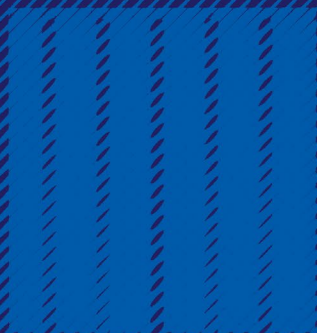


*Looking Inside*

# A Smart Justice Profile of Washington's Prison System







*Looking Inside*  
A Smart Justice  
Profile of Washington's  
Prison System

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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. The United States continues to increase its reliance on the criminal justice system in an attempt to respond to drug addiction, mental illness, and poverty. 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. This mass incarceration crisis has transformed American society, harmed communities, created gross racial disparities, 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 this goal. It's time for the United States to dramatically reduce its reliance on incarceration and invest instead in alternatives to prison, including approaches better designed to break the cycle of crime and recidivism by helping people rebuild their lives.

The ACLU's Campaign for Smart Justice is committed to transforming our nation's criminal justice system and building a new vision of safety and justice. The Campaign is dedicated to cutting the nation's incarcerated population in half and eliminating racial disparities throughout 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. In every state, Urban Institute researchers identified primary drivers of incarceration.

The analysis was eye-opening.

In every state, we found that reducing the jail and prison populations alone does little to diminish racial disparities in incarceration — and in some cases would worsen them. In Washington — where, in 2017, the imprisonment rate of Black adults was more than five times that of white adults<sup>1</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, law enforcement officials, prosecutors, courts, and communities in Washington and across the nation to focus on efforts that specifically address these disparities, including policing, prosecutorial, and sentencing reform.

In Washington, the prison population has experienced explosive growth in recent decades. Between 1980 and 2016, the number of people in the state's prisons increased by 332 percent.<sup>2</sup> In December 2018, 19,369 people were imprisoned in Washington.<sup>3</sup> In addition to the state's prison population, there was an average of 12,326 people in Washington's city, county, and tribal jails across the state on any given day in 2018.<sup>4</sup>

While the number of people newly admitted to prison in Washington every year remained relatively stable between 2007 and 2017, the annual number of readmissions to prison of people who had previously been incarcerated by the Washington State Department of Corrections (DOC) for new sentences increased by 14 percent over the same period.<sup>5</sup> Of people released from prison in 2014, nearly one in three returned to prison within three years for either a new crime or a DOC violation.<sup>6</sup>

In addition to the growth of the prison population, the length of time people in Washington spend in prison has grown. Between 2007 and 2017, the average sentence length in the state increased by 12 percent. Over the same period, sentences for drug offenses grew by 27 percent.<sup>7</sup> The excessive length of time served by many people in Washington's prisons is due in part to sentencing enhancements created by the Legislature, which apply to a multitude of offenses.<sup>8</sup> The Persistent Offender Accountability Act also contributes to long prison terms, and an analysis from 2015 found that half of all people who were given official, court-ordered life without parole sentences between 1985 and 2013 were sentenced under this law.<sup>9</sup>

So, what's the path forward?

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

To start, Washington lawmakers must continue to approve investments in alternatives to incarceration, such as the Law Enforcement Assisted Diversion pre-arrest diversion program for drug offenses,<sup>10</sup> in addition to behavioral health care programs that divert people with mental health needs out of the criminal justice system. Continued expanded access to Medicaid in the state, for example, is one way to ensure Washingtonians have access to substance use and mental health treatment, which can prevent contact with the criminal legal system in the first place. Further, the Legislature should ensure that, for all defendants, judges have the power to impose non-incarceration sentences, such as community supervision, treatment, or restorative justice.

Significantly reducing pretrial detention and the use of cash bail is a key step toward ending mass incarceration in Washington. People awaiting trial comprise nearly 78 percent of the average jail population in King County.<sup>11</sup> To reduce jail populations and conviction rates and end racial disparities, Washington must ensure that no one is detained pretrial due to their inability to pay cash bail or a commercial bail bond.

Prosecutorial reform is also essential. Washington's 39 elected prosecutors have the power to make crucial, life-changing decisions. Elected prosecutors should create guidelines for charging, bail, and plea bargaining decisions that ensure line prosecutors in their offices pursue the least punitive options that still ensure accountability and safety. This guidance should also emphasize diverting all youth away from the criminal justice system, reducing juvenile felony case filings, and declining to charge any person under 18 as an adult.

