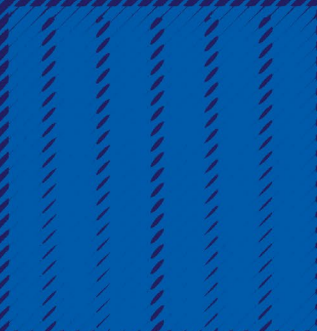


*Blueprint for Smart Justice*  
**North Dakota**







# Blueprint *for* Smart Justice

# North Dakota

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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.

It's no different in North Dakota. Here, the state imprisonment rate jumped by 52 percent between 2000 and 2016.<sup>1</sup> As of the end of 2018, there were 1,695 people in prison in the state overall. All this incarceration is expensive. In 2017 alone, North Dakota spent \$102 million of its general fund on corrections.<sup>2</sup>

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 North Dakota 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, a nonprofit research organization, 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 results were 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 North Dakota — where the Native American adult imprisonment rate was six times as high as the white adult imprisonment rate in 2017<sup>3</sup> — 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.

To their credit, North Dakota policymakers have made some efforts to address their prison population in recent years, passing reforms in April 2017 and taking steps to reduce penalties for marijuana possession in 2019.<sup>4</sup>

Still, sentences for drug and alcohol offenses are a significant contributor to the state's prison population, and admissions to the state's prisons for such offenses

rose 79 percent between 2008 and 2018.<sup>5</sup> By 2018, nearly half (45 percent) of admissions into the state's prisons were for such offenses. Another key driver of prison admissions is revocation from community supervision such as probation. In 2014, such violations constituted 38 percent of all admissions to prison. That year, 45 percent of probation violations were due to noncompliance with supervision provisions, rather than a new crime.<sup>6</sup>

North Dakota's "Truth-in-Sentencing" laws can also make it hard for people to earn good time off their sentences, and people imprisoned for certain violent offenses must serve 85 percent of their sentence before becoming eligible for parole. Mandatory minimums for certain offenses, including some drug offenses, also play a role in long prison stays.

Like most states, North Dakota's mass incarceration crisis has had a particularly severe impact on people of color. In 2017, Native Americans accounted for 4 percent of all adults in the state, yet they comprised 19 percent of its prison population.<sup>7</sup> That same year, the Black adult imprisonment rate was nearly five times as high as the white adult imprisonment rate.<sup>8</sup> Women are also heavily impacted — between 2008 and 2018, the number of women in North Dakota prisons increased by 23 percent, while the number of men increased by only 14 percent.<sup>9</sup> And seven out of 10 women serving time in North Dakota prisons were there for nonviolent offenses, the most common category of which was drug-related offenses.<sup>10</sup>

So, what's the path forward?

Alternatives to incarceration that put people into mental health and addiction treatment when they could benefit from help rather than prison or jail should be a priority for the criminal legal system in North Dakota. And reforming probation and parole practices would ensure that revocations — particularly for technical violations — do not account for such a high proportion of prison admissions. The North Dakota legislature could also decriminalize marijuana possession, instead treating it as a public health issue. This would reduce recidivism, increase public safety, and save the government money.

In addition, reforming parole practices and time served requirements so that the state's Truth-in-Sentencing laws do not require excessively long stays in prison would lower the incarcerated population. And reducing sentencing ranges for drug offenses, burglary and property offenses, robbery, public order offenses, and assault would ensure that the amount of time people spend in prison is not disproportionately long.

For more detailed information about these and other potential reforms, see the sections below on "Reducing Admissions" and "Reducing Time Served." If North Dakota were to adopt these and other changes, the state could have 1,015 fewer people in prison by 2025, leading to a total cost savings of more than \$125 million.

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

# The State of the North Dakota Prison System

The North Dakota prison population increased approximately sevenfold between 1980 and 2016.<sup>11</sup> While the average U.S. state imprisonment rate dropped by 7 percent between 2000 and 2016, North Dakota's rate of imprisonment increased by 52 percent over the same period.<sup>12</sup> As of December 31, 2018, there were 1,695 people in North Dakota prisons.<sup>13</sup>

These trends, coupled with projections published in 2017 that the prison population would grow 36 percent by 2022,<sup>14</sup> led North Dakota to participate in the Justice Reinvestment Initiative<sup>15</sup> and pass a reform legislation package in April 2017. This package included policies to begin reducing the number of people imprisoned for low-level offenses and violations of community supervision, and increased funding for behavioral health treatment in the community.<sup>16</sup>

