

Blueprint for Smart Justice
California



Blueprint *for* Smart Justice California

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Executive Summary

Over the past five decades, the number of people in jails and prisons in the United States has increased dramatically. Today, there are more people incarcerated in this country, in both absolute numbers and per capita, than any other nation in the world. Millions of lives have been upended and families torn apart. This mass incarceration crisis has fractured 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 reduce its reliance on incarceration and invest instead in alternatives to jail and 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 building a new vision of safety and justice. The Campaign is dedicated to cutting the nation's jail and prison populations 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 reduce both.

The analysis was eye-opening.

In every state, we found that reducing jail and prison populations by themselves does little to diminish racial disparities in incarceration — and in some cases would worsen them. In California — where, as of 2017, the per capita adult imprisonment rate of Black people is more than nine times higher than that of white people¹ — reducing the number of people imprisoned will not

on its own reduce racial disparities within the prison system. This finding confirms 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.

Over the last two decades, California's criminal justice landscape experienced a huge transition. Through years of litigation, major legislative initiatives, a U.S. Supreme Court decision that mandated a limit on the state's prison population, and 2011 Realignment legislation, the state achieved a marked reduction in the prison population. But this reduction shifted a large portion of the people held in prisons or those who are prison-eligible into county jails, contributing to a subsequent rise in the jail population.²

While some reforms, such as Proposition 47,³ are aimed at bringing the number of people in jail back down, significant work remains for criminal justice stakeholders in California. A significant number of Californians who don't pose a threat to public safety are still being sent to both jail and prison.

So, what's the path forward?

This report highlights a number of steps that can be taken by decision-makers at every step of the criminal legal system.

California must dramatically reduce the number of people detained in jails through pretrial reform. People arrested and taken into custody should have a path to pre-arraignment release, and no person should be detained due to their inability to pay cash bail or a commercial bail bond. Pretrial detention must be

limited only to the narrow public safety exceptions allowed under Article 1, Section 12 of the state's constitution,⁴ and detention decisions should be based on actual evidence and facts as applied in a hearing with due process. The fundamental focus of state agencies and county governments, including judges, should be to support a new generation of pretrial services that support people who are released while awaiting trial to come to court.

To reduce the number of people in jails and prisons, the voters and county and state policymakers must also demand accountability and transparency from prosecutors. Prosecutors should refuse to charge minors as adults, decline to seek life without parole sentences, and prioritize the diversion of people to community-based substance use disorder and mental health treatment, as well as other alternatives to incarceration. California lawmakers should also create guidelines for charging and plea-bargaining decisions that rely on the least punitive options while ensuring accountability and safety.

Ultimately, the answer is up to California's voters, policymakers, communities, and criminal justice advocates as they move forward with the urgent work of ending the state's mass incarceration crisis.

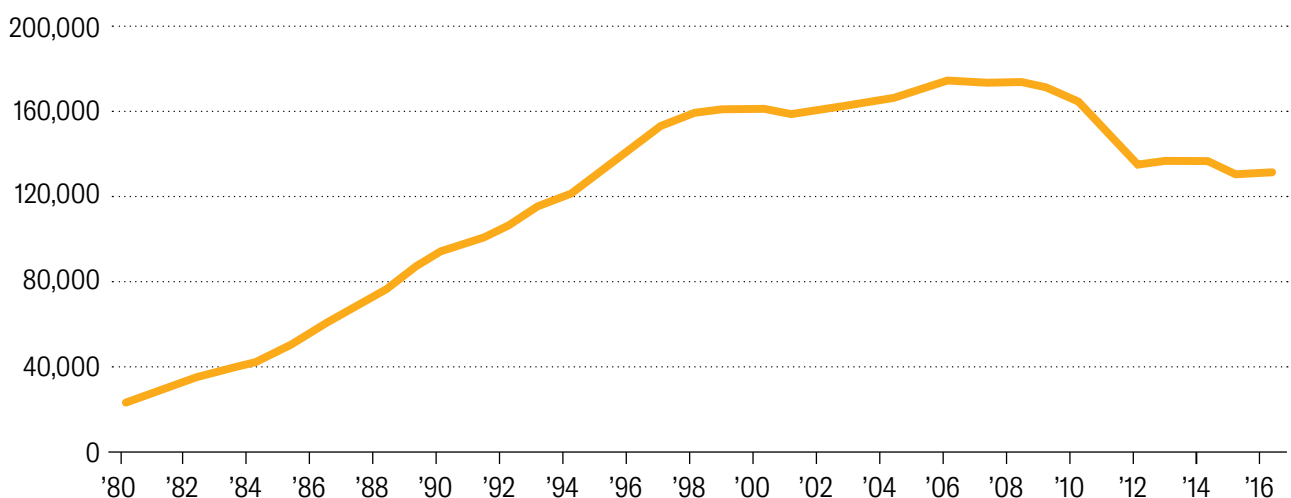
The State of the California Correctional System

The California prison population increased by 648 percent from 1980 to its peak in 2006, before levelling off and then declining by 25 percent between 2006 and 2016. Still, the 2016 prison population was more than five times as big as it was in 1980.⁵ This was the case despite major reforms that cut the prison population in response to years of litigation and a 2011 U.S. Supreme Court decision⁶ that found the extreme overcrowding in state facilities violated the U.S. Constitution. Over the same period of time, the state’s population has nearly doubled⁷, and today we live with the legacies of policies from the 1980s and 1990s that have grown the prison population more than three-fold on a population-adjusted basis.⁸ Major reforms of the past decade have begun to reduce the prison population, but have not been sufficient to push the level of incarceration down to what it was before the mass incarceration policies of the 1980s and 1990s.

