

Blueprint for Smart Justice
Arkansas



Blueprint *for* Smart Justice Arkansas

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Executive Summary

Over the past five decades, the United States has dramatically increased its reliance on the criminal justice system as a way to respond to drug addiction, mental illness, poverty, and broken schools. As a result, the United States today incarcerates more people, both in absolute numbers and per capita, than any other nation in the world. Millions of lives have been upended and families torn apart. The mass incarceration crisis has transformed American society, damaged families and communities, and wasted trillions of taxpayer dollars.

We all want to live in safe and healthy communities, and our criminal justice policies should be focused on the most effective approaches to achieving that goal. But the current system has failed us. It's time for the United States to dramatically reduce its reliance on incarceration and invest instead in alternatives to prison, including approaches better designed to break the cycle of crime and recidivism by helping people rebuild their lives.

The ACLU's Campaign for Smart Justice is committed to transforming our nation's criminal justice system and building a new vision of safety and justice. The Campaign is dedicated to cutting the nation's incarcerated population in half and combating racial disparities in the criminal justice system.

To advance these goals, the Campaign partnered with the Urban Institute to conduct a two-year research project to analyze the kinds of changes needed to cut the number of people in prison in each state by half and reduce racial disparities in incarceration. In every state, Urban Institute researchers identified primary drivers of incarceration. They then 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.

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. In Arkansas — where the Black adult imprisonment rate was four times as high as the white adult imprisonment rate in 2017¹ — reducing the number of people imprisoned will not on its own reduce racial disparities within the prison system. These findings confirm for the Campaign that urgent work remains for advocates, policymakers, and communities across the nation to focus on efforts like policing and prosecutorial reform that are specific to combating these disparities.

Arkansas' prison population has increased dramatically in recent decades, and has bucked a downward trend in imprisonment seen in some other states. While the average U.S. state imprisonment rate dropped by 8 percent between 2000 and 2017, Arkansas' rate of imprisonment increased by 35 percent over the same period.² There were 17,972 people imprisoned³ in the state as of June 30, 2018.⁴ Between 2012 and 2017, Arkansas had the fastest-growing state prison population in the nation.⁵

A primary driver of prison admissions is the large number of people who enter prison from community supervision due to either a technical violation of supervision — which can include things like failing to report to a supervision officer — or committing a new crime. In 2018, this group comprised 45 percent of admissions to the state's prisons.⁶ These admissions to

prison from supervision may be related in part to the lack of sufficient treatment options and reentry support available in the state. Of the people released from prison in 2014, the majority (57 percent) returned to custody within three years.⁷

Recognizing the unsustainable growth in the state's prison population, Arkansas lawmakers have twice passed Justice Reinvestment legislation – first in 2011,⁸ with a focus on improving community supervision and addressing overcrowding in prisons, and again in 2017, focused on developing more effective responses to community supervision violations and creating diversion options for people with mental illnesses.⁹ In spite of these steps forward, in 2018 the state prison population was expected to increase by 9 percent between 2018 and 2028.¹⁰

In addition to Arkansas's prison population, there are roughly 7,562 people being held in county jails across the state, according to the most recently available data (2015). An estimated sixty-five percent of these people were being held pretrial and had not been convicted of a crime.¹¹

As in many states, incarceration in Arkansas disproportionately impacts Black people. Despite accounting for only 15 percent of the state's adult population, Black Arkansans accounted for 42 percent of the prison population in 2017, and an estimated one in 45 Black men in Arkansas was imprisoned that year.¹² As the number of people in Arkansas prisons continues to grow, the number of women is growing even faster than the overall prison population. Between 2000 and 2017, the number of women in Arkansas prisons increased by 84 percent, while the number of men in Arkansas prisons increased by 50 percent.¹³

So, what's the path forward?

As a first step, Arkansas must collect more data on its criminal justice system and all stakeholders in that system, and there must be transparency in the data collection process. Effectively implementing and assessing policies that aim to reduce the state's incarcerated population and eliminate racial disparities is far more possible when coupled with robust data collection.

To address the revolving door of Arkansas prisons and help ensure people on community supervision aren't needlessly reincarcerated, probation and parole officers should prioritize the risk-need-responsivity principle, which will ensure that the level and parameters of community supervision are better aligned with the twin goals of maintaining public safety and improving rehabilitation outcomes. The Arkansas General Assembly must ensure that probation is used as an alternative to incarceration, rather than a means of widening the net of people involved in the criminal justice system. The state's courts, parole board, and General Assembly should also prohibit incarceration in all cases of technical violations.

Arkansas lawmakers can also support successful reentry to the community by building on legislation passed in 2017 that opened mental health crisis stabilization units in four pilot counties. These programs should be expanded beyond correctional settings, and the state should invest in them to ensure every community in the state has access to the mental health support it needs.

Arkansas lawmakers should also engage in sentencing reform to push back against laws and practices that keep people incarcerated for longer periods of time by amending the state's criminal code. The General Assembly should create a "second look" process that will allow anyone who has served 10 or more years to apply for resentencing before a court, and should also limit the use and severity of sentencing enhancements for people with previous felony convictions.

For more detailed information about these and other potential reforms, see the below sections on "Reducing Admissions" and "Reducing Time Served." Ultimately, the answer is up to Arkansas's voters, policymakers, communities, and criminal justice advocates as they move forward with the urgent work of ending the state's obsession with mass incarceration.

The State of the Arkansas Prison System

Arkansas's prison population has soared over the last few decades, growing sixfold between 1980 and 2017.¹⁴ While the average U.S. state imprisonment rate dropped by 8 percent between 2000 and 2017, Arkansas's rate of imprisonment increased by 35 percent over the same period of time.¹⁵ In 2017, Arkansas imprisoned 598 people per 100,000 residents, the fourth-highest imprisonment rate in the nation.¹⁶ As of June 30, 2018, Arkansas imprisoned a total of 17,972 people.¹⁷

To address its rapidly growing prison population, Arkansas engaged in the Justice Reinvestment process in 2011, passing legislation that focused on improving community supervision and addressing prison overcrowding.¹⁸ Immediately following these reforms, the Arkansas prison population decreased by 9 percent between 2011 and 2012.¹⁹ However, the governor-appointed Board of Corrections administratively