Finally, to truly reverse course on incarceration in Washington, legislators must engage in meaningful sentencing reform that reduces sentence lengths and eliminates most enhancements.

The answer is ultimately up to Washington's voters, policymakers, law enforcement officials, prosecutors, courts, communities, and criminal justice advocates as they move forward with the urgent work of ending Washington's mass incarceration crisis.

# The State of the Washington Prison System

Over the past several decades, Washington's prison population has soared.<sup>12</sup> Between 1980 and 2016, the state's prison population grew more than fourfold (a 332 percent increase).<sup>13</sup> As of December 2018, Washington imprisoned 19,369 people across the state.<sup>14</sup> When you include people in local jails and under community supervision, such as probation and community custody, the reach of the criminal justice system in Washington is even greater: In 2016, more than 1 in every 50 Washington adults (2.2 percent) were under some form of correctional control.<sup>15</sup> The Washington State Caseload Forecast Council predicted in December 2018 that, if no reforms are enacted to change course, the number of people under the state's jurisdiction in prisons and work release facilities is expected to remain high through June 2021.<sup>16</sup>

## AT A GLANCE

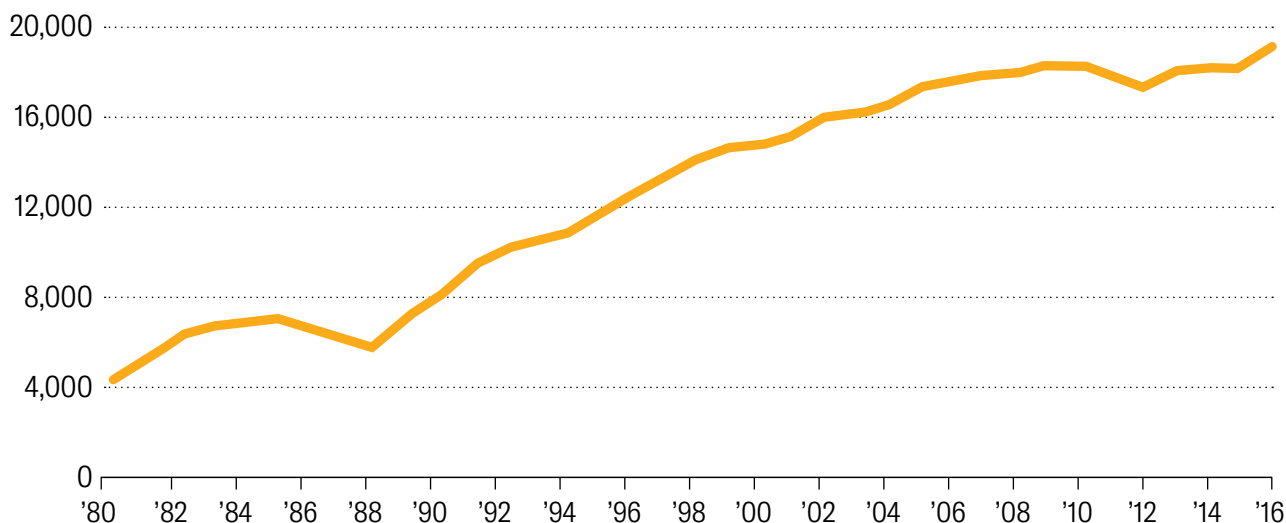
### WASHINGTON PRISONS

Washington's prison population increased by **332 percent** between 1980 and 2016.

As of December 2018, there were **19,369 people** imprisoned in Washington.

The number of people under the state's jurisdiction in prison and work release facilities is projected to increase by **2.2 percent** by 2021.