## AT A GLANCE

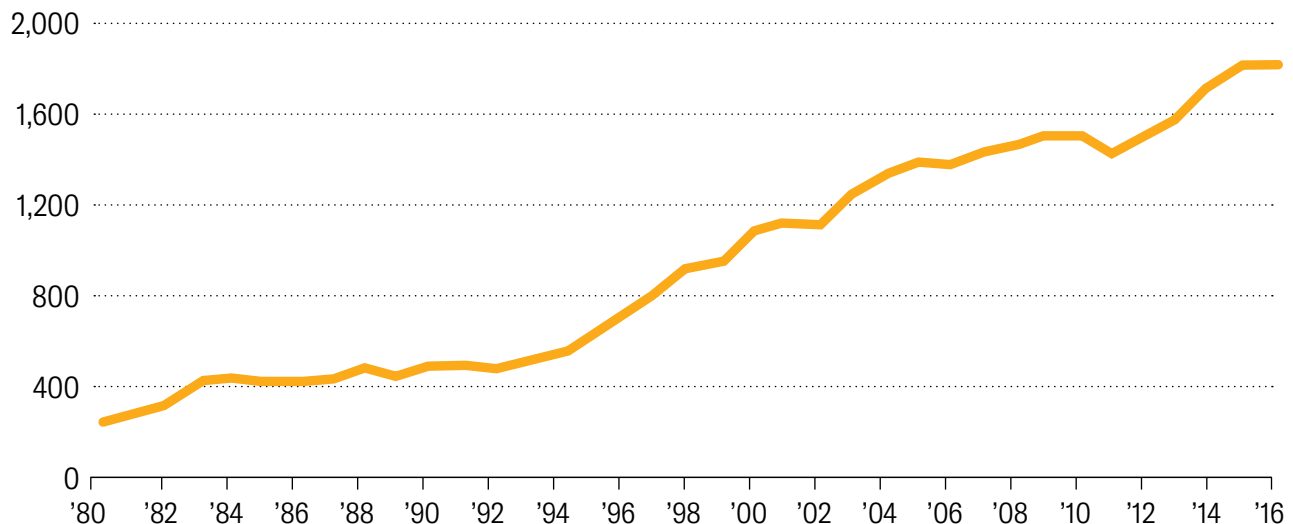
### NORTH DAKOTA PRISONS

North Dakota's imprisonment rate increased by **52 percent** between 2000 and 2016.

There were **1,695 people** imprisoned in North Dakota at the end of 2018.

North Dakota's prison population **grew sevenfold** in size between 1980 and 2016.

## NORTH DAKOTA PRISON POPULATION





North Dakota has also recently taken steps to reduce penalties for marijuana possession: In May 2019, the state passed legislation to decriminalize first-time possession of small amounts of marijuana, which is now considered an infraction punishable by a fine of up to \$1,000 and is not eligible for jail time.<sup>17</sup>

## What is Driving People Into Prison?<sup>18</sup>

In North Dakota, a litany of offenses<sup>19</sup> drives people into prisons. Sentences for drug and alcohol offenses make a particularly significant contribution to new admissions to prison. Between 2008 and 2018, the number of admissions for drug and alcohol offenses increased by 79 percent.<sup>20</sup> In 2018, nearly half (45 percent) of admissions to North Dakota prisons were for drug and alcohol offenses.<sup>21</sup> In addition to drug and alcohol offenses 27 percent of admissions to prison in 2018 were for property and public order offenses, 23 percent for violent offenses, and 5 percent for sex offenses.<sup>22</sup>

In 2014, 16 percent of admissions to North Dakota prisons were for drug trafficking offenses, and 12 percent were for drug possession offenses. Other common offenses amongst admissions that year

included theft (10 percent) and driving while intoxicated (10 percent).<sup>23</sup>