The most prominent reform was the 2011 Realignment legislation, which mandated that individuals sentenced to non-serious, nonviolent, or non-sexual offenses who did not have prior convictions for certain offenses serve their time in county jails rather than in prisons.⁹ In the years following Realignment, county jail populations initially rose by 10 percent, and they continued to rise until voters passed Proposition 47 in 2014.¹⁰ This initiative reclassified most low-level property and drug crimes – including shoplifting, forgery, and theft below \$950 – from felonies to misdemeanors and led to a decline in county jail populations by 10 percent between 2014 and 2015.¹¹ Despite this decline, as of 2018, the county jail population was still larger than it was in 2010 pre-Realignment.¹²

Other significant reforms included Proposition 36, enacted in 2000, which mandated that qualifying adults

CALIFORNIA PRISON POPULATION



facing low-level drug possession charges be sentenced to probation, often with drug treatment, instead of jail or prison.¹³ In 2012, another ballot measure approved by voters (also called Proposition 36) reined in the state’s Three Strikes Law, generally limiting its use to people with new “serious and/or violent” felonies and authorizing re-sentencing for certain people currently serving life for nonviolent third-strike offenses.¹⁴

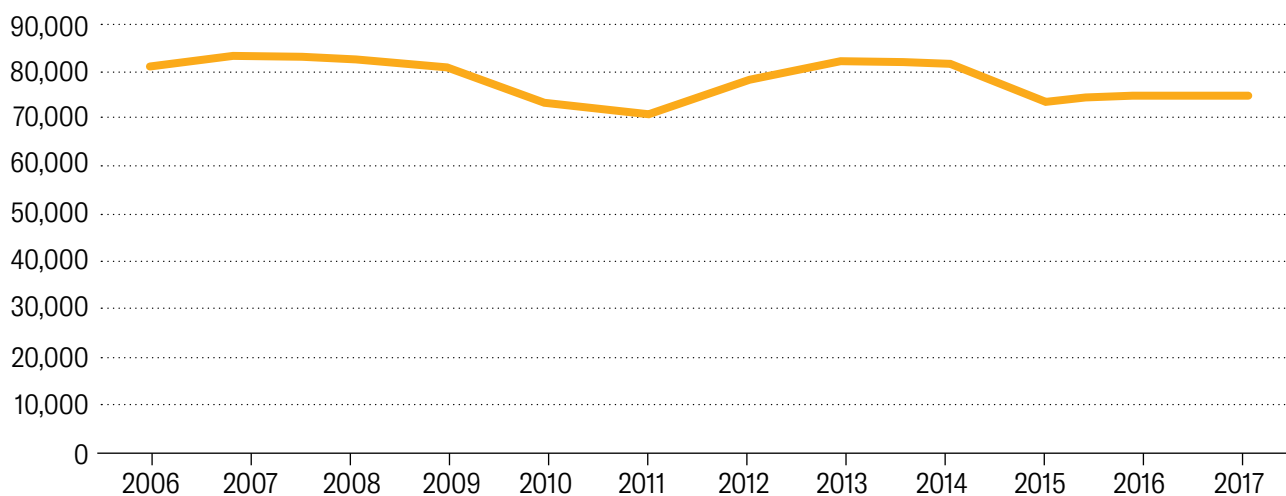
In 2016, voters approved Proposition 57, a combined state statute and constitutional amendment, which increased good behavior credit-earning opportunities for people in prison and parole opportunities for people convicted of low-level felony offenses.¹⁵ The proposition also restored discretion to juvenile court judges when deciding whether or not to try certain juveniles in adult court. In late 2018, a panel of three appellate judges ruled that Proposition 57 also includes relief for thousands of people in prison serving time for nonviolent third-strike offenses.¹⁶ In recent years, Gov. Jerry Brown signed several pieces of legislation that could contribute to reductions to the prison population, including legislation that allows judicial discretion to strike or dismiss sentence enhancements for prior serious offenses¹⁷ and for use of a gun (including gun enhancements that result in additional life sentences)¹⁸, repealed a three-year enhancement for prior drug felonies¹⁹, limited the circumstances in which a person may be convicted of felony murder (requiring intent

where none was required before),²⁰ and prohibited the prosecution of 14- and 15-year-olds as adults²¹.