## WASHINGTON PRISON POPULATION





## Drug Offenses and Readmissions Drive Prison Admissions

In 2017, Washington sent 8,547 people<sup>17</sup> to prison.<sup>18</sup> While a litany of offenses drives people into the state's prisons, in 2015, drug offenses accounted for more than one in every five (22 percent) admissions. Out of all admissions to prison for drug offenses in 2015, 56 percent were for drug possession, 41 percent were for drug trafficking, and the remaining 3 percent were for other drug offenses. Property offenses accounted for an additional 30 percent of 2015 admissions, including 11 percent of all admissions for burglary. The number of people admitted to prison for burglary increased 15 percent between 2005 and 2015. Thirteen percent of 2015 admissions were for offenses categorized as "public order or other," a category that includes such offenses as certain protection order violations, attempting to elude a pursuing police vehicle, and failure to register as a sex offender. Other common offenses among 2015 admissions to Washington prisons were assault (13 percent) and sexual assault (7 percent).<sup>19</sup>

While the number of people admitted to prison remained relatively constant between 2007 and 2017, the number of "readmissions" — people who had previously been incarcerated by the DOC and were

readmitted to prison for a new sentence — increased by 14 percent. In addition, Washington's community supervision violation penalties led to thousands of admissions to correctional facilities every year for short periods of time.<sup>20</sup>

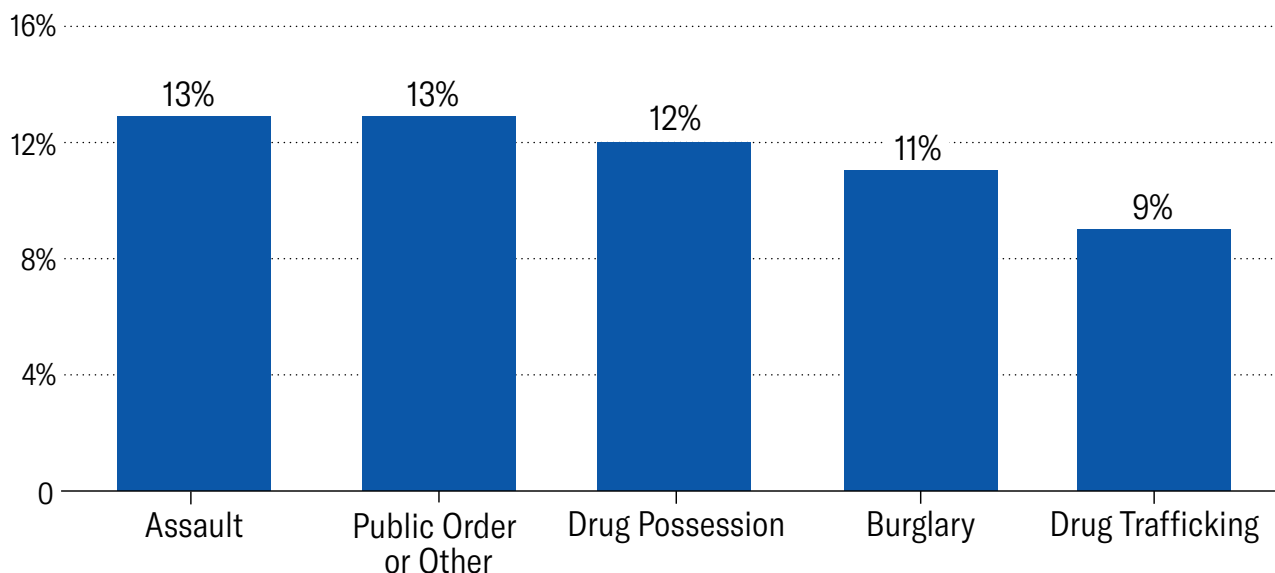
Washington offers limited access to treatment options and reentry support, which have been found to reduce recidivism, for people who have served time in Washington prisons. Nearly one in every three people (32 percent) released from Washington prisons in 2014 returned to a DOC institution within three years of their release.<sup>21</sup>

## The Current Prison and Jail Population

At the end of 2018, 17 percent of the Washington prison population were serving time for a property offense, and an additional 7 percent were serving time for a drug offense. Sentences for assault accounted for 27 percent of the 2018 prison population, and sentences for robbery accounted for an additional 9 percent.<sup>22</sup>

In 2015 (the most recent available data), out of everyone serving time in Washington prisons for drug offenses, 44 percent were serving time for drug possession, 52

## WASHINGTON PRISON ADMISSIONS BY TOP OFFENSE TYPES (2015)



## AT A GLANCE

# WASHINGTON JAIL AND PRISON POPULATION

The annual number of people readmitted to Washington prisons for a new sentence grew by **14 percent** between 2007 and 2017.