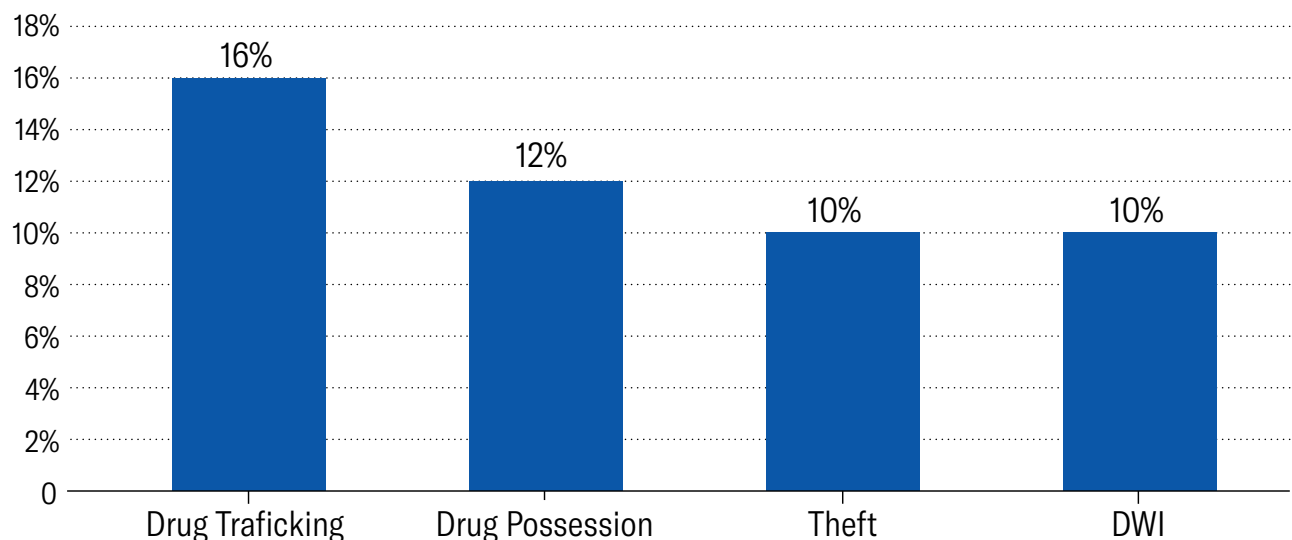
Between 2008 and 2018, admissions to North Dakota prisons increased by 46 percent.<sup>24</sup> In 2018, North Dakota admitted 1,576 people to prison.<sup>25</sup>

A primary driver of prison admissions in North Dakota is the large number of people revoked from community supervision (38 percent of all prison admissions in 2014) due to either a technical violation of supervision or for committing a new crime. In 2014, 45 percent of probation revocations were due to supervision violations and not new crimes, and half (51 percent) of all probation revocations resulted in prison time.<sup>26</sup>

## The Current Prison and Jail Population

At the end of 2018, 35 percent of people in North Dakota prisons were serving time for violent offenses, 29 percent were serving time for drug and alcohol offenses, 18 percent were serving time for property and other public order offenses, and 18 percent were serving time for sex offenses.<sup>27</sup>

## NORTH DAKOTA PRISON ADMISSIONS BY TOP OFFENSE TYPES (2014)



## AT A GLANCE

# NORTH DAKOTA JAIL AND PRISON POPULATION

The number of prison admissions for drug and alcohol offenses increased by **79 percent** between 2008 and 2018.

**83 percent** of people held in North Dakota jails in 2015 were being held pretrial and had not been convicted of a crime.

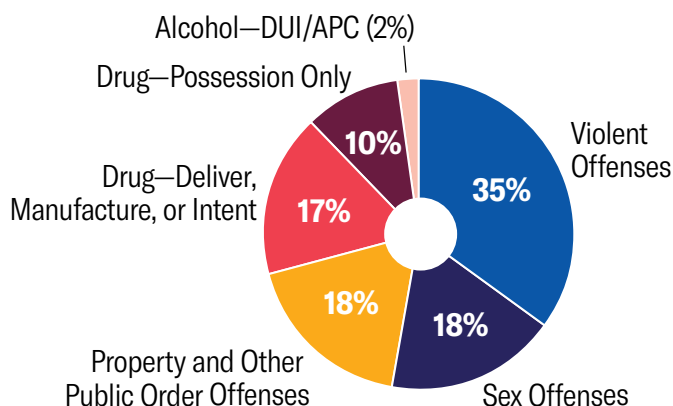
Between 2008 and 2018, admissions to North Dakota prisons increased by **46 percent**.

The number of people in North Dakota prisons serving time for drug offenses increased by 26 percent between 2008 and 2018, rising to 462 people.<sup>28</sup> In 2018, 10 percent of the prison population was imprisoned for drug possession and 17 percent was imprisoned for ‘deliver, manufacture or intent’ offenses.<sup>29</sup>

There is also a lack of sufficient access to treatment options and reentry support in the community, and many people on community supervision end up in prison. In fiscal year 2014, 27 percent of North Dakota prison beds were occupied by people who had been revoked from probation or parole.<sup>30</sup>

In addition to people held in state prisons, North Dakota incarcerated an estimated 1,185 people in county jails, according to the most recently available data (2015). The vast majority of those in jail in 2015 – 986 people (83 percent) – were being held pretrial and had not been convicted of a crime.<sup>31</sup>

## NORTH DAKOTA PRISON POPULATION BY OFFENSE TYPE (2018)



## Why Do People Stay in Prison for So Long?

As in many states, increasingly long prison stays have contributed to the growth of North Dakota’s prison population. Between 2004 and 2014, the average length of time that people in North Dakota prisons had served increased by 20 percent.<sup>32</sup> At the end of 2018, 5 percent of the state’s prison population (84 people) were serving a life sentence.<sup>33</sup>