AT A GLANCE

ARKANSAS PRISONS

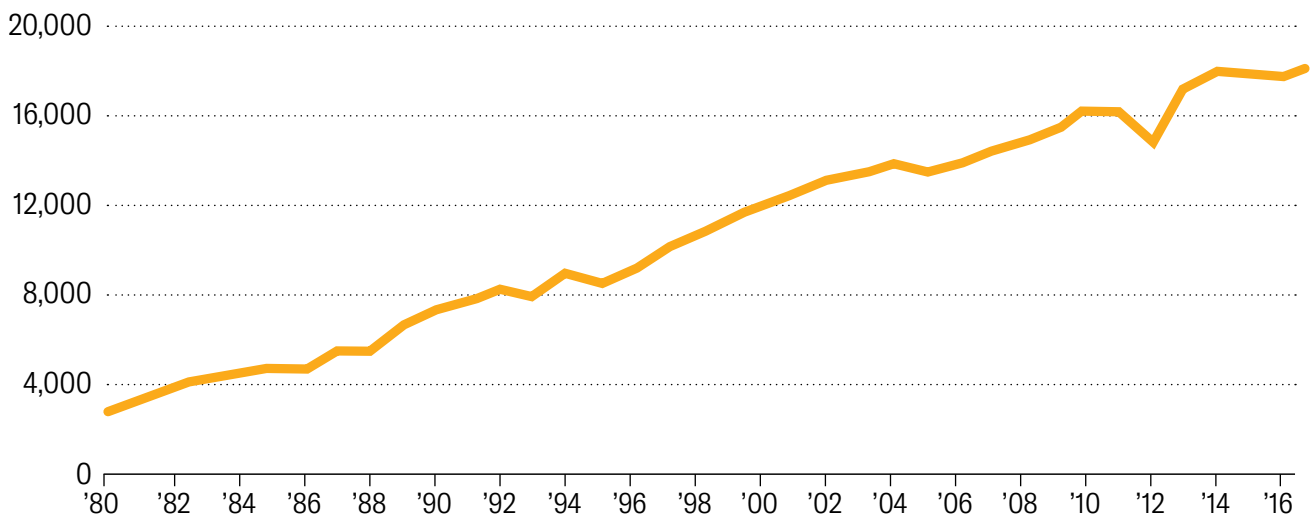
In 2018, **17,972 people** were imprisoned in Arkansas.

Between 2012 and 2017, Arkansas had the **fastest-growing** state prison population in the nation.

In 2018, Arkansas' state prison population was expected to increase by **9 percent** between 2018 and 2028.

tightened parole release criteria and revocation policies in the wake of a high-profile murder in May 2013 involving a suspect who was on parole.²⁰ After these

ARKANSAS INCARCERATED POPULATION



reforms were rolled back, Arkansas' prison population grew by 22 percent between 2012 and 2014.²¹

Arkansas had the fastest-growing state prison population in the nation between 2012 and 2017, and Arkansas' prison population was projected to increase by 28 percent between 2016 and 2026.²² These trends spurred Arkansas to reengage in the Justice Reinvestment process and pass new legislation in March 2017, which included developing more effective responses to community supervision violations and creating diversion options for people with mental illnesses.²³ Still, these codified changes are not expected to curb all future prison growth, and a 2018 analysis projected that the state prison population would increase by 9 percent between 2018 and 2028.²⁴

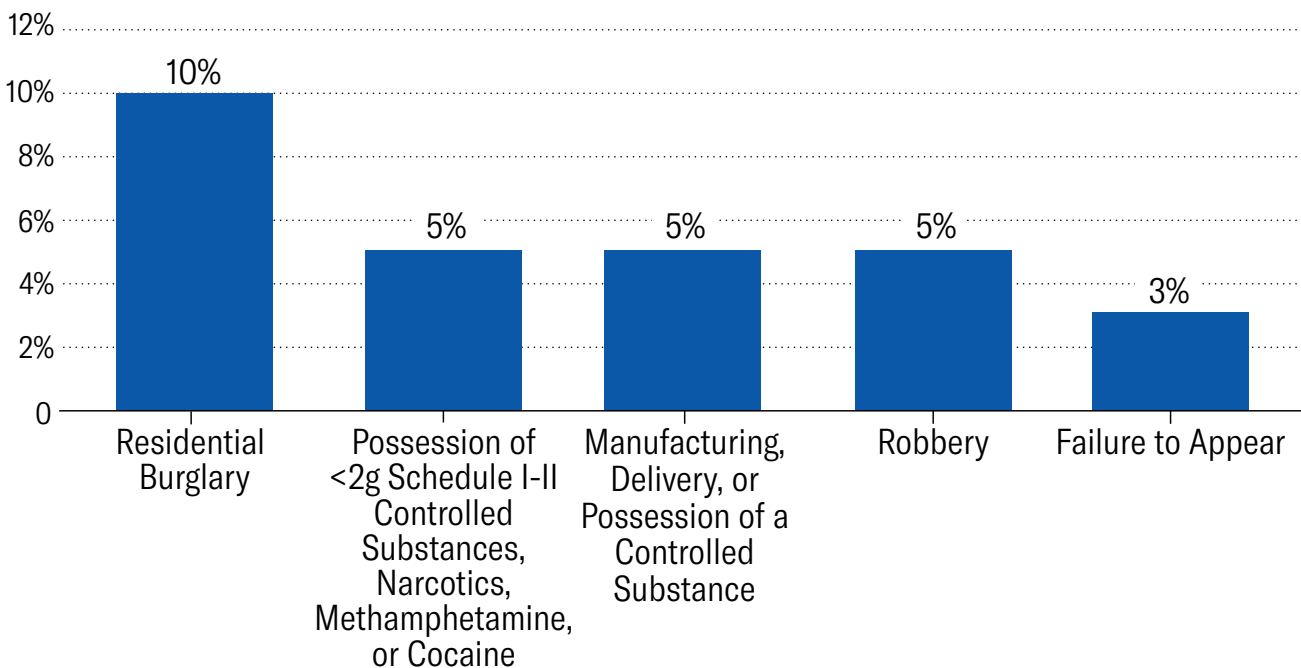
What Is Driving People Into Prison?²⁵

In 2018, there were 8,503 admissions to Arkansas prisons.²⁶ That year, one in 10 admissions were for residential burglary; 5 percent were for simple possession of less than 2 grams of schedule I or II

controlled substances, narcotics, methamphetamine, or cocaine; and another 5 percent were for manufacturing, delivery, or possession of a controlled substance. An additional 5 percent of admissions were for robbery, and 3 percent were for "failure to appear."²⁷