Washington's city, tribal, county, and regional jails held a combined daily average of **12,326 people** in 2018.

Sentences for drug offenses accounted for more than **1 in 5** admissions to Washington prisons in 2015.

percent were serving time for drug trafficking, and the remaining 4 percent were serving time for other drug offenses.<sup>23</sup>

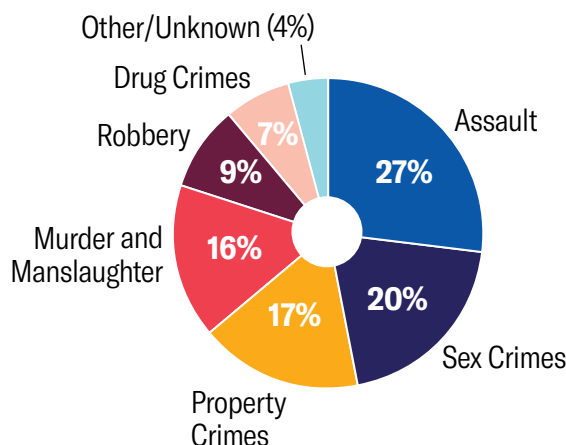
In 2018, Washington's city, tribal, county, and regional jails had a collective average daily population of 12,326 people.<sup>24</sup>

## Washington Is Keeping People in Prison Longer

Between 2007 and 2017, the average sentence length in Washington increased by 12 percent, reaching 3.4 years (41 months) in 2017. The average sentence length for drug offenses grew at an even faster pace over the same time period, growing by 27 percent and reaching 2.4 years (28.8 months) in 2017.<sup>25</sup> In 2018, 41 percent of all people in Washington's prisons were serving a sentence longer than 10 years, and 16 percent were serving a life sentence.<sup>26</sup>

In 2015, of all people serving sentences of at least 10 years in Washington prisons, 44 percent had been admitted to prison before the age of 25. Approximately one in five people (19 percent) who were serving sentences of at least 10 years in 2015 were serving

## WASHINGTON PRISON POPULATION BY OFFENSE TYPE (2017)



time for assault or robbery. In 2015, Black people were overrepresented among the people with the longest sentences, making up 18 percent of the total prison population and 22 percent of people serving sentences of at least 10 years.<sup>27</sup>

Although most people convicted of a felony in Washington receive a sentence determined by the state's sentencing guidelines, judges have the option to lengthen sentences in certain cases. The Washington Legislature has created sentencing enhancements that apply to a multitude of offenses, including felony traffic crimes involving intoxication and certain drug-related crimes, which can cause people to spend longer periods of time in prison, including for some relatively low-level offenses.<sup>28</sup>

In Washington, people convicted of a third "most serious offense" — a category that includes a wide range of offenses, including some that do not necessarily result in violence or physical injury — are labeled "persistent offenders" and are automatically sentenced to life in prison without the possibility of parole.<sup>29</sup> A 2015 preliminary analysis found that about half of all people given official, court-ordered life without parole sentences between 1985 and 2013 were sentenced under the Persistent Offender Accountability Act. Of these "three strikes" cases, more than one-third stemmed from robbery offenses.<sup>30</sup> In 2019, the Washington Legislature removed second degree

## AT A GLANCE

### LENGTH OF IMPRISONMENT

In 2018, **41 percent** of people in Washington's prisons were serving a sentence of more than 10 years.

Between 2007 and 2017, average sentence length increased by **12 percent**.

**16 percent** of people imprisoned in Washington in 2018 were serving life sentences.

robbery from the list of offenses that can trigger life sentences under the “three strikes” provision, however the reform legislation did not apply retroactively to people who had already been sentenced.<sup>31</sup>

Persistent offender laws contribute to Washington's growing prison population through a “stacking effect.” Although a relatively small number of people are admitted each year under these statutes — 14 people in fiscal year 2017<sup>32</sup> — they stay in prison for such extended periods that they contribute to the growing prison population over time.