North Dakota’s inflexible Truth-in-Sentencing laws can restrict opportunities to earn good time, and people imprisoned for some violent offenses must serve at least 85 percent of their sentences before becoming eligible for parole consideration.<sup>34</sup> In 2018, 15 percent of the state prison population was serving a Truth-in-Sentencing term, which can be extremely long. Excluding people serving life sentences, in 2018, the average sentence length among people with Truth-in-Sentencing terms was 13 years.<sup>35</sup>

In addition, the state imposes other inflexible sentencing policies such as minimum mandatory sentences for certain offenses, including some drug offenses. Of people imprisoned in 2018, 7 percent had a minimum mandatory sentence.<sup>36</sup>

North Dakota also has several habitual offender laws that contribute to long stays in prison. People with one, two, or three prior felony convictions face

sentence enhancements that can raise the felony class under which they are sentenced.<sup>37</sup> Other sentencing enhancements include mandatory prison terms for carrying a weapon.<sup>38</sup> Additionally, people classified as “dangerous special offenders” can receive enhanced sentences if they are deemed “mentally abnormal” and demonstrate “persistent aggressive” behavior.<sup>39</sup>

**Female North Dakotans:** The number of women in North Dakota prisons is growing even faster than the prison population overall. Between 2008 and 2018, the number of women in North Dakota prisons increased by 23 percent, while the number of men in North Dakota prisons increased by 14 percent.<sup>40</sup> In 2018, women accounted for 12 percent of the North Dakota prison population (196 people). That year, nearly seven out of 10 (67 percent) women serving time in North Dakota prisons were there for nonviolent offenses, the most common category of which was drug-related offenses.<sup>41</sup>

In its 2015-2017 biennial report, the North Dakota Department of Corrections and Rehabilitation (DOCR) detailed that more than two in three women (70 percent) in North Dakota prisons had reported being subjected to physical or sexual abuse in their lifetime. The same publication found that four in five (79 percent) women in prisons reported being parents.<sup>42</sup>

**Native American North Dakotans:** North Dakota’s Native American population is overrepresented in the prison system. In 2017, Native Americans accounted for 4 percent of all adults in the state and 19 percent of the prison population. In 2017, the Native American adult imprisonment rate in North Dakota was six times as high as the white adult imprisonment rate.<sup>43</sup>

**Black North Dakotans:** Incarceration in North Dakota has a disproportionate impact on Black communities. In 2017, the Black adult imprisonment rate was nearly five times (4.83 times) as high as the white adult imprisonment rate. Despite accounting for only 3 percent of the state’s adult population, Black people accounted for 10 percent of the prison population in 2017.<sup>44</sup>

**Older North Dakotans:** Though generally considered to pose a negligible risk to public safety,<sup>45</sup> people 55

years old and older accounted for 7 percent of the North Dakota prison population (126 people) in 2014. The number of people 55 years old and older in North Dakota prisons has grown in recent years, almost tripling in size (a 180 percent increase) between 2004 and 2014.<sup>46</sup>

## People With Mental Health and Substance Use Disorders

Behavioral health needs are prominent in North Dakota, but treatment options are scarce. A survey by North Dakota’s Incarceration Issues Committee found that 70 percent of district court judges reported sentencing people categorized as low risk who were convicted of nonviolent offenses to prison in order to connect them with behavioral health services.<sup>47</sup> In its 2015-2017 biennial report, DOCR reported that 78 percent of people in its system have a substance use disorder and about 13 percent have a serious mental illness. At the same time, the report highlighted that approximately 35 percent of people in prison received medication treatment from DOCR psychiatry staff.<sup>48</sup>

To help address the lack of sufficient community-based care for people with behavioral health needs, the 65<sup>th</sup> Legislative Assembly allocated up to \$7.5 million of

### AT A GLANCE

## DEMOGRAPHICS

In 2017, the Native American adult imprisonment rate was **six times** as high as the white adult imprisonment rate.

Despite accounting for only **3 percent** of North Dakota’s adult population, Black people accounted for 10 percent of the prison population in 2017.

**70 percent** of women in North Dakota prisons reported being subjected to physical or sexual abuse in their lifetime, according to a 2017 report.

#### AT A GLANCE

## MENTAL HEALTH AND SUBSTANCE USE DISORDER

According to survey results reported in a 2017 publication, **70 percent** of district court judges reported sentencing people who were assessed as low-risk and were convicted of nonviolent offenses to prison in order to connect them with behavioral health services.