A primary driver of prison admissions in Arkansas is the large number of people revoked from community supervision due to either a technical violation of supervision – which can include things like failing to report to a supervision officer – or committing a new crime. In 2018, 45 percent of admissions to Arkansas prisons were due to violations of community supervision: 19 percent for technical violations and 27 percent for new crimes.²⁸ This means that nearly one in five admissions to an Arkansas prison that year were for behavior that was not a criminal offense, but rather violation of the terms of their probation or parole supervision, which can include failure to pay fines or not reporting to a supervision officer.²⁹ The proportion of admissions for technical violations was 131 percent higher in 2018 than in 2009, growing from 8 percent to 19 percent of overall annual admissions.³⁰

ARKANSAS PRISON ADMISSIONS BY TOP OFFENSE TYPES (2018)



AT A GLANCE

ARKANSAS JAIL AND PRISON POPULATION

In 2018, **19 percent** of Arkansas prison admissions were due to a technical violation of community supervision.

In 2015, an estimated **4,948 people** were being held pretrial in Arkansas jails and had not been convicted of a crime.

In 2018, **1,604 people** who had been sentenced to prison were being held in county jails due to prison overcrowding.

state’s reclassification of residential burglary from a nonviolent felony to a violent felony in 2015.³² In 2018, 7 percent of the Arkansas prison population were serving time for a residential burglary offense.³³ The other top offense types for the 2018 prison population reported by the Arkansas Department of Correction (ADC) were rape (9 percent), first degree murder (8 percent), aggravated robbery (8 percent), and sexual assault (6 percent).³⁴

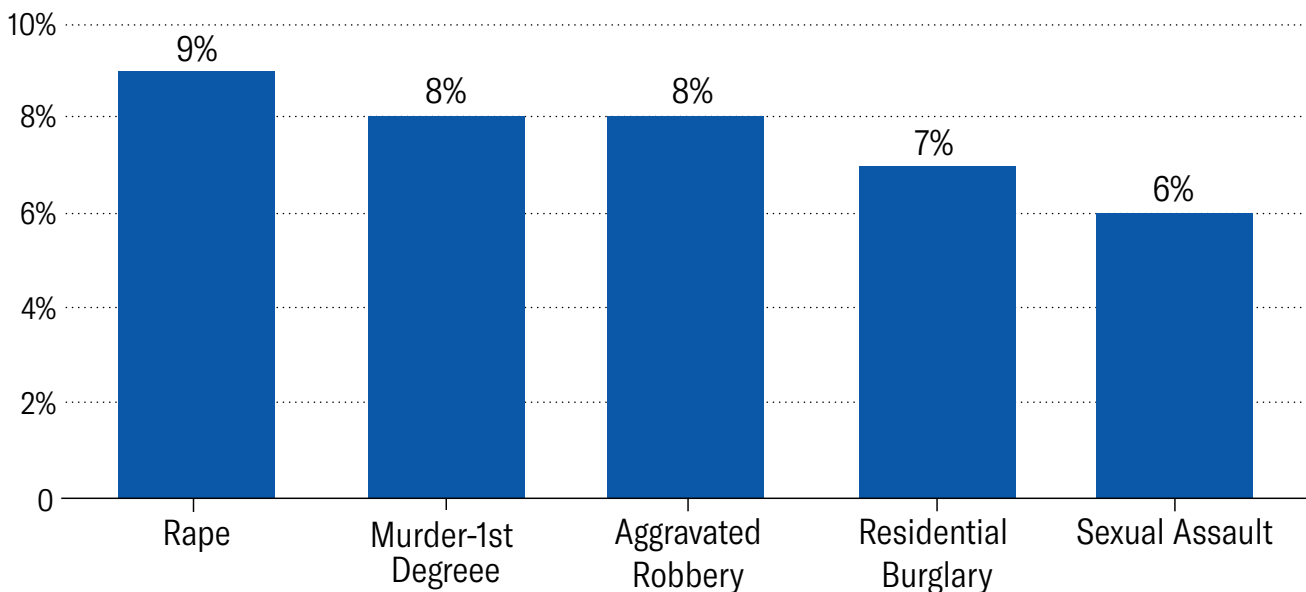
Many people who have served time in Arkansas prisons lack sufficient treatment options and reentry support, and many subsequently return to prison. Of the people released from prison in 2014, the majority (57 percent) returned to custody within three years – a larger proportion than the 2005 release cohort, of which 41 percent returned in three years. Of people released in 2014, 31 percent returned to custody within three years due to a technical violation of supervision conditions. An additional 23 percent of people released that year returned after being convicted of a new crime while on parole, and 4 percent had been discharged from supervision upon completing their sentence and subsequently returned due to a new conviction.³⁵

In addition to people held in state prisons, Arkansas incarcerated an estimated 7,562 people in county jails,

The Current Prison and Jail Population

In 2018, 57 percent of the Arkansas prison population were serving time for a violent offense.³¹ Although the proportion of the prison population serving time for nonviolent offenses declined from 54 percent in 2008 to 44 percent in 2018, this decrease is associated with the

2018 ARKANSAS PRISON POPULATION BY TOP OFFENSE TYPE



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LENGTH OF IMPRISONMENT

Between 2008 and 2018, the average amount of time served by people released from prison **increased by approximately 79 percent.**

Between 2012 and 2015, Arkansas's parole approval rate dropped by **10 percentage points.**

In 2018, **29 people** were on death row in Arkansas.

according to the most recently available data (2015). The majority of those people — 4,948 people, or 65 percent — were being held pretrial and had not been convicted of a crime.³⁶ Arkansas's booming prison population has strained and overcrowded county jails, which the state reimburses to hold people who have been sentenced to prison and are awaiting transfer.³⁷ In 2018, county jails held an average backlog of 1,604 people who had been sentenced to prison.³⁸ In fiscal year 2019, the state of Arkansas paid over \$15.5 million to local jurisdictions to hold this “backup” population.³⁹ Some counties argue that this reimbursement isn't enough to cover costs. For example, Garland and Sebastian counties have pointed out that they are reimbursed \$30 a day to hold someone serving a prison sentence in jail when it costs them up to \$65 or \$54 a day, respectively, to house them.⁴⁰ A cost report from the Association of Arkansas Counties listed an average cost across all counties of \$71.83 per day to house one person in jail in 2017. According to the same report, costs for almost every county significantly exceeded the \$30 per day they received from the state.⁴¹

Why Do People Stay in Prison for So Long?