## Washington Disproportionately Imprisons People of Color

**Black adults:** Incarceration in Washington has a profoundly disparate impact on communities of color. In 2017, the imprisonment rate of Black adults in Washington was more than five times (5.3 times) that of white adults.<sup>33</sup> In 2014, one of every 34 adult Black men in Washington were in prison.<sup>34</sup> Although Black adults made up just 4 percent of the adult state population in 2017,<sup>35</sup> they made up 18 percent of Washington's prison population that year.<sup>36</sup>

**Latinx adults:** In 2017, the imprisonment rate of Latinx adults in Washington was 1.5 times that of white adults.<sup>37</sup> Although they made up just 10 percent

of the adult state population in 2017,<sup>38</sup> Latinx adults made up 14 percent of the state's prison population.<sup>39</sup>

**American Indian/Alaskan Native adults:** The number of American Indian/Alaskan Natives imprisoned in Washington has increased significantly in recent years, growing by 44 percent between 2000 and 2015.<sup>40</sup> In 2017, the imprisonment rate of American Indian/Alaskan Native adults in Washington was more than three times (3.3 times) that of white adults.<sup>41</sup>

**Women:** Between 1980 and 2016, the number of women imprisoned in Washington has grown more than eightfold — a 764 percent increase. This increase far outpaced the growth of the total prison population, which increased 332 percent over the same time period.<sup>42</sup>

**Older adults:** Washington's prison population is also rapidly graying. Though generally considered to pose a negligible risk to public safety,<sup>43</sup> people over the age of 50 accounted for nearly one in every five people (18 percent) imprisoned in 2018.<sup>44</sup>

**Young Adults:** More than one in five (22 percent) people admitted to Washington prisons in 2015 were 25 years old or younger. The most common offenses for these young adult admissions were drug offenses, including possession and distribution (16 percent), assault (15 percent), and burglary (14 percent). At the end of 2015, nearly two out of every five people

## AT A GLANCE

### DEMOGRAPHICS

The imprisonment rate of Black adults in Washington was **more than five times** that of white adults in 2017.

The number of women in Washington prisons grew by **764 percent** between 1980 and 2016.

In 2018, people over the age of 50 accounted for **nearly one in every five people** (18 percent) imprisoned.

#### AT A GLANCE

## MENTAL HEALTH AND SUBSTANCE USE DISORDERS

Monroe State Prison was the second largest mental health treatment facility in Washington in 2014.

In 2013, 20 to 30 percent of Washington's prison population was estimated to have mental health needs.

(39 percent) who had been in prison for at least 10 years were 25 or younger when they were admitted to prison.<sup>45</sup> As of June 2018, 12 percent of the Washington prison population were people 25 years old or younger.<sup>46</sup>

### Mental Health Needs Are Prevalent in Washington's Prisons

In 2013, it was estimated that approximately 20 to 30 percent of Washington's prison population had mental health needs.<sup>47</sup> The Treatment Advocacy Center reported in 2014 that the state prison at Monroe was the second largest mental health disorder treatment facility in Washington and included a special psychiatric unit with 500 beds.<sup>48</sup> Additionally, the DOC Substance Abuse Recovery Unit is one of the largest certified substance abuse treatment agencies in the state and provides treatment in 25 of the state's prisons and work release facilities.<sup>49</sup>

In 2012, the Washington State Institute for Public Policy conducted a study of chemical dependency services offered in Washington, which cited a DOC estimate that over half of all people under its jurisdiction needed chemical dependency treatment. The report concluded that the chemical dependency services offered in the state were effective; substance abuse programs included in the study reduced recidivism by between 4 and 9 percent, and some programs produced benefits that significantly exceeded

#### AT A GLANCE

## BUDGET

Washington spent more than \$1 billion of its general fund on corrections in 2017.

General fund spending on corrections increased by 216 percent between 1985 and 2017.

costs.<sup>50</sup> While the existence of effective chemical dependency services in Washington's prisons is laudable, particularly considering the lack of effective prison-based care in many other states, their size reflects the reality that the state is using its prisons as mental health facilities rather than providing greater funding for hospitals and community-based care.