According to DOCr's 2015-2017 report, **78 percent** of people in its system had a substance use disorder and about 13 percent had serious mental illness.

#### AT A GLANCE

## BUDGET

North Dakota spent **\$102 million** of its general fund on corrections in 2017.

General fund corrections spending **increased nine-fold** in North Dakota between 1985 and 2017.

the 2017-2019 budget to community-based behavioral health services.<sup>49</sup> To carry this out, North Dakota established a “Free Through Recovery” program to help connect people involved in the criminal justice system with community-based services. As of January 2019, this program was serving 627 people using 27 providers throughout the state. Of the participants at the time, 47 percent had a co-occurring behavioral health need (mental health and substance abuse need).<sup>50</sup>

## Budget Strains

As North Dakota’s prison population has risen, so has the cost burden. North Dakota spent \$102 million of its general fund on corrections in 2017, accounting for 4 percent of the state general fund expenditures that year. This spending increased nine-fold (799 percent) between 1985 and 2017.<sup>51</sup>

# Ending Mass Incarceration in North Dakota: 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 North Dakota end its mass incarceration crisis, but it will be up to the people and policymakers of North Dakota 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.

## Reducing Admissions

To end mass incarceration, North Dakota 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.<sup>52</sup> Here are some strategies:

- **Alternatives to incarceration:** Several types of alternative-to-incarceration programs show 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.<sup>53</sup> For crimes involving violence, restorative justice programs — which are

designed to hold responsible people accountable and support those who were harmed — can be particularly promising. When they are rigorous and well-implemented, these processes have not only been demonstrated to reduce recidivism for defendants,<sup>54</sup> they have also been shown to decrease symptoms of posttraumatic stress in victims of crime.<sup>55</sup> Prosecutors and judges who embrace smart-on-crime solutions like these 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 those that divert people to treatment and support services before arrest and prosecutor-led programs that divert people before they are charged. Lawmakers can invest in such interventions at multiple phases in the system, whether through decriminalization or alternatives to arrest, charges, or incarceration — rather than housing people in costly jails and prisons.

- **Expand treatment — mental health:** Mental health diversion is an effective way to redirect people with disabilities out of the criminal legal system and into supportive community treatment, rather than relying on prison. Diversion programs have been shown to be effective for people charged with both nonviolent and violent offenses.<sup>56</sup> When implemented effectively, diversion reduces arrests, encourages voluntary treatment in the community, and saves money.<sup>57</sup> Effective diversion programs coordinate with community services that provide a wide range of substantial, quality



wraparound treatments and supports for people with disabilities to access housing, employment, and intensive, individualized supports in the community. After an initial investment in community supports, diversion programs have the potential of saving jurisdictions large amounts of money.<sup>58</sup>

- **Expand treatment — addiction:** 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.<sup>59</sup> The Legislative Assembly should invest in expanding drug treatment opportunities across the state as an alternative to incarceration before arrest or prosecution, at sentencing, and in response to failed drug tests during probation and parole.
- **Improve community supervision and reduce revocations:** Community supervision is intended to be an alternative to incarceration and a mechanism for early release. Thus, it is an opportunity to lower recidivism through effective reentry practices. Yet, many state probation and parole practices perpetuate mass incarceration, too often relying on their authority to operate much like law enforcement. Probation and parole offices must 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. The North Dakota Legislative Assembly should ensure probation is used as a prison alternative, not widening the net of system-involved people. Further, it should expand parole eligibility and approval.

Moreover, probation and parole practices should no longer drive prison populations. In 2014, probation and parole revocations accounted for 38 percent of prison admissions.<sup>60</sup> Too often, people revoked from supervision are reincarcerated for technical violations — like missing curfew or lack of

employment — not for committing new crimes. In 2014, 45 percent of probation revocations were due to supervision violations, and 51 percent of all revocations resulted in prison time.<sup>61</sup> Racial disparities are stark in revocation decision-making. One national study found that Black probationers were revoked at significantly higher rates than white and Latinx probationers.<sup>62</sup> The North Dakota Legislative Assembly should implement a system of graduated sanctions for probation and parole violations, ensuring responses are proportional. Incarceration should be prohibited in cases of technical violations, and appointed counsel should be provided at all revocation hearings. Further, revocations for technical violations are often due to the 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.