In 2016, voters also approved Proposition 64, which legalized the recreational use of marijuana for Californians aged 21 or older.²² Then, in 2018, Gov. Brown also signed A.B. 1793 into law, which requires the state to review prior marijuana convictions that would be categorized differently under today’s laws. By July 2019, the state must dismiss or redesignate all such eligible prior convictions, providing relief for thousands of Californians by July 2020 when conviction status changes will go into effect.²³

These significant reforms have already contributed to or are expected to contribute to a continued decrease in California’s state prison and county jail populations. At its peak in 2006 California imprisoned 173,942 people²⁴; as of October 2018, there were 128,572 people in prison in California.²⁵ Still, work remains to be done. The California Department of Corrections and Rehabilitation projects the decline in the prison population will continue in coming years, reaching around 121,000 people in 2022.²⁶ As of 2016, the state had the second largest prison population in the nation, after only Texas.²⁷

CALIFORNIA JAIL POPULATION



The Current Prison and Jail Population

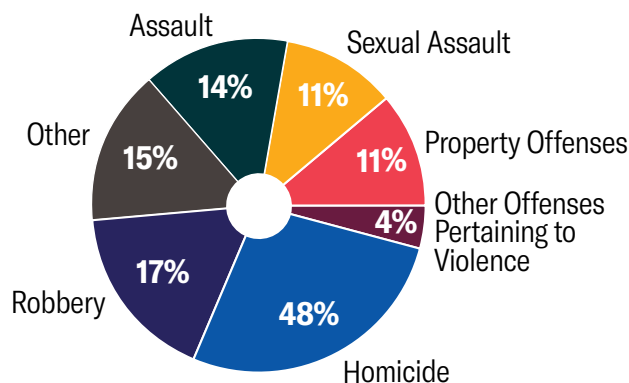
As anticipated, California's prison population has declined considerably following Realignment, particularly the segment of the population serving time for drug and property offenses,²⁸ some of whom now serve their sentences in local jails instead.²⁹ Between 2005 and 2015, the number of people serving time in prison for a drug offense dropped by 81 percent, and the number of people serving time for a property offense dropped by 61 percent. As of 2015, the most common offenses for people serving time in California prisons were homicide (27 percent), robbery (17 percent), and assault (14 percent); people serving time for drug and property offenses accounted for 16 percent of the prison population.³⁰

In addition to people incarcerated in state prisons, as of 2017, 75,065³¹ people were being held in county jails, 65 percent of whom had not been sentenced, including those awaiting trial.³²

While the state's prison population declined substantially following Realignment,³³ the county jail population grew by 15 percent between 2011 and 2013.³⁴ Because Realignment rendered people convicted of certain felonies ineligible for prison, some of the people who previously would have been sentenced to prison were sentenced to serve time in local jails instead.³⁵ In October 2011, when the sentencing changes went into effect, the Board of State and Community Corrections reports that 1,573 people who were sentenced to serve time in jail might have been eligible for a prison sentence prior to Realignment, also known as "1170(h) sentences." The number of new monthly 1170(h) sentences reached a high of 1,797 in July 2014, before dropping later that year when the ballot initiative Proposition 47 went into effect.³⁶ In June 2015, 1,045 people were sentenced to serve 1170(h) terms in California local jails.³⁷

Proposition 47 reclassified certain low-level drug and property crimes from felonies to misdemeanors. Most people serving time for a felony offense that was reclassified could petition the court for resentencing.³⁸ In October 2014, right before Proposition 47 went into effect, there were 81,689 people in local jails in

CALIFORNIA PRISON POPULATION BY OFFENSE TYPE (2018)



Because reliable statewide jail population data by offense type is not available, it is not represented here.

California. Within two months, the jail population decreased by 12 percent to 72,220 in December 2014.³⁹ While the jail population declined since Proposition 47, the average daily jail population in September 2018 of 74,377 was still 4 percent greater than pre-Realignment in September 2011.⁴⁰

What Is Driving People Into Jail and Prison?

In California, a litany of offenses drives people into jails and prisons.⁴¹ In 2015, assault was the most common offense (21 percent) for admissions to prison. After assault, the most common admissions offenses⁴² included robbery (12 percent), weapons offenses (10 percent), burglary (10 percent), and drug offenses (8 percent).⁴³

In 2015, just one year after the passage of Proposition 47, which reclassified most drug possession from a felony to a misdemeanor, the number of people entering prison for drug possession dropped by 87 percent. In 2015, drug possession accounted for only 8 percent of all drug offense admissions, down from 32 percent in 2014. Overall, admissions to California prisons for drug offenses have seen precipitous declines in recent years, dropping 93 percent between 2005 and 2015.

AT A GLANCE

CALIFORNIA JAIL AND PRISON POPULATION AT A GLANCE

After Proposition 47, there was a **68 percent** decline in drug possession bookings to county jails.

The number of Californians admitted to prison for double consecutive prison terms grew by **21 percent** between 2008 and 2017.

In 2016, parole violations accounted for **12 percent** of all prison admissions in California.

California had the **second largest** prison population in the nation as of 2016, behind Texas, and held approximately 75,000 additional people in county jails across the state.