### Prison Costs Strain Washington's Budget

As Washington's imprisoned population has risen, so has the cost burden. In 2017, Washington spent more than \$1 billion of its general fund on corrections, accounting for 5 percent of its general fund expenditures that year.<sup>51</sup> General fund spending on corrections more than tripled between 1985 and 2017 (216 percent increase), forcing tradeoffs in other state priorities like education.<sup>52</sup>

# Ending Mass Incarceration in Washington: 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 Washington end its mass incarceration crisis, but it will be up to the people and policymakers of Washington 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 Jail and Prison Admissions

To end mass incarceration, Washington 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, and failing to provide rehabilitation for incarcerated people or adequate support to the survivors of crime.<sup>53</sup> The time is now for Washington to pursue strategies as ambitious as the goal to end mass incarceration requires. Here are some strategies:

- **Alternatives to incarceration:** Several types of alternative-to-incarceration programs have shown great success in reducing both violent and nonviolent criminal activity. Programs offering support services such as substance use 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.<sup>54</sup> For example, participants in the Law Enforcement Assisted Diversion pre-arrest diversion program for drug offenses, which originated in Washington, were 60 percent less likely to be arrested for drug offenses than people who were arrested and booked into jail.<sup>55</sup>

- For crimes involving violence, restorative justice programs — which are designed to hold 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>56</sup> they have also been shown to decrease symptoms of posttraumatic stress in victims of crime.<sup>57</sup> Prosecutors and judges who embrace these solutions can fulfill their responsibilities to the public and to victims — 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 explore such interventions at multiple phases in the system, whether through decriminalization or alternatives to arrest, charges, or incarceration.
- **Expand treatment — behavioral health care:** Mental health diversion is an effective way to redirect people with disabilities out of the criminal legal system and into supportive community treatment. Diversion programs have been shown to be effective for people charged with both nonviolent and violent offenses.<sup>58</sup> When implemented effectively, diversion reduces arrests, encourages voluntary



treatment in the community, and saves money.<sup>59</sup> Effective diversion 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 in community supports, diversion programs have the potential of saving jurisdictions large amounts of money.<sup>60</sup> One way to support treatment options is expanding Medicaid so that people in Washington have greater access to mental health treatment and substance use treatment while on probation/community custody and after their separation from the criminal justice system. 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>61</sup>

- **Reduce pretrial incarceration:**

Washington can significantly reduce its rates of pretrial detention and the use of money bail statewide. Recent data shows that the majority of people in jail are languishing without a conviction for a crime, and many Washington counties have a pretrial jail population that is higher than the national average of 65 percent. For example, 77.7 percent of the average jail population in King County are pretrial defendants.<sup>62</sup> Those detained are simply awaiting trial and the outcome of their case. Even short stays of a few days in jail can result in significant collateral damage, such as the loss of jobs, cars, housing, custody of children, and significant disruptions to medications and behavioral health care.<sup>63</sup> This punishment is exacted on people who have been merely accused – not convicted – of breaking the law. 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>64</sup> Further, individuals who are jailed while awaiting trial are more likely to plead guilty and receive longer prison sentences than people who are not held in jail pretrial.<sup>65</sup> For these reasons, pretrial detention is a pipeline to mass incarceration.

In order to significantly reduce pretrial incarceration and combat racial disparities, Washington should eliminate wealth-based detention and ensure that no one is detained pretrial due to their inability to pay bail or for pretrial services. Washington and its counties should use the least restrictive methods of incentivizing appearance at trial and implement pretrial services that allow the overwhelming majority of defendants to exercise their constitutional right to release while awaiting trial. By achieving these goals, Washington will significantly reduce both jail populations and conviction rates.

- **Prosecutorial reform:** Washington has 39 elected prosecutors 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 in deciding whom to charge, what charges and enhancements to pursue, and what bail and sentencing recommendations to make. The choices they make can significantly contribute to the crisis of mass incarceration, and they can wield that same power to help end mass incarceration.

To that end, prosecutors should create guidelines 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. Prosecutors should decline to charge all people who would be better served through other services and treatments or in (pre-plea and pre-filing) diversion programs for both felony and misdemeanor cases. In particular, 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 to the criminal legal system, committing to significantly reducing juvenile felony case 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. Furthermore, prosecutors' 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 legal reform.