- **Support marijuana decriminalization:** The North Dakota Legislative Assembly consistently introduces bills to criminalize behavior that previously would not have led to incarceration. Instead, the Legislative 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. The Legislative Assembly should decriminalize marijuana possession, instead treating it as a public health issue to reduce recidivism, increase public safety, and save the government money with regard to judicial resources and incarceration costs.
- **Eliminate cash bail:** North Dakota 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 or months. 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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> In order to significantly reduce pretrial detention and combat racial disparities, the North Dakota Legislative Assembly should eliminate cash bail and limit pretrial detention to the rare case where 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. Their initial charging decisions have a major impact on every aspect of a person's experience with the system, and determine how long they will be involved with the system. They decide, virtually unilaterally, whether an individual is diverted from the criminal system, thereby avoiding the collateral consequences of a criminal record. They resolve most convictions through plea bargains where they primarily decide how the charges are settled. Prosecutors also make influential recommendations regarding bail and sentences. The Legislative Assembly should mandate that prosecutors collect data on these decisions and publish their data and related policies so they are available to the communities that they serve. Moreover, 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.

## Reducing Time Served

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

- **Sentencing reform — general:** The Legislative Assembly can amend North Dakota's criminal code to reduce sentencing ranges, including and especially for drug offenses, burglary and other property offenses, robbery, public order offenses, and assault. Further, the Legislative Assembly should review and reduce current mandatory minimums. These reductions would reverse the 20 percent average increase of time served between 2004 and 2014,<sup>66</sup> while allowing the prison population to get out after serving more appropriate time behind bars.
- **Sentencing reform — enhancements:** The Legislative Assembly can also limit the circumstances and severity of North Dakota's 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. Multiple prior felonies trigger even more substantial enhancements to both sentencing range and initial parole eligibility.
- **Parole release reform:** Improving parole 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.
- **Earned time/earned credit reform:** North Dakota can also consider expanding the availability of earned credits against a prison sentence through participation in educational, vocational, and other opportunities. Currently, incarcerated people in North Dakota can earn five days good time per month for each month of the sentence imposed. South Dakota recently passed a much more generous earned

credit reform that allows 90 days of credit for education programs and work, incentivizing the incarcerated to participate in programs that will make them more successful in society once released.<sup>67</sup> North Dakota should aim for a similar expansion of its earned time/credit system, starting with reforming the state's so-called Truth-in-Sentencing laws, which currently restrict opportunities to earn good time until 85 percent of the sentence has been served,<sup>68</sup> so people are incentivized and able to earn time off beyond this limit.

- **Compassionate release:** The North Dakota Legislative Assembly should expand access to compassionate release from prison for the elderly or aging population. The state currently allows compassionate release in the form of medical parole for serious illnesses that pose immediate risk to life or require complex medical intervention or high-needs intensive medical care.<sup>69</sup> The state's prison population is rapidly aging, in large part due to Truth-in-Sentencing laws and mandatory minimums. Keeping aging people incarcerated significantly taxes prison resources. Studies have shown that incarcerating an older (50 and above) person costs double what it costs to incarcerate a younger person.<sup>70</sup> Moreover, 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.<sup>71</sup> There is also clear evidence showing that older people have much lower rates of recidivism than their younger counterparts.<sup>72</sup>

## Reducing Racial Disparities

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

People of color (especially Black, Latinx, and Native American people) are at a higher risk of becoming involved in the justice system, including living under

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“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.”<sup>86</sup>

— From *The New Jim Crow*, Michelle Alexander

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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 justice system, beginning with initial law enforcement contact and increasing at subsequent stages, such as pretrial detention, conviction, sentencing, and post-release opportunity.<sup>73</sup> Focusing on only one of the factors that drives racial disparity does not address issues across the whole system.

In North Dakota, racial disparities have a particularly large impact on the Native American community. In 2017, Native Americans accounted for 4 percent of all adults in the state and 19 percent of the prison population. In 2017, the Native American adult imprisonment rate was six times as high than as the white adult imprisonment rate.<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup>

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 overpolicing in communities of color
- Evaluating prosecutors' charging and plea bargaining practices to identify and eliminate bias
- Investing in diversion/alternatives to detention in communities of color
- Reducing the use of pretrial detention and eliminating wealth-based incarceration
- Reducing exposure to reincarceration due to revocations from supervision
- Requiring racial impact statements before any new criminal law or regulation is passed and requiring legislation to proactively rectify any potential disparities that may result from new laws or rules
- 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.<sup>77</sup> In particular, people with psychiatric disabilities are dramatically overrepresented in jails and prisons across the country.<sup>78</sup>

- People showing signs of mental illness are twice as likely to be arrested as people without mental illness for the same behavior.<sup>79</sup>
- People with mental illness are sentenced to prison terms that are, on average, 12 percent longer than other people in prison.<sup>80</sup>
- 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.<sup>81</sup>

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.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup> 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, as alternatives to jails, or emergency rooms for people experiencing mental health crises or addiction issues.
  - Training dispatchers and police to divert people with mental health issues who commit low-level nuisance crimes to these behavioral health centers. Jurisdictions that have followed this approach have significantly reduced their jail populations.<sup>85</sup>
- 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,

## 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 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 accommodation 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. They can also 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.