The total number of people in California prisons decreased by **23 percent** between 2005 and 2015.

Proposition 47 also changed the composition of people entering county jails. The Public Policy Institute of California (PPIC) reports that there was a 68 percent decline in drug possession bookings to county jails⁴⁴ and a 35 percent reduction in the number of people held in jails for drug charges immediately following the implementation of Proposition 47.⁴⁵

California's criminal code includes harsh sentencing laws that trigger lengthy prison sentences for many people, including the Two and Three Strikes Law. This sentencing scheme imposes twice the prison term otherwise specified by law for any person convicted of certain felonies who has a prior serious felony conviction. It also allows for a sentence of 25 years-to-life for anyone convicted of a serious felony with two or more prior serious or violent felony convictions, and it can also apply to people with certain previous offenses, even if their third offense is non-violent and non-serious.⁴⁶ Proposition 57 and Proposition 36 (2012)

will provide relief for some people convicted; however, the Three Strikes Law continues to impose excessive prison sentences for people who would otherwise be eligible for shorter sentences or alternatives to incarceration, such as probation and other programming.

While court commitments to California prisons for felony offenses have declined substantially in recent years (down 46 percent between 2008 and 2017), "second strike" court commitments, or the number of people committed to serve double consecutive prison terms by the courts for a second serious offense, have grown 21 percent over the same period, and are projected to continue to grow in coming years.⁴⁷

In 2011, before Realignment, 62 percent of prison admissions in California were for parole violations. Between 2011 and 2012, annual admissions to state prison for parole violations went from more than 60,000 to just 8,017, likely due in part to Realignment reform that limited admissions to prison for parole violations.⁴⁸ Still, parole violations accounted for 12 percent of all admissions to California prisons in 2016.⁴⁹

Why Do People Stay in Jail and Prison for So Long?

As the prison composition has changed due to recent reforms, so has the length of stay for people in jails. As more people served drug and property felony sentences in jail after Realignment, the median length of stay in jail for these offenses rose. For drug felony sentences served in jail, for example, the median length of stay for people released rose from 45 days in October 2011 to 73 days in October 2014 and continued to increase to 98 days by October 2015 after Proposition 47 went into effect.⁵⁰

While annual admissions to California prisons dropped 72 percent between 2005 and 2015, the total number of people in prison declined only 23 percent.⁵¹ As the number of people in prison declined and the offense-type breakdown shifted, with proportionally fewer people in prison for less serious crimes and revocations that carry shorter average sentences, the average amount of time a person spends in prison in California increased

AT A GLANCE

LENGTH OF IMPRISONMENT AT A GLANCE

The median length of jail stay at release for drug felony offenses rose from 45 days in 2011 to **98 days** in 2015.

Between 2005 and 2015, the median time served for people in California increased by **176 percent**.

dramatically. Between 2005 and 2015, the average time served so far for people in prison in California increased 86 percent, from 3.8 years to 7.1 years, and the median time served increased 176 percent.⁵²

Sentence enhancements also contribute to longer sentences. While California is best known for its “Three Strikes” enhancement mechanism, there are over 100 separate code sections that add additional time for certain current and past offenses.⁵³ California also mandates the sentences for certain crimes be served consecutively rather than concurrently.⁵⁴

Prior to Proposition 57, California severely limited the amount of time people could earn off their sentences for participating in programs that are shown to improve reentry outcomes. The state also required that anyone sentenced to prison for a violent felony offense serve at least 85 percent of their sentence – and 100 percent for people with homicide and violent Three Strikes convictions⁵⁵ – before becoming eligible for any kind of release.⁵⁶ This limitation contributed to the growing average length of time served in California prisons.

Acknowledging the need to increase rehabilitation efforts in California prisons, voters overwhelmingly passed Proposition 57. By doing so, they expanded parole eligibility for most people in prison through increased opportunities to earn good behavior credits and guaranteeing that all people serving time for a nonviolent offense have the opportunity to be considered for parole release.⁵⁷

Who Is Imprisoned?

Black Californians: In 2017, the adult Black imprisonment rate in California was more than nine times higher than the adult white imprisonment rate. Despite accounting for only 6 percent of the total adult population in California in 2017, Black people account for 28 percent of the prison population.⁵⁸ As of 2017, one in 24 Black men in California was imprisoned.⁵⁹

Latino Californians: In 2017, the adult Latino imprisonment rate in California was more than twice the adult white imprisonment rate,⁶⁰ and recent declines in the prison population have only widened this disparity. Between 2010 and 2015, the white prison population declined at twice the rate of the Latino prison population.⁶¹ In 2017, Latinos accounted for 35 percent of the total state adult population but made up 43 percent of California’s prison population.⁶²

Female Californians: In 2017, women made up 5 percent of the prison population and 13 percent of the jail population in California.⁶³ The reduction in the number of women in prison has been even more pronounced than the decline for men, dropping 50 percent between 2007 and 2017.⁶⁴ While the population of women in prison declined significantly, the population of women in jail declined by a much smaller amount – 7 percent – over the same period of time.⁶⁵

Older Californians: Though generally considered to pose a negligible risk to public safety,⁶⁶ the population

AT A GLANCE

DEMOGRAPHICS AT A GLANCE

In 2017, **1 in 24** Black men were imprisoned in California.