As in many states, increasingly long prison stays have contributed to the growth of Arkansas' prison population. Between 2008 and 2018, the average

amount of time served by people released from prison increased by approximately 79 percent. People who were released from prison in 2018 had served an average of 4 years and 11 months.⁴²

Another factor contributing to long prison stays is harsh “habitual offender” laws that can trigger mandatory prison sentences for some individuals who have previous convictions. For a person with certain prior felony offenses, an additional conviction for certain offenses can lead to an extended sentence up to life imprisonment.⁴³ In 2018, 8 percent of the state prison population (1,301 people) were serving a life sentence and 29 people were on death row.⁴⁴

Acts 895 (2015), 136 (2013), and 485 (2013) expanded the discretion of the parole board, giving it greater authority to deny parole. Between 2012 and 2015, Arkansas's parole approval rate dropped by 10 percentage points, and the number of people remaining in prison past their parole eligibility date rose by 37 percent.⁴⁵ As of 2018, 21 percent of the prison population was required to serve 70 percent of their sentence before becoming parole-eligible.⁴⁶

Although the total number of annual releases increased by 47 percent between 2009 and 2016, it has dropped in recent years, decreasing by 19 percent between 2016 and 2018.⁴⁷

Who Is Imprisoned?

Black Arkansans: Imprisonment in Arkansas has a disproportionate impact on Black communities. In 2017, the Black adult imprisonment rate was four times as high as the white adult imprisonment rate. Despite accounting for only 15 percent of the state's adult population, Black people accounted for 42 percent of the prison population in 2017, and an estimated one in 45 Black men in Arkansas were imprisoned that year.⁴⁸

Arkansas Women: The number of women in Arkansas prisons is growing even faster than the overall prison population. Between 2000 and 2017, the number of women in Arkansas prisons increased by 84 percent, while the number of men increased by 50 percent.⁴⁹ In 2018, women accounted for 8 percent of

AT A GLANCE

DEMOGRAPHICS

In 2017, the Black adult imprisonment rate was **four times as high** as the white adult imprisonment rate.

Between 2000 and 2017, the number of women in Arkansas prisons grew by **84 percent**.

the state prison population.⁵⁰ The top offense types for women in prison in 2018 were first degree murder (8 percent); residential burglary (6 percent); and simple possession of less than 2 grams of schedule I or II controlled substances, narcotics, methamphetamine, or cocaine (5 percent).⁵¹

Older Arkansans: Though generally considered to pose a negligible risk to public safety,⁵² people age 55 or older accounted for 12 percent of the Arkansas prison population in 2018, up from 6 percent in 2008.⁵³ The cost of imprisoning aging and elderly people is significantly greater than younger people, due to factors such as higher rates of chronic illnesses that require medical care.⁵⁴

People with Mental Health Conditions and Substance Use Disorders

Behavioral health issues are prevalent among people in the Arkansas criminal justice system, and the state has taken steps to address their needs in recent years. For example, the state's latest Justice Reinvestment reforms require trainings to help police officers better respond to people experiencing a mental health crisis.⁵⁵ Additionally, the state opened the first of four 16-bed crisis stabilization units in March 2018 to divert people with behavioral health needs who are arrested for nonviolent crimes away from jails.⁵⁶ Three additional counties opened crisis stabilization units in July 2018, June 2019, and September 2019.⁵⁷ While they only represent a starting point, these reforms

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MENTAL HEALTH AND SUBSTANCE USE DISORDERS

In April 2019, there were **1,439 people** in Arkansas prisons on the waitlist for mental health treatment programs and **3,142 people** on the waitlist for substance abuse treatment.

are anticipated to help avert hundreds of millions of dollars in prison construction and operating costs.⁵⁸ Still, the prison system does not have the capacity to offer treatment to everyone determined to be in need. In April 2019, there were 1,439 people in Arkansas prisons on the waitlist for mental health treatment programs and 3,142 people on the waitlist for the substance abuse treatment program.⁵⁹

Budget Strains

As the Arkansas prison population has risen, so has the cost burden. Arkansas spent \$433 million of its general fund on corrections in 2017, accounting for 8 percent of the state's general fund expenditures that year. These costs increased by 445 percent between 1985 and 2017, far outpacing growth in spending on other state priorities like education, which increased by only 39 percent over the same period of time.⁶⁰ In 2018, it cost an average of \$61.25 a day and \$22,356 a year to house a person in Arkansas prisons.⁶¹

AT A GLANCE

BUDGET

Arkansas spent **\$433 million** of its general fund on corrections in 2017.

Between 1985 and 2017, spending on corrections increased by **455 percent**.

Ending Mass Incarceration in Arkansas: 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. There are many potential policy changes that can help Arkansas end its mass incarceration crisis, but it will be up to the people and policymakers of Arkansas to decide which changes to pursue. To reach a 50 percent reduction, policy reforms will need to reduce the amount of time people serve in prisons and/or reduce the number of people entering jail and prison in the first place.

Importantly, as a first step, Arkansas needs greater data collection and transparency in its criminal legal system. The Arkansas government must increase data collection and transparency for all criminal legal system stakeholders so that policymakers can draft and implement robust policies designed to decarcerate and reduce racial disparities within the system effectively and safely — and hold the system accountable for its success. Moreover, the public should have access to this data — a first step is to share all in-state criminal legal reports with federal government portals and databases.

Reducing Admissions

To end mass incarceration, Arkansas must break its overreliance on jails and prisons as a means to hold people accountable for their crimes. 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.⁶² Here are some strategies:

- **Alternatives to incarceration:** The good news is that alternatives exist. 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.⁶³ Established in 2018, the Restore Hope Alternative Sentencing Program offers people charged with certain offenses in Sebastian and White counties, including shoplifting and marijuana possession, the opportunity to connect with recovery, education, and other support services in lieu of incarceration or community service hours — with the chance to earn forgiveness from paying court-ordered fines and costs.⁶⁴ The Arkansas General Assembly should expand access to and eligibility for these programs, rather than limiting access to certain offenses, and adequately fund it to ensure sufficient support is available for every participant.