- **Improve systemic response to youth and young adults:** To reduce the number of adults who go to jails and prisons, Washington needs to continue to reform its juvenile justice system to minimize the harmful consequences of state supervision or confinement on youth and young adults. The state needs to implement a holistic approach to youth accused of crime 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. Any system involvement should be rehabilitative, and confinement must be humane if it is ever ordered. Youthful conduct should be met with a response that reflects the ability of youth to grow and change rather than with responses that increase the risk of future incarceration. Moreover, the state should reconsider its approach to young adults who are similarly developing and are not well served by incarceration — particularly with long sentences.
- **Allow non-incarceration sentences:** The Legislature should ensure that judges always have the option to impose non-incarceration sentences, such as community supervision. Judges must have a variety of options at their disposal besides imprisonment, allowing them to require treatment, mental health care, restorative justice, or other evidence-based alternatives to incarceration. These programs should be available to the court in all or most

cases, regardless of the severity of the offense or someone's prior criminal history.

- **Reduce DOC community custody revocations:** People revoked from DOC community supervision can be sent to prison for technical violations without having committed new crimes. The Washington Legislature should implement a system of graduated sanctions for such violations, ensuring responses are proportional. Incarceration should be prohibited in cases of technical violations. Further, appointed counsel should be provided at revocation hearings.

DOC community custody revocations for technical violations are often due to the physical or mental disabilities that many people have. Parole and probation officers are required to provide reasonable accommodations so that people with disabilities have an equal opportunity to comply with the requirements of parole. Proper training of DOC community custody officers, and greater awareness of, and advocacy for, these requirements could reduce the number of technical violations significantly.

## Reducing Time Served

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

- **Sentencing reform – reduce sentence lengths:** Evidence indicates that long prison sentences have minimal, if any, deterrent effect and do not improve recidivism rates.<sup>66</sup> A recent review of studies concludes there is little evidence that length of stay increases deterrence at all, while another recent study found merely limited evidence of deterrence, primarily concentrated in the first few years behind bars.<sup>67</sup> Simply put, research does not support theories that have long been used to justify locking people up for decades. The Washington Legislature should reduce all sentence ranges embedded in

its criminal code and enact statutory maximum punishment lengths, even for crimes considered more serious or involving violence. If more research is necessary to determine appropriate sentences, the Washington Legislature should commission this work to inform future sentencing reforms.

- **Sentencing reform – reduce enhancements and mandatory sentences:** The Washington Legislature should reform its sentence enhancements, which have a disproportionate impact on people of color and give enormous leverage to prosecutors, by eliminating or significantly reducing them. These enhancements result in extremely long sentences and drive 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. The Washington Legislature should also 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.

Likewise, the Washington Legislature should eliminate mandatory minimums altogether to allow judges the ability to fashion proportional sentences on a case-by-case basis, preventing people from receiving excessive prison time, especially from mandatory enhancements. Washington should also eliminate its Three Strikes Law. The electorate could significantly reduce the prison population by eliminating this excessive penalty. The Legislature should limit stacked enhancement sentences by enacting caps at a specific number of years or limiting it to one enhancement.

- **Post-conviction review:** Convictions and sentences meted out at one point in time may not be appropriate later, either because the original punishment was excessively harsh or the person serving time has evolved in the interim. The

Washington Legislature should enact several post-conviction review opportunities for those imprisoned for any offense, such as expanding and reforming the Indeterminate Sentence Review Board and establishing a presumptive parole board to release people after they've served a certain amount of their sentence (unless there is a reason to deny and reconsider later). Further, it should provide second look procedures to bring people serving long and life sentences automatically up for resentencing after 10 years. Finally, clemency should more frequently provide relief to those imprisoned. In 2018, Governor Jay Inslee only granted 17 petitions for a pardon or commuted sentence.<sup>68</sup> The governor should expand his clemency powers to offer more people the opportunity to receive either a pardon or commutation to alleviate unfair or unjust convictions and sentences.