In 2017, women made up **5 percent** of the prison population and 13 percent of the jail population in California.

Roughly **1 in 7** people in California prisons were 55 or older as of 2017.

of people in prison age 55 or older increased 94 percent between 2005 and 2015 in California as the total prison population declined.⁶⁷ In December 2017, approximately one in seven people in prison was age 55 or older.⁶⁸

People With Mental Health Disabilities and Substance Use Disorders

Mental health disabilities are prevalent among people in California prisons. As of December 2017, 30 percent of people in prison in California had a “mental health designation” (the term used by the CDCR).⁶⁹ The number of people with “mental health designations” in the prison system grew slightly between 2015 and 2017. This may be due in part to the fact that people with mental illness receive longer sentences, on average, than people convicted of the same crimes who do not have a mental health diagnosis.⁷⁰ They may also have more limited opportunities to participate in the type of programming that allows a person to be considered for release.⁷¹ Please note that this report does not discuss people in jails with mental health disabilities and substance use disorders because there is no reliable statewide data available on this population.

Ending Mass Incarceration in California: A Path Forward

Mass incarceration is a result of many systems failing to support our communities. To end it, we need a better approach to public safety – including an end to the school-to-prison pipeline and to over-policing in communities that have traditionally been denied opportunities and resources – and we need to take better care of all of our communities, especially through investment in health care, education, and economic development. There are many potential policy changes that can help California end its mass incarceration crisis, but it will be up to the people and policymakers of California 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 jails and prisons and reduce the number of people entering jails and prisons in the first place.

Reducing Jail and Prison Admissions

To end mass incarceration, California must break its overreliance on jails and prisons. Evidence indicates that prisons seldom offer adequate solutions to wrongful behavior. In fact, imprisonment is often counterproductive – increasing cycles of harm and violence as well as failing to provide rehabilitation for incarcerated people or adequate support to the survivors of crime.⁷² California is ahead of the rest of the country in making significant steps toward reducing its prison and jail population. The state now needs to pursue strategies as ambitious as the goal to end mass incarceration requires. Here are some strategies:

- **Pretrial Incarceration:** On any given day, over half of the people languishing in jails in California have not been sentenced to serve

time. They are awaiting trial and the outcome of their case.⁷³ Even short stays of a few days in jail can cause people to fail classes or lose their jobs, cars, homes, and even custody of their children. This punishment is exacted on people who have been merely accused – but not convicted – of breaking the law. Individuals who are jailed while awaiting trial are more likely to plead guilty to crimes and receive longer prison sentences than people who are not held in jail pretrial.⁷⁴ In 2018, the California Legislature passed S.B. 10, which eliminates cash bail and ensures that no one will be detained pretrial due to the inability to pay; however, the bill replaces one flawed system with another that could possibly lead to even more pretrial detention⁷⁵ for certain categories of defendants. In January 2019, the bail industry backed a referendum to undo S.B. 10 that will be on the November 2020 ballot.⁷⁶ Regardless of the fate of S.B. 10 or the bail industry-funded efforts to overturn it, California and its counties should implement pretrial services that allow the overwhelming majority of defendants to exercise their constitutional right to release while awaiting trial.

The future of pretrial detention in California is uncertain, but the reforms needed to dramatically reduce the number of Californians trapped in jails before their trials are not. There is an emerging consensus between state legislators and policymakers that no person should be detained pretrial due to their inability to pay bail or for pretrial services. This important consensus based on core

values of due process and equal protection – if implemented – leaves no room for a commercial bail bond industry. California counties should pursue a system that creates a path for pre-arraignment release and limits detention to defendants who fall under the limited exceptions of Article 1, Section 12 of the California Constitution.⁷⁷ Counties should require rigorous hearings before ordering pretrial detention. When courts order release with certain conditions, they should use the least restrictive option possible to ensure that defendants return for their court dates. The county, not the defendant, should bear any associated costs with pretrial release and services. Finally, all pretrial services should be administered by an independent agency, per national best practices, rather than a probation department or other law enforcement agency department.

- **Fair and Just Prosecution:** California has 58 elected prosecutors (known as district attorneys) to serve each of its counties. Prosecutors are arguably the most powerful actors within the criminal justice system because they have significant and almost unfettered discretion on whom to charge, what charges and enhancements to pursue, and what bail and sentencing recommendations to make. The choices they make at every decision-making point has a significant impact in creating the crisis of mass incarceration, and those same decision points can also help end mass incarceration. To that end, district attorneys should create guidelines for line prosecutors to make charging and plea-bargaining decisions that reduce the ongoing and devastating consequences of a criminal conviction by pursuing *the least punitive options* to ensure accountability and safety.