Arkansas has also established a variety of specialty courts designed to divert people with specific treatment needs away from incarceration. Counties across the state offer support to people in need of drug and alcohol treatment, mental health treatment, or veteran-specific treatment and assistance. Creation and implementation of these courts should rely on general revenue and not increased fees, fines and costs to defendants, and they should be implemented with consideration of

the constitutional concerns noted in the creation of some specialty courts.

For crimes involving violence, restorative justice programs — which are designed to hold responsible people accountable and support those who were harmed — have been particularly promising. When they are rigorous and well implemented, these processes have not only been demonstrated to reduce recidivism for defendants,⁶⁵ they have also been shown to decrease symptoms of posttraumatic stress in victims of crime.⁶⁶ Common Justice, a restorative justice program in Brooklyn, New York, responds to violence by focusing on its underlying causes, building practical strategies to hold people accountable for harm, break cycles of violence, and secure safety, healing, and justice for survivors and their communities.⁶⁷ With survivors and people responsible for their harm voluntarily working together, they recognize the harm done and develop appropriate responses to hold people accountable — reaching an agreement that addresses the questions, impacts, needs, and obligations that each person has.⁶⁸ Program staff monitor adherence to the agreement and supervise completion of an extensive 12–15-month violence intervention program; people who successfully complete the agreement commitments do not face jail or prison sentences. Survivors of violence overwhelmingly prefer this process over the normal criminal legal system process — about 90 percent of those approached by Common Justice to participate as an alternative to trial and incarceration agree.⁶⁹

Prosecutors and judges who embrace these solutions can fulfill their responsibilities to the public safety and to supporting victims in their healing — and can often generate far better results than imprisonment can deliver. Other successful models include programs that divert people to treatment and support services before arrest and prosecutor-led programs that divert people before they are charged. Lawmakers can explore such interventions at multiple phases in the system,

whether through decriminalization or alternatives to arrest, charges, or incarceration.

- **Improve community supervision:** Community supervision is intended to be an alternative to incarceration, a mechanism for early release and an opportunity to lower recidivism through effective reentry practices. Yet, many state probation and parole practices perpetuate mass incarceration. Probation and parole offices should instead prioritize the risk-need-responsivity principle, ensuring the level and parameters of supervision are aligned and lead to better public safety and rehabilitation outcomes in a direct effort to end mass incarceration. The Arkansas General Assembly should ensure probation is used as a prison alternative, not widening the net of system-involved people. It should also expand parole eligibility and other release mechanisms.
- **Reduce probation and parole revocations:** Too often, people revoked from supervision are sent to prison for technical violations, not for committing new crimes. Missing curfew or lack of employment could result in reincarceration. In 2017, the General Assembly passed Act 423 to reduce revocations by implementing a system of graduated sanctions for probation and parole violations providing swift, certain, and proportional responses.⁷⁰ It also increased the number of technical violations allowed before incarceration becomes an optional sanction. The courts, parole board, and General Assembly should prohibit incarceration in all cases of technical violations — particularly to comply with the Constitution’s prohibition of detention for inability to pay fines and fees, including those relating to supervision.

Parole revocations for technical violations are often due to physical or mental disabilities. Parole and probation officers are required to provide reasonable accommodations so that parolees and probationers with disabilities have an equal opportunity to comply with the requirements of parole. Proper training of parole officers and greater awareness of, and advocacy for,

these requirements could reduce the number of technical violations significantly.

- **Expand treatment for mental health and addiction:** Mental health diversion is an effective way to redirect people with disabilities out of the criminal legal system and into supportive community treatment. Diversion programs have been shown to be effective for people charged with both nonviolent and violent offenses.⁷¹ When implemented effectively, diversion reduces arrests, encourages voluntary treatment in the community, and saves money.⁷² In 2017, Arkansas passed legislation to open mental health crisis stabilization units where officers could take people with mental illnesses or other behavioral health conditions for treatment, as an alternative to arrest.⁷³ The state should expand these programs beyond the four pilot counties and beyond the correctional setting. It should also provide a wide range of substantial, quality wraparound treatment and support for people with disabilities to access housing, employment, and intensive, individualized support in the community. After an initial investment in ensuring every community across the state has the mental health support it needs, these diversion programs have the potential to save jurisdictions large amounts of money.⁷⁴

Substance use disorders are often underlying drivers of a substantial number of crimes, including and especially more serious offenses like burglaries, robberies, and assaults. Addressing substance use through treatment rather than incarceration can more effectively reduce crime.⁷⁵

Arkansas also expanded Medicaid through its Arkansas Works program, allowing greater access to mental health treatment and substance use treatment. However, the state later included a work requirement for people to maintain their coverage, resulting in the loss of coverage for 18,000 people, as the reporting requirements were incredibly burdensome and not accessible to all people.⁷⁶ The General Assembly should ensure that this critical coverage is available to all recipients of Medicaid, including people on probation/parole

and after their separation from the criminal legal system.

- **Support decriminalization:** The Arkansas General Assembly consistently introduces bills to criminalize behavior that previously would not have led to incarceration. The General Assembly needs to move away from a culture of criminalization, stop expanding the criminal code, and look at alternatives to incarceration. Decriminalization is a winning commitment both for the community and the ballot box. Public order crimes, for example, criminalize poverty and homelessness by targeting people living in poverty with criminal laws such as loitering and trespass. In addition, possession and use of small amounts of drugs remain harshly criminalized in Arkansas – possession of less than 4 ounces of marijuana can carry a punishment of up to a year in jail and a fine of \$2,500.⁷⁷ The Arkansas General Assembly should begin a broad decriminalization effort by reviewing the criminal code and removing these – and other similarly over-punished behaviors – from the law.
- **Eliminate cash bail:** Arkansas can significantly reduce its rates of pretrial detention by eliminating its use of cash bail. Far too often, people who cannot afford their bail will end up in jail for weeks, months, or, in some cases, years as they wait for their day in court. When this happens, the criminal justice system leaves them with a difficult choice: Take a plea deal or fight the case from behind bars. While detained pretrial, research shows many people face significant collateral damage, such as job loss or interrupted education.⁷⁸ After even a short stay in jail, taking a plea deal sounds less burdensome than losing everything, which is likely why evidence shows that pretrial detention significantly increases a defendant's risk of conviction.⁷⁹ The current cash bail system harms people of color in particular. Research shows that people of color are detained at higher rates across the country when unable to meet bail, and that courts set significantly higher bail amounts for them.⁸⁰ In order to significantly reduce pretrial detention and combat racial

disparities, the Arkansas General Assembly should require more reporting and transparency around the use of bail, eliminate cash bail, and limit pretrial detention to the rare case in which a person poses a serious, clear threat to another person.