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
- 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

## Forecaster Chart

There are many pathways to cutting the prison population in North Dakota by 50 percent. To help end mass incarceration, communities and policymakers will need to determine the optimal strategy to do so. This table presents one potential matrix of reductions that can contribute to cutting the state prison population in half by 2025. The reductions in admissions and length of stay for each offense category were selected based on potential to reduce the prison population, as well as other factors. To chart your own path to reducing mass incarceration in North Dakota, visit the interactive online tool at <https://urbn.is/ppf>.

# CUTTING BY 50%: PROJECTED REFORM IMPACTS ON POPULATION, DISPARITIES, AND BUDGET

Impact Compared to 2025 Baseline*				
Offense category**	Policy outcome	Prison population impact	Impact on racial and ethnic makeup of prison population***	Cost savings****
<b>Drug offenses</b>	<ul style="list-style-type: none"> <li>Institute alternatives that end all admissions for drug possession (230 fewer people admitted)</li> <li>Reduce average time served for drug distribution and other drug offenses by 70% (from 0.88 to 0.26 years)</li> <li>Institute alternatives that reduce admissions for drug distribution and other drug offenses by 70% (197 fewer people admitted)</li> </ul>	21.36% reduction (435 fewer people)	White: 1.9% decrease Black: 1.7% decrease Hispanic/Latino: 9.0% increase Native American: 4.7% increase Asian: 27.2% increase Other: 28.8% decrease	\$24,026,589
<b>Assault</b>	<ul style="list-style-type: none"> <li>Reduce average time served by 60% (from 1.52 to 0.61 years)</li> <li>Institute alternatives that reduce admissions by 50% (60 fewer people admitted)</li> </ul>	7.17% reduction (146 fewer people)	White: 2.1% increase Black: 1.3% decrease Hispanic/Latino: 0.3% increase Native American: 6.9% decrease Asian: 5.4% decrease Other: 7.7% increase	\$5,421,758
<b>Theft</b>	<ul style="list-style-type: none"> <li>Reduce average time served by 60% (from 0.68 to 0.27 years)</li> <li>Institute alternatives that reduce admissions by 60% (118 fewer people admitted)</li> </ul>	5.52% reduction (112 fewer people)	White: No change Black: 3.7% increase Hispanic/Latino: 4.0% increase Native American: 2.3% decrease Asian: 8.5% decrease Other: 5.1% decrease	\$4,351,427
<b>Public order offenses*****</b>	<ul style="list-style-type: none"> <li>Reduce average time served by 60% (from 1.23 to 0.49 years)</li> <li>Institute alternatives that reduce admissions by 70% (65 fewer people admitted)</li> </ul>	4.96% reduction (101 fewer people)	White: 0.2% increase Black: 2.1% increase Hispanic/Latino: 1.9% decrease Native American: 0.9% decrease Asian: 5.2% increase Other: 4.4% decrease	\$4,039,728

Impact Compared to 2025 Baseline*				
Offense category**	Policy outcome	Prison population impact	Impact on racial and ethnic makeup of prison population***	Cost savings****
<b>Burglary</b>	<ul style="list-style-type: none"> <li>• Reduce average time served by 60% (from 1.09 to 0.44 years)</li> <li>• Institute alternatives that reduce admissions by 50% (38 fewer people admitted)</li> </ul>	3.27% reduction (67 fewer people)	White: No change Black: 0.2% increase Hispanic/Latino: 2.6% increase Native American: 0.4% decrease Asian: 3.4% increase Other: 6.5% decrease	\$2,531,918
<b>Robbery</b>	<ul style="list-style-type: none"> <li>• Reduce average time served by 50% (from 2.87 to 1.43 years)</li> <li>• Institute alternatives that reduce admissions by 50% (16 fewer people admitted)</li> </ul>	3.09% reduction (63 fewer people)	White: 1.5% increase Black: 6.5% decrease Hispanic/Latino: 7.2% decrease Native American: 1.1% decrease Asian: 3.2% increase Other: 3.2% increase	\$1,993,226
<b>Fraud</b>	<ul style="list-style-type: none"> <li>• Reduce average time served by 60% (from 1.1 to 0.44 years)</li> <li>• Institute alternatives that reduce admissions by 60% (29 fewer people admitted)</li> </ul>	2.17% reduction (44 fewer people)	White: 0.1% decrease Black: 1.5% increase Hispanic/Latino: 0.3% increase Native American: No change Asian: 13.4% decrease Other: 2.2% increase	\$1,660,039
<b>Other property offenses*****</b>	<ul style="list-style-type: none"> <li>• Reduce average time served by 60% (from 0.59 to 0.24 years)</li> <li>• Institute alternatives that reduce admissions by 70% (39 fewer people admitted)</li> </ul>	1.44% reduction (29 fewer people)	White: No change Black: 0.4% increase Hispanic/Latino: No change Native American: No change Asian: 1.5% increase Other: 1.5% increase	\$1,238,570
<b>DWI</b>	<ul style="list-style-type: none"> <li>• Reduce average time served by 60% (from 0.17 to 0.07 years)</li> <li>• Institute alternatives that reduce admissions by 60% (80 fewer people admitted)</li> </ul>	0.92% reduction (19 fewer people)	White: No change Black: 0.4% increase Hispanic/Latino: 0.3% increase Native American: 0.1% decrease Asian: 0.9% increase Other: 0.9% increase	\$905,913