District attorneys should decline to charge all people who would be better served through other services and treatments and diversion programs (pre-plea and pre-filing) for both felony and misdemeanor cases. In particular,

“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.”¹⁰⁴

– From *The New Jim Crow*, Michelle Alexander

people with mental health and substance use disorders should be diverted to such programs. This approach should also include diverting all youth arrested for misdemeanors to community-based alternatives away from the criminal legal system, committing to significantly reducing juvenile felony filings, declining to charge any youth under 18 as adults, and no longer seeking life-without-parole sentences for youth under the age of 25. In addition, district attorneys’ offices should be transparent and track and publish all their prosecution data, create units to review wrongful or unethical convictions, and be advocates for criminal justice reform. Lastly, district attorneys’ offices should vigorously utilize A.B. 2942,⁷⁸ a law that created the first legal mechanism in the nation to allow prosecutors to revisit past sentences and reduce the prison population. This discretionary resentencing law allows district attorneys to petition to resentence people who have been incarcerated for a long time but have shown that they are rehabilitated and whose continued incarceration is no longer in the interest of justice.

- **Alternatives to Incarceration:** Several types of alternative-to-incarceration programs have shown great success in reducing criminal

activity. Programs offering support services – such as substance use disorder treatment, mental health care, employment, housing, health care, and vocational training, often with a community service requirement – have significantly reduced recidivism rates for participants.⁷⁹ For crimes involving violence, restorative justice programs – which are designed to hold responsible people accountable and heal those who were harmed – can be particularly promising. When they are rigorous and well-implemented, these processes not only reduce recidivism for defendants,⁸⁰ but can also decrease symptoms of post-traumatic stress in victims of crime.⁸¹ Prosecutors and judges who embrace these solutions can fulfill their responsibilities to 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 programs that divert people before they are charged. Lawmakers can reduce incarceration by exploring decriminalization and pre-arrest or pre-charge diversion as well as by identifying alternative sentences to incarceration.

- **Improve the Juvenile Justice System:** To reduce the number of adults who go to jails and prisons, California needs to continue to reform its juvenile justice system to minimize the harmful consequences of state supervision or confinement. The state needs to prioritize youth development and implement a holistic approach to youth in conflict with the law that minimizes system contact as much as possible, promotes diversion and restorative justice and seeks to eliminate the use of confinement so that it is an absolute last resort. Confinement should be rehabilitative and humane if it is ever ordered. Youthful conduct should be met with a response that reflects the ability of youth to grow and change and should not be met with responses that increase the risk of future incarceration.

- **Expanding Diversion for People With Mental Disabilities:** California must take targeted action to ensure that people with mental disabilities are not left behind bars. The state took an important first step in 2018 with the passage of a mental health diversion bill, A.B. 1810,⁸² amended by S.B. 215.⁸³ This legislation allows judges to divert many defendants with mental illness into treatment and supportive programs, including housing.

Focusing on services and treatment rather than incarceration for people with mental disabilities and substance use disorders is a promising approach. When implemented effectively, diversion reduces arrests, encourages participation in voluntary treatment, and saves money.⁸⁴ Effective programs coordinate with community services that provide a wide range of substantial, quality wraparound treatment and support for people with disabilities to access housing, employment, and intensive, individualized supports in the community. After an initial investment, diversion programs have the potential of saving jurisdictions money.⁸⁵

To make the promise of A.B. 1810 and S.B. 215 a reality, the state should expand diversion options, and judges, public defenders, and prosecutors should be assertive in considering and advocating for diversion for people with disabilities.⁸⁶ The state should ensure that diversion options include robust case management, wraparound services, peer support, permanent supportive housing, and other evidence-based practices for effective diversion. Further, the Legislature should create incentives for counties to divert people with disabilities from jail into community-based treatment programs. The state should also take steps to ensure that other efforts to reduce incarceration in the state do not undermine the important potential of A.B. 1810 and S.B. 215. At the end of incarceration, all reentry resources made available by the CDCR must be made equally available to people with significant disabilities, including access to lower-security

placements, to ensure an equal opportunity to succeed after release. County jails should also focus on reentry services, particularly for people with disabilities, who often cycle between incarceration in jails and homelessness. Using evidence-based practices and policies that affirmatively divert and support people with disabilities in the community is essential for California to continue its trend of reducing incarceration statewide.

- **Allowing Non-Incarceration Sentences:** The Legislature should ensure that judges always have the option to impose non-incarceration sentences, such as community supervision. These options should be available to the court in all cases, regardless of the severity of the offense or prior criminal history.
- **Reducing Parole Revocations:** Parole revocations for technical violations are often due to the physical or mental disabilities that many people on parole have. Parole and probation officers are required to provide reasonable accommodations so that people on parole with disabilities have an equal opportunity to comply with the requirements of parole. Proper training of parole officers and greater awareness of these requirements could reduce the number of technical violations significantly. Incarceration for technical violations that do occur should be eliminated entirely.