- **Prosecutorial reform:** Prosecutors are the most powerful actors in the criminal justice system, with the ability to wield the power of the state against an individual to deprive that person of life, liberty, and property. The initial decision of whether to charge someone with crimes and if so, what and how many, has a major impact on every aspect of a person's experience with the system, not least of which is the length of incarceration someone faces and eventually serves. There should be some mechanism for the state and counties to review and assess those decisions overall to ensure that they make these decisions appropriately.

Moreover, prosecutors sometimes wrongfully convict a person, whether through prosecutorial misconduct or otherwise. Legislation that supports statewide Conviction Integrity Units in each county prosecutor's office can address wrongful convictions, prosecutorial misconduct, and unconstitutional sentences. Conviction Integrity Units add oversight to a prosecutor's decisions, which encourages prosecutors to use greater scrutiny when reviewing and charging cases. The first Conviction Integrity Unit was established in 2007 by Craig Watkins in Dallas, Texas, to change the culture of the prosecutor's office from conviction-focused to rightful conviction-focused. The Dallas Unit began by internally reviewing cases in which there was DNA evidence that incarcerated people had requested to have tested. From 2007 through 2016, this Unit exonerated and freed 33 people.⁸¹ This example shows the prevalence of wrongful conviction and brings the resulting traumas of wrongful incarceration to light. Prosecutors in Arkansas should also do their part to focus their office cultures on rightful convictions, rather than high conviction numbers. Prosecutors should establish

Conviction Integrity Units in conjunction with public defenders.

- **Invest in public defenders:** Having an adequate defense is a cornerstone of the American criminal legal system. But Arkansas is failing its population by starving the public defense system of adequate funding. Arkansas, which is divided into 23 judicial circuits, assigns public defenders to an entire circuit, requiring many to travel between counties, sometimes attending court in two or three counties in a single day. While the state pays the salaries of the public defenders, the counties are responsible for providing them with support staff and office space.⁸² Many counties provide no staff or office space at all, leaving attorneys to work out of one city while maintaining clients and court appearances in multiple counties.⁸³ In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended caseload limits of 150 felonies, 400 misdemeanors, or 200 juvenile cases per year.⁸⁴ Subsequent commentaries have criticized these limits for being too high, and the Commission itself has repeatedly noted that considerations such as case complexity and travel time may in fact require far lower caseload limits in many jurisdictions.⁸⁵ Caseload data obtained from the Arkansas Public Defender Commission show that multiple attorneys in nearly every circuit are given caseloads well over these recommendations. Some attorneys handled over 400 felony cases, while several attorneys handled misdemeanor cases by the thousands.⁸⁶ This neglect of the constitutionally required public defense system must be immediately remedied by the General Assembly by funding the public defense system at an adequate level to provide attorneys with appropriate caseloads, support staff, and resources. The presence of well-trained and sufficiently resourced defense counsel is critical not just for respecting constitutional rights, but for preventing unjust and unnecessary incarceration and building confidence in the system.
- **Expand judicial discretion:** The General Assembly can also limit the circumstances in

which a judge is required to impose a prison sentence instead of community supervision, especially for drug offenses and in situations when the mandatory prison sentence is triggered by a prior felony. Judges must also have a variety of options at their disposal besides imprisonment, allowing them to require treatment, mental health care, restorative justice, or other evidence-based alternatives to incarceration. They should also be educated on the harms of incarceration, especially as they apply to youth. These programs should be available to the court in all or most cases, regardless of the severity of the offense or someone's prior criminal history. The court, not the General Assembly, should be in a position to decide whether such an option is appropriate in individual cases.

- **Eliminate incarceration and suspension of driver's licenses for failure to pay fines and fees:** The Due Process clause of the 14th Amendment protects people from incarceration or driver's license suspension based solely on an inability to pay. But with the rise of mass incarceration, courts have begun to imprison people for the sole offense of not paying a fee. In Arkansas, some courts have regularly jailed people and suspended their driver's licenses for nonpayment of court fines and fees levied without consideration of the individual's ability to pay.⁸⁷ This practice criminalizes poverty, creates unnecessary barriers for Arkansas citizens and families, and unconstitutionally exposes the poor to the traumas of the criminal justice system and incarceration. This unfair practice also drains the resources of Arkansas taxpayers, who must foot the bill to incarcerate people whose only "crimes" are an inability to afford freedom. Arkansas should stop this practice immediately. A good first step would be for the state court system to revise its rules to require that courts make an on-the-record determination of the ability of each defendant to pay before a driver's license can be suspended or a person can be incarcerated.
- **Juvenile system reform:** Arkansas was one of the only southern states to increase its population

of incarcerated juveniles from 2000 to 2014.⁸⁸ Compounding this problem, there is a lack of transparency and reliable data regarding children involved in the criminal legal system and those who are before other courts in neglect cases.⁸⁹ To address the growing problems in the juvenile system, the state passed Act 189 in 2019.⁹⁰ This law requires diversion agreements in all juvenile courts, mandates the use of validated risk assessments and written findings for commitment to the Division of Youth Services, prohibits commitment for misdemeanor offenses when assessments find low risk, requires a collaborative information-sharing plan among related state agencies and stakeholders, and requires robust community-based alternative services for youth. While these reforms are a step in the right direction, the use of risk assessment tools may aggravate disparate impacts on minorities. Judges should instead be allowed to use discretion to make decisions in favor of juveniles where appropriate, regardless of the risk assessment results. All stakeholders, including judges, prosecutors, and defense counsel, should be aware of the collateral consequences to conviction and incarceration of juveniles. Juveniles should always have access to counsel, and neither they nor their parents should ever be allowed to waive that right. Furthermore, no child should ever be arrested or brought to court for truancy. Arkansas should require study and transparency into the number of cases of abused and neglected children who also have a delinquency case open, and why. The General Assembly should limit detention and prohibit the imprisonment of children in most – if not all – cases, and establish a presumption to use diversion or other alternative programs instead. All children under 18 should be initially charged in the juvenile division, requiring the state to carry the burden of proving the need to transfer the case to the criminal division. The age at which a person can be charged as a juvenile should also be raised to at least 20.

