- 2 Curb the Number of Women Entering State Prisons

# 1 Pass the Dignity for Incarcerated Women Act

For the last 40 years, the incarceration growth rate for women has been double that of men. While the U.S. population is made up of less than 5 percent of the world's women, it is now home to one-third of the world's incarcerated women.<sup>164</sup> The total prison population has declined by 4 percent since 2012, but the number of female prisoners has actually risen 2 percent.<sup>165</sup> Today, there are 1.2 million women behind bars, or on probation or parole.

The majority of women (52 percent) are incarcerated for a drug or a property offense. Most have suffered some form of trauma, such as domestic or sexual violence, and many suffer from drug addiction or mental illness.<sup>166</sup> And an estimated one in four women are pregnant or have a child under the age of one when they enter prison.<sup>167</sup>

But our prisons are not equipped to provide the treatment and services that many women need. In fact, to some extent, women remain an afterthought when it comes to corrections.

New efforts seek to change this oversight. The best solution would focus on reducing the number of women incarcerated. Earlier proposals in this report such as passing the Reverse Mass Incarceration Act and the Sentencing Reform and Corrections Act would help accomplish that goal.

Other reforms would assist women while incarcerated. Last summer, Sens. Elizabeth Warren (D-MA) and Corey Booker (D-N.J.) introduced the Dignity for Incarcerated Women Act.<sup>168</sup> The legislation would expand visitation policies for mothers, eliminate shackling and solitary confinement for pregnant women, and provide free feminine health care items, including tampons and pads.

Research has shown that maintenance of family relationships during incarceration helps lower the risk of recidivism. Additionally, preserving the mother-child relationship has been shown to have rehabilitative effects, including better outcomes for economic independence and lowered recidivism rates.<sup>169</sup>

The Dignity for Incarcerated Women Act would vastly improve the day-to-day experience of women behind bars, and would likely lower recidivism.

## 2 Curb the Number of Women Entering Prison

While some states have started to reduce the number of men behind bars, these very same states are seeing an increase in incarcerated women. Michigan, for example, reduced its male prisoners by 8 percent between 2009 and 2015, yet it incarcerated 30 percent more women.<sup>170</sup> During this same period, more women than men were added to prison rolls in North Carolina, Ohio, Tennessee, and Virginia, causing these state's overall prison populations to swell to between 52 percent and 97 percent.<sup>171</sup>

States are beginning to recognize the societal consequences of incarcerating women and are taking action to address this. In 2010, Oklahoma passed legislation authorizing diversion programs to keep mothers of minor children on probation in lieu of prison.<sup>172</sup> Another Oklahoma program called Women in Recovery authorizes courts to assign women with drug-related offenses to treatment programs and childcare services. The latter program had a recidivism rate of 3.5 percent compared to a 13 percent rate for imprisoned women in the state.<sup>173</sup> In 2015, Oregon, passed the Family Sentencing Alternative Pilot Program (FSAPP), authorizing judges to replace prison sentences with probation and community services for parents convicted of non-violent crimes.

States can enact legislation authorizing courts to assign female defendants who have committed lower-level crimes to treatment programs and social services that help women address the drivers that landed them in the criminal justice system. Diverting women from prison and keeping families together can save money and break the intergenerational cycle of incarceration.

## ENDNOTES

- 1 Michelle Ye Hee Lee, “Does The United States Really Have 5 Percent Of The World’s Population And One Quarter Of The World’s Prisoners?,” *Washington Post*, April 30, 2015, <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/>. (noting that the most recent data has the United States containing 4.4% of the global population, and 22% of global prisoners).
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