\*The baseline refers to the projected prison population based on historical trends, assuming that no significant policy or practice changes are made.

\*\*The projections in this table are based on the offense that carries the longest sentence for any given prison term. People serving prison terms may be convicted of multiple offenses in addition to this primary offense, but this model categorizes the total prison term according to the primary offense only.

\*\*\* This column represents the percent change in the share of the prison population made up by each racial/ethnic group. It compares the proportion of the population made up by a group in the 2025 baseline prison population to the proportion of the population made up by that group when the reform scenario is applied. We then calculate the percent change between those two proportions. Racial and ethnic disproportionality is traditionally measured by comparing the number of people in prison of a certain race or ethnic group to the number of people in the state's general population of that same group. For example, nationally, Black people comprise 13 percent of the population, while white people comprise 77 percent. Meanwhile, 35 percent of people in state or federal prison are Black, compared to 34 percent who are white. While the proportion of people in prison who are Black or white is equal, Black people are incarcerated at nearly three times their representation in the general population. This is evident in North Dakota, where Black people made up 10 percent of the prison population in 2017 but constituted only 3 percent of the state's total adult population that year.

\*\*\*\*Note: Cost impact for each individual policy change represents the effect of implementing that change alone and in 2015 dollars. The combined cost savings from implementing two or more of these changes would be greater than the sum of their combined individual cost savings, since more capital costs would be affected by the population reductions.

\*\*\*\*\* Some public order offenses include drunk or disorderly conduct, escape from custody, obstruction of law enforcement, court offenses, failure to comply with sex offense registration requirements, prostitution, and stalking, as well as other uncategorized offenses.

\*\*\*\*\* Some other property offenses include stolen property trafficking, vandalism, property damage, criminal mischief, unauthorized vehicle use, and trespassing.

## Total Fiscal Impact

If North Dakota were to implement reforms leading to the changes above, 1,015 fewer people would be in prison in the state by 2025, a 50 percent decrease. This would lead to a total cost savings of \$125,028,507 by 2025.

## Methodology Overview

This analysis uses prison term record data from the National Corrections Reporting Program to estimate the impact of different policy outcomes on the size of North Dakota's prison population, racial and ethnic representation in the prison population, and state corrections spending. First, trends in admissions and exit rates for each offense category in recent years are analyzed and projected out to estimate a baseline state prison population projection through 2025, assuming recent trends will continue. Then, a mathematical model is used to estimate how various offense-specific reform scenarios (for example, a 10 percent reduction in admissions for drug possession or a 15 percent reduction in length of stay for robbery) would change the 2025 baseline projected prison population. The model allows for reform scenarios to include changes to the number of people admitted to prison and/or the average length of time served for specific offenses. The model then estimates the effect that these changes would have by 2025 on the number of people in prison, the racial and ethnic makeup of the prison population, and spending on prison. The analysis assumes that the

changes outlined will occur incrementally and be fully realized by 2025.

All results are measured in terms of how outcomes under the reform scenario differ from the baseline projection for 2025. Prison population size impacts are measured as the difference between the 2025 prison population under the baseline scenario and the forecasted population in that year with the specified changes applied. Impacts on the racial and ethnic makeup of the 2025 prison population are measured by comparing the share of the prison population made up by a certain racial or ethnic group in the 2025 baseline population to that same statistic under the reform scenario and calculating the percent change between these two proportions. Cost savings are calculated by estimating the funds that would be saved each year based on prison population reductions relative to the baseline estimate, assuming that annual savings grow as less infrastructure is needed to maintain a shrinking prison population. Savings relative to baseline spending are calculated in each year between the last year of available data and 2025, and then added up to generate a measure of cumulative dollars saved over that time period.

# Endnotes

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