Relatedly, children in foster care have already undergone trauma, both in their homes and when their families are separated. Unfortunately, once in foster care, they experience ongoing trauma and

new barriers, often without a sufficient support system.⁹¹ This trauma, lack of support, and the unique circumstances each foster child is dealing with leave them poorly equipped to transition into adulthood without stumbles. Foster children aging out of the system report difficulties in obtaining housing, education, and work.⁹² These same factors make foster youth vulnerable to involvement in the criminal legal system, both as juveniles and in early adulthood, which can put them at risk for incarceration as adults. In Arkansas, the foster system is unnecessarily growing as the state

A NOTE ON SPECIALTY COURTS

Many jurisdictions assign some people to “specialty courts” such as mental health, behavioral, veterans’, and drug courts. While these courts provide sensible and needed treatment options, the ACLU has concerns about the growing use of these courts. They may violate due process rights, including the rights to notice, hearing, and counsel, and may needlessly subject people with disabilities to criminal justice control. And they require significant resources that would be better spent providing upfront services in the community.

Where established, participation in these courts must be voluntary and not require a guilty plea. Specialty court providers must be disability-competent and informed in public health, addiction, and treatment. People in these courts must have access to counsel, and supervision should not last beyond the length of any sentence that would have been imposed for the underlying charge. Participants should be allowed to quit the program and either take a plea agreement or stand trial, protected by all due process rights, at any time. All programs must be tailored to meet individual needs, including having specialized, evidence-based options for people with dual diagnoses (mental health and substance use disorders). Finally, the response to lapses or noncompliance should be enhanced case management, not incarceration.

removes children from homes at a growing rate. In many cases, the children could probably have remained safely at home if their families were given the help they needed.⁹³ The state should invest in services to keep children with their families and to focus foster resources on the children who truly need it. The General Assembly should also invest in the foster care system to provide better support to foster children, including more resources for the children and training and counseling for families and foster families. The state should also invest more resources into programs for adolescent foster children as they transition into adulthood and age out of the system.

- **Robust reentry services:** In 2015, in response to the growing incarceration rate in Arkansas, Gov. Asa Hutchinson established Restore Hope Arkansas, a state initiative to reduce recidivism.⁹⁴ As some 700–800 people come home to their local communities each year, about 58 percent were returning to prison within three years before the program was established.⁹⁵ Restore Hope’s goal is to reduce this rate by connecting people returning from prison with case managers and life coaches who support them in areas such as employment, substance abuse counseling, life planning, and education from local offices in Fort Smith, Van Buren, Little Rock/North Little Rock, Conway, Hot Springs, Jonesboro, Searcy, and Pine Bluff. From March 2017 to May 2018, in conjunction with community members providing feedback on its work, the program identified 613 people preparing for their release from prison, opened 542 cases, and connected 272 people to recovery coaches. The program is showing early indicators of success in drug recovery, employment, and meeting parole requirements.⁹⁶ Arkansas should reinvest in and expand Restore Hope and programs like it to ensure these efforts support everyone returning home from incarceration.

Reducing Time Served

Reducing the amount of time people serve, even by just a few months, can lead to thousands fewer people in Arkansas' prisons. Here's how:

- **Sentencing reform – general:** Extreme sentencing laws and practices are keeping people incarcerated for far longer than ever before. The General Assembly should amend Arkansas' criminal code to reduce sentencing ranges to more appropriate levels, including for drug offenses, burglary and other property offenses, robbery, public order offenses, and assault. Moreover, the General Assembly should create a "second look" process that allows anyone who has served 10 years or more to apply for resentencing before a court, incentivizing rehabilitation while serving time in prison and rewarding successful efforts at growth with a reduction in sentence.
- **Sentencing reform – enhancements:** The General Assembly can also limit the circumstances and the severity of Arkansas' prior felony sentencing, in which the presence of even a single prior felony can both substantially increase the sentencing range and delay initial parole eligibility. The state's harsh "habitual offender" laws trigger mandatory prison sentences for individuals. In fact, for certain prior felony offenses, a person may face a life sentence behind bars.⁹⁷ These and other sentencing enhancements ultimately drive prison population growths, as people are unfairly and unwisely sentenced to lengthier sentences and must wait significantly longer for parole eligibility.
- **Parole reform:** Improving parole and release policies and practices to ensure that eligible people are paroled more quickly is another key way to reduce the amount of time people spend in prison. Yet, a 2019 report from the Prison Policy Institute graded Arkansas's parole system an F – the lowest grade possible.⁹⁸ The Commission can improve by requiring in-person meetings with board members and the applicant prior to any release decision, allowing the applicant an opportunity to challenge incorrect information, and an opportunity to challenge the final decision. Moreover, release decisions should not be solely based on the nature of the original offense. The General Assembly should also improve transparency and accountability by requiring public parole guidelines and requiring the board to file a report to an oversight committee on that year's denials, with justifications.
- **Earned time/earned credit reform:** Arkansas can also consider expanding the availability of earned credits against a prison sentence through participation in educational, vocational, and other opportunities and a review and revision of existing mandatory minimums to allow for credits that provide for individual considerations and make better sense in terms of public safety and who we continue to incarcerate and why.
- **Compassionate release:** The Arkansas General Assembly should expand access to compassionate release from prison. The state's prison population is rapidly aging. Keeping aging and seriously injured or ill people incarcerated significantly taxes prison resources. Currently, Arkansas law provides medical parole for those who are terminally ill or who require immediate long-term care. The General Assembly should expand medical parole to people who have other serious, long-term illnesses that are a great cost to the state.⁹⁹ The General Assembly should also expand early release opportunities to the older prison population. Studies have shown that incarcerating an older (50 and above) person costs double what it costs to incarcerate a younger person.¹⁰⁰ Furthermore, keeping older people behind bars does not serve the goal of incapacitation, particularly as studies have clearly shown that as people age, their propensity to commit crime significantly declines.¹⁰¹ There is also clear evidence showing that older persons have much lower rates of recidivism than their younger counterparts.¹⁰²

Reducing Racial Disparities

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

People of color — especially Black people — are at a higher risk of becoming involved in the criminal system. Despite accounting for only 15 percent of the state’s adult population, Black people accounted for 42 percent of the prison population in 2017.¹⁰³ This is often due to 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.¹⁰⁴ Moreover, further along in the system, Black people are more harshly punished in Arkansas than white people for the same offenses. In a study conducted from 2011 to 2013 and published in 2015, of homicide offenses for which prisoners in Arkansas were serving sentences,¹⁰⁵ Black Arkansans were more likely than white Arkansans to receive more severe charges and longer sentences for the same crimes, to receive the death penalty, and to plead guilty as charged in capital murder cases.