Reducing Time Served

Reducing the amount of time people serve can lead to significantly fewer people in California's prisons. Here's how:

- **Sentencing Reform – General:** The Legislature can reduce the length of the terms (low, middle, and high) included in the sentence triads provided by the Determinate Sentencing Law. One approach is a universal reduction (e.g. the low, middle, and high term of each triad must be reduced by a year or by one-third). Another approach is reducing each term of the

Penal Code section 1170(h) triad. In addition to reductions in individual sentencing triads, the Legislature can limit aggregate sentences for defendants who receive consecutive sentences for multiple crimes. One approach is capping aggregate sentences for consecutive sentences at either a specific number of years or by another calculation.

- **Sentencing Reform – Enhancements:** California has many options when it comes to reforming sentence enhancements, which have a disproportionate impact on people of color and give enormous leverage to prosecutors. First, the Legislature can eliminate or significantly reduce specific sentence enhancements, such as the enhancements for people who previously served time in prison or jail for prior felony convictions enhancements for use of a gun, or other status or conduct enhancements. California has over 100 sentence enhancements that are resulting in extremely long sentences and extremely large prison and jail numbers. Eliminating many of these enhancements would go a long way toward reducing the prison and jail populations and minimizing racial disparities in sentence lengths. In addition to eliminating enhancements, the Legislature can also alter the application of certain sentence enhancements. For instance, the Legislature could limit the application of enhancements for personal use of a gun to people only who personally used the gun, thereby eliminating application of the enhancement under a vicarious use theory. Likewise, the Legislature can limit prosecutors' ability to charge defendants with multiple enhancements (i.e. stack enhancements), by limiting them to just one enhancement per case, at most, or requiring them to otherwise choose between enhancements. California could also reexamine its historic Three Strikes Law. For example, the electorate could significantly reduce the prison population by eliminating the Second Strike law, if not the entire Three Strikes Law. The Second Strike provision dictates that if a person with a previous violent or serious felony conviction commits a second felony offense, they

will face twice as long in prison even if the second felony is not serious or violent.

- **Parole Reform:** Improving parole policies to ensure that people with life sentences are paroled more quickly is another key way to reduce the amount of time people spend in prison. In 2017, the Board of Parole Hearings granted parole in only 17 percent of suitability hearings.⁸⁷ By law, the board must find someone suitable for parole unless they pose an “unreasonable risk of danger to society.”⁸⁸ In practice, however, factors with no direct relationship to a present risk of danger are too often used to deny parole – including a lack of “insight” into the commitment offense or other prior behaviors as well as unsubstantiated claims of misconduct. The board should give significantly less weight to these factors, and focus on the person’s actual, present level of risk. Since the passage of Marsy’s Law in 2008, those denied parole generally cannot be considered again for three to 15 years, a dramatic jump from the prior range of one to five years. Another significant hurdle is that the governor has the authority to reverse grants of parole of those with homicide convictions and refer all others for new hearings – the three most recent governors overturned between 18 percent to more than 99 percent of parole suitability determinations.⁸⁹ California should remove the governor’s authority to overturn parole decisions, a power they share with only three other governors, and repeal the increase in length of denial put in place by Marsy’s Law.
- **Expanding Recent Parole Reforms:** California has passed significant parole reforms in recent years, including Youth Offender Parole, allowing early parole consideration for people who were 25 or younger at the time of their crimes, and Elder Parole, allowing early parole consideration for people who are over 60 years old. While these reforms have provided opportunities for many individuals with life sentences to earn earlier parole, they exclude people with certain convictions as well as people sentenced under the Three Strikes Law. The

impact of these reforms would be significantly increased if these reforms were expanded to include all prisoners eligible for release in California.

- **Earned Time/Credit Reform:** In 2016, California voters approved Proposition 57, which in part, increased good behavior credit-earning opportunities for people in prison.⁹⁰ The Department of Corrections should aggressively implement Prop. 57. The Legislature should further invest resources into educational, vocational, and similar programs in prisons so the Department of Corrections can expand availability for people to take advantage of Prop. 57 opportunities.

Challenging Structural Racism in the Criminal Legal System

Reducing the number of people who are imprisoned in California will not, without intentional planning, reduce racial disparities in the prison system. In fact, experience tells us that reducing the prison population via discretionary programs is likely to result in greater disparities, as privileged populations – especially the white and wealthy – get preferential access to diversion and other relief programs.

Black, Latinx, and Native American people are at a higher risk of becoming involved in the criminal legal system, in large part because they are more likely than whites to live under heightened police surveillance. This imbalance cannot be accounted for by involvement in illegal activity. Rather, it is the result of myriad social, political, and economic structures, including over-policing. Racial disparity increases at each stage in the justice system, beginning with initial law enforcement contact and increasing at subsequent stages, such as pretrial detention, conviction, sentencing, and post-release opportunity.⁹¹ Focusing on only one of the factors that drives racism in the criminal legal system does not address issues across the whole system.

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 jail or prison. And they can decide not to seek enhancements that greatly increase the length of sentences.

Police: The practices that police employ in communities can shape the public's view of and trust in the criminal justice 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 pre-arrest diversion programs, which enable officers to divert people into community-based intervention programs rather than into the criminal justice system.