- **Earned time/earned credit reform:** Washington should also expand the availability of earned credits against a prison sentence through good behavior or participation in educational, vocational, and other opportunities. Unfortunately, the Washington Legislature has enacted several laws reducing eligibility for and applying further limitations on who can earn good time. The Legislature should reverse course, enacting laws to allow all people serving prison sentences equal access to earned credit, granting equal credit to everyone, and removing limitations that apply to specific subsets of the population and offense categories.
- **Compassionate release:** The Washington Legislature should expand access to compassionate release from prison. The state's prison population is rapidly aging, with nearly one in every five people in prison older than 50.<sup>69</sup> Keeping aging and seriously injured or ill people incarcerated significantly taxes prison resources. Studies have shown that incarcerating an older person costs double what it costs to incarcerate a younger person.<sup>70</sup> What is more, 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 persons have much lower rates of recidivism than their younger counterparts.<sup>72</sup>

## Challenging Structural Racism in the Criminal Legal System

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

People of color (especially Black, Latinx, and American Indian/Alaskan Native people) are at a higher risk of becoming involved in the justice system, including living under heightened police surveillance and being at higher risk for arrest. This imbalance cannot be accounted for by disparate involvement in illegal activity, and it grows at each stage in the 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.

This is no new problem in Washington. In 2011, the Research Working Group of the Task Force on Race and the Criminal Justice System, mandated to investigate systemic disproportionalities, found race and racial bias affect outcomes and matter in ways that are not fair, that increase disparity in incarceration rates, that do not advance legitimate public safety objectives, and that undermine public confidence in the criminal legal system.<sup>74</sup>

Yet racial disparities persist. In 2017, the imprisonment rate of Black adults in Washington was more than five times that of white adults; Latinx adults in Washington 1.5 times that of white adults; and American Indian/Alaskan Native adults more than three times that of white adults.<sup>75</sup>

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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>88</sup>

— From *The New Jim Crow*, Michelle Alexander

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And in 2018, the Washington Supreme Court outlawed the state’s death penalty, finding that the death penalty violated the constitution because it was both arbitrary and discriminatory, especially with regard to race.<sup>76</sup> Black defendants in Washington were more than four times as likely to be sentenced to death as white defendants. That racial bias, along with geographic bias, unreliability and excessive delays, results in a wholly unfair system.

Racial disparity is so ingrained in the system that it cannot be mitigated by solely reducing the scale of mass incarceration. Shrinking the prison population across the board will likely result in lowering 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>77</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>78</sup>

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

Some examples include:

- 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
- Ending sentencing enhancements based on location (e.g., drug-free school zones)
- Reducing exposure to reincarceration due to revocations from supervision
- Requiring racial impact statements before any new criminal law or regulation is passed and requiring legislation to proactively rectify any potential disparities that may result from new laws or rules
- Eliminating discriminatory gang sentencing enhancements that disproportionately target people of color
- 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>79</sup> In particular, people with psychiatric disabilities are dramatically overrepresented in jails and prisons across the country.<sup>80</sup>

- People showing signs of mental illness are twice as likely to be arrested as people without mental illness for the same behavior.<sup>81</sup>
- People with mental illness are sentenced to prison terms that are, on average, 12 percent longer than other people in prison.<sup>82</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>83</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>84</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>85</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>86</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.

## 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:** The practices that police employ in communities can shape the public's view of and trust in that system. They are generally the first point of contact with 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.

**Judges:** Individual judges, as well as judges' associations, are the most powerful decision-makers in terms of individual pretrial release decisions and overall county policy on pretrial release. They have significant discretion over pretrial release and any conditions imposed on defendants. 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. Judges should also analyze their discretionary decisions to ensure they are not exercising that discretion in a racially disparate way.

**State lawmakers:** The state spends billions of dollars on prisons, county jails, and courts. The Legislature 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 fund the creation of new alternatives, including diversion programs that provide supportive housing, treatment, and vocational training. They can also decide to sufficiently fund mental health and substance use addiction and dependency treatment so it is available for people who want it before they encounter the criminal legal system.

**County officials:** County officials control a significant portion of the criminal legal system's budget, appropriating resources to many local system stakeholders, including police and prosecutors. This authority allows county officials influence over local criminal legal policies and practices.

- 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>87</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, 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

## Forecasting a Path Forward to End Mass Incarceration in Washington

There are many pathways to cutting the prison population in Washington by 50 percent. To help end mass incarceration, communities and policymakers will need to determine the optimal strategy to do so.

To help determine an impactful path forward in reducing mass incarceration in Washington, you can chart your own path with the Urban Institute's interactive online tool at <https://urbn.is/ppf>. The tool allows the user to see how reform outcomes that change the average number of people who enter prison every year (admissions) and average length of time they spend there, for each offense category, would impact the size, racial and ethnic composition, and cost of Washington's prison population.



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