The study found statistically significant racial disparities in charges and sentences, including the following:

- Black inmates were more likely than white inmates to be incarcerated for capital murder (55.1 percent vs. 44 percent), whereas white inmates were more likely to be incarcerated for first degree murder than Black inmates (54 percent vs. 44.2 percent).
- Black inmates were more likely than white inmates to be sentenced to death (71.4 percent vs. 28.6 percent) or life without parole (54.2 percent vs. 44.8 percent), whereas white inmates were more likely to be sentenced to life with parole than Black inmates (53.9 percent vs. 44.3 percent).
- Even when controlling for charge, Black defendants were more likely to receive a sentence of

“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.”¹²¹

— From *The New Jim Crow*, Michelle Alexander

death compared to white defendants for the charge of capital murder.

- Of those sentenced to death, 71 percent were Black and 29 percent were white. When combined with achieved educational status, of those sentenced to death and having less than a high school education, 91 percent were Black and 9 percent were white.

Further, the study examined the role of prosecutorial discretion as it related to homicide and robbery offenses in four counties in Arkansas (Crawford, Faulkner, Lee and Pulaski counties).

Among the study’s findings were that:

1. Black defendants were more likely to be initially charged more severely than white defendants in homicide cases;
2. Black defendants were more likely to plead guilty as charged in capital and first degree murder cases, while white defendants were more likely to plead guilty to a lesser offense; and
3. Black defendants were more likely to be brought to trial in cases in which juries eventually found the state could not prove its case beyond a reasonable doubt (i.e., not guilty).

Likewise, a study of juveniles detained in Pulaski County for six months in 2018 indicated that of 786 children arrested, 628 (80 percent) were Black and 148 were white.¹⁰⁶ Children were often arrested not for crimes but for violations of school rules, family disputes, or other issues. The state needs to increase its option for nondetention shelters for youth and should ensure this type of transparency and scrutiny for racial disparities in the treatment of children across the state.

Focusing on only some 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 by solely 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 justice reforms that led to a 26 percent decline in the state prison population between 1999 and 2012.¹⁰⁷ 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.¹⁰⁸

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 justice system. Reductions in disparate imprisonment rates require implementing explicit racial justice strategies.

Some examples include:

- Increasing data collection and transparency for system stakeholders, including and especially for police actions and interactions with the public,

for greater accountability to equal treatment regardless of race

- Implicit bias training for every system stakeholder, including judges, juries, prosecutors, police, and parole boards
- Ending overpolicing in communities of color
- Empowering a state standards board for police to receive and act on complaints from Arkansans about use of force, discrimination, and violations of professional and ethical standards applicable to law enforcement, and empowering the board to provide training and education, resources, and a step-disciplinary processes that includes decertification
- Evaluating prosecutors' charging and plea bargaining practices to identify and eliminate bias
- Training public defenders to challenge searches and seizure more often and more effectively
- 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 (drug-free school zones)
- Reducing exposure to reincarceration due to revocations from supervision
- Requiring racial impact statements through legislation, such as Sen. Joyce Elliott's SB 237 (2017),¹⁰⁹ 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. Numerous studies illustrate racial disparities are rampant throughout the capital sentencing process.¹¹⁰

- Addressing any potential racial bias in risk assessment instruments used to assist decision-making in the criminal justice system
- 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 process to avoid incarcerating children during their most formative years.
- Eliminating fines and fees, which effectively criminalize poverty
- 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.¹¹¹ In particular, people with psychiatric disabilities are dramatically overrepresented in jails and prisons across the country.¹¹²

- People showing signs of mental illness are twice as likely to be arrested as people without mental illness for the same behavior.¹¹³
- People with mental illness are sentenced to prison terms that are, on average, 12 percent longer than other people in prison.¹¹⁴
- 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.¹¹⁵

Arkansas is no exception. In April 2019, there were 1,439 people in Arkansas prisons on the waitlist for mental health treatment programs, and 3,142 people on

the waitlist for the substance abuse treatment program.¹¹⁶

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 absolute number of incarcerated people with psychiatric disabilities.¹¹⁷

Screening tools to evaluate psychiatric disabilities vary by state and jurisdiction, but the most reliable data indicates that more than half of jail populations and close to half of prison populations have mental health disabilities.¹¹⁸ 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.¹¹⁹ Not surprisingly, many of the strategies to reduce disability disparities are similar to approaches that reduce racial disparities. Some examples include:

Increasing data collection and transparency for system stakeholders, including people involved with the system who have a disability

- Investing in pre-arrest diversion:
 - Creating new behavioral health centers in noncorrectional environments, in addition to the existing Arkansas Crisis Stabilization Units, as accessible alternatives to jails, or emergency rooms for people experiencing mental health crises or addiction issues.

TAKING THE LEAD

Prosecutors: They make decisions on when to prosecute an arrest, what charges to bring, and which plea deals to offer and accept. 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.

Police: They are generally the first point of contact with the criminal justice system. The practices that police employ in communities can shape the public's view of and trust in that system. Police can decide 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 into the criminal justice system.

Parole board: They decide when to allow people to leave prison. 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.

State 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, and they can fund the creation of new alternatives, including diversion programs that provide supported housing, treatment, and vocational training. And they can decide to sufficiently fund mental health and substance use treatment so it is available for people who need it before they encounter the criminal legal system.

Judges: They often have discretion over pretrial conditions imposed on defendants, which can make a difference. 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 can also have discretion in sentencing and should consider alternatives to incarceration when possible.

- Training dispatchers and police to divert people with mental health issues who commit low-level nuisance crimes to these behavioral health centers. Jurisdictions that have followed this approach have significantly reduced their jail populations.¹²⁰
- 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 crimes to behavioral health centers.
- Requiring prosecutors to offer diversion for people with mental health and substance use disabilities who are charged with low-level crimes
- 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
- Requiring competency evaluations and determinations by independent experts rather than doctors from Arkansas State Hospital, who often have a vested interest in the outcomes due to overcrowding there
- Increasing support for the State Hospital and other programs to avoid overcrowding while still providing necessary mental health services
- 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 justice 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

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