State lawmakers: The state spends billions of dollars on prisons, county jails, and courts. Legislators can examine fully its total investment in criminal justice and public safety and provide specific incentives to agencies to reduce incarceration and disincentives for those that increase incarceration. Lawmakers decide which offenses to criminalize, what penalties to include, how long sentences can be, and when to provide or take away discretion from judges. They can change criminal laws to remove incarceration as an option when better alternatives exist, and they can also fund the creation of new alternatives, including diversion programs that provide supportive housing, treatment, and vocational training. And they can decide to sufficiently fund mental health and substance use addiction and dependence treatment so it is available for people who want it before they encounter the criminal legal system.

Parole boards: 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. They should also be trained to make determinations based on a person's present risk to the public and not look to factors more connected to a person's original conviction.

Judges: Individual judges, as well as local judicial councils for county courts, are the most powerful decision makers in terms of individual pretrial release decisions and overall county policy on pretrial release. Judges have enormous power in sentencing decisions and should consider alternatives to incarceration when possible, similar to the discussion above about the role of prosecutors in seeking alternatives, and they should use their discretion to dismiss sentence enhancements and strikes.

Governor: The governor has the power to support criminal justice reform laws and sign state lawmakers' reform bills into law. The governor can prioritize naming judges who are receptive to alternatives to incarceration and parole board members who focus more on rehabilitation than only punishment, and the governor can decide not to overturn parole board release decisions. The governor can also grant commutations that can either free people who are incarcerated, allow parole hearings for them, or move up someone's parole eligibility date. The governor also can propose state budget investments that promote and support alternatives to incarceration and can guide the appropriate state agencies to pursue these policy goals.

Racism is so inherent 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 lowering imprisonment rates for all racial and ethnic populations, but it will not address comparative disproportionality across populations. For example, while focusing on reductions to prison admissions and length of stay in prison is critically important, 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.

California, for example, is often heralded as a successful example of reversing mass incarceration, passing justice reforms that led to a 25 percent decline in the state prison population between 2006 and 2016.⁹² However, the state did not target racial disparities in incarceration and, between 2010 and 2015, the white prison population declined at twice the rate of the Latino prison population.⁹³ Latinos account for a growing proportion of people imprisoned in California, making up 43 percent of the prison population as of 2017, despite accounting for only 35 percent of the total state adult population.⁹⁴ Ending mass incarceration is critical to eliminating racial disparities, but it is 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:

- Ending over-policing in Black, Latinx, and Native American communities.
- Eliminating racial bias in prosecutors' charging and plea-bargaining practices.
- Investing in diversion/alternatives to detention in Black, Latinx, and Native American communities.
- Ending sentencing enhancements based on location, which overwhelmingly overlap with urban areas where Black, Latinx, and Native American people are more likely to live (e.g., drug-free school zones).

- Requiring racial impact statements before any new criminal law or regulation is passed and requiring legislation to proactively rectify any potential disparities that may result with new laws or rules.
- Eliminating discriminatory gang sentencing enhancements that disproportionately target Black and Latinx people without due process.
- 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. These disciplinary actions disproportionately fall on Black and Latinx children.

Reducing Disability Disparities

The rates of people with disabilities in the U.S. criminal system is two to six times that of the general population.⁹⁵ In particular, people with psychiatric disabilities are dramatically overrepresented in jails and prisons across the country.⁹⁶ Screening tools to evaluate psychiatric disabilities vary by state and jurisdiction, but the most reliable data indicates that more than half of the people in jail and close to half of those in prison have mental health disabilities.⁹⁷

- People showing signs of mental illness are twice as likely to be arrested as people without mental illness for the same behavior.⁹⁸
- In California, people with mental health diagnoses receive prison terms that are, on average, 12 percent longer than people convicted of the same crimes but without mental health diagnoses.⁹⁹
- People with mental illness stay in jail and prison longer because they frequently face disciplinary action from conduct that arises due to their illness — such as attempted suicide — and they are less likely to qualify for early release because

they are frequently unable to participate in rehabilitative programming, such as educational or vocational classes.¹⁰⁰

Recent reductions in the California prison population have not succeeded in reducing incarceration of people with psychiatric disabilities at the same rate as people without disabilities. The absolute number of incarcerated people with psychiatric disabilities has also increased,¹⁰¹ together with the severity of symptoms. California's new diversion law, AB 1810, focuses on getting people with mental disabilities out of the criminal legal system and into treatment. This is a promising avenue to help people with disabilities stay out of prisons and jails.

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 Black and Latinx people 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.¹⁰² Not surprisingly, many of the strategies to reduce disability disparities are similar to approaches that reduce racial disparities. Some examples include:

- Investing in pre-arrest diversion:
 - Creating behavioral health centers, run by state departments of health or county agencies, as alternatives to jails, or specialized mental health crisis centers for people experiencing mental health crises or addiction or dependence issues.
 - 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.¹⁰³

- 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 abuse 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.
- 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.
- 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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